

FILED

UNITED STATES COURT OF APPEALS

MAR 21 2013

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

WAYNE TALEFF; JUDY CRANDELL;  
 ROSEMARY D'AUGUSTA; JOSE M.  
 BRITO; BRENDA K. DAVIS;  
 KATHERINE R. ARCELL; JUDY  
 BRAY; PAMELA FAUST; CAROLYN  
 FJORD; DON FREELAND; DONALD V.  
 FRY; GABRIEL GARAVANIAN;  
 HARRY GARAVANIAN; YVONNE  
 JOCELYN GARDENER; 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 ROSENTHAL; BILL  
 RUBINSOHN; SONDR A. 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; JAN MARIE  
 BROWN; ROBERT D. CONWAY; TED  
 FRIEDLI,

Plaintiffs - Appellants,

v.

No. 11-16173

D.C. No. 11-CV-2179-JW  
Northern District of California,  
San Francisco

AMENDED ORDER

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

Defendants - Appellees.

Before: Peter L. Shaw, Appellate Commissioner

I  
Background

Wayne Taleff and 42 other plaintiffs (together “Taleff”) brought an action against Southwest Airlines Company, its subsidiary Guadalupe Holdings Corporation, and AirTran Holdings, Incorporated (together “Southwest”) to enjoin the merger of Southwest and AirTran. The district court denied Taleff’s motion for a pre-closing temporary restraining order, noting that Southwest’s acquisition of AirTran was completed one day before Taleff filed the action.

Taleff filed a notice of appeal from the district court’s order denying the temporary restraining order, along with an emergency motion for an injunction seeking a hold-separate order -- broader relief than Taleff had sought in the district court -- pending the disposition of an unrelated appeal.<sup>1</sup> This court granted

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<sup>1</sup> After filing the notice of appeal, Taleff amended the complaint to include a request for a hold-separate order. Later, the district court dismissed the amended complaint for failure to state a claim, with each party to bear its own fees and costs.

Southwest's motion to dismiss Taleff's appeal for lack of jurisdiction, and denied Taleff's emergency motion for an injunction as moot.

The court also granted Southwest's motion for attorneys' fees as a sanction against Taleff's counsel for filing the emergency motion. *See* 28 U.S.C. § 1927.<sup>2</sup> The court referred to the Appellate Commissioner the determination of the amount of attorneys' fees to be awarded. *See* 9th Cir. R. 39-1.9. The court denied motions for reconsideration and reconsideration en banc of the order granting the motion for sanctions, and the United States Supreme Court denied a petition for a writ of certiorari.

On March 5, 2013, the Appellate Commissioner filed an order awarding attorneys' fees in the amount of \$67,495.30 in favor of Southwest Airlines Company, Guadalupe Holdings Corporation, and AirTran Holdings, Incorporated, and against Joseph M. Alioto, Esq., Theresa D. Moore, Esq., Thomas P. Pier, Esq., Jamie L. Miller, Esq., and the Alioto Law Firm, jointly and severally. Within the time for filing a motion for reconsideration of the order, the parties filed a stipulation that the Appellate Commissioner's order should be amended to award

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<sup>2</sup> Taleff was represented on appeal by Joseph M. Alioto, Esq., Theresa D. Moore, Esq., Thomas P. Pier, Esq., and Jamie L. Miller, Esq., of the Alioto Law Firm in San Francisco. Miller, a Lincoln Law School graduate admitted to the State Bar of California in 2010, signed the emergency motion for an injunction, as well as a reply and a letter in support of the motion.

fees against Joseph M. Alioto, Esq., and the Alioto Law Firm, jointly and severally, and that the attorneys' fees award would be paid within 21 days after filing of an amended order. Pursuant to the parties' stipulation, and because it appears that Alioto directed and was responsible for the filing of the emergency motion for an injunction, reply, and letter, despite the other attorneys' appearances, the Appellate Commissioner's March 5, 2013 order is amended by this order.

