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' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING SANCTIONS PURSUANT TO 28 U.S.C. § 1927

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I. PRELIMINARY STATEMENT

Notwithstanding the vituperative remarks and tone by the Defendants' attorney, a former assistant attorney in the antitrust division in charge of merger enforcement, the Defendants have failed to make the necessary showing of bad faith and recklessness required under 28 U.S.C. § 1927. Plaintiffs' counsel respectfully submits that the Motion for Reconsideration should be granted and that the order of sanctions should be vacated.

II. ARGUMENT

Circuit Rule 27-10 requires a party seeking reconsideration of an Order to state the points of law or fact which, in the opinion of the party, the Court has overlooked or misunderstood.

Defendants' Opposition to Plaintiffs Counsels' Motion for Reconsideration is without merit. Other than Defendants counsel's snide remarks about the chilling effect on the private enforcement of the antitrust laws, the Defendant has failed to show any evidence of bad faith, recklessness or improper purpose on the part of Plaintiffs' counsel. Furthermore, recent news reports show that the very anticompetitive effects alleged by the Plaintiffs are in fact occurring,

and that, in the opinion of Plaintiffs' counsel, these anticompetitive effects would not be taking place if the Emergency Motion had been granted.

A. PLAINTIFFS COUNSELS' MOTION FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE THE IMPOSITION OF SANCTIONS WILL CHILL THE VIGOROUS AND IMPORTANT PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

The Defendants' assertion that the chilling of enforcement of the antitrust laws is "irrelevant to the issue of the propriety of sanctions here" (Opp. to Mot. for Reconsideration at 2), is not only plainly wrong but directly contrary to the decision of this Court in *Matter of Yagman*:

> At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *See* Proposed Amendments to Fed.R.Civ.P. 11, Advisory Committee Notes, 97 F.R.D. 198, 199 (1983). *Matter of Yagman,* 796 F.2d 1165, 1182 (9th Cir. 1986).

Defendants would have this Court impose sanctions to do just that—to chill the vigorous private enforcement of the antitrust laws, which the Defendants smearingly describe as "frivolous" and as "strike suits." The imposition of sanctions for an Emergency Motion for a Hold

Separate Order, a practical device utilized in private antitrust merger enforcement, especially when it was clear that the district court would not grant such relief, will most certainly chill the private enforcement of the antitrust laws.

Contrary to the Defendants' assertion, the chilling of the private vigorous enforcement of the antitrust laws is plainly and unequivocally relevant, as underscored by the Supreme Court, noted in the Motion for Reconsideration (Mot. for Reconsideration at 1.) and reiterated here:

> 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 right of 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).

Plaintiffs' Emergency Motion, which was the basis for the Motion for Sanctions, was not brought unreasonably or vexatiously. Indeed, as previously noted, the Motion was necessary to prevent the anticompetitive effects which the Plaintiffs' counsel believed would happen, as they in fact have happened.

Thus, what is really "shocking" and "clearly erroneous," is the Defendants attorneys' claim that the importance of the private

enforcement of antitrust laws is "irrelevant to the issue of sanctions." (Opposition to Mot. for Reconsideration at 2.)

B. DEFENDANTS FAILED TO MAKE THE NECESSARY SHOWING FOR AN IMPOSITION OF SANCTIONS PURSUANT TO 28 U.S.C. § 1927

The filing of Plaintiffs' Emergency Motion was not unreasonable nor vexatious nor in bad faith nor reckless when viewed in the context of the urgency of this case. This provides an additional and proper basis for reconsideration of the imposition of sanctions.

Defendants argue that there has been no change of law or fact necessary to warrant reconsideration—and yet, conveniently, they ignore and mischaracterize the text of Circuit Rule 27-10: "[a] party seeking [reconsideration] shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood." Circuit Rule 27-10 does not require a change in law, as the Defendants contend.

Defendants offered absolutely no evidence in support of their Motion for Sanctions and this point alone, in the opinion of the movant, merits the granting of reconsideration by this Court. The thrust of Defendants' argument is that Plaintiffs' filing of an Emergency Motion

in this Court is in and of itself conduct which should be sanctioned. However, Defendants did not and could not show that the filing of the Emergency Motion was in bad faith, or recklessness, or filed for an improper purpose. To the contrary, the Motion sought to prevent the anticompetitive effects which are now beginning to occur.

