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ORDER DENYING MOTION FOR ATTORNEYS FEES, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APRIL 18, 2023)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

MARK D. POTTER,

Appellant,

v.

JULIO YEE CABRERA;
ENRIQUE WONG VASQUEZ,

Defendants-Appellees,

WILLIAM ANTHONY ADAMS,

Appellee,

and

BEAMSPEED, LLC, an Arizona Limited Liability Company; DOES, 1-10,

Defendants.

No. 22-55273

D.C. No. 3:14-cv-00333-JAH-RBB
Southern District of California, San Diego

Before: M. SMITH, COLLINS, and LEE,
Circuit Judges.

ORDER

Appellees' Motion for Attorneys Fees' (ECF No. 38) is **DENIED**.

ORDER DENYING MOTION FOR CLARIFICATION, MODIFICATION, OR RECONSIDERATION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MAY 18, 2023)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

MARK D. POTTER,

Appellant,

v.

JULIO YEE CABRERA;
ENRIQUE WONG VASQUEZ,

Defendants-Appellees,

WILLIAM ANTHONY ADAMS,

Appellee,

and

BEAMSPEED, LLC, an Arizona Limited Liability Company; DOES, 1-10,

Defendants.

No. 22-55273

D.C. No. 3:14-cv-00333-JAH-RBB
Southern District of California, San Diego

Before: M. SMITH, COLLINS, and LEE,
Circuit Judges.

ORDER

Appellees' Motion for Clarification, Modification or Reconsideration re: Denial of Attorneys' Fees (ECF No. 41) is **DENIED**.

MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARCH 7, 2023)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

MARK D. POTTER,

Appellant,

v.

JULIO YEE CABRERA;
ENRIQUE WONG VASQUEZ,

Defendants-Appellees,

WILLIAM ANTHONY ADAMS,

Appellee.

and

BEAMSPEED, LLC, an Arizona Limited Liability Company; DOES, 1-10,

Defendants.

No. 22-55273

D.C. No. 3:14-cv-00333-JAH-RBB

Appeal from the United States District
Court for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted December 9, 2022
Pasadena, California

Before: M. SMITH, COLLINS, and LEE,
Circuit Judges.

Partial Concurrence and
Partial Dissent by Judge COLLINS.

MEMORANDUM*

Plaintiff appeals the district court's imposition of sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. For the reasons below, we affirm the sanctions award under Section 1927 but vacate the Rule 11 sanctions.

1. The district court did not abuse its discretion by imposing sanctions pursuant to 28 U.S.C. § 1927. Section 1927 provides for imposition of "excess costs, expenses, and attorneys' fees" on counsel who "multiplies the proceedings in any case unreasonably and vexatiously." In conducting review of a district court's factual findings in support of sanctions, we "would be justified in concluding that [the court] had

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

abused its discretion in making [the findings] only if [they] were clearly erroneous." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 386 (1990)) (alterations in original). The district court's legal findings must be affirmed unless they result from a "materially incorrect view of the relevant law." *Id.* (quoting *Cooter & Gell*, 496 U.S. at 402).

Plaintiff argues that the Section 1927 award should be vacated because the district court did not make a finding of "subjective bad faith" on the part of counsel. But our case law states that while "bad faith is required for sanctions under the court's inherent power" to sanction, "recklessness suffices" for the imposition of sanctions under Section 1927. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (quoting *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001)).

Here, the district court's finding that Plaintiff's counsel "ignor[ed] Defendants' counsel's repeated requests for a copy of the settlement agreement and then doubl[ed] the settlement demand," is sufficient for purposes of imposing sanctions under the statute, as the conduct multiplied proceedings in an unreasonable manner. *See id.* ("Here defense counsel's misconduct multiplied the proceedings by prompting the motion for a mistrial and the subsequent imposition of sanctions."); *cf. Christian*, 286 F.3d at 1129 (finding that district court did not abuse its discretion in awarding sanctions where counsel "sought to resurrect [a] copyright claim by deluging the district court with supplemental filings."). It was inexcusable for Plaintiff to have filed this duplicative suit without first retrieving and reviewing the prior settlement

agreement, and the district court reasonably concluded that the unjustified delay in producing the agreement adversely affected the course of the settlement discussions and unreasonably lengthened the proceedings.

Moreover, the district court's reference to counsel's conduct in "doubling the settlement demand" must be understood in the context of its additional factual findings in support of sanctions in its prior order. The court, for example, found that Plaintiff increased the settlement amount "to punish Defendants"; and that "Plaintiff's emails appear[ed] to be indicative of vexatious behavior as opposed to zealous advocacy."[1] These findings further support the district court's Section 1927 sanctions award.

2. The district court did abuse its discretion in imposing Rule 11 sanctions, however. In the parties' first appeal, we explained that Rule 11 sanctions "appl[y] to signed writings filed with the court," while Section 1927 sanctions are "aimed at penalizing conduct that unreasonably and vexatiously multiplies the proceedings." *Lozano v. Cabrera*, 678 F. App'x 511, 513 (9th Cir. 2017). We further explained that "[e]ach

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[1] We reject Plaintiff's contention that the district court's order did not make clear which attorneys were the subject of the sanctions imposed under Section 1927. Viewing the order in context, it is clear that the court's sanctions were directed at the attorneys whose conduct underlay the court's findings—namely, Phyl Grace and Mark Potter. To the extent that Plaintiff now contends that there was sufficient evidence to support a sanctions award under Section 1927 against Grace but not against Potter, no such differential argument was raised below. In any event, the grounds we have described above extend sufficiently to both counsel that we cannot say that the district court abused its discretion in extending its order to both attorneys.

of these sanctions alternatives has its own particular requirements, and it is important that the grounds be separately articulated to assure that the conduct at issue falls within the scope of the sanctions remedy." *Id.* (citing *Christian*, 286 F.3d at 1127). Where, as here, the complaint is the primary focus of Rule 11 proceedings, a district court must determine "whether the complaint is legally or factually 'baseless' from an objective perspective." *Christian*, 286 F.3d at 1131.

