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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Department 68 Hon. Mark V. Mooney, Judge

DANIEL V, INC.,)
Plaintiff,)
vs.) Case No. BC457301
FRANCHISE TAX BOARD OF THE STATE OF)
CALIFORNIA,)
Defendants.)

**CERTIFIED
TRANSCRIPT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Friday, June 14, 2013

APPEARANCES:

For the Plaintiff: REED SMITH
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and
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Department of Justice
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Reported by:
Shelly Goodell, CSR No. 10307
Official Court Reporter

1 Case Number: BC457301
2 Case Name: Daniel V, Inc. v. Franchise Tax
3 Board of California
4 Los Angeles, California Friday, June 14, 2013
5 Department 68 Hon. Mark V. Mooney, Judge
6 Appearances: (As heretofore noted.)
7 Reporter: Shelly Goodell, CSR No. 10307
8 Time: A.M. Session

9

10 * * *

11

12 THE COURT: Okay, now counsel can make their
13 appearances for the record.

14 MR. DAKESSIAN: Good morning, your Honor, Marty
15 Dakessian representing the plaintiff, Daniel V.

16 MS. WEI: Shirley Wei on behalf of the plaintiff,
17 Daniel V.

18 MR. SGHERZI: Good morning, Anthony Sgherzi, deputy
19 attorney general, appearing on behalf of Kamala Harris,
20 attorney general of the state of California, on behalf
21 of the defendants, Franchise Tax Board.

22 MR. BROWN: Good morning, your Honor, Eric Brown,
23 Franchise Tax Board.

24 THE COURT: All right. The matter is here today on
25 the plaintiffs' motion for attorney's fees. And the
26 court did get a chance to look at the various materials
27 submitted to it and I guess basically we've got a couple
28 of issues.

1 First of all, it's the position of the
2 Franchise Tax Board is not substantially justified. And
3 then if we get past that hurdle, the -- what fees should
4 this court be awarding, if any. And, you know, I -- in
5 terms of just whether or not the court should be even
6 sitting awarding fees in this matter, I do find that the
7 position taken by the Franchise Tax Board in this matter
8 was not substantially justified.

9 You know, as I recall, when I was hearing the
10 case, you know, I was waiting for that smoking gun.
11 Where's the evidence here? And as I indicated in my
12 statement of decision, you know, at most we had some,
13 what I thought, some circumstantial evidence. And maybe
14 I was, to put it a little mildly in my statement of
15 decision, but I'll say now, I thought the evidence was
16 surprisingly weak in terms of a case that's gone on for,
17 how many years now, 12 years or so. And all we've got
18 is some speculation, some supposition but evidence just
19 wasn't there.

20 If I may digress for just a moment. Before
21 being on the bench, I spent some time in the U.S.
22 Attorney's Office and one of the great pleasures that I
23 had in representing the government was the notion that,
24 you know, it wasn't just about winning the case it was
25 about doing the right thing. And, you know, in this
26 case the conduct of the Franchise Tax Board just was not
27 doing the right thing.

28 Okay, it's a corporation that has lots of

1 money. That doesn't mean that, you know, you don't look
2 at this and say: Okay, where's the actual evidence
3 here? You know, all we have is -- you know, because the
4 major stockholder lives in California, you know, that's
5 not enough. Like I said, all we really had was some
6 speculation because the corporation has their CPA's in
7 California, that's not enough.

8 So I thought the evidence was particularly
9 lacking, and so for that reason I don't have a -- I
10 don't have a problem in determining that the attorney's
11 fees should be awarded to the plaintiff in this matter.

12 Now, that being said, the amount I do have
13 some issues with. It is a substantial amount and the
14 same logic that leads me to find that the state's
15 position was not substantially justified also leads me
16 to question the amount being requested because, well,
17 the bottom line was it wasn't that tough a case.

18 I don't know why it took so much time, effort
19 and money by all the parties here, but ultimately the
20 state really had very little evidence to support its
21 position. It really seems like a lot more time and
22 effort was spent by everybody than was really necessary.