## II Analysis

### A. Excess Attorneys' Fees

Southwest requested and the court awarded attorneys' fees pursuant to 28 U.S.C. § 1927, which provides that "[a]ny attorney or other person admitted to conduct cases in any court of the united States 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."

Thus, under section 1927, the court may award the excess attorneys' fees reasonably incurred because of Taleff's counsel's unreasonable and vexatious conduct in filing the emergency motion for an injunction, but not ordinary attorneys' fees associated with opposing the appeal. *See Moore v. Keegan Mgmt.*

*Co.*, 78 F.3d 431, 435 (9th Cir. 1995); *U.S. v. Associated Convalescent Enters.*, 766 F.2d 1342, 1347-48 (9th Cir. 1985); *U.S. v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983).

Southwest's fee request is accompanied by a declaration that "the fees sought . . . are limited to those accrued directly in connection with [Southwest's attorneys'] work in opposing [Taleff's] Emergency Motion. . . . Other fees were accrued in connection with defending this appeal . . . but Southwest does not seek to recover those fees," and that "[w]ith respect to the Emergency Motion alone, [Taleff's] filing required [Southwest's attorneys] to engage in extensive legal research, internal strategizing, and consultation with Southwest on an expedited basis."

#### B. Reasonably Incurred

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

In connection with opposing Taleff's emergency motion for an injunction, Southwest requests fees in the amount of \$82,276.65 for 126.75 hours of work by six attorneys and a paralegal from the Washington, D.C. and Palo Alto, California

offices of Skadden, Arps, Slate, Meagher & Flom LLP at their hourly billing rates, as follows:

<u>Attorney/Paralegal</u>	<u>Experience</u>	<u>Rates</u>	<u>Hours</u>	<u>Total</u>
Partner Sunshine	27 years	\$986	5.50	\$ 5,423.00
Partner MacDonald	23 years	\$927	12.25	\$11,355.75
Counsel Meidan	12 years	\$734	41.30	\$30,314.20
Associate Bensley	10 years	\$639	18.50	\$11,821.50
Associate Hammon	4 years	\$536	22.50	\$12,060.00
Associate Soderstrom	3 years	\$486	20.70	\$10,060.20
<u>Paralegal Buchwald</u>	<u>N/A</u>	<u>\$207</u>	<u>6.00</u>	<u>\$ 1,242.00</u>
Total			126.75	\$82,276.65

Southwest requests attorneys' fees for filing a 20-page opposition to Taleff's emergency motion for an injunction and, in support of the motion, a 3-page request for judicial notice of a Securities and Exchange Commission filing by AirTran.

Although Taleff opposed Southwest's motion for sanctions, Taleff's opposition addressed only the imposition of sanctions and did not include an objection to the Southwest's requested amount of attorneys' fees. Since the court's August 30, 2011 order granting Southwest's motion for sanctions and referring to the Appellate Commissioner the determination of the attorneys' fees award

amount, neither Taleff nor his attorneys submitted or requested leave to submit objections to the amount of attorneys fees requested by Southwest.

#### 1. Number Of Hours Reasonably Expended

Although Taleff did not oppose the requested fee amount, the court conducts its own review of the reasonableness of Southwest's fee request. A review of the court of appeals docket and pleadings, in light of fee requests in similar cases, reveals that Southwest's attorneys should have required somewhat fewer hours to oppose Taleff's emergency motion for an injunction.

On May 10, 2011, associate Hammon billed 2.1 hours for traveling from Palo Alto to San Francisco and attending the oral argument in an unrelated appeal, apparently because Taleff's requested injunction was to be in effect pending the disposition of that appeal. This work was not "useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 560, 561 (1986) (quoting *Webb v. Bd. of Educ.*, 471 U.S. 234, 243-44 (1985)); see *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) ("the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed"). By the next afternoon, an audio recording of the oral argument was available to Hammon

on the court's website. Hammon's 2.1 hours (\$1,125.60 in fees) for traveling and attending the unrelated oral argument are disallowed.

