No. 11-16173

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE TALEFF, ET AL.,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 3:11-cv-02179 (JW)
(Hon. James Ware, Chief Judge, Presiding)

DEFENDANTS-APPELLEES' REPLY IN SUPPORT OF THEIR MOTION FOR SANCTIONS PURSUANT TO 28 U.S.C. § 1927

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INTRODUCTION

Defendants-Appellees Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings, Inc. ("Defendants") respectfully submit this Reply in Support of Their Motion for Sanctions Pursuant to 28 U.S.C. § 1927. In Plaintiffs-Appellants' Opposition to Defendants-Appellees' Motion for Sanctions Pursuant to 28 U.S.C. § 1927 ("Opp'n"), Plaintiffs-Appellants ("Plaintiffs") argue (1) that Plaintiffs' counsel's conduct was authorized by Rule 8(a)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 27-3 and, thus, was not pursued improperly, and also (2) that there is no evidence that Plaintiffs' counsel's conduct was undertaken in bad faith or recklessly. Plaintiffs are wrong on both scores. Neither Rule 8 nor Circuit Rule 27-3 authorizes their counsel's tactics, which actually conflict with both rules, demonstrating recklessness at the very least. Plaintiffs also argue at length about the merits of their merger challenge, but that is entirely irrelevant to the sanctionability of their Emergency Motion for Injunction Seeking Temporary "Hold Separate" Order Pending Disposition of Malaney, et al. v. UAL Corporation, et al. ("Emergency Motion").

ARGUMENT

There is no dispute that 28 U.S.C. § 1927 authorizes the imposition of sanctions against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously," *id.*, and that "unreasonably and vexatiously" means

intentionally, recklessly or in bad faith. *See, e.g.*, *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985). In opposing Defendants' sanctions motion, Plaintiffs' counsel attempt to defend their Emergency Motion on the grounds that it was somehow permitted by Rule 8(a)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 27-3 and therefore could not have been reckless or in bad faith. Plaintiffs' argument has no merit because Plaintiffs' counsel's tactics clearly did not comport with Rule 8(a)(2) or Circuit Rule 27-3. Moreover, the striking inconsistency of the conduct with respect to both rules demonstrates that it was undertaken recklessly or in bad faith and therefore is sanctionable under 28 U.S.C. § 1927.

I. THE RULES DO NOT PERMIT PLAINTIFFS' COUNSEL'S TACTICS

A. Rule 8(a)(2) of the Federal Rules of Appellate Procedure

Rule 8 (a) of the Federal Rules of Appellate Procedure narrowly limits the circumstances in which a party may move the court of appeals in the first instance for injunctive relief pending appeal, and a self-proclaimed "emergency" is not one of them. As Defendants explained in Defendants-Appellees' Opposition to Plaintiffs' Emergency Motion ("Opp'n to Emergency Mot."), Rule 8(a)(2) allows such a motion for injunctive relief "only upon a showing 'that moving first in the district court would be impracticable,' or that, 'a motion having been made' before the district court, the 'district court denied the motion or failed to afford the relief

requested.'" (Opp'n to Emergency Mot. at 6 (quoting Fed. R. App. P. 8(a)(2)(A).) Plainly neither exceptional circumstance applies to Plaintiffs, and Plaintiffs themselves do not even argue the latter. Instead, Plaintiffs assert in wholly conclusory terms that it would have been "impracticable" to have sought an injunction pending appeal from the district court "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." (Opp'n at 10-11.) This two part contention does not even come close to establishing impracticability.

First, Plaintiffs are wrong that the district court's previous denial of their TRO motion somehow vitiates the requirement under Rule 8 (a)(1) that preliminary injunctive relief pending appeal be sought from the district court in the first instance. *See* Fed. R. App. 8(a)(1). Plaintiffs' interpretation of Rule 8(a)(2) would render Rule 8(a)(1) meaningless. As Defendants pointed out in their Opposition to Plaintiffs' Emergency Motion, a party is always seeking review of an adverse decision on appeal, and so that mere circumstance—that the district court has already denied some relief to the movant—cannot possibly render it "impracticable" to seek relief pending appeal from the district court initially.

(Opp'n to Emergency Mot. at 7-8 (citing *Chem. Weapons Working Group v. Dep't of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996); *Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970)).)

