Docket No. 13-15851

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Owner-Operator Independent Drivers Association, Inc.,
Frank Belcher and Marc Mayfield,

Plaintiffs/Appellees,

v.

Swift Transportation Co., Inc. (AZ)
and Swift Transportation Co., Inc. (NV),

Defendants/Appellants.

On Appeal from the United States District Court
for the District of Arizona (Phoenix), No. 02-CV-01059
Honorable Paul G. Rosenblatt

Petition for Panel Rehearing and Petition for Rehearing En Banc

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CORPORATE DISCLOSURE STATEMENT

Swift Transportation Co., Inc. (AZ) ("Swift") is currently known as Swift Transportation Co. of Arizona, L.L.C., which is wholly-owned by Swift Transportation Company, a company publicly traded on the New York Stock Exchange.

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INTRODUCTION
(INCLUDING RULE 35(B)(1) AND 40(A)(2) STATEMENT)

In counsel's judgment, the Panel's decision conflicts with and misapprehends the United States Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992) and a related group of Supreme Court "prevailing party" cases, including *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1, (1988), *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and *Lefemine v. Wideman*, 133 S.Ct. 9 (2012).

Given that the Supreme Court has granted *certiorari* to address the "prevailing party" issue in at least the above-cited five cases, the Panel's decision contravening those "prevailing party" authorities substantially affects a rule of national application in which there is an overriding need for national uniformity.

The Panel here affirmed an attorneys' fees award of nearly $350,000 even though Plaintiffs were denied every measure of monetary and injunctive relief they sought, and even though they lost on the merits of every claim save one—a meaningless declaratory judgment that an old-form lease (one the Swift Defendants had voluntarily abandoned more than four years earlier) had violated certain

regulations. The Panel nevertheless affirmed the District Court's decision that Plaintiffs were "prevailing parties," stating flatly that "[u]nder *Farrar*, [Plaintiffs] needed to show only that [they] had obtained an enforceable judgment to be entitled to attorneys' fees." Slip Op. at 4-5.

But the Panel was wrong. *Farrar* imposes two additional and distinct requirements on a "prevailing party" determination. Not only must there be an "enforceable judgment," but (1) that judgment must alter "the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," and (2) it must do so "at the time of the judgment." *Farrar*, 506 U.S. at 111-12. While the Panel recited these requirements elsewhere in its decision, it never explained how the declaratory judgment here modified *any* behavior by Swift that directly benefitted Plaintiffs, much less at the time that judgment was entered, since Swift had already voluntarily discontinued its use of the lease four years earlier. The Panel said merely that the judgment was "legally binding" and resolved a "live controversy." This ruling distorts *Farrar* and related Supreme

Court authority by erroneously collapsing the three distinct *Farrar* requirements into a single "enforceable judgment" test.

Panel rehearing or rehearing en banc is necessary to correct this misapprehension of, and conflict with, *Farrar* and related Supreme Court decisions, and to secure and ensure uniformity in the national application of those authorities. Fed. R. App. P. 35(b)(1), 40(a)(2).

FACTUAL AND PROCEDURAL HISTORY

Over ten years ago, in June 2002, the Owner-Operator Independent Drivers Association, Inc., an association of owner-operator truck drivers, and thirteen current and former owner-operator truck drivers who contracted with Swift to haul freight (collectively, Plaintiffs), filed this lawsuit against Swift. Plaintiffs alleged that the standard lease agreements that governed the relationship between the owner-operator drivers and Swift violated federal Truth-in-Leasing regulations, 49 C.F.R. § 376.12.

Plaintiffs, hoping to certify a large class of current and former owner-operator truck drivers for Swift, sought declaratory and injunctive relief, restitution and disgorgement, and millions of dollars in damages. Within seven months after this suit was filed, in January

2003, Swift voluntarily discontinued its use of the lease agreement on which Plaintiffs claims were based and implemented a new standard lease agreement.

Plaintiffs' putative class claims were never certified, and Plaintiffs dismissed many of their claims and amended others. The District Court denied Plaintiffs' request for a preliminary injunction, and ultimately entered summary judgment holding that Swift's new standard lease fully complied with the Truth-in-Leasing regulations. Although the District Court also held that Swift's pre-2003 lease had violated the Truth-in-Leasing regulations, it specifically rejected Plaintiff's claims for monetary or injunctive relief based on that claim. This Court, in successive appeals, affirmed all relevant District Court rulings.

Plaintiffs thereafter argued before the District Court that they were entitled to attorneys' fees under 49 U.S.C. § 14704(e), which provides fees for a "prevailing party." The District Court found that Plaintiffs had partially prevailed based on its finding that Swift's pre-2003 lease (the one no longer in effect that the District Court had not enjoined Swift from using because of the undisputed evidence that Swift had not used it for four years and had no intent to revert to it) had

violated Truth-in-Leasing regulations, and awarded Plaintiffs $349,302.50 in attorneys' fees. This Court affirmed.