Here, the district court explained that it found the lawsuit to be baseless because "the plain language of the stipulation for dismissal clearly indicat[ed] the court retained jurisdiction over 'all disputes between (among) the parties arising out of the settlement agreement,'" thereby precluding the need for a new lawsuit. Plaintiff, however, correctly notes that he raised colorable arguments in support of filing the second lawsuit even in light of this language.

For example, he notes that at least one portion of the agreement's release language referred to claims that "may have arisen prior to the effective date" of the agreement, which he argued supported his view that future claims involving new conduct may not have been released. He also argued that, under his reading of the settlement's language, there were no terms in the settlement binding defendants that Plaintiff could have enforced through a motion. Therefore, even though we did ultimately reject Plaintiff's arguments on the merits in the prior appeal, *Lozano,* 678 F. App'x at 513, the district court did not demonstrate that the facts surrounding the pleadings filed warranted Rule 11 sanctions.

AFFIRMED IN PART, REVERSED IN PART. Each party shall bear its own costs on appeal. The

Clerk is directed to forward a copy of this memorandum to the State Bar of California, with copies to attorneys Mark Potter and Phyl Grace. *Cf.* Cal. Bus. & Prof. Code § 6086.7(a)(3), (b). We note that, in its earlier sanctions order, the district court stated that the record contained evidence of "questionable settlement practices with opposing parties" by Plaintiff's counsel that "suggest[ed] conduct bordering upon, if not an actual, violation of the code of conduct." Although we do not rely on such alleged practices in our decision, we nonetheless call the district court's observation to the State Bar's attention for whatever consideration, if any, it may warrant.

COLLINS, CIRCUIT JUDGE, CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority that the district court abused its discretion in awarding sanctions under Federal Rule of Civil Procedure 11, and I therefore concur in Part 2 of the memorandum disposition. But I would also reverse the district court's separate award of sanctions under 28 U.S.C. § 1927, and I therefore dissent from Part 1 of the majority's decision.

Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. To warrant sanctions under this provision, the conduct must be at least reckless, *see Lahiri v. Universal Music and Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010), and it must cause the proceedings to be multiplied "in both an 'unreasonable and vexatious manner.'" *In re Girardi*, 611 F.3d 1027, 1060–61 (9th Cir. 2010). The district court abused its discretion in finding that this standard was met here.

The district court's § 1927 sanctions award was based on the premise that, by "ignoring Defendants' counsel's repeated requests for a copy of the settlement agreement and then doubling the settlement demand when they finally provided a copy of the agreement to Defendant's counsel, *rather than dismissing the action*, [Plaintiffs' counsel] unreasonably multiplied proceedings in this matter" (emphasis added). To the extent that this analysis rests on the view that Plaintiffs' counsel, after retrieving and reviewing the

settlement agreement, should have immediately "dismiss[ed] the action" outright, that is just another way of saying that the district court thought that counsel pursued a frivolous case. That theory necessarily fails for the same reasons that the district court's reliance on Rule 11 fails. *See* Mem. Dispo. at 5.

Given that the § 1927 sanctions cannot be sustained on the theory that Plaintiff's counsel multiplied the proceedings by pursuing frivolous claims, the only remaining question is whether there is any *other* basis for concluding that Plaintiffs' counsel can be said to have multiplied the proceedings either by (1) delaying the production of the prior settlement agreement or by (2) doubling the settlement demand in this case. The answer is no.

As an initial matter, the delay in producing the settlement agreement from the earlier case was fairly modest. Defendants' counsel first requested the settlement agreement on April 11, 2014 and Plaintiffs' counsel finally provided a copy on April 30—a delay of only 19 days. No court activity took place during those 19 days; there were no impending court deadlines; and Defendants' counsel did not file a motion to dismiss until August of that year. Accordingly, there is no sense in which it can be said that the delay in providing the settlement agreement caused any *filings or court proceedings* to take place that would not have otherwise occurred. *Cf. B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (holding that counsel multiplied proceedings by engaging in bad-faith conduct that necessitated a motion for mistrial).

That leaves only the theory that, by delaying production of the prior settlement agreement and doubling the settlement demand for this case, Plaintiffs'

counsel unreasonably and vexatiously multiplied the proceedings by *causing the case not to settle*. The majority upholds the sanctions award on this basis, *see* Mem. Dispo. at 3–4, but in my view, there simply is no factual basis in this record for concluding that Plaintiffs' counsel's challenged conduct derailed a settlement that was otherwise in the offing.

