UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-175 Caption [use short title] Ransmeier v. UAL Corporation

Motion for: Order limiting consideration of motion to court: three-judge panel (F.R.A.P. 27(c))

Set forth below precise, complete statement of relief sought:

On emergency basis limit decisions on concurrently-filed procedural motion and any prospective motions to court action, i.e by three-judge panel, in light of IOP E(b) which provides for determination by two judges only where recusal occurs after a matter is assigned, and where post-argument procedural motions other than motions to reconsider merits decision are necessarily new matters; or for other just cause

MOVING PARTY: Ellen Mariani
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: John Ransmeier / UAL Corporation

MOVING ATTORNEY: Bruce Leichty
[name of attorney, with firm, address, phone number and e-mail]
625-A 3rd Street
Clovis, CA 93612
(559) 298-5900
leichty@sbcglobal.net

OPPOSING ATTORNEY: P. Beeson/C. Capace/J. Ellis
Devine Millimet, 43 N. Main, Concord, NH 03301
(603) 226-1000, pbeeson@devinemillimet.com
Zimble & Bretler, 21 Custom House St., Boston, MA
(617) 732-2222, ccapace@zimbret.com
Quirk & Bakalor, 845 Third Ave., New York, NY 10022
(212) 319-1000, jellis@quirkbakalor.com

Court-Judge/Agency appealed from: SDNY, Hellerstein, Alvin K.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☑ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency: 06/21/2013 to ensure decision is made prior to consideration of concurrently-filed motion

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: this is post-argument motion

Signature of Moving Attorney: Date: 6/19/2013 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER, Case No. 11-175

Plaintiff-Appellee,

v.

UNITED AIRLINES, INC.
et al.,

Defendant-Appellee,

v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation

_____/

MEMORANDUM OF APPELLANT ELLEN MARIANI IN SUPPORT OF EMERGENCY MOTION FOR ORDER LIMITING CONSIDERATION OF MOTION TO COURT: THREE-JUDGE PANEL (F.R.A.P. 27(C)]

Ellen Mariani, Appellant, together with undersigned counsel to the extent that the Court's prior orders affect him ("Appellant" or "Movant"), hereby submits the following points and authorities in support of her Motion, filed concurrently herewith ("Court Process Motion"), asking under F.R.A.P. 27(c) for the Court to order that only the Court duly constituted, i.e. by a three-judge panel, may consider another motion filed concurrently herewith ("Reconsideration Motion") and any other procedural motions which may be

filed hereafter. This Court Process Motion is made in light of the fact that the handling of a post-merits procedural motion by a two-judge panel which happened to decide the merits is not contemplated by the Internal Operating Procedures of the Court, and in light of the contention here that the two-judge panel in question erred in a 6/14/13 order by ruling on matters which were beyond its province even if its authority existed, and by failing to rule on one of the critical requests at issue in the prior 5/31/13 procedural motion resulting in the 6/14 order, as addressed in the motion filed concurrently herewith.

Movant is asking for relief on an emergency basis to assure that the Court Process Motion is determined before determination of the concurrently filed Reconsideration Motion, and also to prevent undue delay in the matter assuming that the Reconsideration Motion is granted, as Movant believes it must be. The Motion is based on the accompanying Motion Information Statement[1] and this memorandum, and the accompanying Declaration of Bruce Leichty, and on the following grounds:

1. Movant is making this motion as part of a final effort to protect his

---

[1] Movant believes that Local Rule 27.1 contemplates the treatment of the Motion Information Statement plus supporting document as "the Motion," and that no separate document denominated "motion" is required. Local Rule 27.1(a)(3), for example, states that a movant must attach to Form T-1080 (the Motion Information Statement) any affidavit or other document necessary to support the motion; it does not state that an affidavit or other document must be attached to "the motion" or to Form T-1080 "and the motion." See also Local Rule 27.1(b) which requires that "the motion" must state certain information which is in fact required to be disclosed on Form T-1080 (it would be superfluous for the moving party to have to disclose the same information twice). Finally, all of the substance that would be contained in a separate document identified as "Motion" is in fact contained in Form T-1080 and this Memorandum, and the Court is respectfully asked to acknowledge same in its order hereon.

client's interest and his own interest in having at least an opportunity for some disinterested review--short of seeking U.S. Supreme Court review--of a highly damaging order issued by two judges of this court; essentially Movant is saying that Movant must at least have the opportunity to have the court's sanction order, issued by and known only to two judges of the court, scrutinized by someone other than those two judges and the Clerk.[2] The Court Process Motion is filed ancillary to a Reconsideration Motion whereby those objectives are further advanced.