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). Further, in *Fink v. Gomez,* 239 F.3d 989, 993 (9th Cir. 2001), this Court held that proof of something more than recklessness is required if sanctions are to be imposed.

1. Filing an Emergency Motion for a Hold Separate Order in this Court When it was Clear that the District Court Would Not Grant Such Relief Does Not Constitute Bad Faith or Recklessness but Rather Demonstrates Plaintiffs Counsels' Rigorous Effort to Enforce the Antitrust Laws

Defendants contend that Plaintiffs counsel should have first sought relief in the district court. As demonstrated in the Opposition to the Motion for Sanctions (Opp. to Mot. for Sanctions at 10), Federal Rule of Appellate Procedure 8(a)(2)(A) does not require filing first in the

district court if it would have been "impracticable" to do so—and it was evident that it would have been impracticable to do so.

It was "impracticable" to do so because the very language of the district court's Order, which was issued without a hearing by Judge Ware, addressed and dismissed the elements required for issuing a TRO:

- Upon review, the Court finds that Plaintiffs have failed to establish that they will be subject to immediate irreparable injury. In particular, while Plaintiffs contend that the unlawful merger will result in concentration of ownership on a number of routes, by Plaintiffs' own reports Defendants completed acquisition of Airtran the day before this Motion was filed. (Order Denying TRO at 2.)
- Given the fact that Defendants' acquisition of Airtran was completed the day before this action was filed, Plaintiffs fail to establish likelihood of success on the merits for an action seeking solely prospective relief. (Order Denying TRO at 2.)

As a practical matter, the requirements for a TRO and a Hold Separate Order are essentially identical, and accordingly, it would have been futile to request a Hold Separate Order. In indicating that "Plaintiffs failed to establish likelihood of success on the merits for an action seeking solely prospective relief," the district court made it clear that it would not only have been "impracticable" but entirely futile to

request a Hold Separate Order from a court refusing to grant prospective relief after the closing of the merger.

2. Tying the Emergency Motion to the Resolution of *Malaney v. UAL Corp.,* No. 10-17208 (9th Cir.), Another Anti-Merger Case in the Airline Industry, Does Not Constitute Bad Faith or Recklessness

While Defendants argue that it is "reckless" to tie the Emergency Motion to the developments in another appeal, they cite no rule that prohibits this. In fact, by tying the Motion to the *Malaney* case, Plaintiffs' counsel was pointing out the similar issues in the two cases. Defendants themselves filed a 28(j) letter, on May 26, 2011, addressing the decision in *Malaney.*

3. Plaintiffs' Counsel Addressed the Urgency in their Emergency Motion

Defendants argue that Plaintiffs failed to follow the Circuit Rule 27-3 requirement addressing urgency. Of course, Defendants mischaracterize and mislead the Court, once again, by failing to recognize that Plaintiffs Emergency Motion did contain a section entitled "Nature of Urgency." (Emergency Motion at 3.) And once again Defendants completely failed to show bad faith and recklessness or any improper purpose whatsoever.

Because the Defendants' Motion does not demonstrate the necessary findings of "bad faith" and "recklessness" or "improper purpose" required for an imposition of sanctions pursuant to 28 U.S.C. § 1927, Plaintiffs' counsel respectfully submit that a Motion for Reconsideration of an order granting sanctions should be granted and that that the order granting sanctions should be vacated.

C. PLAINTIFFS COUNSELS' MOTION FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE THE ANTICOMPETITVE EFFECTS OF THE MERGER ALLEGED BY PLAINTIFFS' COUNSEL ARE IN FACT OCCURRING AND WOULD NOT BE IN THE OPINION OF MOVANT, IF THE EMERGENCY MOTION HAD BEEN GRANTED

Further, the anticompetitive effects Plaintiffs alleged and sought to prevent through their Emergency Motion, are occurring:

Fares and Fees are Increasing--

- Discount carrier Southwest and its subsidiary AirTran matched a fare increase Wednesday that was launched by larger airlines, likely ensuring that the industry's latest attempt to raise ticket prices will be successful. Delta Air Lines on Tuesday announced an increase of $4 to $10 in ticket prices for one-way trips across much of the USA, with United Continental following. Southwest and AirTran matched it by raising $2 to $5 one-way on nearly all domestic fares, says Jamie Baker, an airline analyst at JPMorgan....Fare increases don't always stick because some airlines balk and carriers don't like to prices themselves too high against competitors. But Southwest's

match is a pretty good sight it'll cost more to fly. (*USA Today,* "Airlines Hike Fares in Time for Holiday Travel, So Book Now", October 20, 2011, Exhibit F.)

