No. 10-17896

IN THE

United States Court of Appeals for the Ninth Circuit

SAVE THE PEAKS COALITION, *et al.*,
Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE, *et al.*,
Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,
Intervenor-Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Arizona, No. 3:09-CV-08163

REPLY IN SUPPORT OF SNOWBOWL'S MOTION FOR FEES

This Court explained in affirming the dismissal of plaintiffs' follow-on action that their suit imposed an "unfair" burden on Snowbowl; that plaintiffs "engaged in strategic gamesmanship" to "hinder development and impose costs unnecessarily"; and that their suit was a "gross abuse of the judicial process." *Save the Peaks Coalition* v. *U.S. Forest Serv.*, 669 F.3d 1025, 1028, 1032, 1034 (9th Cir. 2012). In light of these and other statements, and the undisputed facts, Snowbowl's request for reasonable attorney's fees incurred in the defense of this appeal is well supported under the controlling legal standards.

Plaintiffs offer a remarkable response: They argue that this Court's decision is wrong. They assert, for example, that the Court's conclusion that plaintiffs abused the judicial process amounts to nothing but "unfounded" "allegations" and

"accusations." Opp. 1-2. They argue that this Court's conclusions are "false." Opp. 4. They argue that the panel "was not in a fact finding position." Opp. 2, 15. They argue that the case may have come out the other way "had [it] been assigned to another panel." Opp. 7. And they rely three times on a vacated panel decision (Opp. 6, 11, 12), even after the panel specifically instructed counsel not to do so.

This Court should reject plaintiffs' attempts to relitigate the appeal and should award fees in the amounts requested. To begin with, and put simply, the panel got it right. Nor are plaintiffs' other arguments well-founded. They are wrong to suggest that Section 1927 authorizes sanctions only where particular *documents* are filed to harass an opposing party or duplicate proceedings; in fact, sanctions are warranted when the entire *appeal* is harassing and duplicative, as it was here. Plaintiffs are wrong to suggest that Section 1927 applies only where claims are frivolous; sanctions are appropriate when an appeal is brought to harass or delay, as it was here. They are wrong to suggest that intervenors are not entitled to fees; there is no such principle of law. And they are quite wrong to claim Snowbowl "was not in any way hindered by this action" from completing its long-delayed facility upgrade. Opp. 7. In fact, the appeal delayed Snowbowl's upgrade project and cost it millions—losses Snowbowl cannot recoup through this fee request, leaving it still many millions of dollars the worse for plaintiffs' abusive filings. Exercise of this Court's sanctioning authority is amply warranted.

ARGUMENT

I. PLAINTIFFS' COUNTERARGUMENTS ARE MERITLESS.

1. Plaintiffs' primary legal argument is that Section 1927 sanctions apply " 'only to unnecessary filings and tactics once a lawsuit has begun.' " Opp. 5 (quoting *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996)). According to plaintiffs, this means they can be sanctioned under Section 1927 only if Snowbowl points to a *specific document* "within the confines of the appeal" that improperly multiplied the proceedings. Opp. 4. Plaintiffs misunderstand the law.

In re Keegan stands for the proposition that Section 1927 cannot be used to punish an "initial pleading," such as a complaint. 78 F.3d at 435. That is the province of Rule 11. But once the suit is underway, all conduct is fair game for Section 1927 sanctions—including the appeal itself. That is why this Court has specifically held that Section 1927 sanctions can be "appropriate on appeal" for conduct that had its origin in District Court. *Trulis* v. *Barton*, 107 F.3d 685, 696 (9th Cir. 1995). This Court also has upheld Section 1927 sanctions in the district court and awarded double costs on appeal where the appeal was "just another stage" in litigant's "long abuse of the federal judicial system." *In re Peoro*, 793 F.2d 1048, 1052 (9th Cir. 1986). And court after court has made clear that Section 1927 sanctions are available where a litigant "pursue[s] [an] appeal in bad faith."

