

United States Court of Appeals,
Tenth Circuit.
DOMINION VIDEO SATELLITE, INC., Plaintiff-Appellee,

v.

ECHOSTAR SATELLITE L.L.C., f/k/a Echostar Satellite Corporation, Defendant-Appellant,
Todd A. Jansen, T. Wade Welch, and Ross W. Wooten, Parties of Interest-Appellants.

Nos. 04-1465, 05-1080.

Dec. 7, 2005.

Background: Operator of Christian-themed television network sued satellite television broadcaster for declaratory and injunctive relief, asserting that broadcaster violated exclusivity provisions of parties' transponder lease agreement by accepting other channels' applications to broadcast their programming on its transponders. The District Court granted preliminary injunction in favor of operator, denied competing channel's motion to intervene, and ordered parties to begin arbitration, [270 F.Supp.2d 1205](#). Broadcaster and competing channel appealed. The Court of Appeals reversed in part and dismissed in part, [356 F.3d 1256](#). The United States District Court for the District of Colorado, [John L. Kane](#), J., confirmed arbitration award and awarded operator its costs, expenses, and attorneys' fees incurred in responding to broadcaster's frivolous motions. Broadcaster appealed.

Holdings: The Court of Appeals, [Tacha](#), Chief Circuit Judge, held that: [\(6\)](#) attorneys multiplied proceedings unreasonably and vexatiously; and [\(7\)](#) attorneys had sufficient notice of specific conduct which became basis for award.

Affirmed.

1272 Submitted on the briefs: ^{FN} [Todd Jansen](#), Cockrell, Quinn & Creighton, Denver, CO; [T. Wade Welch](#) and [Ross W. Wooten](#), T. Wade Welch & Associates, Houston, TX, for Defendant-Appellant.

^{FN*} After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See [Fed. R.App. P. 34\(a\)\(2\)](#); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[Mark D. Colley](#) and [Cameron W. Fogle](#), Holland & Knight LLP, Washington, DC; [Thomas D. Leland](#), Hale Friesen LLP, Denver, CO, for Plaintiff-Appellee.


Before [TACHA](#), Chief Circuit Judge, [BALDOCK](#), and [O'BRIEN](#), Circuit Judges.

[TACHA](#), Chief Circuit Judge.



This case began in 2003 when Plaintiff-Appellee Dominion Video Satellite, Inc. ("Dominion") claimed that Defendants-Appellants EchoStar Satellite Corporation and Echosphere Corporation

(collectively, “EchoStar”) were in breach of a lease agreement between the parties and sought to have the matter arbitrated as required by the agreement. After holding hearings on the dispute, the arbitration panel found in favor of Dominion and granted it \$2,438,178 in damages. Dominion moved the District Court to confirm the award, pursuant to the Federal Arbitration Act, [9 U.S.C. §§ 9](#) and [13](#). EchoStar vigorously opposed both the arbitration panel's decision as well as Dominion's motion to confirm by filing numerous motions and supporting memoranda. In October 2004, the District Court confirmed the arbitration award. **It also determined that EchoStar had unreasonably and vexatiously extended the arbitration hearings and court proceedings. As a result, the District Court sanctioned counsel for EchoStar and awarded Dominion its costs, expenses, and attorneys' fees incurred in responding to EchoStar's frivolous motions. See [28 U.S.C. § 1927](#). EchoStar appeals the confirmation of the arbitration award; its counsel also appeals the fees and costs awarded to Dominion. We take jurisdiction of both appeals under [28 U.S.C. § 1291](#) and AFFIRM.**

III. [SECTION 1927](#) SANCTIONS


[\[15\]](#)  Mr. Jansen, Mr. Welch, and Mr. Wooten (collectively, “attorneys for EchoStar” or “EchoStar's attorneys”) challenge the basis for the District Court's order sanctioning them under [28 U.S.C. § 1927](#). They also claim they were not accorded sufficient due process prior to being sanctioned.

A. *Standard of Review*

[\[16\]](#)  [\[17\]](#)  [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](#). Sanctions under [§ 1927](#) are appropriate when an attorney acts “recklessly or with indifference to the law.” [Braley, 832 F.2d at 1511](#). They may also be awarded “when an attorney is cavalier or bent on misleading the court; intentionally acts without a plausible basis; [or]when the entire course of the proceedings was unwarranted.” [Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1342 \(10th Cir.1998\)](#) (quotations and internal citations omitted). A decision to impose [§ 1927](#) *1279 sanctions is reviewed only for abuse of discretion. [Griffen v. City of Okla. City, 3 F.3d 336, 342 \(10th Cir.1993\)](#).

B. *Merits*




1. *Scope of [§ 1927](#)*

[\[18\]](#)  EchoStar's attorneys contend that the District Court abused its discretion in determining that their acts fell within the purview of [§ 1927](#). The crux of their argument is that they filed the motions and briefs in opposition to confirmation of the award, to vacate the award, and in opposition of attorneys' fees only to preserve the issues for appeal.^{FN6}


[FN6](#). EchoStar also argues that the District Court abused its discretion in imposing sanctions because its attorneys did not act in bad faith. This Court, however, has explicitly held that [§ 1927](#) does not require a finding of bad faith. [Braley, 832 F.2d at 1512](#).

