No. 11-16173

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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

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)

PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANTS –APPELLEES' MOTION FOR SANCTIONS PURSUANT TO 28 U.S.C. § 1927

JOSEPH M. ALIOTO (SBN 42680)
THERESA D. MOORE (SBN 99978)
THOMAS P. PIER (SBN 235740)
JAMIE L. MILLER (SBN 271452)
ALIOTO LAW FIRM
225 BUSH STREET
16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
JMILLER@ALIOTOLAW.COM
TMOORE@ALIOTOLAW.COM

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELMINARY STATEMENT

Plaintiffs' Emergency Motion to Hold the Assets of the Defendants' separate did not multiply the proceedings "unreasonably and vexatiously," nor recklessly, nor in bad faith; to the contrary, the Emergency Motion was necessary in order to prevent the "scrambling of the egg" of the alleged, unlawful, technically consummated merger.

Furthermore, Plaintiffs Emergency Motion was brought pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3, both of which were conspicuously ignored by Defendants.

Moreover, Defendants' accusations against Plaintiffs' counsel are unjustified and totally without merit[1] because it is well-established that the Supreme Court of the United States has consistently held non-trivial mergers and acquisitions of significant rivals to be in violation of the antitrust laws; and that the Supreme Court has specifically encouraged private enforcement as a "threat" to deter those violations. *Perma Life Mufflers*, 392 U.S. at 139.

The other anti-merger cases brought by Plaintiffs' counsel, which Defendants claimed to be without merit, were fully and completely justified on the

---

[1] The inflammatory language such as, "extortionate lawsuits", "frivolous appeals", "strike suits", "spurious allegations", "modus operandi", etc. are unworthy of Skadden, Arps, an occasional opponent of The Alioto Law Firm.

facts of those cases and the binding authority of the consistent decisions of the Supreme Court of the United States. Petitions for Certiorari have not as yet been filed in those cases. (Declaration of Joseph M. Alioto at 7,8.)

I. INTRODUCTION

The sole claim by the Defendants is that the Plaintiffs' Emergency Motion, and only the Plaintiffs' Emergency Motion, violated 28 U.S.C. § 1927. That claim is without merit. Plaintiffs' response to Defendants' Motion can be summarized concisely: Plaintiffs' Emergency Motion was brought in good faith, without recklessness, pursuant to Federal Rule of Appellate Procedure 8(a)(2), Circuit Rule 27-3, and in reliance on a binding line of Supreme Court precedent. Accordingly, Plaintiffs request that this Court deny Defendants' Motion for Sanctions.

Defendants filed their Motion on June 30, 2011, requesting reimbursement for the attorneys' fees incurred by Defendants in connection with Plaintiffs' Emergency Motion. Defendants cite no case law in support of the proposition that Plaintiffs' Motion was not proper. Glaringly absent from Defendants' Motion is a discussion of the very rules that permit Plaintiffs' Motion: Federal Rule of Appellate Procedure 8(a)(2), authorizes a motion in the Court of Appeals for an order suspending, modifying, restoring, or granting an injunction while an appeal is pending. Moreover, this Court's rule, Circuit Rule 27-3, also authorizes emergency motions when immediate relief is needed to avoid irreparable injury.

The Ninth Circuit has construed 28 U.S.C. § 1927 to require a finding of recklessness or bad faith. *See United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir.1983); *See also Barber v. Miller*, 146 F.3d 707, 711 (9th Cir.1998).

Plaintiffs brought their Emergency Motion in this Court pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3 in good faith, without recklessness, to avoid irreparable injury. Plaintiffs brought suit in the District Court under Section 7 of the Clayton Act, 15 U.S.C. § 18, which provides for injunctive relief, in preventing illegal mergers of corporations that "may substantially lessen competition." Section 7 of the Clayton Act provides for injunctive relief in recognition of the dangers to the public and consumers of illegal mergers. Defendants formally closed their merger on May 2, 2011. Every day that the Defendants are permitted to integrate operations pursuant to their alleged illegal merger results in the likelihood that the integration of operations will have lasting anticompetitive effects on the airline industry that harm the Plaintiffs and consumers, and cannot be undone. The likelihood of injury to consumers was the irreparable injury Plaintiffs' sought to avoid through the Emergency Motion for a Hold Separate Order.

