

AUG 07 2012

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP Nos. CC-11-1684-DMkKi
)	CC-11-1685-DMkKi
6	IBT INTERNATIONAL, INC.;)	(Related appeals)
	SOUTHERN CALIFORNIA SUNBELT)	
7	DEVELOPERS, INC.,)	Bk. Nos. 02-10608-ES
)	02-10617-ES
8	Debtors.)	

9
10 IBT INTERNATIONAL, INC.;

11 SOUTHERN CALIFORNIA SUNBELT

12 DEVELOPERS, INC.,

13 Appellants,

v.

MEMORANDUM¹

14 BANYON LIMITED PARTNERSHIP;

15 ORANGE BLOSSOM LIMITED

16 PARTNERSHIP; PEAR TREE LIMITED

17 PARTNERSHIP; DONALD W.

18 GRAMMAR; VAN DAN LIMITED

19 PARTNERSHIP; CTM LIMITED

20 PARTNERSHIP; DTG LIMITED

21 PARTNERSHIP; BIRCH

22 INTERNATIONAL LIMITED

23 PARTNERSHIP; GALLERY I, INC.;

24 HAMPTON LIMITED PARTNERSHIP;

25 KEY ENTERPRISES, INC.; SLEVIN

26 LIMITED PARTNERSHIP;

27 SNOWTHUNDER, INC.; TRAILS END

28 LIMITED PARTNERSHIP; DAVID H.

29 TEDDER,

30 Appellees.

Argued and Submitted on July 19, 2012
at Pasadena, California

Filed - August 7, 2012

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appeal from the United States Bankruptcy Court
2 for the Central District of California

3 Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

4 Appearances: William Miles Burd, Esq. of Burd & Naylor for the
5 Appellants IBT International, Inc. and Southern
6 California Sunbelt Developers, Inc.; Thomas W.
7 Dressler, Esq. of the Dressler Law Group, LLP for
8 Appellees Banyon Limited Partnership, Orange
9 Blossom Limited Partnership, Pear Tree Limited
10 Partnership and Donald W. Grammar; Stella Havkin,
11 Esq. of Litwak & Havkin for Appellees Van Dan
12 Limited Partnership, CTM Limited Partnership,
13 DTG Limited Partnership, Birch International
14 Limited Partnership, Gallery I, Inc., Hampton
15 Limited Partnership, Key Enterprises, Inc., Slevin
16 Limited Partnership, Snowthunder, Inc., Trails End
17 Limited Partnership and David H. Tedder.

18 Before: DUNN, MARKELL and KIRSCHER, Bankruptcy Judges.
19
20

21 Southern California Sunbelt Developers, Inc. ("SCSD") and
22 IBT International, Inc. ("IBT") appeal the bankruptcy court's
23 order denying their motions for post-judgment attorney's fees and
24 costs ("post-judgment fee motions").² Specifically, SCSD and IBT
25 sought awards of attorney's fees and costs incurred in defending
26 against an appeal of attorney's fees and costs and punitive
27 damages earlier awarded in their favor under § 303(i). The
28 bankruptcy court declined to award SCSD and IBT their post-
judgment attorney's fees and costs, based on its reading of

29 ² Unless otherwise indicated, all chapter, section and rule
30 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
31 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
32 enacted and promulgated prior to the effective date (October 17,
33 2005) of most of the provisions of the Bankruptcy Abuse
34 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
35 April 20, 2005, 119 Stat. 23 ("BAPCPA").

1 Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701 (9th Cir.
2 2004).³ We AFFIRM.

3 **FACTS**⁴

4 Ten years ago, thirteen creditors filed involuntary
5 chapter 11 bankruptcy petitions against SCSD and IBT.⁵ Donald
6 Grammar and David Tedder controlled the petitioning creditors.⁶

7
8
9 ³ SCSD and IBT are related entities that each appealed the
10 post-judgment fee order (CC-1685 and CC-11-1684, respectively).
11 They each filed opening briefs and reply briefs in their
12 respective appeals; their opening and reply briefs nearly are
13 identical.

14 ⁴ We have taken many of the facts from the 9th Circuit
15 opinion, Orange Blossom Ltd. P'ship v. Southern California
16 Sunbelt Devs., Inc. (In re Southern California Sunbelt Devs.,
17 Inc.), 608 F.3d 456 (9th Cir. 2010), which addressed SCSD and
18 IBT's earlier award of attorney's fees and costs under § 303(i).
19 We recite only those facts relevant to the appeals before us.