2. The Court Process Motion is addressed to only one issue: how the 2nd Circuit handles and must handle--or at least how it is allowed to handle under F.R.A.P. 27(c)--motions that do not directly relate to the merits of the case but are rightly regarded as procedural motions. F.R.A.P. 27(c) provides in pertinent part as follows: "A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions."

3. Movant invokes the authority of the court under that last provision as well as the rights argued below to ask that the Court in this case provide "by

---

[2] Movant is concerned that either her adversaries or the Court will characterize this motion as part of what the Court has already mischaracterized as frivolous or vexatious motions. Movant simply wants to impress on the Court and on the adversaries that she has no improper motives, does not wish to cause any undue delay, does not wish to harass or vex any party or the court, but that instead she has a good faith claim to being the victim of injustice in this proceeding and has raised bona fide issues of whether she does not deserve some sort of review when sanctions are imposed on her and her attorney by only two persons, whatever their authority may be to do so, and when the targets of the sanctions are also labeled as "anti-Semitic," a scourge that few persons of good repute and intelligence are willing to accept.

order" that only the court may act on that class of motions which is described as follows: all post-merits motions filed from this date forward which are not motions for reconsideration of the order denying the appeal. By "post-merits" Movant refers to anything occurring after this Court ruled on Movant's appeal June 26, 2012.

4. Movant also invokes IOP E(b) in support of this request, insofar as Movant takes that operating procedure to mean that only in a very few limited instances will the Court allow a two-judge panel as distinct from a three-judge panel to decide a matter. The IOP provides as follows: "After the matter has been assigned to a three-judge panel, if for any reason a panel judge ceases to participate in consideration of the matter, the two remaining judges may--if they agree--decide the matter...." Movant starts from the premise that the judges who adjudicated the merits of the appeal are not ordinarily assigned post-merits procedural motions--at least where the procedural motion is not denominated a motion for reconsideration (i.e. to vacate or to modify an order issued by that selfsame panel), and that is based on the fact that pre-argument procedural motions are assigned to different panels who will not be the panelists assigned to the merits, as is clear from the procedural history in this case alone. Movant then proceeds from the literal terms of the Operating Procedure to note that, unless the term "matter" is read expansively to include all issues raised after oral argument and a decision on the merits, the term would more typically be read to include within its embrace a "motion." If each new post-merits motion other than motions for reconsideration are "matters," therefore, there has been no recusal of a judge after the "matter" was assigned within the plain meaning of IOP E(b).

5. Movant is cognizant of the provision in F.R.A.P. 27(c) that a "single

circuit judge" can also decide a motion. Movant believes that there is an established procedure in the clerk's office for assigning some motions to a single judge, although the details of the procedure or policy are not available to the public or to litigants. Movant notes that most if not all of the motions previously submitted in this case were decided by three-judge panels, and suggests that this may indicate an internal operating procedure for this case (not reduced to writing, perhaps). In any case, however, Movant believes that the first sentence of F.R.A.P. 27(c) is necessary precisely because it is usually assumed that a reference to a "court" will mean a reference to a three-judge panel.

6. As an alternative to the remedy requested herein that the Court limit all future motions to consideration of a three-judge panel, Movant notes her willingness to have a "single circuit judge" decide certain motions as well--as long as the usual protocol of the court is followed and the "single circuit judge" selected is not Susan Carney, the only circuit judge to have ruled on the merits and on the sanctions order imposed on Movant. Movant believes it would be just as anomalous and inappropriate for Judge Carney to rule on post-merits procedural motions as it would be for Judges Carney and Hall to both rule on them.

7. In addition to invoking the authority of F.R.A.P. 27(c) and IOP E(b) based on the reasonable constructions offered by Movant, Movant also invokes considerations of equity, policy and fairness. Assuming for the moment that two judges do act erroneously with regard to a merits decision or a sanctions decision, it would quite obviously not be in the interests of the Court of Appeals or the interests of justice for those same two judges (or the Clerk) to be able to prevent other judges from ruling on issues which are not inherently related to

their rulings. Thus, irrespective of whether the reviewers here believe that the two-judge panel acted correctly, there are bigger implications to certain post-merits motions. Here, those issues raised (and addressed in the concurrently filed Reconsideration Motion) are whether a petition for rehearing en banc may be filed on a post-mandate order without the mandate being recalled, and whether the court will allow judges who issued the challenged order to effectively insulate their post-mandate ruling from en banc review by precluding the only procedural step possible (recall of the mandate) by which such a ruling could be reviewed by their peers.