- The same things making many air travelers grumble these days—rising air fares with more and more fees, fewer flights, planes filled to the brim—are the things giving airline executives a reason to smile. (*New York Times,* "Airlines Battle Back to Profit, a Fare and a Fee at a Time", October 18, 2011, Exhibit A.)

- Domestic fares, which have risen in recent years, averaged $337 last year. (*New York Times,* "Airlines Battle Back to Profit, a Fare and a Fee at a Time", October 18, 2011, Exhibit A.)

- The airlines now generate extra revenue from passengers by charging for a variety of services and goods, including checked bags, priority seating and onboard items like food, television and blankets. (*New York Times,* "Airlines Battle Back to Profit, a Fare and a Fee at a Time", October 18, 2011, Exhibit A.)

- The worldwide airline industry is expected to collect $32.5 billion in fees for checked bags, onboard entertainment and other extras this year, a 44% increase over 2010…U.S. airlines should collect the vast majority of fees worldwide, pocketing $12.5 billion this year, compared with $6.7 billion last year. (*Los Angeles Times,* "Airlines worldwide expected to collect $32.5 billion in fees in 2011", October 19, 2011, Exhibit B)

Cutting Service to Markets—

- The mergers allowed the biggest airlines to cut service to many smaller markets, ground unprofitable flights and focus on their most profitable hubs. With fewer airlines competing to make their seats the cheapest, they could

increase fares. (*New York Times,* "Airlines Battle Back to Profit, a Fare and a Fee at a Time", October 18, 2011, Exhibit A.)

- Service will shift to focus on larger cities and more direct flights…Daily departures will fall about 13 percent to 175 as some smaller markets are cut, [Gary Kelly, Chief Executive Officer of Southwest] said. (*Bloomberg,* "Southwest Sees $1 Billion Atlanta Revenue Gain on AirTran Merger", October 6, 2011, Exhibit E.)

- Southwest Chief Executive Gary Kelly acknowledged, though, that some of AirTran's less-frequent routes and subsidized routes don't fit into Southwest's model. (*The Atlanta Journal-Constitution*, "Southwest to Link Network with AirTran", September 19, 2011, Exhibit C.)

- So far, Southwest has announced plans to ax AirTran flights to Atlantic City, N.J., and Newport News, Va.…'The immediate danger is to smaller cities,' said Brett Snyder, a former airline manager. (*The Atlanta Journal-Constitution,* "Southwest to transform AirTran Hub into 'Megacity'", September 11, 2011, Exhibit D.)

<u>Fewer Available Seats</u>—

- Just looking at the number of seats available, domestic airlines' capacity peaked in 2005 and has generally fallen since. (*New York Times,* "Airlines Battle Back to Profit, a Fare and a Fee at a Time", October 18, 2011, Exhibit A.)

As Plaintiffs alleged and sought to prevent through their Emergency Motion (Emergency Motion at 3, 7-10, 13-14), the anticompetitive effects of the merger are already coming to fruition: Southwest and AirTran fares and fees are increasing, routes are being

cut, and there are fewer available seats. These serious post-merger anticompetitive effects demonstrate, in the opinion of Plaintiffs' counsel, that the efforts made by Plaintiffs' counsel, were in good faith and proper vigorous efforts to enforce the antitrust laws in accordance with the numerous anti-merger decisions by the Supreme Court, as previously noted in Plaintiffs counsels' Motion for Reconsideration.

III. CONCLUSION

Plaintiffs' counsel respectfully move this Court to grant Plaintiffs Counsels' Motion for Reconsideration and vacate this Court's prior order granting sanctions.

October 20, 2011

Respectfully submitted,

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