REASONS FOR GRANTING REHEARING OR REHEARING EN BANC

I. Rehearing en banc is necessary because the Panel's decision, holding that nothing more than an enforceable judgment is needed to render a party "prevailing" for attorneys' fee purposes, is contrary to *Farrar v. Hobby*, 506 U.S. 103 (1992) and related Supreme Court decisions.

The Panel affirmed the District Court's "prevailing party" ruling by holding, both expressly and effectively, that Plaintiffs "needed to show only that [they] had obtained an enforceable judgment to be entitled to attorneys' fees" under *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). This holding directly contradicts *Farrar*. There the Supreme Court reiterated its holding from *Rhodes v. Stewart* that "a judgment—declaratory or otherwise—will constitute relief" for prevailing-party purposes "if, and only if, it affects the behavior of the defendant toward the plaintiff," and does so at the time of judgment. *Farrar*, 506 U.S. at 110 (citing *Rhodes*, 488 U.S. 1, 4 (1998)).

Farrar and *Rhodes* together stand for the rule that a mere "enforceable judgment" is not enough. While the Panel at a different point of its opinion (Slip Op. at 3) at least noted the additional *Farrar*

requirements—that the plaintiff must obtain "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" at "the time of the judgment"—the Panel never explained how these mandatory requirements were met. It instead merely observed that the declaratory judgment "is legally binding on the parties" and "resolv[es] a live controversy."

There was no "live controversy" here because the lease in question had been abandoned years earlier. But even if there had been, a judgment that "is legally binding on the parties" and "resolv[es] a live controversy" is nothing more than an "enforceable judgment," *i.e.*, a judgment meeting only the first of *Farrar*'s *three* prevailing-plaintiff requirements. Describing the judgment as "legally binding" and "resolving a live controversy" does not establish that Plaintiffs obtained "actual relief on the merits" of their claim that "materially alters the legal relationship between the parties" by modifying Swift's behavior in a way that "directly benefits" Plaintiffs "at the time of the judgment."

Farrar and its predecessors are clear that the end of litigation, and one party's cessation of its defense of an issue because judgment

was entered against it, is not what the Supreme Court meant by its requirement that a plaintiff obtain relief that "materially alters the legal relationship between the parties." As the Supreme Court explained in *Hewitt v. Helms*:

> At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper "case or controversy" rather than an advisory opinion—is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

482 U.S. 755, 761 (1987) (emphasis in original) (quoted in part in *Farrar*, 506 U.S. at 110, and quoted in full in *Rhodes*, 488 U.S. at 3-4).

Here, Plaintiffs sought damages and were denied them. Plaintiffs sought restitution and disgorgement and were denied them. Plaintiffs sought injunctive relief, which was denied—not surprisingly, because Swift had stopped using the pre-2003 lease four years before the District Court entered its declaratory judgment, and uncontroverted evidence established that Swift had no intention to revert to its use in the future. While Plaintiffs were granted a 2007 declaratory judgment

that the abandoned pre-2003 lease had violated Truth-in-Lending regulations, that judgment did nothing to materially alter the legal relationship between the parties, because it did not modify Swift's behavior in any way that directly benefitted Plaintiffs at the time of judgment.

Indeed, Swift had only continued to defend the validity of its abandoned old-form lease as an alternative to its argument that, even if the pre-2003 lease had violated regulations, Plaintiffs should not recover any monetary damages because they never established any injury. Swift prevailed on this point, the District Court denied Plaintiffs' related claim for money damages, and the District Court's declaratory judgment changed nothing between Swift and Plaintiffs.

More specifically, the judgment did not cause Swift to stop using the pre-2003 lease (which Plaintiffs sought to accomplish, *inter alia*, through their claim for injunctive relief). Swift had voluntarily done so four years earlier. The Supreme Court has addressed this precise situation, holding that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to

render the plaintiff a "prevailing party." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Servs.*, 532 U.S. 598, 605 (2001). The *Buckhannon* Court continued:

> Never have we awarded attorneys' fees for a nonjudicial "alteration of actual circumstances."

Id. at 606 (holding that plaintiffs were not "prevailing parties" because, after plaintiffs' lawsuit was filed, the West Virginia Legislature voluntarily eliminated a challenged statutory provision).

A *Buckhannon*-like nonjudicial alteration of actual circumstances is all that Plaintiffs obtained here. Although the District Court eventually declared that Swift's pre-2003 lease had violated Truth-in-Lending regulations, that declaration altered no "actual circumstances" under *Buckhannon*, because it came four years after Swift had voluntarily changed its conduct. The declaration therefore did not "directly benefit" Plaintiffs at "the time of the judgment," and thus did not satisfy *Farrar*'s third requirement. It was at most the sort of "nonjudicial" alteration that *Buckhannon* recognized has "never" authorized an attorneys' fees award.

