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' OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING 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 Opposition to Plaintiffs-Appellants' Motion for Reconsideration of Order Granting Defendants-Appellees' Motion for Sanctions Pursuant to 28 U.S.C. § 1927. Defendants believe that reconsideration of the Sanctions Order is unnecessary and should be denied; in the alternative, Defendants explain why the Court's initial Sanctions Order should be affirmed.

In their Motion for Reconsideration of Order Granting Defendants-Appellees' Motion for Sanctions Pursuant to 28 U.S.C. § 1927 ("Reconsideration Motion"), Plaintiffs-Appellants ("Plaintiffs") do not point to any change of law or fact to warrant any different outcome, nor do they raise new argument. Instead, Plaintiffs complain that the Order granting sanctions lacks sufficient detail, and they argue, simply but wrongly, that Plaintiffs' counsel's tactics should be excused as so-called "vigorous" advocacy. As discussed herein, however, Plaintiffs' counsel's conduct—namely, pursuing the Emergency Motion for Injunction Seeking Temporary "Hold Separate" Order Pending Disposition of Malaney, et al. v. UAL Corporation, et al. ("Emergency Motion")—is undoubtedly sanction-worthy because it unreasonably and vexatiously multiplied the proceedings in violation of 28 U.S.C. § 1927. Plaintiffs' counsel's rhetoric about the importance

of enforcing antitrust laws is irrelevant to the issue of the propriety of sanctions here, and their assertion that they should be able to do "whatever it [sic] could" (Reconsideration Mot. at 1) to interfere with the merger of Southwest and AirTran is a shocking, but clearly erroneous, assertion that Plaintiffs' counsel's ends justify any means. These are not valid grounds for avoiding sanctions.

ARGUMENT

I. THE SANCTIONS MOTION WAS PROPERLY GRANTED UNDER 28 U.S.C. § 1927

The Court properly granted Defendants-Appellees' Motion for Sanctions Pursuant to 28 U.S.C. § 1927 ("Sanctions Motion"). Under § 1927, conduct by an attorney is sanctionable if it "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927.[1] This certainly describes

[1] Conduct is "unreasonabl[e] and vexatious[]" for purposes of § 1927 if it is intentional, reckless or in bad faith. (Sanctions Mot. at 6 (citing cases).) Here, Plaintiffs' counsel's failure to abide by the rules—both Rule 8 of the Federal Rules of Appellate Procedure and Circuit Rule 27-3—amply demonstrates recklessness at the very least. (Defs-Appellees' Reply in Supp. of Their Mot. for Sanctions Pursuant to 28 U.S.C. § 1927 [hereinafter Sanctions Reply] at 8-9.) *Cf. Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir. 2008) ("'Although subjective good faith on the part of a non-attorney party appellant may in some instances excuse otherwise unreasonable conduct, we are entitled to demand that an attorney exhibit some judgment. To excuse objectively unreasonable conduct by an attorney would be to state that one who acts with "an empty head and a pure heart" is not responsible for the consequences.' So any conduct that, 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court,' is sanctionable." (quoting *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987))).

Plaintiffs' counsel's wholly unreasonable pursuit of the "Emergency" Motion, seeking broader injunctive relief than was at stake in the underlying appeal, without attempting to seek the relief first from the district court, and—while it suited them—trying to tie the "emergency" relief to developments in another case.

It is undisputed that Plaintiffs' counsel:

(1) filed an Emergency Motion in this Court without first seeking the relief from the district court;

(2) sought relief, via "Emergency" Motion before this Court, that was broader than the relief at stake in the underlying appeal of the denial of a temporary restraining order ("TRO");

(3) tied the relief sought in the "Emergency" Motion to the resolution of a different appeal altogether, *Malaney v. UAL Corp.*, No. 10-17208 (9th Cir.); and

(4) did not even follow the rules applicable to emergency motions.