Defendants' Motion for Sanctions requesting reimbursement for attorneys' fees is without merit and unwarranted, besides being a simple rehash of the Defendants' previous motions.

II. BACKGROUND

1. On April 26, 2011, the U.S. Department of Justice, Antitrust Division ("DOJ") announced its clearance of the merger of Southwest Airlines Co. ("Southwest") and AirTran Holdings, Inc. ("AirTran"). (Decl. of T. Pier, Exhibit 6.)

2. On May 2, 2011, less than one week after the announcement by the DOJ clearing the merger, Southwest and AirTran closed their merger. (Compl., Exhibit 7.)

3. In the brief window between the clearing of the merger by the DOJ and the closing of the merger by Defendants, Plaintiffs acted immediately and swiftly, filing their Complaint on May 3, 2011, against Defendants in the United States District Court, Northern District of California, for violation of Section 7 of the Clayton Act, which provides for injunctive relief in preventing illegal mergers of corporations.

4. On May 3, 2011, Plaintiffs filed an Ex Parte Motion for a Temporary Restraining Order, requesting that the Court issue an order enjoining Defendants from completing Southwest's acquisition of AirTran. (Plaintiffs' Not. of Motion and Motion for a TRO at 2; MM in Suppt of Plaintiffs' Mot. for TRO at 1.)

5. On May 4, 2011, the District Court denied Plaintiffs' Motion for a TRO.

6. On May 9, 2011, Plaintiffs filed their Notice of Appeal, appealing the District Court's Order of May 4, 2011.

7. On May 9, 2011, Plaintiffs' filed their Emergency Motion for Injunction Seeking Temporary "Hold Separate" Order Pending Disposition of *Malaney et al., v. UAL Corporation, et al.*

8. On May 10, 2011, this Court was scheduled to hear oral argument in *Malaney, et al. v. UAL, et al.*, Case No. 10-17208, involving the merger of United Airlines and Continental Airlines, a case certain to have a major impact on the airline industry and addressing issues and Supreme Court precedent similar to this case. (Emergency Mot. at 2, 7.) *Malaney* was submitted for decision by this Court on the same day, May 10, 2011.

9. On May 12, 2011, Defendants filed their Motion to Dismiss the appeal in this matter before this Court.

10. On May 20, 2011, Plaintiffs filed an Amended Complaint in the District Court, to request that, "If Defendants have closed, completed, or consummated their merger, require Defendants to hold their assets separate and apart and/or order divestiture." (Amend. Compl. at 14.)

11. On May 20, 2011, Defendants filed their Opposition/Response to Plaintiffs' Emergency Motion.

12. On May 23, 2011, this Court affirmed the District Court's decision in

Malaney.

13. On May 23, 2011, Plaintiffs filed their Reply to Defendants' Opposition to Emergency Motion, the same day the Court issued its decision in *Malaney*. Plaintiffs advised the Court that *Malaney* had been decided[2]. Plaintiffs further clarified that they also requested relief pending appeal of the present case. (Repl. to Opp. to Emergency Mot. at 10.) Plaintiffs' counsel later informed the Court that they intended to Petition for Rehearing/Rehearing E*n Banc* in *Malaney* in their opposition to Defendants' 28(j) letter on May 27, 2011.

14. On May 26, 2011, Defendants filed their Supplemental Authorities 28(j) letter pursuant, not advising the court of the substance of the *Malaney* decision as claimed (*See* Mot. for Sanctions at 5) but instead as follows:

> In their Emergency Motion, Plaintiffs explicitly sought relief pending the "disposition" of *Malaney*. (Emergency Motion at 2.) Therefore the attached order from *Malaney*, disposing of that appeal by affirming the denial of a preliminary injunction, moots Plaintiffs' Emergency Motion. The attached order was issued on Monday, May 23, 2011, after Defendants submitted their opposition to Plaintiffs' Emergency Motion. (Defendants' 28(j) Letter.)

