

No. 11-16173

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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WAYNE TALEFF., *et al.*
Plaintiffs-Appellants,
v.

SOUTHWEST AIRLINES CO., GUADALUPE HOLDINGS CORP., and
AIRTRAN HOLDINGS, INC.,
Defendants-Appellees.

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On Appeal of an Interlocutory Order of the
United States District Court for the Northern District of California
(Case No. 3:11-CV-2179-JW)

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**MOTION FOR RECONSIDERATION
OF ORDER GRANTING
DEFENDANTS-APPELLEES' MOTION FOR SANCTIONS
PURSUANT TO 28 U.S.C. § 1927**

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MOTION

Pursuant to Circuit Rule 27-10, the Movant submits that, in its opinion, this Court overlooked and misunderstood the following material points of fact and law when it granted Defendants' Motion for Sanctions Pursuant to 28 U.S.C. § 1927, which required a finding that the Movant had "so multiplie[d] the proceedings....unreasonably and vexatiously":

1. The Court made no finding nor gave any reasons for its decision to grant the Motion for Sanctions.
2. The Movant justifiably and reasonably believes that the actions by the Defendants violated Section 7 of the Clayton Antitrust Act, as interpreted by the binding authority of the Supreme Court of the United States, which holdings have never been overruled.
3. Because the government refused to enforce the law against this acquisition by the dominant Low Cost Carrier of the second dominant Low Cost Carrier, resulting in 75% control of the market, the Movant was required to do whatever it could to either stop the acquisition or require that the assets be held separate pending a decision by this Court on a similar issue.
4. The Movant's lawsuit was specifically encouraged by the Supreme Court to vigorously prosecute its case:

Both Simpson and Kiefer-Stewart were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. *Perma Life Mufflers v. Int'l Parts Corp*, 392 U.S. 134, 139 (1968).

5. Because the District Court in its Order specifically referred to various elements of injunctive relief, which it believed were not satisfied by the Plaintiffs, the Plaintiffs believed reasonably and justifiably that it was “impracticable” to move in the District Court for an order that the Defendant’s hold their assets separate and apart. Indeed, it would have been unreasonable to seek a motion for the Defendant’s to hold their assets separate in the District Court, in light of the District Court’s decision.

6. In light of the fact that the acquisition had been technically consummated, there was an obvious emergency need to seek an order requiring the defendants to hold their assets separate and apart, pending the decision by this Court in a case involving similar issues. If the Movant did not seek that motion, the Defendant would likely attempt to scramble the egg, making it difficult to segregate the assets should this Court ultimately find that the acquisition was unlawful.

7. In the circumstances of this case, an order granting sanctions against a vigorous effort to prevent an unlawful merger or to require assets of a combination to be held separate pending a decision on the merits, would chill and discourage vigorous private prosecutions of the antitrust laws.

8. Because of the seriousness of the situation in this case, the Movant respectfully submits it should be entitled to a hearing on the Defendants’ motion, including the cross-examination of witnesses.

9. There is no evidence whatsoever of either bad faith or reckless conduct by the Movant. Vigorous efforts to enforce the antitrust laws, especially in the circumstances of this case in which the binding authority of the Supreme Court is completely ignored, cannot be bad faith nor reckless.

CONCLUSION

The Movant respectfully submits that the order granting sanctions should and must be reconsidered. Vigorous private enforcement of the antitrust laws is specifically encouraged by the Supreme Court. Indeed, the Supreme Court has encouraged private enforcement as a “threat” to violators. If vigorous enforcement by private parties is to be sanctionable, then that vigorous enforcement will be chilled, and many actions that otherwise should be taken will not be.

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For these reasons, and based upon the facts in this case, the Movant respectfully submits that the Court should reconsider its Order of Sanctions and deny the Defendants' Motion.

September 13, 2011

Respectfully submitted,

ALIOTO LAW FIRM

By: /s/ Joseph M. Alioto

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CERTIFICATE OF SERVICE

ALL PARTICIPANTS REGISTERED FOR THE APPELLATE CM/ECF SYSTEM

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 13, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph M. Alioto _____

Attorneys for Plaintiffs-Appellants