Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WAYNE TALEFF, ET AL.,
Petitioners,

v.

SOUTHWEST AIRLINES CO., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decisions enjoining mergers under § 7 of the Clayton Act, which have never been overruled and which have been interpreted by the 7th Circuit to collectively stand for the proposition that a nontrivial acquisition of a significant rival in an industry with a trend towards concentration is presumptively illegal, are still binding and viable since many of the lower courts have either ignored them completely or overruled them *de facto*?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, plaintiffs-appellants below, are:

WAYNE TALEFF , KATHERINE R. ARCELL, JUDY BRAY, JOSE' M. BRITO, JAN MARIE BROWN, ROBERT D. CONWAY, JUDY CRANDELL, ROSEMARY D'AUGUSTA, BRENDA K. DAVIS, PAMELA FAUST, CAROLYN FJORD, DON FREELAND, TED FRIEDLI, DONALD V. FRY, GABRIEL GARAVANIAN, HARRY GARAVANIAN, YVONNE JOCELYN GARDNER, LEE M. GENTRY, JAY GLIKMAN, VALARIE ANN JOLLY, GAIL S. KOSACH, JOHN LOVELL, MICHAEL MALANEY, LEN MARAZZO, LISA MCCARTHY, MICHELE MCKECHNIE, PATRICIA ANN MEEUWSEN, CYNTHIA PROSTERMAN, DEBORAH M. PULFER, DANA L. ROBINSON, ROBERT A. ROSENTHAL, BILL RUBINSOHN, SONDRA K. RUSSELL, SYLVIA N. SPARKS, JUNE STANSBURY, CLYDE D. STENSRUD, GARY TALEWSKY, ANNETTE M. TIPPETTS, DIANA LYNN ULTICAN, J. MICHAEL WALKER, PAMELA S. WARD, DAVID P. WENDELL, CHRISTINE O. WHALEN

Respondents in this Court, defendants-appellees below, are:

SOUTHWEST AIRLINES CO., GUADALUPE HOLDINGS CORP., AIRTRAN HOLDINGS, INC.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is unreported. Appendix to the Petition for Writ of Certiorari (hereinafter "App") 1-4. The opinion of the District Court (App. 5-20) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals issued its decision on February 14, 2014. (App. 1-4.) The court denied a timely petition for rehearing with a suggestion for rehearing en banc on March 27, 2014. (App. 21-22.)

On June 11, 2014, Justice Kennedy granted Petitioners' Application (13A1217) to extend the time to file a petition for writ of certiorari, extending the time to file until July 18, 2014.

STATUTORY PROVISIONS INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes any person who is "engaged in commerce or in any activity affecting "commerce" from acquiring "the whole or any part" of a business if the effect of that acquisition "may be substantially to lessen competition, or to tend to create a monopoly."

Under Section 16 of the Clayton Act, a private plaintiff may obtain injunctive relief for a violation of

Section 7 upon a showing of "threatened loss or damage." 15 U.S.C. § 26.

INTRODUCTION

The United States airline industry has become increasingly concentrated through a series of mergers. The number of major U.S. airlines has been reduced from seven to four in just a few years (Delta-Northwest in 2008; United-Continental in 2010; Southwest-Airtran in 2011; and American-US Airways in 2013.) Petitioners herein brought suit to enjoin the acquisition of AirTran Airways by Southwest Airlines as violative of Section 7 of the Clayton Act, 15 U.S.C. § 18, in that the effect of the merger would be to "substantially lessen competition or tend to create a monopoly."

Section 7 of the Clayton Act was intended by Congress to stop trends in concentration. The panel's decision ignores and fails to address a line of binding Supreme Court precedent, which when taken together, stand for the proposition that in an increasingly concentrated market, any non-trivial acquisition of a significant rival is presumptively illegal. Price increases and reductions in service alleged in the Complaint are precisely the type of injury the antitrust laws are intended to prevent. Accordingly, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action brought under § 16 of the Clayton Act, 15 U.S.C. § 26, for injunctive relief by forty-three purchasers of airline tickets for travel in

the United States. Plaintiffs' Complaint alleges that the merger of Southwest Airlines and AirTran violates § 7 of the Clayton Act, 15 U.S.C. § 18. Section 7 of the Clayton Act proscribes any merger the effect of which "may be substantially to lessen competition."

Plaintiffs brought suit under § 16 of the Clayton Act, 15 U.S.C. § 26, which entitles "any person...to sue for and have injunctive relief...against threatened loss or damage by a violation of the antitrust laws." Through their complaint, Plaintiffs seek Southwest's divestiture of AirTran and the reinstatement of competition between these major competitors. Private parties are authorized and encouraged to seek divestiture to remedy violations of § 7. *California v. American Stores,* 495 U.S. 271, 282 (1990).