Koffski v. *Village of N. Barrington*, 988 F.2d 41, 45 n.8 (7th Cir. 1993); *accord, e.g.*, *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 116 (2d Cir. 2000).

This Court's *separate* inherent power to award fees also "extends to a full range of litigation abuses." *Fink* v. *Gomez*, 239 F.3d 989, 991-992 (9th Cir. 2001). As we explained in the fee motion, that power reaches parties and "counsel who willfully abuse the judicial process." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980)). And this Court has already reached that conclusion: It emphasized three times that plaintiffs and their counsel committed a "gross" and "serious" "abuse of the judicial process." *Save the Peaks Coalition* v. *U.S. Forest Serv.*, 669 F.3d 1025, 1028, 1034 (9th Cir. 2012). It is hard to imagine how plaintiffs can argue, in the face of that conclusion, that this case does not meet the standard for a fee award.

2. Plaintiffs nonetheless assert that sanctions are inappropriate because they "neither knowingly nor recklessly raised any frivolous argument"; indeed, they continue to assert that their NEPA claim has merit. Opp. 6-7. They are wrong about the "meritorious" part. The panel found plaintiffs' NEPA claims "meritless" and "mistaken," *Save the Peaks*, 669 F.3d at 1028, 1035-38, and that conclusion was sufficiently obvious that it did not even warrant a call for a response when plaintiffs sought rehearing. But in any event, it does not matter whether the NEPA argument was "frivolous." Sanctions may be imposed when an

attorney raises a frivolous argument "*or* argues a meritorious claim for the purpose of harassing an opponent." *Estate of Blas ex rel. Chargualaf* v. *Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) (emphasis added). Snowbowl presses the second half of this disjunctive standard, and plaintiffs offer no credible answer to it.

As for the bad-faith standard itself, Mr. Shanker and his clients say they could not have acted in bad faith because they "maintained a good faith belief that they would prevail on the merits." Opp. 7. That is not the standard—which is why sanctions can be imposed even where a litigant "argues a meritorious claim." *Estate of Blas*, 792 F.2d at 860. As this Court has explained, "where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees." *In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986). Likewise, a fee award is justified where a litigant engages in "[t]actics * * * with the intent to increase expenses or delay," regardless of their merit. *New Alaska Dev. Corp.* v. *Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Those requirements are met here. This Court correctly concluded that plaintiffs undertook this appeal "for no apparent reason other than to ensure further delay and forestall development," *Save the Peaks*, 669 F.3d at 1028—a conclusion that tracks *New Alaska Development*'s test almost word for word. And *In re Itel*'s reference to "obduracy" aptly describes Mr. Shanker and his clients' behavior in this case. Rather than allow Snowbowl to move ahead with

its lawful expansion plans after *Navajo Nation*, Mr. Shanker and his "new" clients brought a serial lawsuit to try to halt Snowbowl's progress and litigate claims that "could have, and should have been asserted in" that first case. *Save the Peaks*, 669 F.3d at 1028, 1033. Moreover, despite claiming to be "mortified" by this panel's decision, Opp. 16, Mr. Shanker has not yet learned his lesson; he has continued to sling invective—including at this Court—and vowed to "continue to file appeals" to fight the Snowbowl project. C. Cole, *"Legal Nightmare" Sees Snowbowl Sue For Attorney Fees*, Arizona Daily Sun, May 10, 2012 ("Shanker * * * says he plans to continue to file appeals" to fight Snowbowl's expansion) ;[1] T. Hull, *Ski Lodge Can Make Controversial Snow*, Courthouse News Service, Feb. 9, 2012 (quoting Mr. Shanker's accusation that the panel had a "pro-defendant bias").[2]

3. Plaintiffs also argue the Court was wrong to conclude that their suit and appeal were "little more than a vehicle for * * * counsel to evade res judicata and collateral estoppel" and that they "grossly abused the judicial process by strategically holding back claims that could have, and should have, been asserted in the first lawsuit." Opp. 8-13. But the Court did not pull those observations out of thin air. They were fully in accord with the record below—a record on which the District Court reached similar conclusions. The District Court found that "[a]ll

[1] *Available at* http://azdailysun.com/news/local/crime-and-courts/legal-nightmare-sees-snowbowl-sue-for-attorney-fees/article_898e206f-b951-50df-927c-c10714e89bb7.html.