---

[2] Defendants inaccurately allege in their Motion for Sanctions that Plaintiffs' failed to disclose the substance of the decision in *Malaney.* Plaintiffs have repeatedly called attention to the substance of the *Malaney* case since the initial filing of this appeal, as these matters involve similar issues. Plaintiffs further point out that Defendants' have through out these proceedings called *Malaney* "an entirely different unrelated case" (Motion to Dismiss at 3) and then later in their Motion for Sanctions seek to take credit for calling to this Court's attention the substance of the Court's decision in *Malaney.* (Mot. for Sanctions at 5.)

.

15. On May 26, 2011, Plaintiffs and Defendants filed a Stipulation and Proposed Order to stay the proceedings in the District Court to promote efficient resolution of this matter.

16. On May 27, 2011, the District Court entered an order granting the stay of proceedings in the District Court pending resolution of the matter in this Court.

17. On June 2, 2011, this Court entered an order granted Defendants' Motion to Dismiss, the granting of which mooted all pending motions.[3] (Order Granting Mot. to Dismiss at 1.)

18. On June 30, 2011, Defendants filed their Motions for Sanctions pursuant to 28 U.S.C. § 1927, the basis of which is Plaintiffs' Emergency Motion.

III. ARGUMENT

A. THERE IS NO SHOWING BY DEFENDANTS THAT THE PLAINTIFFS' EMERGENCY MOTION WAS UNREASONABLE, VEXATIOUS, IN BAD FAITH AND RECKLESS

Defendants base their Motion for Sanctions on Plaintiffs' Emergency Motion. Defendants' Motion for Sanctions fails to even make mention of Federal Rule of Appellate Procedure 8(a)(2) or Circuit Rule 27-3, the rules that permitted Plaintiffs to bring their Emergency Motion before this Court. Defendants failed to show that

[3] As a matter of clarification, Defendants in their Motion for Sanctions indicate that this court "dismissed Plaintiffs' Emergency Motion as moot" (Motion for Sanctions at 5). This Court, necessarily upon granting the Motion to Dismiss, denied all pending motions as moot. (Order Granting Motion to Dismiss at 1.)

the Plaintiffs' Emergency Motion was unreasonable, vexatious, in bad faith, and reckless, rather than to prevent further harm and irreparable injury resulting from violations of Section 7 of the Clayton Act by seeking a "Hold Separate" Order. Plaintiffs brought their Emergency Motion in order to prevent irreparable injury to the plaintiffs and to consumers. The motion was authorized by Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3. Defendants failed to show that the Plaintiffs filed their motion unreasonably, vexatiously, in bad faith, and recklessly rather than to prevent irreparable injury to consumers. Furthermore, the Defendants failed to note that the Plaintiffs were authorized to file the Motion under Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3.

1. An Award of Sanctions Pursuant to 28 U.S.C. § 1927 Requires a Showing of Bad Faith or Recklessness

28 U.S.C. § 1927 provides for an award of fees and costs under certain circumstances, none of which are found here:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This Court has construed 28 U.S.C. § 1927 to require a finding of bad faith or recklessness for an award of sanctions under that section. *See United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir.1983); *See also Barber v. Miller*, 146 F.3d

707, 711 (9th Cir.1998). Neither are found here and Defendants have offered no evidence of either bad faith or recklessness.

In *Fink v. Gomez,* 239 F.3d 989, 993 (9th Cir. 2001), this Court held that even if an attorney acted recklessly, there must also be proof of something more, such as an improper purpose:

> And *Keegan* reiterates that sanctions are permissible when an attorney has acted recklessly if there is something more-such as an improper purpose. Our latest application of *Keegan* confirms such a reading. *See, e.g., Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 648 (9th Cir.1997)

Defendants cite *B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1107 (9th Cir. 2002), in which the attorney for the County defendant introduced evidence of prior sexual history, knowing that the Court's had already refused twice to allow it. This Court upheld the district court's finding that recklessness plus knowledge was sufficient to justify the imposition of § 1927 sanctions. The "knowledge" in *B.K.B.* was tantamount to an improper purpose, in that the defense improperly introduced evidence of prior sexual history in violation of Rule 412 at trial, despite assurances by defense counsel to the Court in sidebar that the testimony intended to be elicited was not in violation of Rule 412 and despite the fact that defense counsel had previously brought two pretrial motions (both of which were denied) to permit them to introduce Rule 412 material. The "knowledge" in *B.K.B.* was that defense counsel was prohibited (on more than one occasion) from introducing evidence of

the victim's prior sexual history in violation of Rule 412 and did so anyway. *(Id. at 1106.)*

B.K.B. is easily distinguishable from the present case. Plaintiffs' filed their Motion under the authority of Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3. There were no repeated admonitions by the Court of any impropriety, or anything remotely similar to the *B.K.B.* case.