For a similar reason, this case is immediately distinguishable from the Supreme Court's decision in *Lefemine v. Wideman*, 133 S.Ct. 9

(2012), which the Panel cited in support of its conclusion that "[t]he declaratory judgment satisfied the requirement that [Plaintiffs] obtain an enforceable judgment." Slip Op., at 3. In *Lefemine*, an "abortion protester" named Lefemine and members of his organization were told by police that they would be ticketed for breach of the peace if their signs, picturing aborted fetuses, were not discarded. 133 S.Ct. at 10. Under threat of ticketing, the protesters disbanded. *See id.* The group's attorney later wrote a letter to the sheriff, informing him that the group intended to return to the protest site and continue using the disputed signs in protest. *See id.* The sheriff's office responded that police officers would respond in the same manner as before if the protests resumed. *See id.* Out of fear of those sanctions, the group refrained from protesting. *See id.*

Lefemine later filed a § 1983 complaint, alleging First Amendment violations and seeking nominal damages, a declaratory judgment, a permanent injunction, and attorneys' fees. *See id.* On summary judgment, the district court determined that Lefemine's rights had been infringed, and permanently enjoined the defendant police officers from further engaging in "content-based restrictions on

[Lefemine's] display of graphic signs" under similar circumstances. *Id.* at 10-11. The district court denied Lefemine's request for attorneys' fees however, holding that Lefemine wasn't a prevailing party because his request for nominal damages had been refused. *See id.* at 11.

The Supreme Court reversed, holding that the district court's injunction ruling "worked the requisite material alteration in the parties' relationship." *Id.* As the *Lefemine* Court explained:

> Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner.

Id.

The critical element missing here, which distinguishes this case from *Lefemine*, is that "before the ruling"—that is, for four years before the District Court's declaratory judgment ruling—Swift had not used and had no intent to use its abandoned, old-form lease. Consequently, "after the ruling," nothing between the parties here changed. Swift had not used the pre-2003 lease for years before the judgment, and would not use it after the judgment. For this very reason, among others, the District Court here did not grant Plaintiffs the injunctive relief they sought, further distinguishing this case from *Lefemine*.

The Panel's decision, expressly holding that Plaintiffs "only" needed to have obtained an enforceable judgment to be "prevailing parties" under *Farrar*, is directly contrary to *Farrar*. And to the extent the Panel did analyze *Farrar*'s other two requirements, despite its clear pronouncement that only an "enforceable judgment" needed be shown, it simply collapsed those requirements back into the "enforceable judgment" determination. This holding squarely contravenes *Farrar*, its predecessors *Hewitt* and *Rhodes*, and related cases *Buckhannon* and *Lefemine*.

En banc rehearing is necessary under Rule 35(a)(1) to secure and maintain uniformity of these decisions.

II. Panel rehearing is necessary because the Panel's decision, holding that nothing more than an enforceable judgment is needed to render a party "prevailing" for attorneys' fee purposes, misapprehends *Farrar v. Hobby*, 506 U.S. 103 (1992) and related Supreme Court decisions.

Even though the Panel's decision was not designated for publication, panel rehearing is necessary because the Panel's decision misapprehends Supreme Court precedent on this important issue, cursorily collapsing the Supreme Court's three-part prevailing-party test in *Farrar v. Hobby* into a "enforceable judgment" test.

For each of the reasons stated in Part I of this Petition, *supra*, panel rehearing should be granted under Rule 40 to correct the Panel's express misapprehension of *Farrar* and *Lefemine*, and misapprehension of *Hewitt*, *Rhodes*, and *Buckhannon*, by extension.

CONCLUSION

En banc review is necessary to correct the law of this Circuit in light of *Farrar*, *Hewitt*, *Rhodes*, *Buckhannon*, and *Lefemine*, with which the Panel's decision directly conflicts. Panel rehearing is necessary to correct misapprehensions of those authorities. For these reasons, Swift respectfully requests that the Court grant panel rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that under Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing and rehearing en banc is:

✓ Proportionately spaced, has a typeface of 14 points or more and contains 2,383 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as applicable according to Circuit Rule 40-1(a) and Fed. R. App. P. 32(c)(2) (petitions and answers must not exceed 4,200 words).

or

__ Monospaced, has 10.5 or fewer characters per inch and contains ___ words or ___ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

__ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

/s/ James C. Sullivan
Attorney for Appellants

STATEMENT OF RELATED CASES

In *OOIDA v. Swift Transportation Co., Inc.*, 367 F.3d 1108 (9th Cir. 2004) (No. 03-15735), this Court affirmed the denial of plaintiffs' motion for preliminary injunction against Swift.