[2] *Available at* http://www.courthousenews.com/2012/02/09/43752.htm.

the plaintiffs in this case were aware of the other litigation." ER25. It found that "some of them were actively supporting it." *Id.* It found that plaintiff Save the Peaks Coalition referred to the *Navajo Nation* litigation on its Web site as "our prior court case." ER19. It found that the current plaintiffs failed to bring suit earlier only because "they were not needed." ER25. And it made these findings on a record demonstrating that within *24 hours* after certiorari was denied in *Navajo Nation*, Mr. Shanker was already pondering how to get back into court to block Snowbowl's expansion. He told reporters that day that he and the plaintiffs were "exploring other legal options" and that they "will definitely do something." Dist. Ct. Docket No. 108 at 3-4 (filed June 21, 2010). How that is not "holding back claims that could have been asserted * * * in the first lawsuit" and "evad[ing] res judicada and collateral estoppel," Mr. Shanker and his clients do not explain.

Mr. Shanker likewise argues that his clients approached him, rather than the other way around, and that as a result he cannot be called to account for his harassing and meritless second lawsuit. Opp. 10-12. Even if it is true that plaintiffs approached Mr. Shanker unprompted—an assertion Snowbowl frankly doubts, given Mr. Shanker's statements immediately after denial of certiorari—it does not change the analysis. An attorney, after all, has an obligation not to bring a bad-faith appeal even if asked by a client to do so. *See, e.g.*, Ariz. R. Prof.

Conduct 3.1 cmt. 1 (advocate must not "abuse legal procedure" despite duty to use procedure "for fullest benefit of the client's cause").

4. Plaintiffs repeatedly observe that Snowbowl "chose to intervene in this case," Opp. 2, 4, 6, 14, 15, suggesting that Snowbowl brought its expenses on itself and should not be entitled to fees. That is baseless. Section 1927 is not limited by its terms to initial parties—it makes counsel liable to pay *any* fees incurred due to vexatious conduct—and plaintiffs cite no support for the proposition that intervenors cannot collect fees. Nor would such a principle make sense, as this case demonstrates. Snowbowl intervened for a simple reason: Plaintiffs were attempting to put Snowbowl out of business. Mot. 2. Snowbowl's intervention was not some idle luxury; it was essential.[3]

5. Last but not least, plaintiffs assert that they cannot be said to have acted "with the intent to increase expenses or delay," *New Alaska Dev. Corp.*, 869 F.2d at 1306, because "Snowbowl began construction as soon as it received its permits and was not in any way hindered by this action from continuing construction during the appeal." Opp. 7. That is wrong for two reasons.

[3] Plaintiffs complain that three attorneys represented Snowbowl at oral argument. Opp. 4. But those attorneys were the arguing counsel, Catherine Stetson; her associate, who was the primary drafter of Snowbowl's brief; and Snowbowl's trial counsel. There is nothing unreasonable about that staffing. (And in any event, trial counsel's bill for the day of argument amounted to only $1,273.) Plaintiffs also complain that Snowbowl redacted entire time entries. Opp. 4 n.3. They misunderstand those redactions. They are not for confidentiality, but to eliminate entries for time Snowbowl *has not claimed* as part of this fee application.

First, as a legal matter, the question is whether plaintiffs evinced an "*intent* to increase expenses or delay," *New Alaska Dev. Corp.*, 869 F.2d at 1306 (emphasis added), not whether they succeeded. But in any event, plaintiffs are absolutely wrong about the effect their appeal had on Snowbowl. Our motion explained—and the record demonstrates—that the second proceeding blocked Snowbowl from obtaining $12 million in financing to buy required snowmaking equipment. Mot. 5. It increased by at least $600,000 per year of delay the cost of the expansion. *Id.* And crucially, it delayed by several years the date when Snowbowl can actually unveil its expanded facility. *Id.* That delay cost Snowbowl millions. Plaintiffs' blithe assertion that their appeal—which lasted as long (14 months) as the District Court proceeding—had no effect on Snowbowl ignores the reality that pending litigation can paralyze a small business.