8. By way of underlining the possible problems that insulated review can lead to, the court is asked to acknowledge that--even if the court does not agree with these contentions--Movant is contending in the Reconsideration Motion filed concurrently herewith that even if they had proper control over the 5/31/13 motion the two judges nonetheless overstepped their authority by ruling on subjects which should have been subjects of threshold consideration in the process undertaken on Movant's petition for rehearing en banc; and that the two judges failed totally to address one request made in the 5/31/13 motion, namely whether Ellen Mariani was not at least entitled to file a petition for rehearing en banc from a post-mandate order imposing sanctions on her without having to get the mandate recalled, and whether the cognizability of such a petition for rehearing did not belong with the judge(s) who were asked to consider the petition, since obviously the Court itself had not recalled the mandate before issuing the ruling that Movant wished to challenge.

9. Movant also notes that she is unable to confirm with 100 per cent certainty the correctness of her assumption that Judges Carney and Hall actually attended directly to her 5/31/13 motion. Their names are at the top of the order

issued by the Court 6/14/13, but that order was of course signed by the Clerk. The motion was directed to an allegedly improper act of the Clerk (refusing to file a petition for rehearing en banc). Under Local Rule 27.1, the Clerk is permitted to decide certain motions on her own, i.e. when they are not opposed. The 5/31 motion filed by Movant was not formally opposed by an appellee, so Movant is not sure whether that could be taken by the clerk as license to decide the motion herself and to merely attach the names of the last two judges to the top of the page for other reasons. Of course, Movant believes that the spirit of the rule is that a clerk should only be able to decide motions in favor of the moving party when there is no opposition, and Movant also believes that a motion should be deemed to be opposed if it is directed at an improper act of the Clerk herself, and Movant believes that courts would have to concur that these policies serve the interests of justice; and Movant further asserts that either of those factors would have required consideration by the Court here, but Movant does not know if those policies were observed or respected in this instance.

10. It should go without saying that for the reasons noted above, it would also be inappropriate for this motion itself to be determined by Judges Carney and Hall. Movant notes that she is not suggesting that either judge must recuse himself or herself, and not suggesting impropriety on the part of either judge, but rather only that post-merits motions that are not motions for reconsideration or petitions for rehearing would not and should not be assigned to a panel that decided the merits of the case particularly where that panel was reduced by a member through recusal. This Court Process Motion thus stands on principle, rule and considerations of due process in a clerk's office and in the handling of matters on appeal, as set forth above.

WHEREFORE, Movant requests that the Court make the following order forthwith:

(1) That under F.R.A.P. 27(c) all motions in this case filed concurrently herewith and henceforth be decided by the Court, i.e. by a three-judge panel consisting of judges different from the two judges who decided the merits of the appeal or the sanctions order arising therefrom, unless such motions directly challenge some ruling of 6/26/12 or of the 5/15/13 sanctions order herein;

(2) Alternatively, that the Court at least order that all such motions should be decided by a unit of the court different from the unit that ruled on the merits, even if that unit were to consist of a single circuit judge ruling pursuant to F.R.A.P. 27(c);

(3) That the Clerk be directed to process all motions in accordance with the foregoing, and

(4) For such other and further relief as the Court may deem just and proper.

/s/ Bruce Leichty

Bruce Leichty, #132876
625 Third Street, Suite A
Clovis, California 93612-1145
(559) 298-5900
(559) 322-2425 (fax)
180OMPA.619
Attorney for Ellen Mariani,
Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER,

Plaintiff-Appellee,

v.

UNITED AIRLINES, INC. et al.,

Defendant-Appellee,

v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation

_____/

Case No. 11-175

DECLARATION OF BRUCE LEICHTY IN SUPPORT OF MOTION FOR ORDER LIMITING CONSIDERATION OF MOTIONS TO COURT: THREE-JUDGE PANEL

I, Bruce Leichty, declare as follows:

1. I am the attorney of record in this case for Appellant Ellen Mariani. I have represented Mrs. Mariani throughout this appeal. I was admitted to the State Bar of California in 1987, and I have had a private civil litigation practice in state and federal courts for the last 25 years, the last 20 of which have been as the owner and sole proprietor of my own law practice. I am admitted to practice before the United States Supreme Court and three courts of appeal other than this court (for the 3rd, 6th and 9th circuits). I represent Mrs. Mariani in all matters pertaining to her rights and interests in connection with the Estate of deceased husband, Neil Louis Mariani, No. 318-2002-ET-00051 pending in Rockingham County, New Hampshire, and in this appeal.