20 ⁵ The thirteen petitioning creditors are Banyon Limited
21 Partnership, Birch International Limited Partnership, Van Dan
22 Limited Partnership, CTM Limited Partnership, DTG Limited
23 Partnership, Gallery I, Inc., Hampton Limited Partnership, Key
24 Enterprises, Inc., Orange Blossom Limited Partnership, Pear Tree
25 Limited Partnership, Slevin Limited Partnership, Snowthunder,
26 Inc., and Trails End Limited Partnership.

27 ⁶ According to the petitioning creditors, Tedder controlled
28 DTG Limited Partnership, Van Dan Limited Partnership, Hampton I
29 Limited Partnership and Key Enterprises, Inc. BAP Rule 8010(a)-
30 1(b) Disclosure Statement to Petitioning Creditors' Response
31 Brief. Grammer controlled Banyan Limited Partnership, Orange
32 Blossom Limited Partnership and Pear Tree Limited Partnership.
33 Id. Richard McGrath controlled Trails End Limited Partnership,
34 Slevin Limited Partnership, CTM Limited Partnership and
35 Snowthunder, Inc. Id. Daniel Schoenman controlled Birch
36 International Limited Partnership and Gallery I, Inc. Id.

37 According to the Ninth Circuit, only Tedder and Grammar
38 controlled the petitioning creditors.

1 The bankruptcy court dismissed the involuntary petition against
2 SCSD after finding that the petitioning creditors' claims were
3 the subject of a bona fide dispute under § 303(b). It also
4 dismissed the involuntary petition against IBT on a motion by the
5 petitioning creditors.

6 SCSD and IBT thereafter filed motions for attorney's fees
7 and costs and punitive damages under § 303(i) ("§ 303(i) fee
8 motions").⁷ They also sought sanctions against Grammar and
9 Tedder under Rule 9011 and the bankruptcy court's inherent power.
10 SCSD and IBT did not seek damages under § 303(i)(2)(A).

11 After a month-long evidentiary hearing on the § 303(I) fee
12 motions, the bankruptcy court entered judgment against Grammar,
13 Tedder and the petitioning creditors ("§ 303(I) fee judgment").
14 It held the petitioning creditors jointly and severally liable
15 under § 303(i)(1) for \$745,318 in costs and attorney's fees
16 incurred by SCSD and IBT, including costs and fees they incurred
17 during the post-dismissal proceedings on the § 303(I) fee
18 motions. It further found that the petitioning creditors had
19

20
21 ⁷ Section 303(I) provides: If the court dismisses a petition
22 under this section other than on consent of all petitioners and
23 the debtor, and if the debtor does not waive the right to
24 judgment under this subsection, the court may grant judgment -

- 25 (1) against the petitioners and in favor of the debtor
26 for -
27 (A) costs; or
28 (B) a reasonable attorney's fee;
(2) against any petitioner that filed the petition in
bad faith, for -
(A) any damages proximately caused by such filing;
or
(B) punitive damages.

1 filed the involuntary chapter 11 petitions in bad faith under
2 § 303(i)(2)(B), holding them jointly and severally liable for
3 \$130,000 in punitive damages (\$5,000 per creditor per petition).
4 Under its inherent power to impose sanctions, the bankruptcy
5 court also held Grammar and Tedder jointly and severally liable
6 for costs and attorney's fees awarded against the petitioning
7 creditors.

8 Grammar, Tedder and the petitioning creditors appealed to
9 the district court, which affirmed the § 303(I) fee judgment in
10 its entirety. They then appealed to the Ninth Circuit. In its
11 opinion, Orange Blossom Ltd. P'Ship v. Southern California
12 Sunbelt Devs., Inc. (In re Southern California Sunbelt Devs.,
13 Inc.), 608 F.3d 456 (9th Cir. 2010), the Ninth Circuit affirmed
14 the § 303(I) fee judgment in part and reversed it in part.

15 Specifically, the Ninth Circuit affirmed the § 303(I) fee
16 judgment as against the petitioning creditors. Id. at 460. It
17 also affirmed that portion of the § 303(I) fee judgment against
18 Grammar and Tedder for the attorney's fees and costs SCSD and IBT
19 incurred in obtaining dismissal of the involuntary petitions.
20 Id.