On May 20, 2011, associate Hammon billed 2.1 hours for "prepared materials for filings." Filing is clerical work that may not be billed at attorneys' hourly rates. *See Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989); *Davis v. City & Cnty. of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992). Therefore, Hammon's 2.1 hours (\$1,125.60 in fees) are disallowed. On the same date, counsel Meidan billed 5.6 hours described as "Review and revise draft opposition to Plaintiffs' emergency motion and request for judicial notice in support thereof; phone calls with team regarding filing; assist with Ninth Circuit filing." Because Meidan block billed unrelated tasks, it is impossible to tell precisely how much time he spent on filing. *See Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007). Based on other time entries, however, 1.6 of Meidan's hours (\$1,174.40 in fees) are allocated to filing and are disallowed.

Counsel Meidan drafted the opposition and the request for judicial notice, with assistance by associate Bensley. Associates Bensley, Hammon, and Soderstrom conducted legal research in support of the motion. Partners Sunshine and MacDonald reviewed and refined the opposition drafted by Meidan, and conferred with the team about the opposition. Given Meidan's experience and

compensation levels, and the nature of the work involved, having both Sunshine and MacDonald review Meidan's drafts was unnecessary and duplicative. *Id.* at 949.

In addition, Sunshine, MacDonald, Meidan, and Bensley billed for multiple meetings, telephone calls, discussions, and e-mails among the team on May 13, 14, 17, 18, and 19, 2011, and some of this intra-office conferencing also was unnecessary and duplicative. *Id.* Again, on most of the dates the attorneys block billed unrelated tasks, and therefore it is impossible to determine precisely how much time was spent on conferencing. *Id.* at 948. To account for unnecessary and duplicative review of Meidan's work and intra-office conferencing, in light of Southwest's attorneys' block billing, MacDonald's 12.25 hours (\$11,355.75 in fees) are disallowed.

Southwest's attorneys reasonably expended the remaining 108.7 hours on the opposition to Taleff's emergency motion, and these hours are awarded. In this case, block billing does not appear to have unreasonably inflated the time billed. *Id.* Moreover, Meidan reasonably expended approximately 39.7 hours drafting the opposition, and the use of associates for legal research was efficient.

## 2. Reasonable Hourly Rates

Southwest requests hourly rates of \$207 for a paralegal and \$486 to \$986 for attorneys with 3 to 27 years of experience. In support of the requested rates, Southwest submits Sunshine's declaration that the requested rates are Skadden's billing rates. "That a lawyer charges a particular hourly rate, and gets it, is evidence bearing on what the market rate is, because the lawyer and his clients are part of the market." *Carson v. Billings Police Dep't*, 470 F.3d 889, 892 (9th Cir. 2006).

Sunshine also states that "[b]ased upon [his] understanding of rates charged by other large private firms in national antitrust cases in the United States, [he] believe[s] the hourly rates of the Skadden attorneys and the legal assistant assigned to this matter are well within the range of rates charged by professionals of comparable experience, expertise, and reputation in connection with high stakes merger litigation." Taleff offers no evidence to rebut Southwest's evidence in support of the requested rates. *See Nadarajah v. Holder*, 569 F.3d 906, 917-18 (9th Cir. 2009).

The Appellate Commissioner's review of many other court of appeals fee requests confirms that Southwest's requested hourly rates are "in line with those [rates] prevailing in the community for similar services by lawyers [and paralegals]

of reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Southwest’s requested hourly rates are reasonable and the rates are awarded.

### III Conclusion

Attorneys’ fees in the amount of \$67,495.30 are awarded in favor of Southwest Airlines Company, Guadalupe Holdings Corporation, and AirTran Holdings, Incorporated and against Joseph M. Alioto, Esq., and the Alioto Law Firm, jointly and severally.

Within 21 days after this order is filed, Joseph M. Alioto, Esq., and the Alioto Law Firm shall pay the amount of \$67,495.30 to the person or company designated by Southwest Airlines Company, Guadalupe Holdings Corporation, and AirTran Holdings, Incorporated.

This order amends the court’s mandate. *See* Fed. R. App. P. 41.