23 That being said, there are a couple of
24 components in terms of the fees that are requested in
25 this matter. First component is the hourly rate. The
26 state is pushing the 160 an hour. I don't think that's
27 really an appropriate benchmark. It seems to me that
28 there is justification that this -- this is an area of

1 law that not everybody can just pick up and then take
2 one of these cases and they handle it all the way
3 through it. It does take some specialization, some
4 skilled counsel.

5 Just because ultimately I found it wasn't that
6 complicated, it took experienced counsel to explain it
7 to me so that I could understand it, it wasn't that
8 complicated. But once we get down to the basic issue,
9 you know, the court was able to determine, you know,
10 whether or not this is the proper domicile or the
11 state's position was appropriate in this matter.

12 So I think the 160 is low. I think that
13 certainly the defendants -- rather plaintiffs are
14 entitled to a greater amount than the 160.

15 So the next sort of issue we've got to
16 consider then is the appropriate marker and also
17 consider the hours that were worked. If I may make
18 another observation here. In fee motions, in general,
19 what the court finds typically most persuasive is when I
20 get the actual time sheets that people work, when I get
21 the actual bill that was submitted to the client, and
22 then even the final part that makes it very convincing
23 is the amount the client actually paid.

24 When I get all that I very rarely reduce the
25 bill after that because, you know, it's already been
26 through people looking at it, the client has paid for
27 the services. Of course, I didn't get all that in this
28 case. I have no idea what Daniel V actually paid or

1 what the actual bills here were. I got the summary of
2 bills, which it's sufficient for the court to consider.
3 Appellate courts have said an attorney can even just
4 ballpark it and say, yeah, I spent this amount of time
5 on the case.

6 When I get that, it's a little more difficult
7 to determine what's appropriate but I did get a fair
8 amount in this case but just not all those pieces that
9 really makes it a lot easier for the court.

10 So then that leaves, you know, a ten-year
11 history of bills to go through. And to that extent I do
12 want to acknowledge that I thought the declaration of
13 Mr. Greenfield was very helpful. I had to go through
14 the stuff as well but, you know, I often don't get as
15 detailed of an opposition on these fee motions.

16 Typically, I get sort of a blanket statement
17 that, you know, work was excessively overcharged. And
18 at least here I get some specifics to sort of lean on.
19 And I don't agree 100 percent with Mr. Greenfield's
20 analysis, but I did find a lot of his opinions and
21 analysis to be persuasive and helpful to the court.

22 For example, you know, let's take, at least
23 what I consider one of the easy ones, multiple attorneys
24 at appearances. You don't need more than one attorney
25 at a deposition. I don't care how complicated it is,
26 you know. Maybe a couple attorneys at trial but
27 appearances at depositions you only need one attorney.

28 Also, as I said, you know, there's a lot more

1 fees generated here than were probably necessary
2 considering the narrowness of the issue. So, you know,
3 I think Mr. Greenfield's -- is it Greenfield -- yeah,
4 Greenfield or Feldafield (phonetic)?

5 MR. SGHERZI: I think it's Mr. Greenfield, is how I
6 pronounce it.

7 THE COURT: It's Greenfield, okay. So I think some
8 of his recommended adjustments that the court is willing
9 to take into consideration. So, as a -- let me look at
10 my figures and I think the statement by the, or the
11 assertion by the plaintiffs in their reply that the
12 Franchise Tax Board number that was submitted wasn't
13 necessarily the amount they provided. They gave few
14 options for the court to go by, but the defendants said
15 the baseline should be a minimum of 933,623.20.

16 Yeah, I agree that's the baseline. I'm
17 willing to start there, but I think that they should get
18 a little bit more. And I'll tell you where I differ
19 from Mr. Greenfield in his analysis, and that is he
20 thought we should just disregard entirely the time spent
21 by Brian Toman and Scott Jacobs. You know, I disagree
22 with that. I think that they obviously billed for
23 things. They put in work.