2. Plaintiffs' Emergency Motion is Permitted by Federal Rule of Appellate Procedure 8(a)(2)—Defendants' Motion for Sanctions Omits This Rule

Federal Rule of Appellate Procedure 8(a)(2)(A) clearly permits a motion for an order suspending, modifying, restoring, or granting an injunction while an appeal is pending. The motion must: "(i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action."

Plaintiffs clearly satisfy Rule 8(a)(2)(A) because it was both impracticable to move in the district court and because the denial by the district court of the temporary restraining order made clear that it would not grant prospective relief and accordingly failed to grant the relief requested.

It was impracticable to move the district court for the requested relief because (1) it had just denied plaintiffs' motion for a temporary restraining order

and would more than likely deny plaintiffs' motion for injunction pending appeal; and (2) there was insufficient time to move the district court, given the closing of defendants' merger and the actions that were being taken towards integrating operations.

Furthermore, it was self evident that the Defendants were moving to integrate operations immediately following the closing of the merger on May 2, 2011. Defendants had argued that "significant integration has already taken place." (Opp. to Emergency Mot. at 17.) The dangers of unscrambling the illegal merger increased daily and the need for relief was immediate. The aim of a Hold Separate Order was to maintain an acquired unit as a viable competitor while the litigation unfolds, and to safeguard 'unscrambled' the assets acquired so that they may be divested effectively should the [plaintiff] ultimately prevail. *Federal Trade Comm'n v. Weyerhaeuser Co.*, 665 F.2d 1072, 1075, n.7 (D.C. Cir. 1981).

Further, the immediate dangers associated with the scrambling of an unlawful merger coupled with the District Court's denial of the TRO formed the basis for Plaintiffs' Emergency Motion; 16 Wright, Miller, Cooper & Gressman, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3954 (1977) at 381, n. 5 ("[i]mpracticability of obtaining relief in the district court might be shown by the fact that … the need for relief is so immediate that an application to the district judge would unduly prolong the crisis, or that prior actions or statements of the

district judge indicate the improbability of any relief being granted") (citing, *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5th Cir. 1964).

In their Motion for Sanctions, Defendants fail to so much as mention, much less dispute, the plain applicability of Federal Rule of Appellate Procedure 8(a)(2).

3. Plaintiffs' Emergency Motion is Permitted by Circuit Rule 27-3, Which Provides for Emergency Motions When Immediate Relief is Needed to Avoid Irreparable Injury—Defendants' Motion for Sanctions Omits This Rule

Circuit Rule 27-3, permits emergency motions when immediate relief is needed from the court to avoid irreparable injury. Defendants were clearly moving to integrate operations following the closing of the merger on May 2, 2011. Indeed, as noted, by May 20, 2011, the Defendants already conceded that "significant integration has already taken place." (Opp. to Emergency Mot. at 17.)

There plainly was the danger of irreparable injury to the plaintiffs and consumers in having to *unscramble* a merger, which might later be found to be unlawful. Indeed, the Plaintiffs were following the very intent of Congress itself which sought to avoid the monumental task of unscrambling an anticompetitive merger, describing a pre-merger injunction as:

> often the only effective and realistic remedy against large, illegal mergers – before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act. H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2637, 2627.

4. Defendants Have Not Offered Any Evidence of Bad Faith by Plaintiffs in Bringing their Emergency Motion and Bad Faith Cannot Be Found

Plaintiffs in good faith brought their Emergency Motion, which was

permitted by Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3. Defendants have offered no evidence and made no showing of any kind that Plaintiffs' brought their Emergency Motion in bad faith. As noted above, hold separate orders allow a transaction to proceed but require the maintenance of separate assets to prevent irreparable injury and the complication of later unscrambling an illegal merger. Plaintiffs brought their Emergency Motion in good faith pursuant to the above-referenced rules.