2. I make this declaration without waiving any applicable privileges or rights of my client, including but not limited to the attorney-client privilege or the rule protecting attorney work product. Any statements made here containing or consisting of information that would otherwise be protected by the attorney-client privilege may not be deemed a waiver of that privilege as to the content of any other protected communications.

3. I prepared the accompanying Memorandum which supports an emergency motion I have called Court Process Motion. All factual statements made therein that are self-evidently based on my personal knowledge are true and correct. The motion is filed as an emergency because it needs to be determined before any other motions in the case are determined, and because I do not wish to cause any more delay in this appeal than what has already been caused (through circumstances beyond my control, and not because I wanted it, although I have been accused of wanting delay).

4. I also prepared a different Motion that is being filed with this Court today, supported by another Memorandum, for reconsideration of the Court's denial of a (procedural) motion filed 5/31/13. Both of these motions are part of a final effort to protect my client's interest and my own interest in having at least an opportunity for some disinterested review--short of U.S. Supreme Court review--of a highly damaging order issued by two judges of this court 5/15/13.

5. Most if not all of the motions previously submitted in this case were decided by three-judge panels. I am not aware of all of the operating procedures or policies governing how matters are handled in the Clerk's office, nor are all available to the public, and I have had to use reasoned speculation to try to construe the meaning of some of aspects of the Local Rules and the Internal Operating Procedures of the Court as they relate to my concerns here.

6. My client Ellen Mariani and I are willing to have a "single circuit judge" decide certain motions of Mrs. Mariani if the Court declines to require that a three-judge panel be assigned to all motions filed herewith and hereafter--as long as the usual protocol of the court is followed and the "single circuit judge" selected is not Susan Carney, the only circuit judge to have ruled on the merits and on the sanctions order imposed on Movant. I believe it would be just as anomalous for Judge Carney to rule on post-merits procedural motions as it would be for Judges Carney and Hall to both rule on them. I have raised issues in the Reconsideration Motion submitted concurrently of whether a petition for rehearing en banc may be filed on a post-mandate order without the mandate being recalled, and whether the court will allow judges who issued the challenged order to effectively insulate their post-mandate ruling from en banc review by precluding the only procedural step possible (recall of the mandate).

7. I am contending in the accompanying Reconsideration Motion that even if Judges Carney and Hall had proper control over the 5/31/13 motion I filed--which motion did not pertain to the substance of their prior orders but asked only that the Clerk be overruled in her decision to not even file a petition for rehearing en banc--these two judges nonetheless overstepped their authority by ruling on subjects which should have been subjects of threshold consideration in the process undertaken on Movant's petition for rehearing en banc; and that the two judges failed totally to address one request made in the 5/31/13 motion, namely whether Ellen Mariani was not at least entitled to file a petition for rehearing en banc from a post-mandate order imposing sanctions on her without having to get the mandate recalled, and whether the cognizability of such a petition for rehearing did not belong with the judge(s) who were asked to consider the petition.

8. I am unable to confirm with 100 per cent certainty the correctness of my assumption that Judges Carney and Hall actually attended directly to the 5/31/13 motion I filed on behalf of Mrs. Mariani and myself. Those judges' names are at the top of the order issued by the Court 6/14/13, but that order was of course signed by the Clerk. The 5/31 motion filed by Movant was not formally opposed by an appellee, so I am not sure whether that could be taken by the clerk as license to decide the motion herself pursuant to Local Rule.

9. I do not believe it would be appropriate for this motion itself to be determined by Judges Carney and Hall, for the legal reasons noted in the accompanying Motion. I am not suggesting that either judge must recuse himself or herself, and not suggesting impropriety on the part of either judge, but rather only that post-merits motions that are not motions for reconsideration or petitions for rehearing would not and should not be assigned to a panel that decided the merits of the case particularly where that panel was reduced by a member through recusal.

Pursuant to 28 U.S.C. Section 1746 I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on June 19, 2013 at Escondido, California.

/s/ Bruce Leichty
Bruce Leichty

Respectfully submitted,

/s/ Bruce Leichty
Bruce Leichty, #132876
625 Third Street, Suite A
Clovis, California 93612-1145
(559) 298-5900
(559) 322-2425 (fax)
180ODBL.619
Attorney for Ellen Mariani, Appellant