24 Some of it appears to have been duplicative, I
25 mean, unnecessary; but I think the same 40 percent
26 reduction that Mr. Greenfield had recommended for the
27 post board of equalization time, probably it's as good
28 as any approximation of what's appropriate. Using those

1 figures then I would then take that 933,000 and change,
2 add an additional 225,168 to account for Mr. Toman's
3 time, another \$53,028 to account for Mr. Jacobs' time,
4 and that would give a total of \$1,211,819.20.

5 Since Mr. Greenfield threw in another 100
6 hours at 450 an hour to account for the time he was
7 taking out for not including Mr. Toman and Mr. Jacobs,
8 that should then come off of that 101 million 211
9 figure. And when all that math is done, I come up with
10 a figure of \$1,166,819.20 that the court would be
11 inclined to award in attorney's fees in this matter.

12 That is just my tentative, but that explains
13 how I got to that number. I'll give either side an
14 opportunity to be heard if they would like, or you can
15 simply submit.

16 MR. SGHERZI: I'd like to be heard, if you would.

17 THE COURT: Sure.

18 MR. SGHERZI. Thank you. May I use the podium?

19 THE COURT: Sure.

20 MR. SGHERZI: I think as the court had indicated,
21 if you take a look at the final statement of decision
22 it's clear that the court's determination, as to the
23 merits of the case, is based on a weighing of evidence.
24 That's, in fact, what the statement of decision says.
25 The court, as the bench officer had, the option of
26 listening to the evidence, listening to the witnesses,
27 and making its determination.

28 Nowhere in the final statement of decision

1 does the court refer or infer that the FTB had virtually
2 no evidence whatsoever or presented no case whatsoever.

3 This is a tax case. The way the cases are
4 usually proved, in fact, even in terms of tax evasion,
5 there's no direct evidence. It's all produced through
6 circumstantial evidence.

7 For example, they have something called the
8 bank deposits method, something called the net worth
9 method. Those are all indirect circumstantial ways of
10 proving that a tax payer has failed to report income,
11 okay.

12 THE COURT: Daniel V's all tax records were in a
13 bank in Nevada?

14 MR. SGHERZI: No, no, no.

15 THE COURT: I mean they had a bank in Nevada,
16 correct? As I recall the evidence and where they did
17 their business.

18 MR. DAKESSIAN: That is correct.

19 MR. SGHERZI: That's true, but that hardly fails to
20 answer the question.

21 THE COURT: Go ahead.

22 MR. SGHERZI: In fact, this notion that there's any
23 traditional factors which the court needs to examine to
24 make this determination is truly fiction. It's not
25 based on any statute. It's not based on any regulation.
26 It's not based on any published authority. In fact, the
27 only published authority in this case is the Southern
28 Pacific case, Southern Pacific v. McColgan.

1 I'll read directly from what that opinion states --
2 MS. REPORTER: I'm sorry, versus what?

3 MR. SGERZI: McColgan. M-c-c-o-l-g-a-n.

4 The case states as follows: The true test
5 must be to consider all the facts relating to a
6 particular corporation and all the facts relating to the
7 intangibles in question and to determine from those
8 facts which state among all states involved gives the
9 greatest protections and benefits to a corporation.
10 That is partially a question of fact and partially a
11 question of law. And that's quoted from Page 80 of that
12 particular case.

13 So when you're looking at, okay, they had a
14 bank account, so what. Number one, as we've indicated
15 in our briefs and during trial, it's not only checks
16 from that bank account. They were never given to the
17 Franchise Tax Board, only selected ones are given. We
18 can only proceed according to what the taxpayers are
19 willing to provide. And obviously if there's something
20 damaging he's not going to provide it.

21 Another one, which the court appears to
22 overlook. As the court knows, the court has experience
23 in federal courts, as do I. When you make a
24 representation to a federal agency that you're a
25 particular owner or president of a corporation, that has
26 certain consequences. It's a criminal offense to lie to
27 a federal organization under 18 USC 1001, that's a
28 criminal offense.