B. Course of Proceedings

Defendants announced their plans to merge on September 27, 2010. On Wednesday, April 26, 2011, the Antitrust Division of the United States Department of Justice (DOJ) announced that it had terminated its Hart-Scott-Rodino Act review and the closing of its investigation of the airlines' pending merger.

Plaintiffs filed their complaint on May 3, 2011, and on the same day moved the district court to issue a temporary restraining order ("TRO") to enjoin Defendants' from completing or otherwise consummating their merger. (II ER 112.) The district court denied the TRO the following day without a hearing. (I ER 16.) On May 9, 2011, Plaintiffs filed a Notice of Appeal to this Court from the May 4, 2011, order of the district court. Defendants filed a Motion to

Dismiss the appeal on May 12, 2011, which was granted on June 2, 2011.

Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") in the district court pursuant to Fed. R. Civ. Proc. 12(b)(6) on August 8, 2011. Plaintiffs requested limited discovery in the form of limited depositions and Defendants' production of documents pursuant to the Hart-Scott Rodino Act. The district court entered an order on August 23, 2011, continuing the scheduled case management conference and staying discovery pending disposition of the Motion to Dismiss. (I ER 14.)

C. Disposition Below

On November 30, 2011, the district court entered an order granting Defendants' Motion to Dismiss. (I ER 4.) The court held that Plaintiffs have not demonstrated that, "they are entitled to the 'extreme remedy of divestiture." (citation omitted) (I ER 9:10-11.) In its order, the district court found that because Plaintiffs delayed filing their suit until after Defendants' merger had already closed, the remedy of divestiture was unavailable to Plaintiffs. (I ER 10:7-9.) The court also found that: 1) Plaintiffs had not demonstrated that the remedies at law, such as monetary damages, would be inadequate (I ER 9:12-14.); 2) that Plaintiffs did not demonstrate that the balance of hardships tipped in their favor (I ER 9:14-17.); and 3); that Plaintiffs did not demonstrate that the public interest would not be disserved by an order of divestiture (I ER 10:1-3.). Finally, the district court denied further amendment of the Complaint as "futile." (I ER 12:9.) would not be disserved by an order of divestiture (I ER 10:1-3.).

Finally, the district court denied further amendment of the Complaint as "futile." (I ER 12:9.)

D. Factual Background

On September 27, 2010, Defendants announced that they had agreed to combine in an all stock transaction, valued at more than $1.4 billion. (II ER 93; FAC ¶ 1.) This combination eliminated competition between the two largest Low-Cost Carriers, companies which operate on a point-to-point basis and travel high density routes rather than to and from small communities. In contrast to the LLCs are the "Network" carriers, which operate on a "hub-and-spoke" business model. (II ER 93; FAC ¶ 2.)

By reason of the combination, the planned anticompetitive effects of this unlawful combination were increases in prices and fares, elimination and/or curtailment of services, elimination or curtailment of frequency of flights, curtailment of capacity of aircraft and available seats for passage, elimination of tens of thousands of jobs, the deterioration of quality of service, the addition of charges for amenities otherwise considered part and parcel of the service, the elimination or substantial cutback of traffic to hubs, the creation of monopolies for passenger air traffic from and to major cities, and the encouragement and trend to further concentrate the industry toward ultimate monopoly. (II ER 93; FAC ¶ 5.)

Plaintiffs are individuals who have purchased airline tickets from one or both of the Defendants in the past and expect to continue to do so in the future. They are threatened with loss or damage in the form of

higher ticket prices and diminished service. (II ER 94; FAC ¶ 6.)

As of September 30, 2010, Southwest was the largest air carrier in the United States, as measured by the number of domestic passengers carried. (II ER 96; FAC ¶ 10.) Southwest had a market share of approximately 14.2% in 2010, the 2nd largest domestic market share, as measured by revenue passenger miles. (II ER 96; FAC ¶ 11.) Southwest uses the "Point to Point" flight routing system, serving 72 cities in 37 states, with more than 3,400 flights a day coast-to-coast. (II ER 96; FAC ¶ 13.) AirTran is the seventh largest domestic carrier, with more than 19.5 billion RPMs in 2010. (II ER 97; FAC ¶ 16.) AirTran has more than 1,000 daily departures, primarily in the Eastern and Midwestern United States, serving over 70 destinations in the United States, Mexico and the Caribbean. (II ER 97; FAC ¶ 17.)