The prior settlement agreement was delivered to Defendants' counsel on April 30, 2014, and less than one hour later the settlement demand for this case was doubled. But by that point, the parties' respective settlement positions had already consistently remained far apart. Until the demand was doubled, Plaintiffs' counsel had repeatedly demanded $6,000 and had shown no willingness to accept a lower number. Although Defendants' counsel had moved from offering only non-monetary relief to offering $2,000, there is no evidence that Plaintiffs' counsel would ever have accepted that number. Nor is there any evidence—other than sheer speculation—that the parties might otherwise have agreed to a number between those two. In one communication, Defendants' counsel noted that the statutory damages under the Unruh Act were fixed at "$4,000 ($2,000 for quick repairs)," *see generally* CAL. CIV. CODE §§ 52(a), 55.56(f)(2) (2014 ed.), but he then explained that this was an "extremely rare and unique" case that warranted "something other than formulaic treatment." Thus, even if this communication were generously construed as obliquely floating a compromise at $4,000, there is no actual basis in the record for concluding that Plaintiffs' counsel would ever have accepted that number. Accordingly, to the extent that the district court concluded that, but for the delay in the production of the prior

settlement agreement and the doubling of the current settlement demand, the case would otherwise have settled, that finding rests on "unadulterated speculation" and is therefore "clearly erroneous." *United States v. Coffey*, 233 F.2d 41, 43–44 (9th Cir. 1956).

Because none of the grounds identified by the district court can support a conclusion that Plaintiffs' counsel "unreasonably and vexatiously" "multiplie[d] the proceedings," 28 U.S.C. § 1927, I would reverse the district court's sanctions award under that statute as well. I therefore respectfully dissent from Part 1 of the majority's memorandum disposition.

ORDER GRANTING RULE 11 SANCTIONS AND SANCTIONS UNDER 28 U.S.C. § 1927, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (MARCH 2, 2022)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ENRIQUE LOZANO,

Plaintiff,

v.

JULIO YEE CABRERA, ET. AL.,

Defendant.

Case No.: 14cv00333 JAH-RBB

Before: John A. HOUSTON,
United States District Judge.

ORDER GRANTING RULE 11 SANCTIONS AND SANCTIONS UNDER 28 U.S.C. § 1927, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

INTRODUCTION

In March 2001, Plaintiff filed a cause of action against Defendants Julio Yee Cabrera and Enrique Wong Vazquez asserting violations of the Americans with Disabilities Act ("ADA"), Unruh Civil Rights Act ("Unruh"), California's Disabled Persons Act ("CDPA"), and negligence. The parties settled the action pursuant to a settlement agreement in which they agreed the district court retained jurisdiction to enforce the agreement. The court approved the dismissal of the action on September 18, 2001.

On February 12, 2014, Plaintiff filed a complaint for damages and injunctive relief for violations of the ADA, Unruh and the CDPA against Cabrera and Vazquez in the instant action.[1] Defendants moved to dismiss the complaint for lack of jurisdiction and later, filed a motion seeking attorney's fees pursuant to 28 U.S.C. Section 1927.

Finding the Court lacked jurisdiction, this Court granted Defendants' motion to dismiss without prejudice and the Clerk of Court entered judgment. Plaintiff filed a notice of appeal of the judgment. Thereafter, Defendants filed a motion for issuance of Rule 11 sanctions. This Court granted the motion for sanctions and, later, denied the motion for issuance of sanctions pursuant to section 1927. Plaintiff appealed the Court's order granting sanctions.

The Ninth Circuit Court of Appeals issued its mandate affirming the dismissal[2] but vacating the

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[1] Plaintiff also named Beamspeed, LLC who was later dismissed from the action.

[2] The Ninth Circuit disagreed with the Court's conclusion that

sanctions award and remanding the matter. In its order spreading the mandate, this Court permitted the parties to file simultaneous supplemental briefing and responsive pleadings addressing the motions for sanctions.

Defendants filed a supplemental brief. Instead of filing a supplemental brief, Plaintiff filed a response to Defendants' brief and filed a request for judicial notice of the arguments taken in the legal briefs filed in the appeal.[3] Defendants filed a response to Plaintiff's brief and a notice of recent authority.

DISCUSSION

In its decision vacating the sanctions award, the Ninth Circuit determined this Court invoked the wrong procedural mechanism to support the sanctions imposed because the Court considered extra-pleadings conduct in awarding sanctions under Rule 11. The Ninth Circuit remanded the matter to allow this Court to consider whether to award sanctions under section 1927 or to clarify its reasons for imposing sanctions under Rule 11.

Defendants seek sanctions under both Rule 11 and section 1927. Defendants argue the order granting Rule 11 sanctions should stand without reduction because Plaintiff violated the prior settlement agreement and stipulation for dismissal by filing this action. They further argue the Court's prior findings of misconduct support additional sanctions under

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it lacked jurisdiction but found the lawsuit was barred by the prior settlement.

[3] The Court grants the request to take judicial notice.

section 1927. Plaintiff argues there has been no sanctionable conduct. He suggests the Ninth Circuit erred in ruling the prior settlement agreement barred this action and maintains he had a colorable legal argument to support the filing of the action. He also contends section 1927 sanctions are unwarranted because the record does not support this Court's prior findings and even if it did, it does not support sanctions.

I. Rule 11

Rule 11 imposes a duty on attorneys or unrepresented parties, to certify by their signature, the pleading is "not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation;" is "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;" "the factual contentions have evidentiary support" and "the denials of factual contentions are warranted." Fed. R. Civ. P. 11(b). The purpose of this rule is to curb baseless filings. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 39798 (1990). Sanctions under Rule 11 must be appropriate and "limited to what suffices to deter repetition of the conduct or comparable conduct." Fed. R. Civ. P. 11(c). They may include "payment of the reasonable attorney's fees and other expenses resulting from the violation." *Id*.