1 THE COURT: You're talking about the 1998 filing
2 that was an electronic signature that doesn't even say
3 president where the -- it was apparently a click of the
4 mouse by Mr. Hehn or Hone, I can't remember.

5 MR. SGHERZI: No, no, no. That was signed by Ron
6 Lane, the president.

7 THE COURT: Right, right.

8 MR. SGHERZI: Who we contend was president.

9 THE COURT: But that was the electronic signature,
10 as I recall.

11 MR. SGHERZI: And so what, what difference does
12 that make?

13 THE COURT: So your whole case is -- well, that's
14 the only piece of evidence I've heard in the entire case
15 that I thought was any potential evidence, and it boiled
16 down to a mouse click.

17 MR. SGHERZI: Well, your Honor, I frankly disagree
18 with the court's analysis. I think the court is
19 overlooking all of the evidence and just selecting the
20 ones that it believes, so --

21 THE COURT: I only interrupt you to point out that,
22 you know, I was -- you know, I fully considered the
23 electronic filing of the 1998 mouse click that it wasn't
24 signed by him, but I considered that and had -- and
25 certainly worth something for the Franchise Tax Board to
26 investigate based upon that. But if that's what they
27 were hanging their hat on, that certainly wasn't enough.

28 And as a matter of fact, any decent

1 investigation done by them back in 2001, 2003 should
2 have resolved that one long ago. But go ahead.

3 MR. SGHERZI: But, again, you know, the court's
4 characterization, I'm afraid to say, is absolutely
5 incorrect that's the only evidence. I was there at
6 trial and I can tell you that I beg to differ strongly
7 with the court's opinion. You've got other evidence.
8 You have an account, a Merrill Lynch account that holds
9 \$5- or \$6-million, okay that was never -- that was never
10 given to the Franchise Tax Board during audit.

11 During discovery we were able to find out that
12 that account has the owner, Ron Lane, the sole
13 shareholder and his assistant as signatories on that
14 account which means they had complete access to all the
15 money in that account; unilateral ability to withdraw
16 that.

17 Is that management in control from Nevada?
18 You don't think that a reasonable person would estimate
19 that that provides some type of control by individuals
20 in California. That's what we're talking about.

21 The court seems to be overemphasizing and
22 focused on factors which are factors to consider but
23 which are not the ones that are important. And I'll
24 give you another quote to back that up. This is not
25 something I'm making up. This comes from authority,
26 Southern Pacific v. McColgan.

27 It says as follows: The fact that the board
28 of directors meets in New York is an important, a very

1 important factor to be considered in determining whether
2 California is, in fact, the commercial domicile of the
3 company. But that factor is not conclusive. The state
4 where the ultimate control is exercised is not
5 necessarily the commercial domicile if it's implicit in
6 the holding of a case called Smith v. Ajax.

7 And that comes from the only published
8 decision, Southern Pacific v. McColgan. So I think the
9 court is placing way too much emphasis on the fact that
10 they had a bank account holding minimal amounts of money
11 in Nevada. Not all the checks were presented on that
12 account so we don't know who else signed it. We have
13 someone who was here that had ties, and then we have
14 David Hehn, who worked full time for the law firm who
15 set this deal up. He worked in the same position for
16 several other corporations.

17 Now, the question is not whether that and this
18 type of evidence was dispositive in terms of the issue
19 of commercial domicile. That evidence accumulated,
20 asked the question, was the Franchise Tax Board
21 reasonable in its position; that there was contrary
22 evidence than the evidence that the plaintiff contends
23 show that the commercial domicile was in Nevada.

24 Now, we contend that it's not and this is what
25 the cases say: Substantial justification that the FTB
26 needs to prove is that its position was one which was
27 reasonable to agree that would satisfy a reasonable
28 person or has a reasonable basis in both fact and law.