Second, the argument about insufficient time to move the district court does not even bear on impracticability at all. Plaintiffs fail to explain why an expedited request for a hold separate order would be adjudicated faster by the Ninth Circuit than the district court.[1]

Furthermore, neither the language of Rule 8 nor common sense permits preliminary injunctive relief under Rule 8 to be tethered to the resolution of a different case. Plaintiffs overreached in attempting to do so, claiming that *Malaney* was a "related case." Plaintiffs have retreated from that position now that *Malaney* has been decided by the Ninth Circuit against their interest, but that does not change the fact that Plaintiffs lacked a proper basis for their Emergency Motion. Plaintiffs' counsel attempt to deflect attention from their own maneuvering by falsely accusing Defendants of taking inconsistent positions with respect to

[1] Plaintiffs argue that the immediacy of post-merger integration, "coupled with the District Court's denial of the TRO," was enough to show impracticability. (Opp'n at 11-12.) However, Plaintiffs ignore that they neglected to ask the district court for a hold separate order, but instead only sought the impossible relief of a TRO to block the consummation of the already consummated transaction. The fact that the district court denied the impossible TRO relief sought by Plaintiffs does not establish how the district court might have ruled on a request for a hold separate order pending appeal and, therefore, does not show that asking the district court would have been impracticable.

Malaney. (*See* Opp'n at 6 n.2.) To be clear, Defendants' position all along has been that *Malaney* is a different lawsuit to which Defendants are not parties. Therefore, Plaintiffs' counsel's efforts to expedite the instant case simply to suit Plaintiffs' counsel's litigation strategy in a different case are improper and not sanctioned by Rule 8. That *Malaney* may be a *relevant* case for a variety of reasons does not make it a *related* case.[2]

B. Circuit Rule 27-3

Circuit Rule 27-3 imposes requirements for an emergency motion that Plaintiffs' counsel neglected to follow in letter or spirit. Specifically, Plaintiffs' counsel did not submit the required "Circuit Rule 27-3 Certificate" certifying, among other things, the "[f]acts showing the existence and nature of the claimed emergency." 9th Cir. R. 27-3(a)(3)(ii). In response, Plaintiffs asserted that "[i]n effect, Appellants have complied with this requirement in the section entitled 'Nature of the Urgency' in the Emergency Motion." (Pls.-Appellants' Reply to Defs.-Appellees' Opp'n to Emergency Mot. at 11.) In fact, that referenced section of Plaintiffs' Emergency Motion provides no explanation for why "emergency"

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[2] For example, *Malaney*, like this case, is a private challenge to an airline merger; and the decision of the Ninth Circuit confirms that the plaintiffs' alleged relevant market in *Malaney*, which matches the markets alleged by Plaintiffs here in relevant detail, is improper for purposes of antitrust analysis. *See Malaney v. UAL Corp.*, No. 10-17208, 2011 WL 1979870, at *1 (9th Cir. May 23, 2011).

injunctive relief would be appropriate when the underlying appeal was of the denial of a TRO to stop the consummation of a deal that had been consummated already.

The "Nature of Urgency" section of Plaintiffs' Emergency Motion starts out by noting that the oral argument in *Malaney* was scheduled for the next day, and that "[t]he decision of this court in that case involving that merger will have a substantial effect on the airline industry and the case presently before this court." (Emergency Mot. at 3.) The timing of developments in a different appeal does not justify forcing this Court and Defendants into emergency mode. Plaintiffs' "Urgency" argument further notes in conclusory fashion that "[e]very day that lapses without [a hold-separate] order will increase the irreparable harm and the hardship of both the courts and the plaintiffs in 'unscrambling' the merged entity should it be found illegal." (*Id.*) Given that the merger had already been consummated, it is entirely unclear what harm and hardship Plaintiffs mean to suggest. This conclusory statement falls woefully short of Circuit Rule 27-3's requirement of a certification of "[f]acts showing the existence and nature of the claimed emergency." 9th Cir. R. 27-3(a)(3)(ii).

At best, Plaintiffs seem to suggest that they are entitled to manufacture their own "emergency" by strategically delaying bringing suit to challenge a merger until it is too late to achieve effective injunctive relief without

resort to expedited court procedures. This would be improper. *Cf. Hirschfeld v. Board of Elections*, 984 F.2d 35, 38, 40 (2d Cir. 1993) (request for stay pending appeal under Fed. R. App. P. 8 denied where movant had not shown it would have been impracticable to seek such relief first from the district court; further noting that movant's "claim of irreparable injury was meritless because any injury in the absence of the stay would be self-inflicted"). Plaintiffs do not suggest any logical reason for their own delay in bringing suit against Southwest. Plaintiffs assert that they "acted immediately and swiftly" to sue after the Department of Justice ("DOJ") cleared the merger (Opp'n at 4), but meanwhile Plaintiffs' counsel blasts the DOJ for its supposed corruption and inefficacy (*see* Decl. of Joseph M. Alioto in Supp. of Pls.-Appellants' Opp'n to Defs.-Appellees' Mot. for Sanctions Pursuant to 28 U.S.C. § 1927, ¶ 20 (describing DOJ staff as "unknown myrmidons in the bowels of the Department of Justice who were or are dissatisfied with the Supreme Court's ability to express Itself," and complaining that "during the last decade officials in the Government charged with enforcing the antitrust laws plainly abdicated their responsibilities").