The record demonstrates sanctions are appropriate under Rule 11 due to Plaintiff and Plaintiff's counsel's action in filing and maintaining this baseless lawsuit. The record reflects Plaintiff and his law firm initiated a nearly identical complaint against the same defendants addressing the exact parking space at issue in the prior action, in which Plaintiff was represented

by the same counsel. Plaintiff and Plaintiff's counsel knew or were in the best position to know that Plaintiff settled with the same defendants and entered an agreement for retention of jurisdiction over enforcement of the settlement agreement. The parties agreed, in the settlement agreement, that the designated disabled parking space complied with the ADA guidelines. Additionally, the plain language of the stipulation for dismissal clearly indicates the court retained jurisdiction over "all disputes between (among) the parties arising out of the settlement agreement." *See* Doc. No. 19-3 at 27. In light of the clear language of the stipulation for dismissal, Plaintiff had no colorable legal argument to support filing this action. As such, the Court finds the lawsuit was not legally tenable and Rule 11 sanctions are warranted.

II. Section 1927

Pursuant to 28 U.S.C. section 1927, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Sanctions are permitted when an attorney intends to harass, or either knowingly or recklessly makes frivolous arguments. *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1107 (9th Cir. 2002). A fee award under section 1927 may include "excess costs, expenses and attorney's fees reasonably incurred because of" the sanctionable conduct. 28 U.S.C. § 1927.

Plaintiff's counsels' conduct of ignoring Defendants' counsel's repeated requests for a copy of the settlement agreement and then doubling the settlement demand when they finally provided a copy of the agreement

to Defendant's counsel, rather than dismissing the action, unreasonably multiplied proceedings in this matter. Counsel's conduct supports sanctions under section 1927.

Defendants seek $29,855 which represent the fees incurred from the time they first requested the settlement agreement from Plaintiff's counsel through the filing of the motion for sanctions. The Court finds that amount represents fees reasonably incurred as a result of counsel's sanctionable conduct.

Accordingly, IT IS HEREBY ORDERED:

1. Defendants' motion for Rule 11 sanctions is GRANTED. Plaintiff and Plaintiff's counsel shall pay Defendants' counsel $15,000.

2. Defendant' motion for attorney's fees is GRANTED. Plaintiff's counsel shall pay Defendants' counsel $29,855.

/s/ John A. Houston
United States District Judge

Dated: March 2, 2022

APPELLEES' MOTION FOR ATTORNEYS' FEES AND DECLARATION OF WILLIAM A. ADAMS (MARCH 20, 2023)

No. 22-55273

(Related appeal nos. 15-55535 & 16-55522)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

MARK D. POTTER,

Appellant,

v.

JULIO YEE CABRERA;
ENRIQUE WONG VASQUEZ,

Defendants-Appellees,

WILLIAM A. ADAMS,

Appellee.

On Appeal from the United States District Court
for the Southern District of California
Case No. 3:14-CV-00333 JAH – RBB
Hon. John A. Houston, Judge

APPELLEES' MOTION FOR ATTORNEYS' FEES AND DECLARATION OF WILLIAM A. ADAMS NORTON MOORE & ADAMS L.L.P.

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Julio Yee Cabrera and Enrique Wong Vasquez
No. 22-55273

[TOC, TOA, Omitted]

Appellees Julio Yee Cabrera, Enrique Wong Vasquez, and William A. Adams seek recovery of attorney's fees in the amount of $53,056 pursuant to Ninth Circuit Local Rule 39-1.6 and 28 U.S.C. § 1927 for the time reasonably expended after the District Court fee award to defeat Appellants' Enrique Lozano and Mark D. Potter appeal of the District Court's order granting Appellees' motion for attorney's fees pursuant to 28 U.S.C. § 1927 of the Americans with Disabilities Act ("ADA").[1]

Appellees are prevailing parties because the March 7, 2023 Opinion affirmed the District Court's award of attorney fees under 28 U.S.C. § 1927. The

[1] Appellees have concurrently filed a motion to transfer this motion for fees to the District Court for consideration pursuant to Ninth Circuit Local Rule 39-1.8, given its familiarity with the matter and counsel.

fees requested are reasonable and were necessary to secure the affirmance of the District Court award as discussed below.

1. This fee request is timely.

This Court's Opinion was filed on March 7, 2023. Appellants's time to petition for rehearing expired on March 21, 2023. (Ninth Circuit Local Rule 40(a)(1)). This Motion is timely filed within fourteen days of "the expiration of the period within which a petition for rehearing may be filed." (Ninth Circuit Local Rule 39-1.6(a)). This information is provided in compliance with Ninth Circuit (Local Rule 39-1.6(b)(3)).

2. Appellees are entitled to recover attorney's fees on appeal.

Appellees were awarded attorney's fees pursuant to 28 U.S.C. § 1927 for their "excess costs, expenses, and attorneys' fees" because Appellants' "multiplie[d] the proceedings . . . unreasonably and vexatiously. (28 U.S.C. § 1927) It is well established that a party who is awarded attorney's fees in the trial court is also entitled to its fees when it prevails on appeal. *See Legal Voice v. Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014) ("a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal"); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir.2008) ("This is so because it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee."). Finally, in a case similar to the present, this Court in *Whitaker v. 370 N. Canon*

Drive, 2022 U.S. App. LEXIS 1171, *1-2 (9th Cir. 2022) ruled:

> "Generally, a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal." *Legal Voice v. Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014). We have determined that Appellees were entitled to an award of attorneys' fees in the district court. They are therefore entitled to fees on appeal as well.