1 That comes from Wertin v. Franchise Tax Board, 68 Cal.
2 App. 4th, 961, 977.

3 The appellate courts in deciding whether tax
4 agency's position was substantially justified has
5 concluded as follows: So long as the position is one
6 which a reasonable person could think is correct it may
7 be substantially justified even in the face of
8 conflicting evidence. Comes from a case called, Fujitsu
9 I.T. Holdings, Inc. v. Franchise Tax Board. It's cited
10 as 120 Cal. App. 4th, 459, 487.

11 If the FTB's position is one upon which
12 reasonable minds can differ its position is
13 substantially justified. But that comes from another
14 published California public court decision, Lennane v.
15 Franchise Tax Board, 51 Cal. App. 4th, 1180 at 1189.

16 THE COURT: You realize the cases that you've cited
17 in your briefs you don't need to give the citation again
18 for the record. It's there in the record.

19 MR. SGHERZI: All right. I think it just makes it
20 a little bit easier when we need to figure out how to
21 proceed.

22 THE COURT: All right.

23 MR. SGHERZI: And finally we came off with a
24 federal case which, 1991 decision called, Creske Sierra
25 v. CRR, Commission Terminal Revenue 946 Fed. 2nd 43,
26 it's a Seventh Circuit 1991 case which has a statute,
27 which addresses attorney's fees which is similar to the
28 one that we're involved in in this particular case.

1 And that case holds that when the decision of
2 a court is based on the credibility of the witnesses the
3 court cannot find that the position of the tax agency is
4 not substantially justified. I go back, I take a look
5 at the court's final statement of decision. It had -- I
6 think it was more than, close to 60 days or more to
7 craft its final statement of decision. And the decision
8 says what the decision says. And the decision says that
9 it was based on the credibility of the witnesses. It
10 said that the Franchise Tax Board did not have
11 sufficient circumstantial evidence to overcome the
12 direct evidence of the plaintiff.

13 Thank you, your Honor.

14 THE COURT: Counsel, your chance to be heard on the
15 issue of the substantial justification on the court's
16 position.

17 MR. DAKESSIAN: Thank you, your Honor.

18 May it please the court, with respect to the
19 Southern Pacific v. McColgan decision, the key point in
20 that case is that all facts relating to commercial
21 domicile, the facts that the FTB introduced at trial did
22 not relate to commercial domicile, it related to its own
23 theory which this court rejected.

24 If had the Franchise Tax Board stayed true to
25 Southern Pacific v. McColgan, actually adhered to and
26 sought guidance from that decision, they would have
27 noticed that in Southern Pacific v. McColgan the
28 taxpayer had 24,000 employees in California yet was

1 claiming commercial domicile in New York where it only
2 had 1000 employees. And the court in that case did say
3 that all facts should be considered and that board
4 meetings were one of many factors to be considered. I
5 didn't take this court's decision to be based solely on
6 the location of board meetings.

7 Second, with respect to the Merrill Lynch
8 account, Mr. Sgherzi mentioned that Mr. Lane was on the
9 signature card at Merrill Lynch, so is Mr. Hehn. That
10 part wasn't mentioned. But, more importantly, we had
11 evidence at trial as to who acted on that account. And
12 the evidence was overwhelming that Mr. Hehn acted on
13 that account.

14 With respect to the Wertin v. Franchise Tax
15 Board case, that case is an interesting case because
16 there the FTB failed to properly conduct an audit in
17 issuing a notice of proposed assessment and that was the
18 basis for the court finding that its position was not
19 substantially justified.

20 Fujitsu case similarly, another case where the
21 FTB's position was found not substantially justified
22 based on some of its actions at the administrative
23 level.

24 With respect to the Creske case which came
25 into the record rather recently, this was the case where
26 the rule was that preferring an oral explanation over
27 the documents does not mean that the position of the
28 other side relying on the documents was unreasonable.