21 The Ninth Circuit determined that the bankruptcy court did
22 not err by awarding attorney's fees incurred by SCSD and IBT in
23 pursuing their claims under § 303(i)(1) and (2), as § 303(i)(1)
24 was a fee shifting provision. Id. at 463. It pointed out that
25 in statutory fee cases, it has held that time spent in
26 establishing entitlement to and the amount of attorney's fees was
27 compensable under § 303(i)(1). Id. (citing In re Nucorp Energy,
28 Inc., 764 F.2d 655, 659-60 (9th Cir. 1985)). Relying on Comm'r

1 v. Jean, 496 U.S. 154 (1990), the Ninth Circuit further reasoned
2 that in fee shifting statutes, such as § 303(I), a fee award
3 presumptively encompassed all aspects of the civil action. Id.

4 It reversed that portion of the § 303(I) fee judgment
5 against Grammar and Tedder for costs and fees incurred by SCSD
6 and IBT on the § 303(I) fee motions themselves. Id. Based on
7 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), the Ninth
8 Circuit held that sanctions must be limited to the costs of
9 opposing the offending pleading or motion. Id. at 466. It
10 concluded that the bankruptcy court erred by holding Grammar and
11 Tedder personally liable for the costs and fees incurred by SCSD
12 and IBT on their post-dismissal motions. Id. at 467.

13 Back before the bankruptcy court, SCSD and IBT filed their
14 post-judgment fee motions. They sought attorney's fees and costs
15 incurred in defending the appeal of the § 303(I) fee judgment
16 before the district court and the Ninth Circuit and in moving for
17 an award of post-judgment attorney's fees and costs.⁸ They also
18 sought attorney's fees and costs incurred from and after July
19 2011 in preparing and prosecuting the post-judgment fee motions.
20 Id.

21 Relying on North Sports, Inc. v. Knupfer (In re Wind N'
22 Wave), 509 F.3d 938 (9th Cir. 2007), SCSD and IBT contended that
23 where a party obtained an award under a fee shifting statute and
24 then was required to defend the award on appeal, that party was
25 entitled to attorney's fees and costs on appeal so as not to

26
27 ⁸ For the period from January 2006 to July 2011, SCSD sought
28 \$185,464.50 in attorney's fees and \$8,479.74 in costs, and IBT
sought \$66,648.50 in attorney's fees and \$998.59 in costs.

1 dilute the award.

2 In Wind N' Wave, the petitioning creditors filed a
3 successful involuntary chapter 7 petition against the debtor.
4 They later moved for an award of attorney's fees under
5 § 503(b)(4) ("§ 503(b)(4) fee motion"), which the bankruptcy court
6 denied. The Wind N' Wave petitioning creditors appealed to this
7 Panel, which reversed the bankruptcy court's denial of their
8 § 503(b)(4) fee motion. The case was remanded to the bankruptcy
9 court for a determination as to the appropriate award of
10 attorney's fees.

11 The Wind N' Wave petitioning creditors later moved for an
12 award of attorney's fees incurred in the appeal of their
13 § 503(b)(4) fee motion to this Panel ("appellate fees motion").
14 The Panel summarily denied the Wind N' Wave petitioning
15 creditors' appellate fees motion. They then appealed the
16 appellate fees motion denial to the Ninth Circuit.

17 The Ninth Circuit in Wind N' Wave determined that the Panel
18 erred in denying the appellate fees motion. It vacated and
19 remanded to this Panel with instructions to clarify that the
20 denial was without prejudice to the petitioning creditors seeking
21 an award under § 503(b)(4) from the bankruptcy court.

22 Relying on In re Nucorp Energy, 764 F.2d 655 (9th Cir.
23 1985), and Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d
24 918 (9th Cir. 2002),⁹ the Ninth Circuit held that fees and costs
25 incurred in connection with litigation over fees awarded under

26 _____
27 ⁹ Smith dealt with an award of attorney's fees incurred in
28 defending against a frivolous challenge to an authorized fee
application made under § 330(a). See Smith, 317 F.3d at 928-29.