5. Defendants Have Not Offered Any Evidence of Recklessness by Plaintiffs in Bringing Their Emergency Motion and Recklessness Cannot be Found

Defendants argue that Plaintiffs' Emergency Motion was improper and sanctionable because it sought a broader form of relief than was requested in the underlying appeal, the denial of the TRO. As discussed at length above and in the Emergency Motion and in the Reply, Federal Rule of Appellate Procedure 8(a)(2) permits the request for the Hold Separate Order.

Further, this Court has held that a finding of violation of 28 U.S.C. § 1927 requires recklessness and something more, such as an improper purpose. *See Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001). Defendants have made no showing of an improper purpose of any kind or anything else to constitute the requisite something more.

a. Plaintiffs Rely in Good Faith on a Line of Binding Supreme Court Precedent

Actions of Plaintiffs' counsel in this matter and previous actions have been grounded in reasonable, good faith reliance on binding Supreme Court decisions, which have been discussed in further detail in Plaintiffs' Emergency Motion and Reply. (*See* Declaration of Joseph M. Alioto.) None of these Supreme Court decisions have been overruled. For this reason alone, sanctions are wholly inappropriate.

Defendants refer to cases filed by Plaintiffs' counsel. According to the Defendants' lawyers, other cases were brought by Plaintiffs' counsel in bad faith and for an improper purpose. There is no such evidence. And, moreover, to the contrary, each of the cases cited by the Defendants demonstrates the need for private enforcement:

1. The United/Continental merger resulted in the largest airline company in the world. The transaction was nontrivial and the Defendants were significant rivals through out the United States. Neither United nor Continental was a failing company. (Decl. of Joseph M. Alioto at 7.)

2. The Pfizer/Wyeth the largest merger in the history of the United States. Pfizer publically announced that the acquisition, "cemented" Pfizer as the number one bio-pharmaceutical company in the United States, Europe, Japan, and South America. Neither Pfizer nor Wyeth was a failing company. (Decl. of Joseph M. Alioto at 8.)

3. The InBev-Anheuser acquisition was the largest acquisition in the history of the brewing industry, a notorious industry in the Supreme Court merger cases. InBev was the largest brewer in the world. Anheuser-Busch was the largest largest brewer in the United States, comprising more than 50% of the brewing industry in the United States. In each instance, neither company was a failing company. (Decl. of Joseph M. Alioto at 8.)

The issue involved in these cases and in the case at bar is the scope of the relevant product market and whether a national market exists with regard to the airline industry, the pharmaceutical industry, the beer industry, and others. According to the Supreme Court decisions, there is no doubt of the existence of national markets. The same is true of the media and public recognition. However, in these cases, the courts constricted the markets to unnatural areas of competition, which, if followed, would permit mergers of any size so long as they did not compete in some insignificant submarket.

Bedrock antitrust Supreme Court case law recognizes real world indicia of markets, and even more important, has enjoined mergers between entities whose market shares are dwarfed by the pre- and post- merger market shares of Southwest and AirTran in this case.

Mergers that threaten the competitive vitality of United States markets are so vilified that Congress specifically wrote the statute to reach mergers whose

anticompetitive effects were not *actually known*. Section 7 of the Clayton Act makes any merger illegal if its effect "*may* be substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Congress used the word "may" in formulating its "expansive definition of antitrust liability" (*California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990)), to "indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

In a series of decisions which have never been overruled, the Supreme Court established a resolute intolerance for mergers that result in over-concentration of United States markets. These decisions, if applied to the present case, would by themselves require the instant merger to be enjoined.

Two central points are to be gleaned from these decisions. First, they adamantly strive to prevent "trends toward concentration": "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." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966). 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.* 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." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 365, n.42 (1963).

Second, these cases enjoined mergers between two direct competitors in industries marked by a trend toward concentration, *even* where the increases in market share of the combined entity were slight:

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 *United States v. Philadelphia Nat'l Bank*, the defendants proposed to merge the 2nd and 3rd largest banks in a four-county area which would have created the largest bank, holding 36% of all assets in the area. 374 U.S. at 330-31, 364. The merger was enjoined.