Southwest and AirTran are substantial actual and potential rivals; and neither is a failing company. (II ER 97; FAC ¶ 22.) Furthermore, not only do Southwest and AirTran provide competing passenger service against each other on a number of passenger routes, but also they are potentially able to provide competing passenger service against each other on any route anywhere in the United States if they believe it would be profitable to do so. (II ER 97; FAC ¶ 24.) Both Southwest and AirTran have the capability to serve every major market in the United States. (II ER 97; FAC ¶ 25.) Because of this ease of entry by these experienced airlines, the behavior of each is constrained by the actual and potential competition

from the other throughout the United States. (II ER 97-98; FAC ¶¶ 27-28.)

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH A LINE OF BINDING SUPREME COURT PRECEDENT

The memorandum decision by the Ninth Circuit panel overlooked, indeed in the opinion of the petitioners, simply ignored, the binding decisions by the Supreme Court of the United States in Section 7 cases, in which the statute's concern about the lessening of competition or the tendency to create a monopoly is to be judged. Those Supreme Court decisions are *Brown Shoe, Co. v. United States,* 370 U.S. 294 (1962), *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963), *United States v. Aluminum Co. of America et al.,* 377 U.S. 271 (1964), *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966), *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966). Under the authority of the Supreme Court, Defendants' merger was and is presumptively illegal. Judge Posner summarized this line of binding Supreme Court precedent as *establishing the illegality of any nontrivial acquisition of a competitor*:

> The Commission's detailed analysis of those effects fills most of a 117-page opinion that, whatever its substantive merits or demerits, is a model of lucidity. The Commission may have made its task harder (and opinion longer) than strictly necessary, however, by studiously avoiding reliance on any of the Supreme Court's section 7 decisions from the 1960s except *United*

> *States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), which took an explicitly economic approach to the interpretation of the statute. The other decisions in that decade-in particular *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Aluminum Co. of America,* 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); *United States v. Von's Grocery Co.,* 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966), and *United States v. Pabst Brewing Co.,* 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966)-*seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor,* whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. *The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may ... substantially ... lessen competition." Hospital Corp. of America v. F.T.C,* 807 F.2d 1381, 1385. [Emphasis added.]

In the above-mentioned line of precedent, the Supreme Court simultaneously established a resolute intolerance for mergers that result in over-concentration of United States markets. The panel ignored these decisions. These Supreme Court cases establish two fundamental themes with respect to merger legality. First, they adamantly strive to prevent any "trend toward concentration," as forcefully explained by the Court in *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966):

> Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.

Thus, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers." *Id.* As the Court put it in *Philadelphia Nat'l Bank*, 374 U.S. at 365, n.42, where market "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Second, the cases not only enjoined, but required divestiture, of mergers involving two direct competitors in concentrated industries, even where the increases in market share of the combined entity were *slight*, in some cases, less than 2%. These two fundamental principles clearly establishing the law are echoed through each case.

In *Brown Shoe*, the named-defendant was the 4th largest shoe manufacturer with 6% of the market, and its competitor Kinney was the 12th largest firm with only 0.5%. In the shoe retailing market, Brown Shoe was the 3rd largest firm and Kinney was number eight. When the two firms proposed to merge, their combined share of the manufacturing market would only amount to 6%, while their combined share of the retail market would only be 9.5%. 370 U.S. at 297, 303, 327, 331, 346. The Supreme Court enjoined the merger.

In *Philadelphia National Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a

four-county area which would have created the largest bank in the market, with 36% of all assets. 374 U.S. at 330-31, 364. Moreover, the merger would have resulted in intense concentration of the market: the first and second largest firms would have controlled 58% of the market, and the top four firms would have controlled 77% of the market. *Id.* at 331. The Supreme Court enjoined the merger, holding that the resultant market share of the combined firm, as well as the significant increase of concentration in the market, were both so high as to be *presumptively* illegal. Based on the "intense congressional concern with the trend toward concentration," the Court dispensed with the plaintiffs' need for "elaborate proof of market structure, market behavior, or probable anticompetitive effects" and instead established a presumption of illegality for any merger that results in a combined-firm market share of 30%. This case similar market data as those deemed presumptively illegal in *Philadelphia National Bank*.