1 § 503(b)(4) were compensable so long as (1) the services for
2 which the fees were sought met the requirements of § 503(b)(4);
3 and (2) the case exemplified a set of circumstances where the
4 time and expense incurred by the litigation were necessary. It
5 reasoned that litigation over fee awards should be compensable.
6 Otherwise they would be diluted. If an attorney had to spend
7 time litigating his or her fee claim but might not be compensated
8 for that time, the Ninth Circuit in Wind N' Wave continued, the
9 attorney's effective rate for the hours spent on the bankruptcy
10 case would be decreased.

11 The Ninth Circuit determined that the attorney's fees the
12 Wind N' Wave petitioning creditors sought met the statutory
13 requirements because the Wind N' Wave petitioning creditors
14 established an allowable expense under § 503(b)(3)(filing an
15 involuntary petition under § 503(b)(3)(A)), and the attorney's
16 fees for the appellate services performed were reasonable. It
17 further determined that the litigation was necessary because
18 appeal of the bankruptcy court's denial of their request for
19 attorney's fees was the only way through which the Wind N' Wave
20 petitioning creditors could recover their attorney's fees.

21 The petitioning creditors opposed SCSD and IBT's post-
22 judgment fee motions, contending that Wind N' Wave was
23 inapplicable as it dealt with § 503(b), not § 303(i). They
24 pointed out that the Ninth Circuit already addressed attorney's
25 fees and costs incurred on appeal within the context of § 303(i)
26 in Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701 (9th Cir.
27 2004). The petitioning creditors argued that, under Higgins,
28 only trial-level costs and fees were recoverable under § 303(I).

1 In Higgins, the debtor sought an award under § 303(i) for
2 attorney's fees and costs incurred in litigating dismissal of the
3 involuntary chapter 7 petition. The debtor also sought an award
4 of attorney's fees and costs in defending against the petitioning
5 creditors' subsequent appeal of the dismissal. The Ninth Circuit
6 determined that the bankruptcy court did not err in awarding the
7 debtor attorney's fees and costs related to the initial
8 litigation. It determined that the bankruptcy court erred,
9 however, in awarding attorney's fees and costs related to the
10 appeal of the dismissal of the involuntary chapter 7 petition.

11 The Ninth Circuit relied on its earlier decision, State of
12 Cal. Emp. Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d
13 1147 (9th Cir. 1996), in making its determination. The Ninth
14 Circuit in Del Mission held that Rule 38 of the Federal Rules of
15 Appellate Procedure ("FRAP") was the only authority for awarding
16 discretionary appellate fees in bankruptcy appeals. It reasoned
17 that a bankruptcy court's express discretionary authority to
18 award fees at the trial level should not be inferred at the
19 appellate level. Thus guided by Del Mission, the Ninth Circuit
20 in Higgins determined that § 303(i)(1) "which expressly grant[ed]
21 discretionary authority to award [attorney's] fees at the trial
22 level, should not be construed to grant similar authority to
23 award [attorney's] fees at the appellate level." Higgins,
24 379 F.3d at 709.

25 However, the petitioning creditors continued, if Higgins and
26 Wind N' Wave were found to be in conflict despite the fact that
27 they address different sections of the Bankruptcy Code, only the
28 Ninth Circuit sitting en banc could reverse Higgins.

1 At the October 20, 2011 hearing on the post-judgment fee
2 motions, the bankruptcy court found that it was bound by the
3 Ninth Circuit's decision in Higgins. It acknowledged that
4 although Higgins and Wind N' Wave were similar in that they both
5 dealt with fee shifting statutes, Higgins specifically addressed
6 § 303(I). The bankruptcy court reasoned that "where there [was]
7 a specific statute that [was] being analyzed and it [was] the
8 statute that [it] had to look to to make the decision regarding
9 the award of fees," it was bound by that Ninth Circuit decision,
10 even though other Ninth Circuit decisions had arrived at
11 different conclusions on similar fee shifting statutes. Tr. of
12 October 20, 2011 hr'g, 12:23-25, 13:1-3. See also Tr. of
13 October 20, 2011 hr'g, 14:6-10 ("[W]hen it's the [N]inth
14 [C]ircuit and they're making that statement and it seems pretty
15 clear to [the bankruptcy court] and it seems fairly unequivocal,
16 and it's interpreting, you know, the exact statute that [the
17 bankruptcy court has] to apply, that's where [it] come[s] out.");
18 Tr. of October 20, 2011 hr'g, 15:2-4. It determined that

19 the language [in Higgins looked] fairly conclusive and
20 it look[ed] fairly general in terms of the [Ninth
21 Circuit] making the distinction between trial level
22 costs and fees and appellate cost [sic] and fees, and
23 as to the parameters of where this Court can go in
24 terms of awarding fees under [§] 303(I), [the
25 bankruptcy court could not] see a way around that
26 decision.