In *United States v. Aluminum Co. of America* (*Alcoa*), 377 U.S. 271, 278 (1964), Alcoa's acquisition of Rome Cable would have increased Alcoa's market share by *less than 1.5%*, from 27.8% to 29.1%. The merger was enjoined.

In *United States v. Continental Can Co.*, 378 U.S. 441, 445-46 (1964), the Supreme Court enjoined a merger between the 2nd largest metal container company in the country, with a 33% share of the can market, and the country's 3rd largest glass container company, with a share of 9.6% of the glass container market.

United States v. Von's Grocery Co., 384 U.S. 270 (1966) involved the proposed merger of Von's, the 3rd largest retail grocery store in Los Angeles with a 4.7% market share, and Shopping Bag, the 6th largest grocery store controlling 4.2% of the market. The Supreme Court enjoined the merger.

Finally, in *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550 (1966), the Supreme Court enjoined the merger of Pabst and Blatz, the 10th and 18th largest brewers in the United States, the combination of which would have resulted in just the 5th largest brewer with less than 5% of total domestic beer sales.

In *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1385 (7th Cir. 1986), Judge Posner 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.

Applied to this case, these decisions all but mandate that the merger here be enjoined. First, the airline industry is marked by a pattern of ever-increasing concentration, having been distilled down to only 5 major airlines from 34 in the last twenty-five years. (Compl., Exhibit A). Of the seven low cost carrier airlines, Southwest is by far the dominant carrier, accounting for approximately 60% of the combined market share of the low-cost carriers that report data to the DOT. AirTran controls almost 15% of the LCC's combined market share. The combined company would account for approximately 75% of the combined market share of low cost carrier airlines in the United States. (Compl. at 9).

Plaintiffs' counsel properly relied on this line of precedent in filing their Emergency Motion, in good faith and without an improper purpose.

6. Defendants' Application for Attorneys Fees is Without Merit

Defendants' Application for Attorneys Fees is without merit. There has been no showing that the Motion to Hold Separate "unreasonably and vexatiously" multiplied the proceedings, nor any showing of bad faith or recklessness. Therefore, there is no basis for application for attorneys' fees. The Defendants' opposition to the Emergency Motion is a simple rehash of previously filed motions.

IV. CONCLUSION

For the reasons stated above, this Court should deny Defendants' Motion for Sanctions, as Plaintiffs' Emergency Motion was brought pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3, in good faith and without recklessness.

Dated: August 2, 2011

Respectfully submitted,

ALIOTO LAW FIRM

By: /s/ *Joseph M. Alioto*

Joseph M. Alioto
ALIOTO LAW FIRM
225 Bush Street
16th Floor
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200
jmalioto@aliotolaw.com
jmiller@aliotolaw.com

Attorneys for Appellants

No. 11-16173

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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

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)

DECLARATION OF JOSEPH M. ALIOTO IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANTS –APPELLEES' MOTION FOR SANCTIONS PURSUANT TO 28 U.S.C. § 1927

JOSEPH M. ALIOTO (SBN 42680)
THERESA D. MOORE (SBN 99978)
THOMAS P. PIER (SBN 235740)
JAMIE L. MILLER (SBN 271452)
ALIOTO LAW FIRM
225 BUSH STREET
16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TEL: (415) 434-8900
FAX: (415) 434-9200
JMILLER@ALIOTOLAW.COM
TMOORE@ALIOTOLAW.COM

Attorneys for Plaintiffs-Appellants

Joseph M. Alioto, declares and states as follows:

1. That he is one of the attorneys representing Plaintiffs-Appellants in the above-entitled action and is duly licensed to practice law in the State of California and before this Court. He has personal knowledge of the facts stated herein, and is competent to testify to those facts.

2. That he files this declaration in opposition to the antitrust defendants-appellees' motion for sanctions pursuant to 28 U.S.C. § 1927;

3. That he is licensed to practice before the Supreme Court of the United States, the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Northern District of California, and the California Supreme Court.

4. That he has argued appeals on behalf of antitrust plaintiffs before the Supreme Court of the United States, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Second Circuit, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Seventh Circuit, the United States

Court of Appeals for the Eighth Circuit, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Tenth Circuit, and the Appellate Courts of the State of California and other states.