Although cases on appellate attorney's fees such as *Legal Voice* and *Planned Parenthood* have fee awards based on § 1988, there is no meaningful difference for the standard for awarding fees in the trial court under § 1927 for vexatious conduct that unreasonably multiplies the proceedings:

> Under 42 U.S.C. § 1988, a prevailing defendant may be awarded fees at the trial court's discretion where the plaintiff's action, even though not brought in subjective bad faith, is "'frivolous, unreasonable, or without foundation.'" *Parks v. Watson*, 716 F.2d 646, 664 (9th Cir. 1983) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978)).

Soffer v. Costa Mesa, 798 F.2d 361, 364 (9th Cir. 1986).

Appellants cannot argue that Appellees were not the prevailing party in this appeal. Appellants filed and unsuccessfully prosecuted three appeals spanning 8 years. Appellants appealed the District Court's dismissal and also appealed the District Court's sanction/attorney fee orders. (Appeal nos. 15-55535,

16-55522, & 22-55273) By this motion, Appellee is only seeking recovery of their fees concerning the latter two appeals. Despite a remand of the District Court's first sanctions order, and a partial overruling of its post-remand revised order Appellant's appeals resulted in a net increase in the award to Appellees of $14,855. Appellants' appeals failed to achieve any net improvement for themselves over the District Court's original rulings – just the opposite. In other words, had they not appealed at all, Appellants would have been in a better position than the position they ultimately achieved via their appeals. Their appeals may have achieved a fine tuning of the legal basis for the sanctions but achieved nothing in the way of lessening the sanction when compared to the start of their appellate journey. Nevertheless, Appellants have caused Appellees to incur substantial additional fees in an amount which has entirely deprived them of the District Court's intention of compensating them for the "excess costs, expenses, and attorneys' fees" from Appellants' multiplication of "the proceedings . . . unreasonably and vexatiously." (28 U.S.C. § 1927). Thus, in order to accomplish the intent of the upheld-award of attorney fees, Appellee's must be compensated for their additional attorney fees incurred as a result of Appellants' unsuccessful appeals.

3. Attorney Fees are not Costs under Rule 39.

In its March 7, 2023 opinion, this Appellate Court stated: "Each party shall bear its own costs on appeal." (Opinion at 5-6). In an opinion last year, this Appellate Court stated:

> [W]e hold that the term "costs" under Federal Rule of Appellate Procedure 39 does not

> include attorney's fees recoverable as part of costs under 42 U.S.C. § 1988 and similar statutes. The district court properly awarded attorney's fees to Family PAC for the previous appeal."

Family PAC v. Ferguson, 745 F.3d 1261, 1269 (9th Cir. 2014). Accordingly, this Court upheld the right to recover attorney fees in an appeal of the granting of attorney fees. Interestingly, that decision distinguished a Supreme Court opinion that denied the recovery of appeals-related attorney fees under an earlier version of 28 U.S.C. § 1927 under which the definition of "costs" did not include attorney fees. *Family PAC, supra*, 1264, discussing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Three months after the *Roadway* decision, Congress amended 28 U.S.C. § 1927 to expressly include attorney fees. (Pub. L. 96-349, 94 Stat. 1154 (Sept. 12, 1980)). But rather than attorney fees an item of "costs," Congress amended § 1927 to make recoverable "excess costs, expenses, and attorney fees." (emphasis added). Therefore, this Court's instruction that each party "bear its own costs on appeal" neither pertains to attorney fees either under App. Rule 39 nor under § 1927.

4. The amount of fees sought was reasonable and necessary.

For their success in this appeal, Appellees seek a total of $53,056, of which $51,306 are already incurred and $1,750 are anticipated. Attached as Exhibit A is the Court's Form 9. Attached as Exhibits B and C are the timesheets for Appellees' counsel for their time charged following the fee award by the District Court.

Appellants filed multiple appeals spanning 8 years. Two of the three appeals related directly to the District Court sanctions. In each of their opening briefs, Appellants raised a number of legal arguments. The briefs contained 46 and 45 pages of substantive argument, respectively. Additionally, upon the Court's remand concerning Appellant's first sanctions appeal (16-55522), the District Court requested additional briefing. Thus, Appellee researched and prepared an additional brief for the District Court. Moreover, after waiting for more than four years for a ruling by the District Court, and with Defendant / Appellee Enrique Wong Vasquez being 92 years of age at the time (he and his wife have since passed away), and Defendant / Appellee Julio Yee Cabrera 86, Appellee researched and drafted an ex parte application, together with a memorandum of points and authorities, requesting that the District Court expedite issuance of a decision. As set forth in the declaration of William A. Adams, the total hours spent was reasonable and necessary to defeat the two sanctions appeals, research and draft remand briefing, prepare the ex parte application, and counter all the legal arguments made by Appellants on the appeals and finally, for the preparation of this motion for attorney fees. "It's now well established that time spent in preparing fee applications under 42 U.S.C. § 1988 is compensable. [Citation.]" *Anderson v. Dir., Office of Workers Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996). *Anderson* applies with equal force to fee applications brought pursuant to unsuccessful appeals of § 1927 fee awards.