If the DOJ is as corrupt and ineffective as Plaintiffs' counsel asserts, it makes no sense for Plaintiffs to have waited for seven months to see the result of the DOJ investigation before bringing their own enforcement challenge. In addition, Plaintiffs' counsel—and even the Plaintiffs themselves—have challenged

other mergers prior to those mergers' closings, and have acknowledged the futility of a private enforcement action seeking injunctive relief after a merger has already closed. Forty of the 43 Plaintiffs here are also challenging the merger of United and Continental (in *Malaney v. UAL Corp.*),[3] a proceeding in which they sued before the merger closed and then aptly identified myriad equitable problems with post-merger divestiture:

> [D]ivestiture post-merger presents far too many problems to make it a preferable remedy to a preliminary injunction. First, it is obviously much easier to require people to stop what they intend to do than to require them to go back and undo what they have already done. Plaintiffs further presume that this Court has no great desire to put itself into the business of overseeing the unraveling and divestiture of a major merged network airline . . . .

Plaintiffs' Post-Hearing Memorandum at 36, *Malaney v. UAL Corp.*, No. 3:10-cv-02858-RS (N.D. Cal. filed Sept. 13, 2010) (ECF No. 118).

II. PLAINTIFFS' COUNSEL'S FAILURE TO COMPLY WITH THE RULES DEMONSTRATES AT LEAST RECKLESSNESS

Plaintiffs' counsel's conduct in pursuing the "Emergency" Motion, which at the very least constitutes recklessness, is evidenced by the inexplicable and unjustifiable nature of Plaintiffs' counsel's tactics described above. With respect to Federal Rule of Appellate Procedure 8, the entire purpose of an

[3] Twenty-one of the 43 Plaintiffs also challenged the merger of Delta and Northwest, in the action *D'Augusta v. Northwest Airlines Corp.*, No. 3:08-cv-03007-VRW (N.D. Cal. filed June 18, 2008).

injunction pending appeal is to preserve the status quo while the *instant* appeal is being heard, and so it is patently unreasonable and vexatious to use Rule 8 to seek relief that is explicitly inconsistent with that purpose. Defendants have searched the case law but found nothing that might justify Plaintiffs' counsel's twisting of Federal Rule of Appellate Procedure 8(a)(2) beyond its intended and obvious purpose.

With respect to Circuit Rule 27-3, Plaintiffs' counsel's conduct in seeking emergency treatment for Plaintiffs' "Emergency" Motion without any showing whatsoever, let alone certification, of an actual emergency was, again, reckless, at minimum, and as such, is sanctionable. Furthermore, it is ironic for Plaintiffs' counsel to flout a Circuit Rule and then invoke the very same rule as justification for their own procedural overreaching.

III. PLAINTIFFS' EXTENSIVE DISCUSSION OF THE MERITS IS IRRELEVANT TO THIS MOTION

Plaintiffs' Opposition argues in great detail the merits of Plaintiffs' underlying antitrust claim. (*See* Opp'n at 13-19.) Defendants do not agree with those arguments, but that entire discussion is irrelevant to the present sanctions motion. As Plaintiffs themselves acknowledge, Defendants only seek sanctions based on the improper Emergency Motion, not for the appeal itself (improper as it was) or the underlying antitrust lawsuit (meritless as it is). (*See* Opp'n at 2 ("The sole claim by the Defendants is that the Plaintiffs' Emergency Motion, and only

the Plaintiffs' Emergency Motion, violated 28 U.S.C. § 1927.").) The question of the continued vitality and applicability of certain decisions under Section 7 of the Clayton Act, 15 U.S.C. § 18, has absolutely no bearing on whether Plaintiffs' counsel multiplied these proceedings unreasonably and vexatiously with their pursuit of an "Emergency Motion" for preliminary injunctive relief without seeking such relief first from the district court, where there was no emergency and where the relief sought on a supposed interim basis was tied to an unrelated case and exceeded the scope of the underlying appeal.

CONCLUSION

For the reasons stated above, as well as in Defendants-Appellees' opening brief, the Court should award to Defendants-Appellees the excess fees incurred as a result of opposing the meritless Emergency Motion.

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Respectfully submitted,

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