In *OOIDA v. Swift Transportation Co., Inc.*, 632 F.3d 1111 (9th Cir. 2010) (No. 09-17643, 09-17726), this Court affirmed the summary judgment in Swift's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, I electronically filed the foregoing and the attached Memorandum Opinion with the Clerk of the Court through Appellate CM/ECF System. I further certify that all participants are registered CM/ECF users and service will be accomplished by the CM/ECF System.

/s/ James C. Sullivan
Attorney for Appellants

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 04 2015

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

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.; et al., Plaintiffs - Appellees, v. SWIFT TRANSPORTATION CO., INC. (AZ), Defendant - Appellant.	No. 13-15851 D.C. No. 2:02-cv-01059-PGR MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, Senior District Judge, Presiding

Argued and Submitted April 16, 2015
San Francisco, California

Before: SCHROEDER and N.R. SMITH, Circuit Judges and RESTANI,** Judge.

Swift Transportation Co. ("Swift") appeals the district court's award of attorney's fees to Owner-Operator Independent Drivers Association, Inc. and

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jane A. Restani, Judge for the U.S. Court of International Trade, sitting by designation.

certain owner operators (collectively "OOIDA"), pursuant to 49 U.S.C. § 14704(e). OOIDA obtained a declaratory judgment against Swift declaring that leases Swift used prior to 2003 ("Old Form Leases") violated the Truth in Leasing Act. Swift contends that (1) this declaratory judgment does not satisfy the requirement that OOIDA must be a prevailing party to be entitled to attorney's fees; and (2) the district court did not have the authority under 49 U.S.C. § 14704(a) to enter a declaratory judgment. We affirm.

To be entitled to attorney's fees under 49 U.S.C. § 14704(e), OOIDA must be a prevailing party in the underlying litigation. *Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 623-24 (9th Cir. 2008). In order to be a prevailing party, OOIDA must satisfy three requirements. First, OOIDA "must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (internal citation omitted). Second, "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* Third, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

The declaratory judgment satisfied the requirement that OOIDA obtain an enforceable judgment. *See Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam). Though Swift contends that the declaratory judgment did not materially alter its legal relationship with OOIDA or provide a direct benefit at the time judgment was entered, because Swift persisted in its claim that the Old Form Leases were lawful, OOIDA obtained a direct benefit at the time that the declaratory judgment was entered, which altered the legal relationship between the parties. We have previously characterized this declaratory judgment as "legally binding on the parties." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 632 F.3d 1111, 1123 (9th Cir. 2011). By resolving a live controversy in the case, the district court entered relief that was sufficient under *Farrar* to qualify OOIDA for prevailing party status. Accordingly, the district court did not err in determining that OOIDA was a prevailing party for purposes of 49 U.S.C. § 14704(e).

Swift also contends that the award of attorney's fees was unlawful because the district court lacked the authority to enter a declaratory judgment. 49 U.S.C. § 14704(a)(1)-(2) provides that a plaintiff "may bring a civil action for injunctive relief" and that "[a] carrier . . . is liable for damages sustained by a person." We have previously rejected OOIDA's contention that § 14704(a) authorizes forms of

equitable relief other than an injunction, noting that the statute "list[s] only injunctive relief to the exclusion of other equitable remedies." *Swift*, 632 F.3d at 1121. However, "[a] declaratory judgment does not necessarily constitute a form of 'equitable' relief." *Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987). Indeed, we considered the fact that OOIDA obtained a declaratory judgment as a factor in previously concluding that injunctive relief was unnecessary. *Swift*, 632 F.3d at 1123.

However, we need not resolve whether declaratory relief is available under § 14704(a), because the question of whether the declaratory judgment was a final, enforceable judgment was already decided in the prior appeal. The doctrine of law of the case precludes us from reconsidering an issue that has "been decided explicitly or by necessary implication in the previous disposition." *Lower Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (internal alteration and quotation marks omitted). Although the question of whether § 14704(a) authorizes a district court to enter a declaratory order was not raised in the prior appeal, we held that Swift's failure to raise that challenge meant that the declaratory judgment was legally binding against it. *Swift*, 632 F.3d at 1123 (holding the declaratory judgment "is unchallenged and legally binding on the parties"). Under *Farrar*, OOIDA needed to show only that it had obtained an

enforceable judgment to be entitled to attorney's fees. *Farrar*, 506 U.S. at 111. It is undisputed that the declaratory judgment is enforceable against Swift and would have res judicata effect in any subsequent action. Accordingly, regardless of whether § 14704(a) authorizes a declaratory judgment, the district court did not err in awarding attorney's fees to OOIDA based on the enforceable order it obtained against Swift.

AFFIRMED.