CONCLUSION

This Court should award Appellees $53,056 pursuant to 28 U.S.C. § 1927 and Ninth Circuit Local Rule 39-1.6.

Date: March 20, 2023

Norton Moore Adams, LLP by:

/s/ William A. Adams
Attorney for Appellees Julio Yee Cabrera, Enrique Wong Vasquez, and William A. Adams

DECLARATION OF WILLIAM A. ADAMS

William A. Adams declares:

1. I am an attorney licensed to practice law in the state of California and admitted to practice before the United States District Court for the Central District of California and before the Ninth Circuit Court of Appeals.

2. Exhibit A attached to this motion is the completed Form 9 of this Court for this case.

3. Exhibit B attached to this motion is my timesheet detailing the hours charged for the work performed beginning after Appellants filed a Notice of Appeal in 2016 when the District Court awarded Appellees attorney fees for the defense of the action.

4. Exhibit C attached to this motion is the timesheet of my junior attorney at the time, Ridgeway James Woulfe (Cal. SBN 309837), who also worked on this matter – in the first appeal of the sanctions (16-55522).

5. Appellants have filed three unsuccessful appeals spanning eight years, all directly pertaining to the District Court's dismissal of their lawsuit and sanctioning of Appellants' for the manner in which they conducted the litigation. Appellants filed briefs of 46 and 45 substantive pages of argument, respectively. They raised theories never raised in the District Court. This Appellate Court remanded the District Court's first award of sanctions, asking for clarification but expressly not casting doubt on the District Court's issuance of sanctions. The District Court then requested additional briefing. Thus, Appellee researched and prepared an additional brief for the District Court.

Then, after a little more than four years, Appellees had not yet received the District Court's post-remand ruling. Defendant / Appellee Enrique Wong Vasquez was 92 years of age at the time, and Defendant / Appellee Julio Yee Cabrera was 86. Accordingly, Appellees prepared and filed an ex parte application seeking expedition of the District Court's remand-ruling. The ex parte application was successful, with the District Court issuing its updated ruling shortly thereafter. In the second Appeal, Appellants gained a partial overruling of the revised award of sanctions and attorney fees. However, Appellants achieved a zero net improvement over the District Court's original ruling. In other words, had they never appealed, Appellants would have been in a better position than the position they ultimately achieved via their appeals. Their appeals achieved nothing in the way of lessening the sanctions when compared to the start of their appellate journey – just the opposite. Nevertheless, Appellants have caused Appellees to incur substantial additional fees in an amount which has entirely deprived them of the District Court's intention of compensating them for the "excess costs, expenses, and attorneys' fees" from Appellants' multiplication of "the proceedings in any case unreasonably and vexatiously." (28 U.S.C. § 1927) Moreover, justice delayed is justice deprived in the 8 years since the District Court dismissed Plaintiff's lawsuit and held it to be frivolous. One of the two Defendant/Appellees has now passed away.

6. Appellants asserted a number of arguments in their two appeals of the sanctions orders and authored briefs that nearly exhausted the page limits for briefing. Their arguments required numerous

counter-arguments, not raised in the District Court, that required extensive research and writing.

7. My work on this case to oppose Appellants' two sanctions appeals was reasonable and necessary to affirm the District Court award of fees. My hours in this 8-year appellate process are 114.55. They are contained in Exhibit B. They include 14.85 hours for the research and preparation of this Motion for Fees. All these hours pertained to Appellants' appeal of the attorney fees award (Appeal Nos. 16-55522 and 22-55273) and none pertained to Appellants appeal of the District Court's dismissal of their lawsuit (Appeal No. 15-55535).

8. The hours of the junior attorney, Ridgeway James Woulfe, who worked on the first attorney fees-appeal, (16-55522) are contained in Exhibit C. According to the time sheets he provided me, he spent 74.76 hours researching, writing, reviewing documents, and conducting other appeals related tasks.

9. My standard hourly rate is $350. This rate is reasonable in light of my 35 years of experience as an attorney and the rates awarded by the courts on this type of case in the Central District. I have handled the defense of disability access cases for more than 20 years in the Southern and Central Districts and in the 9th Circuit, including some of the most cited defense-favorable opinions in ADA litigation. Among these opinions are *Org. for the Advancement of Minorities v. Brick Oven Rest.,* 406 F.Supp.2d 1120 (S.D.Cal. 2005), *Reyes v. Flourshings Plus, Inc.*, 2019 U.S.Dist.LEXIS 74495 (S.D.Cal. May 1, 2019, No. 19cv261 JM (WVG), and *Schutza v. Cuddeback*, 262 F. Supp. 3d 1025 (S.D.Cal. 2017). The *Cuddeback*

opinion case has nearly 3,400 citing opinions according to Shepard's citator.

10. I am aware that ADA/Unruh plaintiff counsel with less experience than I have been awarded between $400 to $500 per hour. *See e.g.*, *Hoang Minh Le v. Hickory One, Ltd.*, 2018 U.S. Dist. LEXIS 228563, at *5 (C.D. Cal. Mar. 12, 2018); *Rutherford v. Hellas, Inc.*, 2018 U.S. Dist. LEXIS 228544, at *17 (C.D. Cal. Mar. 19, 2018); *Uriarte-Limon v. Leyv*a, 2017 U.S. Dist. LEXIS 222113, at *5-6 (C.D. Cal. June 30, 2017); *Lee v. Winebright Warner* LLC, 2021 U.S. Dist. LEXIS 72338, at *10 (C.D. Cal. Apr. 13, 2021).