It is evident from the record and the course of litigation that the behavior of EchoStar's attorneys was both “unreasonable and vexatious.” The District Court found that, given the narrow standard of review, the arguments presented on behalf of EchoStar were completely meritless and therefore the course of the proceedings was unwarranted. The District Court also found that these attorneys need not have filed lengthy briefs at every stage of the arbitration and court proceedings in order to preserve EchoStar's arguments for appeal. Nothing in the record indicates that the District Court abused its discretion in finding such action sanctionable.


2. Due Process

[\[19\]](#)  [\[20\]](#)  [\[21\]](#)  “The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond.” [Braley, 832 F.2d at 1514](#). In determining whether due process has been afforded, no bright-line rule applies because “[d]ue process is a flexible concept, and the particular procedural protections vary, depending upon all the circumstances.” *Id.* EchoStar's attorneys first assert that they were not given sufficient notice of the specific conduct which became the basis for Dominion's costs and fees.

A review of the record discloses that Dominion asked for [§ 1927](#) sanctions in its brief opposing EchoStar's motion to vacate the final arbitration award. As a basis for sanctions, Dominion asserted that EchoStar filed the motion to vacate with the sole intention of delaying payment of the arbitration award to Dominion. Dominion labeled the motion frivolous and concluded that “EchoStar has abused the judicial process in an effort to extend the duration of its breach and avoid paying Dominion just compensation.” In addition, Dominion filed a reply in support of its motion to confirm in which Dominion similarly asserted that EchoStar's opposition to confirmation of the award is “another pretext for resistance and delay” and is “utterly frivolous.” Finally, at the hearing on October 20, 2004, Dominion's counsel made reference to EchoStar's “multiple filings and challenges” and pointed out that Dominion had asked for sanctions in a prior brief to the court. At the same hearing, EchoStar's attorneys attempted to demonstrate that their actions were legitimate, which undermines any argument that they did not know what conduct might be sanctioned. Each of these facts belies the attorneys' present claim that they did not have sufficient notice of the specific conduct that was being considered for sanctions. It is clear that counsel knew Dominion had sought fees based on the fact that EchoStar filed several untenable motions and briefs, including the motion to *1280 vacate the award and its motion in opposition to confirm the award.

[\[22\]](#)  EchoStar's attorneys also argue that they were denied due process because they were not given an opportunity to contest the amount of the attorneys' fees alleged by Dominion. The record reflects, however, that after the District Court determined that fees were appropriate at the October 20 hearing, it outlined a clear process to be followed in order to determine the amount of

fees chargeable to EchoStar's counsel: it asked the parties to file a statement of agreement, and it specified that if the parties could not agree the court would appoint a special master to resolve the dispute. Dominion followed through with this process by sending a proposed agreement to EchoStar listing fees in excess of \$60,000. EchoStar's counsel, however, completely ignored the proposed agreement, and instead, only filed an opposition motion once Dominion filed its November 5th motion to the District Court seeking its fees. Because EchoStar failed to take advantage of the process afforded them, it cannot now complain that it was not afforded an opportunity to respond. See [Santana v. City of Tulsa, 359 F.3d 1241, 1244 \(10th Cir.2004\)](#) (stating that the availability of sufficient procedure satisfies due process requirements if the complainant fails to take advantage of the procedure).

 [23] Finally, EchoStar's counsel argues that the District Court abused its discretion in sua sponte imposing an additional \$750 sanction at the January 2005 fees hearing. As the District Court explained, the sanction was based on the amount of attorneys' fees Dominion incurred as a result of EchoStar's failure to respond to Dominion's October 29th letter requesting attorneys' fees. The District Court found that EchoStar's conduct "unnecessarily complicated and delayed this case." These grounds were substantially similar to the basis for sanctions EchoStar's attorneys had been apprized of several months earlier. As a result, these individuals cannot credibly claim that they did not know that filing a brief in opposition to attorneys' fees without conferring with opposing counsel in direct violation of the court's instructions might subject them to further sanctions under [§ 1927](#). See [Sally Beauty Co. Inc. v. Beautyco, Inc., 372 F.3d 1186, 1191 \(10th Cir.2004\)](#) (stating that imposition of costs because of attorney's disregard for court imposed deadline is "reasonably foreseeable" and therefore counsel had adequate notice). Moreover, EchoStar's attorneys were present at the hearing and attempted to explain why they failed to respond to Dominion's request for fees. Under the facts and circumstances of this case, we find that this was a sufficient opportunity to respond to the imposition of sanctions for their conduct. See *id.* (stating that less process is due when a relatively small monetary sanction is to be divided among several persons). The District Court therefore did not abuse its discretion in ordering counsel for EchoStar to pay Dominion its reasonable attorneys' fees of \$62,686.02 plus the additional \$750.

IV. CONCLUSION

EchoStar has failed to show that the arbitration panel acted fraudulently or with a manifest disregard for the law. We therefore affirm the District Court's order confirming the final award. Because we also find EchoStar's appeal of the District Court's order to be frivolous, Dominion may file a motion seeking reasonable attorneys' fees within fifteen days of the filing of this opinion; EchoStar will then have fifteen days to respond. Finally, we conclude that the District Court did not abuse its discretion in awarding Dominion *1281 \$63,436.02 in attorneys' fees and costs under [28 U.S.C. § 1927](#).

C.A.10 (Colo.),2005.

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