5. That he was admitted pro hac vice for the prosecution of private antitrust actions in the United States District Courts of major metropolitan cities of the United States, including Boston, Massachusetts; New York, New York; Newark and Trenton, New Jersey; Philadelphia, Pennsylvania; Washington, D.C.; Alexandria, Virginia; Atlanta, Georgia; Youngstown, Ohio; Chicago, Illinois; Detroit, Michigan; Minneapolis and Saint Paul, Minnesota; Louisville, Kentucky; Wichita, Kansas; St. Louis, Missouri; Tulsa, Oklahoma; New Orleans, Louisiana; Austin, Amarillo, Laredo, Dallas, Fort Worth, Houston and San Antonio, Texas; Albuquerque, New Mexico; Phoenix, Arizona; Salt Lake City, Utah; Denver, Colorado; Boise, Idaho; Reno and Las Vegas, Nevada; Seattle, Washington; San Jose, San Diego, Los Angeles, Sacramento, and San Francisco, California; and Honolulu, Hawaii.

6. That he has tried antitrust cases on behalf of plaintiffs in the United States District Courts in Boston, Massachusetts; New York, New York; Atlanta, Georgia; Wichita, Kansas; Phoenix, Arizona; Salt

Lake City, Utah; Boise, Idaho; Las Vegas and Reno, Nevada; Los Angeles, San Diego, San Jose, San Francisco, and Sacramento, California; Albuquerque, New Mexico; Seattle, Washington; Amarillo, Texas; Tulsa, Oklahoma; and Honolulu, Hawaii; and that he has tried antitrust cases on behalf of plaintiffs in the State Courts of California.

7. That in the United States District Court for the Northern District of California he has tried approximately sixteen to twenty antitrust trials before twelve former or sitting Federal Judges of the Northern District and two visiting Federal Judges sitting by designation in the Northern District.

8. That his antitrust trials involved violations of the Sherman, Clayton, and Robinson-Patman Antitrust Acts and the California Cartwright Act, including trial involving price- fixing, group boycotts, divisions of markets, divisions of customers, divisions of products, tying arrangements, Rule of Reason restraints, attempts to monopolize, conspiracy to monopolize, monopolization, patent cross-licensing and misuse, unlawful horizontal, vertical and conglomerate mergers and acquisitions, exclusive dealing, interlocking directorates, price discrimination, commercial bribery and unfair competition.

9. That he has represented antitrust plaintiffs at every level of industry including inventors, manufacturers, distributors, wholesalers, retailers, transporters, brokers, service providers, and consumers; and that his cases involved all the major industries in the United States, including, among others, automobiles, trucks, trains, and airplanes and their services; livestock, cattle, sheep, hogs, and fowls; farming, wheat, corn, beets, potatoes, sugar, rice, tomatoes, fruits; aluminum, oil, steel, iron, alloys, mining; medical equipment, hospitals, doctors, insurance companies, pharmaceuticals, brokerage, medical devices, and medical services; electronic devices, heavy industrial, wet milling, optical fibers, professional groups, heavy farm equipment, tractors, plows, real estate, movies, newspapers, and other publications, media, construction, broadcasting, optical fibers, appliances, power, VCRs, CDs, recorders, computers, computer services, telecommunication, satellites, telephones and telephony, and others.

10. That he is lead counsel in the above-captioned case.

11. That, based upon his knowledge, information, and experience, especially with regard to the recognition by the industry and the public of the accepted market definition of the national airline industry in trade publications and otherwise, and the binding

authority of the Supreme Court of the United States - all formed after a reasonable inquiry under the circumstances, he believed, and continues to believe, that the acquisition by Southwest of its significant profitable rival, AirTran, in a non-trivial 1.4 billion dollar transaction that would be and is a blatant and unlawful violation of the Clayton Act. That, neither Southwest nor AirTran is a small company, nor is either a failing company, facts that were noted by the Supreme Court in *Brown Shoe:* "The present merger involved neither small companies nor failing companies." Brown Shoe v. United States, 370 US at 331.