II. SNOWBOWL SHOULD RECEIVE ITS FEES FOR THE TIME SPENT ON THIS FEE PETITION.

As Snowbowl indicated in its motion, at the time the motion was filed its attorneys had not yet billed all of their fees for work in this Court, particularly the fees spent preparing its application. Mot. 11; Stetson Decl. ¶ 8(g). Bills including that time have now been issued, and Snowbowl has attached them to this reply along with a supplemental declaration. To the extent this Court finds sanctions warranted, it should award fees for preparing the petition as well. *Clark* v. *City of*

Los Angeles, 803 F.2d 987, 992 (9th Cir. 1986) (holding that "time spent in establishment to an amount of fees * * * is compensable").

CONCLUSION

Plaintiffs characterize their conduct as evidencing the "enthusiasm [and] * * * creativity that is the very life blood of the law." Opp. 2. Plaintiffs' vigorous pursuit of a meritless and harassing second lawsuit may indeed have been motivated by great enthusiasm, and it certainly was creative, but that does not make it right. This Court has held that "[t]actics undertaken with the intent to increase expenses or delay" constitute bad faith. *New Alaska Dev. Corp.*, 869 F.2d at 1306. That is what this appeal was.

Plaintiffs have not contested the calculation of Snowbowl's attorneys' fees or otherwise taken issue with the specifics of those fees (other than to complain, baselessly, about Snowbowl's representation at oral argument). This Court accordingly should award Snowbowl attorneys' fees and non-taxable costs in the amount requested: $279,842.05, assessed jointly and severally against the plaintiffs and their attorney, Howard M. Shanker.

Respectfully submitted,

/s/ Catherine E. Stetson

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May 21, 2012

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Supplemental

Form 9: APPLICATION FOR ATTORNEYS FEES
Under Ninth Circuit Rule 39-1.6

9th Cir. No. 10-17896 Case Name: Save the Peaks Coalition v. U.S. Forest Service

DESCRIPTION OF SERVICES	***HOURS***
Interviews & Conferences	0.7
Obtaining & Reviewing Records	4.4
Legal Research	0
Preparing Briefs	17.8
Preparing for & Attending Oral Argument	0
Other (specify below):	

Computerized Research Costs -- $28.71

TOTAL Hours Claimed 22.9

TOTAL COMPENSATION REQUESTED: $ 10,562.21

Signature /s/ Catherine E. Stetson Date 5/21/2012

A request for an award of attorneys fees must be supported by a memorandum showing that the party seeking fees is legally entitled to them and must be accompanied by Form 9 or a document that contains substantially the same information, along with:

(1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task;
(2) a summary for each lawyer and paralegal of the total hours spent in the categories set forth above;
(3) a showing that the hourly rates claimed are the prevailing rates in the relevant market; and
(4) an affidavit attesting to the accuracy of the information submitted.

IN THE UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT

SAVE THE PEAKS COALITION, *et al.*, Plaintiffs-Appellants, v. U.S. FOREST SERVICE, *et al.*, Defendants-Appellees, ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP, Intervenor-Defendant-Appellee.	No. 10-17896

SUPPLEMENTAL DECLARATION OF CATHERINE E. STETSON

I, Catherine E. Stetson, hereby declare:

1. I am lead appellate counsel for intervenor-defendant-appellee Arizona Snowbowl Resort Limited Partnership ("Snowbowl"). I make this supplemental declaration in support of Snowbowl's application for attorneys' fees based upon my personal knowledge and my review of records kept in the ordinary course of my law firm's business.