Plaintiffs' counsel's tactics with respect to the Emergency Motion defy common sense and amount to an attempted end-run around the original jurisdiction of the district court, and, consequently, imposed a vexatious burden on

both this Court and upon Defendants. Plaintiffs' counsel should be sanctioned because this is misconduct that ought to be discouraged.[2]

A. Plaintiffs' Counsel Improperly Tried to Bypass the District Court

Rule 8 permits injunctive relief pending appeal to be sought in the first instance from the appellate court *only* if it would have been "impracticable" to have sought the relief first from the district court. Fed. R. App. P. 8(a)(2)(A). Here, Plaintiffs did not seek hold-separate relief in either their initial Complaint or in their TRO motion to the district court. Instead they belatedly sought a TRO to block an already consummated merger, and then, only after Defendants raised the issue in this Court (Defs-Appellees' Mot. to Dismiss Appeal at 10-11), they amended their Complaint to add a request for a hold-separate order. (Am. Compl. at 14.) Plaintiffs' counsel have reprised their refrain that it would have been "impracticable" to seek a hold-separate from the district court because that court had just ruled against their TRO motion. (Reconsideration Mot. at 2; Opp'n to Sanctions Mot. at 10-11.) However, that argument underscores the fatal flaw in Plaintiffs' position: Plaintiffs never sought hold-separate relief from the district court. Even if Plaintiffs believe that they would have been unsuccessful, a hold-separate order (and particularly one pending appeal) is not what they sought with

[2] Defendants believe Plaintiffs' entire attempt to appeal the TRO denial was frivolous and, indeed, this Court summarily dismissed the appeal for lack of jurisdiction. However, Defendants have only sought sanctions for Plaintiffs' counsel's conduct in connection with the "Emergency" Motion.

their initial motion for a TRO to block the consummated transaction, and therefore their earlier failure to secure a TRO does not establish impracticability for purposes of Rule 8. (*See* Sanctions Reply at 3-4 (citing cases).)

B. The Relief Sought Here By Plaintiffs Was Wholly Improper

It was simply wrong for Plaintiffs' counsel to seek broader relief from the appellate court by way of the "Emergency" Motion than was at stake in the underlying appeal. Furthermore, there was no "emergency" here at all (unless it is one of Plaintiffs' own making[3]). Moreover, Plaintiffs' counsel failed to follow Circuit Rule 27-3, which clearly requires that an emergency motion be accompanied by a "certificate of counsel" that must contain, among other things, "[f]acts showing the existence and nature of the claimed emergency." 9th Cir. R. 27-3(a)(3)(ii).

First, it is reckless, at best, to try to apply Rule 8 in a fashion that would swallow the whole matter that is pending on appeal. Rule 8 injunctions exist for the purpose of keeping the *status quo ante* while the appeal is being resolved. Where the underlying appeal is of a TRO denial, the underlying relief sought is limited generally to 14 days, *see* Fed. R. Civ. P. 65(b)(2), and therefore it was improper for Plaintiffs' counsel to use Rule 8 to seek, not a TRO pending

[3] Plaintiffs sat on their hands for over seven months until the merger between Southwest and AirTran had already closed, and then they filed suit, seeking injunctive relief to undo the consummated merger.

appeal, but rather new injunctive relief of an indefinite duration. Such tactics attempt to stretch Rule 8 beyond recognition.

Second, it is also reckless for Plaintiffs' counsel to have tried to tie Plaintiffs' Emergency Motion to developments in another appeal. That, too, is blatantly inconsistent with the purpose of a Rule 8 injunction.

Third, Plaintiffs' counsel ignored Rule 27-3's requirement that they submit a certificate, signed by counsel, explaining the claimed emergency. Instead of certifying anything, or even identifying a need for immediate relief beyond conclusory statements, Plaintiffs' counsel argued in the Emergency Motion that time is of the essence with respect to Plaintiffs' requested injunction against Southwest/AirTran because there was an impending hearing in *Malaney*. (*See* Emergency Mot. at 3.) Developments in another action in which Defendants are not even parties clearly do not constitute an "emergency" in this case, and it was at least reckless for Plaintiffs' counsel to have asserted otherwise as a purported basis for their "Emergency" Motion.