11. Additionally, I am requesting $150 an hour for the work performed by my junior attorney on the appeals. At the time he was in his first and second years as a California licensed attorney.

12. Appellees request attorney fees be awarded in favor of Appellees in the amount of $51,306 (114.55 hours @ $350 + 74.76 hours @ $150 = $51,306). Additionally, I estimate another 5 hours will be incurred to Review and Reply to Appellant's Opposition to this motion, respond to Court notices, and other related matters, adding $1,750 in fees, bringing the total to $53,056.

I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct.

Date: March 20, 2023

/s/ William A. Adams

APPELLEES' MOTION FOR CLARIFICATION, MODIFICATION OR RECONSIDERATION RE: DENIAL OF ATTORNEYS' FEES AND DECLARATION OF WM. ADAMS (APRIL 28, 2023)

No. 22-55273

(Related appeal nos. 15-55535 & 16-55522)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

MARK D. POTTER,

Appellant,

v.

JULIO YEE CABRERA;
ENRIQUE WONG VASQUEZ,

Defendants-Appellees,

WILLIAM A. ADAMS,

Appellee.

On Appeal from the United States District Court
for the Southern District of California
Case No. 3:14-CV-00333 JAH – RBB
Hon. John A. Houston, Judge

APPELLEES' MOTION FOR CLARIFICATION, MODIFICATION OR RECONSIDERATION RE: DENIAL OF ATTORNEYS' FEES AND DECLARATION OF WM. ADAMS

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Julio Yee Cabrera and Enrique Wong Vasquez
No. 22-55273

[TOC, TOA, Omitted]

MOTION AND ARGUMENT

Appellees Julio Yee Cabrera, Enrique Wong Vasquez, and William A. Adams hereby seek clarification, modification, or reconsideration of the Order issued April 18, 2023 ("the Order") denying their motion for attorneys. This motion is made pursuant to Circuit Rule 27-10.[1]

[1] This is not a disfavored motion because only motions assigned to the Motions Panel are designated as disfavored. Circuit Advisory Committee Notes to Rule 271 (3)(a) and 27-10. Appellees motion for fees was not assigned to the Circuit Motions Panel.

1. This motion is timely and complies with procedural requirements.

This Court's Order denying Appellees was filed on April 18, 2023. This Motion "must be filed within 14 days after entry of the order." (Ninth Circuit Local Rule 27-10(a)(2)). Appellee filed this motion within this timeframe. Additionally, as set forth in the accompanying declaration, Appellees' counsel has met and conferred with Appellant's counsel Russell Handy, Esq. pursuant Ninth Circuit Local Rule 27-1(5). Appellants oppose the relief requested herein.

2. Appellees Request Clarification, Modification, or Reconsideration.

Appellees bring this motion on the following grounds:

1) This Court's Order set forth no factual basis, reasoning, or legal authority for denying Appellees' motion for attorney fees. All parties to the appeal are left to speculate regarding the grounds for denial. (Decl. Wm Adams)

2) Appellants filed no opposition to Appellees' motion for attorney fees.

3) This Court did not issue a notice of filing deficiency.

4) Appellees timely filed their motion for fees pursuant to Ninth Circuit Rule 39-1.6(a) and the motion complied with all other procedural and format requirements of Rule 39-1.6.

5) Appellees motion for fees demonstrated that it was consistent with the Court's Memoran-

dum of Decision, March 7, 2023, instructing that each party bear their own costs, because this Court has held that fees are expressly excluded from costs under Federal App. Rule 39. *Family PAC v. Ferguson*, 745 F.3d 1261, 1269 (9th Cir. 2014)

6) Appellants appealed the District Court's grant of statutory attorney fees pursuant to 28 U.S.C. § 1927 to compensate Appellees for fees incurred in connection with Appellants' unreasonable and vexatious multiplication of proceedings.

7) The Court's denial appears to conflict with recent rulings from this Court. Appellees cited 9th Circuit appellate precedent holding that when appellants unsuccessfully appeal attorney fees awarded against them pursuant to statute, including cases of the same type at issue here (involving identical plaintiff's counsel), appellees may recover their reasonable attorney fees incurred in the appeal, to wit:

> "Generally, a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal." *Legal Voice v. Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014). We have determined that Appellees were entitled to an award of attorneys' fees in the district court. They are therefore entitled to fees on appeal as well.

Whitaker v. 370 N. Canon Drive, 2022 U.S. App. LEXIS 1171, *1-2 (9th Cir. 2022).

8) This Court upheld the District Court's award of attorney fees to Appellees under 28 USC § 1927, and thus Appellees are entitled to additional attorney fees incurred in the appeal.

9) Appellants' success in overturning the District Court's Rule 11 sanctions does not effect Appellees right to recover attorney fees for Appellant's unsuccessful appeal of the District Court 28 USC § 1927 fee award. Even if Appellant's overall appeal was considered "a draw" for having been "half successful," Appellees right to attorney fees is not based on a "prevailing party" fee shifting statute applicable to the appeal as a whole. Rather Appellees' right to attorney fees under § 1927 is specific to itself and independent of any right to attorney fees in connection with Appellant's appeal of the Rule 11 sanctions. Appellant's success in overturning the Rule 11 sanctions did not create an offsetting right to attorney fees. Additionally, the two statutes apply to different conduct. Rule 11 grants sanctions for frivolous pleadings while § 1927 grants attorney fees to compensate for fees incurred in connection with unreasonable and vexatious multiplication of the proceedings, even if the underlying action is not frivolous. At most, Appellants' success in overturning the Rule 11 sanctions would allow a reduction in the fees recoverable by Appellees (*e.g.* based on the ratio of the

amount at issue under each statute). It would be unjust to remove Appellees' right to appellate attorney fees under § 1927 just because this Court determined that the District Court was in error in also granting Rule 11 sanctions.