2. I incorporate by reference my May 3, 2012 declaration in support of Snowbowl's motion for attorneys' fees.

3. Since Snowbowl submitted its motion for attorneys' fees, Hogan Lovells has billed Snowbowl an additional $10,497.50 for professional services, plus another $28.71 in computerized research costs, for a total of $10,562.21. This bill encompasses the work Hogan Lovells did reviewing plaintiffs' petition for rehearing and preparing this fee application. I have attached a copy of Hogan Lovells' bill to Snowbowl reflecting these fees and costs as Exhibit A.

4. In accordance with Circuit Rule 39-1.6(b), attached as Exhibit B to this declaration is a spreadsheet providing a summary for each timekeeper of the total hours he or she spent on the matter since the initial application, broken down into the categories listed on this Court's Form 9.

5. In my opinion, the time and costs reflected in the attached bills are necessary and reasonable given the factual and legal issues presented by this opposed fee petition and the need, in connection with the petition, to categorize and summarize all of the time entries by all Hogan Lovells timekeepers on this matter. I also believe that that the minimal amount of time spent reviewing plaintiffs' petition for rehearing and advising Snowbowl of its contents was reasonable and necessary. I therefore believe that $10,562.21 is a reasonable additional amount for Snowbowl to be awarded for Hogan Lovells' services.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 21, 2012.

/s/ Catherine E. Stetson
Catherine E. Stetson

EXHIBIT A

Invoice No. 2663109

Client / Matter No. 029938.000001

Arizona Snowbowl Resort Limited Partnership
22214 N. La Senda Drive
Scottsdale, AZ 85255

May 15, 2012

For Professional Services Rendered Through April 30, 2012

PUBLIC LANDS

Date	Timekeeper	Hours	Description
3/9/12	C. Stetson	0.50	Review Coalition's petition for rehearing; exchange e-mails with client and co-counsel regarding same
3/13/12	C. Stetson	0.50	Review rules; e-mail with E. Borowsky regarding process and timing of petition for rehearing and any subsequent Supreme Court filings
4/19/12	D. Perella	0.30	Review rehearing order; save and transmit to client; telephone conference with S. Marotta regarding research on fee petition
4/19/12	C. Stetson	0.30	Review order denying rehearing; exchange e-mails with D. Perella and S. Marotta regarding timing and materials for motion for attorneys' fees
4/25/12	C. Stetson	0.20	Exchange e-mails with D. Perella and S. Marotta regarding draft motion for fees
4/26/12	S. Marotta	3.30	Review, categorize, and tabulate Hogan Lovells bills for Ninth Circuit fee petition
4/27/12	S. Marotta	1.50	Begin drafting Ninth Circuit fee application memorandum
4/29/12	S. Marotta	8.00	Complete draft of Ninth Circuit fee memorandum; prepare declaration of C. Stetson in support of Ninth Circuit fee application
[redacted]			
4/30/12	S. Marotta	4.00	Review and revise first draft of motion and C. Stetson declaration and forward same to D. Perella; generate Exhibit B to Stetson declaration
4/30/12	D. Perella	3.10	Review and edit draft motion for attorneys fees and draft declaration of C. Stetson, drafting additional material as needed; telephone conference with S. Marotta regarding case law analogous to current situation; begin reviewing S. Marotta draft attachments
4/30/12	C. Stetson	1.20	Review and revise draft motion for attorneys' fees; exchange e-mails with D. Perella and S. Marotta regarding same

Total for Professional Services $10,615.50

Other Charges

Computer Research - Westlaw	28.71

EXHIBIT B

March and April, 2012						
Timekeeper Name	*Interviews & Conferences*	*Obtaining & Reviewing Records*	*Legal Research*	*Preparing Briefs*	*Preparing For & Attending Oral Argument*	*Totals*
Catherine E. Stetson	0.7	0.8		1.2		2.7
Dominic F. Perella		0.3		3.1		3.4
Sean Marotta		3.3		13.5		16.8
Totals	0.7	4.4	0	17.8	0	22.9

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply was electronically filed with the Clerk using the appellate CM/ECF system on May 21, 2012. I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Catherine E. Stetson
Catherine E. Stetson