12. That, by reason of his experience and the evidentiary hearing in the United/Continental merger case, he believes that two national airline sub-markets were established: "legacy" or "network" airlines, consisting of American Airlines, Continental Airlines, United Airlines, US Airlines, and Delta Airlines; and the "LLC" airlines (the so-called low-cost carriers) consisting of principally Southwest and AirTran. That in the LLC market, Southwest had approximately 60% of the national market and AirTran had approximately 15% of the national market, which, if the merger were completed, would result in Southwest controlling 75% of the so-called low cost national airline market.

13. That he, on behalf of his clients, 43 airline travelers, instructed and authorized the filing of the Emergency Motion, not for any improper purpose, but indeed, and to the contrary, for the specific and legally encouraged purpose of seeking a Hold Separate Order, which would temporarily prohibit a "scrambling of the egg."

14. That he previously filed anti-merger cases on behalf of plaintiffs against companies which he believed were violating the law and that those cases were in complete conformity with and warranted by binding authority of the Supreme Court of the United States.

15. That he filed suit against the United/Continental merger. That merger resulted in the creation of the largest airline in the world from two profitable airlines. That the District Court in that case held that the relevant market was not a national airline market, but rather individual markets from individual cities, a notion which he believes is directly contrary to the decisions by the Supreme Court. The District Court's decision was upheld by this Court. A Petition for Certiorari will be filed.

16. That he filed suit against the acquisition of Wyeth by Pfizer. That acquisition was the largest merger in the history of the United States. Both Pfizer and Wyeth were profitable companies. According to Pfizer, the merger "cemented" its leadership as "#1"

in the United States, Japan, Europe, and South America. The District Court found that the relevant market was individual drugs as distinguished from the national pharmaceutical industry, contrary to trade papers, admissions by the Defendants themselves, and the binding authority of the Supreme Court. That decision was upheld by this Court. A Petition for Certiorari will be filed.

17. That he filed suit against the InBev-Anheuser acquisition. In that acquisition, InBev, the largest brewer in the world, purchased Anheuser Busch, the largest brewer in the United States. Both companies were profitable and gave InBev 50 percent of the beer brewing industry in the United States. The District Court denied the injunction, without allowing a hearing. The Seventh Circuit affirmed. Damage claims remain.

18. That he filed an anti-merger case against Avis-Dollar/Thrifty. The District Court dismissed the case, without prejudice, pending a decision of the Federal Trade Commission. Avis then abandoned the transaction.

19. That each of the above-mentioned cases were brought in good faith and for the purpose of preventing those mergers from taking place, because, in his opinion, they would naturally result, as they have, in

higher prices, less service, and the laying off of tens of thousands of people.

20. That he respectfully repudiates any notion that the Supreme Court decisions are somehow replaced or modified or amended or limited or ignored or overshadowed by the so-called Merger Guidelines, which were written, so far as anyone knows, by unknown myrmidons in the bowels of the Department of Justice who apparently were or are dissatisfied with the Supreme Court's ability to express Itself. That during the last decade officials in the Government charged with enforcing the antitrust laws plainly abdicated their responsibilities and created numerous companies that became "too big to fail." A so-called, "thorough investigation" by the Department of Justice is no longer worthy of reliance with regard to whether a merger or an acquisition is unlawful. Indeed, in another anti-merger case brought by Declarant, the District Court noted, "its action or inaction in this case was p[political favoritism masquerading as law enforcement." Reilly v. Heart Corp., 107 F. Supp. 2d 1192, 1212 (N. D. Cal 2000).

21. That he asserts and avers that none of his actions in this case were designed or meant to do anything other than to enforce the antitrust laws that the authorities refused to do; and that, in his opinion, this

case demonstrates why the Congress, in granting a private right of action, understood that the enforcement of the antitrust laws cannot be trusted to be in the sole care of the Government.

I declare under penalty of perjury and the laws of the State of California and the United States of America that the foregoing is true and correct.

Dated: August 2, 2011

/s/ *Joseph M. Alioto*

Joseph M. Alioto

9th Circuit Case Number(s) 11-16173

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are 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 (date) 08/02/2011 .

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.

Signature (use "s/" format) /s/ Joseph M. Alioto

****

CERTIFICATE OF SERVICE
When Not All Case Participants are 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 (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)