10) The Denial of Appellee's motion for attorney fees incurred in the appeal defeats the purpose of the upheld District Court order, as well as 28 USC § 1927 itself, to compensate Appellees for their reasonable fees arising from Appellant's unreasonable and vexatious multiplication of the proceedings, including appeals arising therefrom. "This is so because it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir.2008).

11) Appellee's motion for attorney fees was accompanied by a motion for transfer of the motion to the District Court for consideration, which remains Appellee's preferred option.

As a result of the Order which provided no reasons or authority, Appellees are left to speculate regarding the basis for the Court's denial, or even whether it was a clerical or computer error. They are unaware of any substantive authority or fatal procedural error for denial of their motion.

CONCLUSION.

Accordingly, Appellees respectfully request modification of the Order issued April 18, 2023 providing the reasoning and legal authority for denial of their motion for attorney fees; and if appropriate, for modification of the Order so as to award such fees or a portion thereof. Alternatively, Appellees request that their motion for attorney fees be transferred to the District Court for consideration and a ruling.

/s/ William A. Adams
Attorney for Appellees Julio Yee Cabrera, Enrique Wong Vasquez, and William A. Adams

Date: April 28, 2023

DECLARATION OF WILLIAM A. ADAMS

William A. Adams declares:

1. I am an attorney licensed to practice law in the state of California and admitted to practice before the United States District Court for the Central District of California and before the Ninth Circuit Court of Appeals.

2. Exhibit A attached to this motion is the Court of Appeal's Order of April 18, 2023

3. I emailed Russell Handy, Esq. on April 25, 2023 to inquire if he opposed this motion, and if he knew the basis for the Court's ruling. His position is that he opposes this motion. However, he also stated that he didn't know and thought it was "odd" that the Court did not provide reasoning or authority in the Order denying attorney fees. However, he speculated as to several theories for the Court's denial, all of which I believe are refuted in the motion for attorney fees as well as the motion for clarification, etc.

4. In trying to determine a reason for the Court's denial of Appellees' motion for attorney fees, it did come to my belated attention that I inadvertently failed to contact and determine Appellant's position on the motion prior to filing it. I'm not an experienced appellate attorney and missed that part of the Local Rules (Circ. Local Rule 27-1(5)). I don't believe there was prejudice to Appellants because their opposition appeared to be a foregone conclusion, which they have corroborated in connection with this motion. Nevertheless, that does not appear to have been the likely basis for denying the motion outright, particularly given that Appellants failed to file an Opposition to

the motion when they received notice of it. In any case, I have corrected the error in this motion. Moreover, I offered to Appellant's counsel not to oppose a request by Appellant to file an untimely Opposition. However, Appellant's counsel declined to accept my offer in exchange for not opposing the relief requested by this motion.

I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct.

Date: April 28, 2023

/s/ William A. Adams

APPELLANT'S OPPOSITION TO THE MOTION RECONSIDERATION (MAY 12, 2023)

No. 22-55273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUE LOZANO,

Plaintiff-Appellant,

v.

JULIO YEE CABRERA; ET AL.,

Defendants and Appellee.

United States District Court for the
Southern District of California
Case No. 3:14-CV-00333 JAH-RBB
John A. Houston, District Judge

APPELLANT'S OPPOSITION TO THE MOTION RECONSIDERATION CENTER FOR DISABILITY ACCESS

CENTER FOR DISABILITY ACCESS
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San Francisco, California 94111

Phone (858) 375-7385
Fax (888) 422-5191
Attorneys for Appellant

Lozano opposes the motion for reconsideration. This Court's decision to preemptively deny the recovery of fees to Cabrera was properly decided.

Unlike other cases where there is a statutory entitlement to fees in the underlying case and, therefore, a statutory entitlement to fees for successful appeals, this case does not fall into that category. Cabrera had no entitlement to fees in the underlying case. He was awarded sanctions for discrete acts that district court found constituted the vexatious multiplying of proceedings under 28 U.S.C. § 1927.

Here, though, there has been no claim that Lozano's appeal is, itself, sanction worthy. Lozano's appeal was successful in getting Rule 11 sanctions—not small issue–reversed. Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. To warrant sanctions under this provision, the conduct to be compensated for must cause the proceedings to be multiplied "in both an 'unreasonable and vexatious manner.'" *In re Girardi*, 611 F.3d 1027, 1060–61 (9th Cir. 2010).

Here, Lozano's appeal does not meet that standard. The appeal itself, partially successful, did not multiply proceedings in a way that was unreasonable and vexatious. Thus, Cabrera should bear its own attorney's fees and costs just as he must for *every other part* of

the lawsuit that did not involve the specific vexatious conduct.

Dated: May 12, 2023

CENTER FOR DISABILITY ACCESS

By: /s/ Russell Handy
Russell Handy, Esq.
Attorney for Appellant