1 I think it would be extremely generous in this
2 case to say that the Franchise Tax Board was the side
3 relying on the documents. We had lots of documents in
4 this case that we introduced and the oral testimony of
5 our witnesses corroborated that evidence, and I did not
6 take this court's statement of decision to mean that it
7 rested solely on the credibility of witnesses. There
8 was discussions, this final statement of decision before
9 that portion that alluded to the documents that were
10 provided, the extensive and voluminous documents that we
11 had provided.

12 So with that I will submit on the issue of
13 substantial justification.

14 THE COURT: I've fully considered all the evidence
15 that was presented in this case and I said, I kept on
16 waiting for something from the Franchise Tax Board and I
17 really heard nothing that I thought supported their
18 position other than some speculation. But the weight of
19 the evidence was entirely in plaintiffs' favor and it
20 wasn't just a matter of credibility, it was a matter
21 that we've got direct evidence and circumstantial
22 evidence that was submitted by the Franchise Tax Board.

23 But, generally, it didn't meet the burden but
24 it, you know, just nothing there to connect the dots
25 other than, do you want me to make some inferences that
26 the -- the weight of the evidence was strongly against.
27 So you look at everything. I don't think any reasonable
28 person would have thought that the domicile of this

1 corporation was California. And that's why I -- you
2 know, I was rather disappointed at the conduct of the
3 Franchise Tax Board throughout the history of this case.
4 I know you take the cases as you had if this went to
5 trial. But, you know, this thing should have wrapped up
6 years ago instead of taking all this time on so -- so
7 little evidence to base it on.

8 That's why I said, as a former public entity
9 attorney, and I, you know, I like to think people
10 working for the state are making effort to do the right
11 thing. They're not just there to, you know, get as much
12 as you can. I think what would the citizens of this
13 country, what are you doing in terms of what was
14 appropriate, and I just didn't think that the conduct of
15 the Franchise Tax Board in this matter is a -- was in
16 the -- their -- well puts them in the best light, we'll
17 leave it at that.

18 I was disappointed at how they conducted the
19 whole investigation and what very little they had to go
20 on to make this assessment. So I'm -- I don't have a
21 problem with the position that the -- or the court's
22 determination that the -- the Franchise Tax Board's
23 position was not substantially justified.

24 If you want to be heard at this point in time
25 as to the amounts that the court has determined
26 appropriate, or submit on the amounts?

27 MR. DAKESSIAN: Your Honor, you know, we understand
28 that the court went through a detailed analysis of

1 everything and we may differ as to some points, but we
2 will submit.

3 MR. SGHERZI: I mean, our analysis is in the
4 record. Our analysis shows it was and the court will
5 make its determination and we'll proceed as we feel
6 necessary.

7 Thank you, your Honor.

8 THE COURT: Very well. So that will be the court's
9 order in terms of the amount. Let me find my cheat
10 sheet where I had these written out.

11 MR. DAKESSIAN: Your Honor, we may have it right
12 here.

13 THE COURT: I know roughly what it was but, you
14 know, it was -- just because I was reading off of it.

15 MR. DAKESSIAN: The number that we have is --

16 THE COURT: Oh, wait, wait. I knew I was reading
17 off this. The final number that I came up with, and I
18 already went through how I got there, is 1,166,819.20.

19 Okay, that will be the order of the court and
20 we'll have plaintiff submit the appropriate judgment.

21 MR. DAKESSIAN: Thank you, your Honor.

22 MR. SGHERZI: Thank you, your Honor.

23 THE COURT: Thank you.

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25 (Whereupon the proceedings concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department 68 Hon. Mark V. Mooney, Judge

DANIEL V, INC.,)
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Plaintiff,)
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vs.) Case No. BC457301
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FRANCHISE TAX BOARD OF THE STATE OF)
CALIFORNIA,)
)
Defendants.)
_____)

I, Shelly Goodell, official court reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages 1 through 18, inclusive, comprise a full, true, and correct transcript of the proceedings held in the above-entitled matter on June 14, 2013.

Dated this 18th day of June, 2013.



SHELLY GOODELL, CSR NO. 10307
OFFICIAL REPORTER