In *Alcoa*, 377 U.S. 271, the Supreme Court ordered Aluminum Company of America to divest itself of Rome Cable Corporation where Alcoa's market share of 27.8% had been increased by merely 1.3% through the acquisition of Rome. The decision was driven by what the Supreme Court considered to be unacceptably high levels of concentration in the aluminum wiring industry. In that case, Alcoa was the leading producer of aluminum conductor, with 28% of the market. *Id.* at 278. Alcoa plus Kaiser, the second leading competitor, together controlled 50% of the market. *Id.* The top three competitors had a combined market share of 76%. *Id.* Nine firms in total – including Rome with only 1.3% of the market – controlled 95% of all aluminum created in the United States. *Id.* In the narrower submarket of

insulated aluminum conductor, Alcoa was third with only 11.6% of the market and Rome was eighth with 4.7%; however, five companies controlled 65% and four smaller companies added another 23%. Based on these figures, the Supreme Court deemed both of these markets "highly concentrated." The market concentrations in the present case are almost identical. *United States v. Continental Can Co.*, 378 U.S. 441 (1964), concerned the market for glass and metal containers with the following competitive positions: American Can (26.8% market share), Continental Can (21.9%), Owens-Illinois Glass (11.2%), Anchor-Hocking Glass (3.8%), National Can (3.3%) and Hazel-Atlas Glass (3.1%). 378 U.S. at 461, n.11. Some 125 other firms manufactured the remaining 30% of the market units. *Id.* at 445-446 (75 to 90 other firms manufacturing metal containers; 39 other firms manufacturing glass containers). The 2nd largest competitor, Continental Can, acquired the 6th competitor, Hazel-Atlas. The acquisition would have only increased Continental's market share from 21.9% to 25%, and it still would not have become the largest player in the market. Nevertheless, the Supreme Court ordered divestiture. It reasoned that the acquisition not only increased Continental's market share by 14%, it also "reduced from five to four the most significant competitors who might have threatened its dominant position." 378 U.S. at 461. The resulting percentage of the combined firm of 25% "approaches that held presumptively bad" in *Philadelphia National Bank*, "and is almost the same as that involved in [*Alcoa*]." *Id.* Thus, the Court held, "[t]he case falls squarely within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be

curbed in their incipiency.'" *Id.* (quoting *Brown Shoe*, 370 U.S. at 346). The trend toward concentration and the resultant market shares in the present appeal dwarf those found in *Alcoa*.

In *Von's*, 384 U.S. 270, the Supreme Court "not only reverse[d] the judgment below but direct[ed] the District Court to order divestiture without delay." *Id.* at 279. That case involved the acquisition by Von's, which had merely a 4.7% share of the market, of Shopping Bag, with only a 4.2% of the market. *Id.* at 281 (White, J., concurring). The premerger market leader had only 8% of total market sales. *Id.* But, the growing number of grocery market chains and the shrinking number of independently-owned stores, *id.* at 272-273, resulted in the Court holding that "these facts alone are enough to cause us to conclude ...that the Von's-Shopping Bag merger did violate § 7." *Id.* at 273. The Supreme Court stated that "the basic purpose" of the law "was to prevent economic concentration in the American economy by keeping a large number of small competitors in business," *id.* at 275, and that "congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *Id.* at 277. In his concurring opinion, Justice White interpreted the majority decision as establishing the following rule:

> [W]here the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary.

Id. at 281 (White, J., concurring). Here, the top four firms, now control nearly 90% of the market.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the Supreme Court again ordered divestiture of a merged entity, this time between Pabst and Blatz, the former 10th and 18th largest brewers in the United States which, combined, resulted in just the 5th largest U.S. brewer with merely 4.49% of all domestic beer sales. *Id.* at 550. "In accord with" the cases already discussed above, the Court "h[e]ld that the evidence on competition ... was sufficient to show a violation of § 7 ...." *Id.* at 551-52. As in *Von's*, the Court relied heavily on evidence indicating that the merger had taken place "in an industry marked by a steady trend toward economic concentration," *id.* at 550, and then went on to "hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." *Id.* at 552-53.

None of these Supreme Court cases has been overruled or even diminished by later opinions. Each of them was later discussed by Judge Posner in *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), in which the Seventh Circuit observed that these cases, taken together, prohibited "any nontrivial acquisition of a competitor":

> [These cases] seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by

> itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may ... substantially ... lessen competition." [¶] None of these decisions has been overruled.

There is little question that, under the authority of these cases, an order of divestiture should ultimately be mandated in this case. First, the airline industry is highly concentrated: The top four firms have a combined 87% of all sales and the number of competitors gone from seven to four in just a few years: in 2008, Delta, merged with Northwest; in 2010, United and Continental merged to create the then largest airline in the world; in 2011, Southwest merged with low-cost carrier, AirTran; and in 2013, American Airlines and US Airways merged, creating a new largest airline in the world.

The decisions by the Supreme Court of the United States should and must be honored. In Section 7 cases, regardless of whether a particular judge or panel agrees or disagrees with those decisions, the Supreme Court has emphasized that a trend toward concentration, even in situations with very small market percentages, was and is a primary concern of Congress and that should and must be followed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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