II. THERE HAS BEEN NO CHANGE OF LAW OR FACT TO WARRANT ANY DIFFERENT OUTCOME

Circuit Rule 27-10 provides that "[a] party seeking [reconsideration of a court order] shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be

stated with particularity." 9th Cir. R. 27-10(a)(3); *see also Memije v. Gonzales*, 481 F.3d 1163, 1164 (9th Cir. 2007) ("Because petitioners have not identified any points of law or fact overlooked by the court, these motions are denied."). In moving for reconsideration, Plaintiffs do not set forth any change in law or facts, and therefore reconsideration is not appropriate:

Point 1 of Plaintiffs' Reconsideration Motion simply requests clarification of the Sanctions Order in the form of greater detail for the reasons for granting sanctions. (*See* Reconsideration Mot. at 1.) First, "explicit findings" are not required for sanctions imposed pursuant to 28 U.S.C. § 1927. *Lloyd v. Schlag*, 884 F.2d 409, 413 (9th Cir. 1989) ("We have held explicit findings to be unnecessary in cases involving sanctions brought under authority other than Rule 11."). Second, as discussed above and as clearly shown in Defendants' Sanctions Motion briefing, there is ample support for the Sanctions Order, and therefore clarification of the Sanctions Order is unnecessary. *Cf. Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1051 (9th Cir. 1985) ("A district court's failure to make express findings does not require a remand if 'a complete understanding of the issues may be had [from the record] without the aid of separate findings.'" (alteration in original) (citation omitted)).

Points 2 and 3 of the Reconsideration Motion assert Plaintiffs' views about the merit of the underlying merger challenge. (*See* Reconsideration Mot.

at 1.) Although Defendants believe that Plaintiffs' underlying suit is meritless, neither Plaintiffs' nor Defendants' views of the merits matter for this sanctions issue. What is relevant is whether Plaintiffs' counsel's specific conduct *in connection with the Emergency Motion* may be sanctionable, and the Court should decline to adopt Plaintiffs' standard that any behavior is permissible as long as it is in connection with a lawsuit that a party believes is meritorious or is based on a law that the Supreme Court has said is important.

Plaintiffs' Point 4, asserting that the Supreme Court has encouraged private antitrust actions (Reconsideration Mot. at 1), is not new, and it remains irrelevant to the present sanctions issue. Plaintiffs' Opposition to the Sanctions Motion made the exact same point, even citing the same Supreme Court case. (Opp'n to Sanctions Mot. at 1 (citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).) Obviously the Supreme Court did not grant antitrust plaintiffs license to violate rules and run roughshod over the interests of the courts and the rights of defendants.

Points 5 and 6, which attempt to explain why Plaintiffs bypassed the district court and sought a hold-separate order in the first instance from this Court and why they think there was an "emergency" here, are arguments repeated from Plaintiffs' Opposition to the Sanctions Motion. (*Compare* Reconsideration Mot. at

2, *with* Opp'n to Sanctions Mot. at 10-11.) Not only are these arguments stale, they are also legally incorrect, as explained in Defendants' Reply Brief and summarized above. (*See* Sanctions Reply at 2-5 (impropriety of bypassing the district court); *id.* at 5-8 (absence of emergency).)

Plaintiffs' Point 7 asserts, in essence, that the conduct at issue should be excused as mere "vigorous" advocacy in order to encourage more plaintiffs to challenge mergers in any way they see fit. (*See* Reconsideration Mot. at 2.) This is not a proper ground for avoiding sanctions. *See, e.g.*, *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) ("'An attorney's ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims that are frivolous on the merits, or by pursuing non-frivolous claims through the use of multiplicative litigation tactics that are harassing, dilatory, or otherwise "unreasonable and vexatious."'" (citation omitted)). The granting of sanctions in these circumstances should encourage parties to follow the rules, not chill any permissible litigation behavior.

Plaintiffs' Point 8 seeks "a hearing on the Defendants' motion, including the cross-examination of witnesses." (Reconsideration Mot. at 2.) However, the issues have been fully addressed in the parties' briefs, and therefore no hearing is necessary. *See, e.g.*, *Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 & n.11 (9th Cir. 2000) (explaining that "[t]he

opportunity to brief the issue fully satisfies due process requirements" and "'[t]he usual method for resolving factual issues under § 1927 is by affidavit'" (citation omitted)). Furthermore, the suggestion of cross-examination is rather surprising, given that the only witnesses that could conceivably be relevant might be Plaintiffs' counsel themselves.

CONCLUSION

For the reasons stated above, the Court need not reconsider its Sanctions Order. However, if the Court were to reconsider, it should affirm its Sanctions Order for the reasons stated herein and in Defendants-Appellees' briefing in support of their Sanctions Motion.

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Respectfully submitted,

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