24 Tr. of October 20, 2011 hr'g, 13:8-13. The bankruptcy court
25 found that the ruling in Higgins was "pretty definitive and it
26 look[ed] like the [Ninth Circuit was] absolutely making a
27 distinction legally between what's allowable under [§] 303(I) and
28 what [wasn't]." Tr. of October 20, 2011 hr'g, 14:1-4.

1 The bankruptcy court admitted that it did not agree with the
2 holding in Higgins because it believed that if a party could
3 recover trial fees and costs, that party should be able to
4 recover appellate fees and costs. It observed that even the
5 Ninth Circuit seemed conflicted by its determination, but it
6 recognized that it was bound by the language of § 303(I).

7 On November 23, 2011, the bankruptcy court entered an order
8 denying the post-judgment fee motions ("post-judgment fee
9 order").¹⁰ SCSD and IBT timely appealed.

10 **JURISDICTION**¹¹

11 The bankruptcy court had jurisdiction under 28 U.S.C.
12 §§ 1334 and 157(b)(2)(A) and (B). We have jurisdiction under
13 28 U.S.C. § 158.

14 **ISSUE**

15 Did the bankruptcy court err in declining to award SCSD and
16 IBT attorney's fees and costs incurred defending against the
17 appeal of the § 303(I) fee judgment?

18 **STANDARD OF REVIEW**

19 We review de novo the bankruptcy court's conclusions of law,
20

21 ¹⁰ It explicitly stated in the post-judgment fee order that
22 it was bound by Higgins in making its determination.

23 ¹¹ IBT and SCSD moved for certification for direct appeal to
24 the Ninth Circuit, which the Panel granted by order filed
25 March 19, 2012. Approximately one month later, IBT and SCSD
26 notified the Panel that they would not seek direct appeal to the
27 Ninth Circuit, as they realized that the chapter 11 involuntary
28 petition had been filed before the effective date of BAPCPA.
(Under 28 U.S.C. § 158, amended by BAPCPA, parties can seek
certification for direct appeal from the bankruptcy court to the
Ninth Circuit.)

1 including its interpretation of the Bankruptcy Code. Southern
2 California Sunbelt Devs., Inc., 608 F.3d at 461. "We will not
3 disturb a bankruptcy court's award of attorney's fees unless the
4 [bankruptcy] court abused its discretion or erroneously applied
5 the law." Id.

6 DISCUSSION

7 We face an interesting legal dilemma on appeal: How do we
8 reconcile two seemingly contrary Ninth Circuit precedents
9 involving two similar fee shifting provisions of the Bankruptcy
10 Code? Wind N' Wave deals with the grant of an award of appellate
11 fees under § 503(b)(4) while Higgins deals with the denial of an
12 award of appellate fees under § 303(i)(1).

13 A. Further examination of Wind N' Wave and Higgins

14 As we summarized above, the Ninth Circuit in Wind N' Wave
15 held that creditors' attorneys may receive compensation for
16 litigation over a fee award under fee shifting provisions, even
17 when those provisions did not expressly allow for it. Wind N'
18 Wave, 509 F.3d at 942. Citing Nucorp and Smith, the Ninth
19 Circuit reasoned that "litigation over a fee award should also be
20 compensable, otherwise fee awards would be diluted: If an
21 attorney is required to expend time litigating his fee claim, yet
22 may not be compensated for that time, the attorney's effective
23 rate for all the hours expended on the case will be
24 correspondingly decreased." Id. at 943 (quoting Prandini v.
25 Nat'l Tea Co., 585 F.2d 47, 52-53 (3rd Cir. 1978)(internal
26 quotation marks omitted)). Notably, the Ninth Circuit recognized
27 in Wind N' Wave that it made its pronouncement in Nucorp in
28 dicta.

1 The Ninth Circuit in Wind N' Wave acknowledged that it was
2 dealing with § 503(b)(4), which involved compensation for
3 creditors' attorneys, whereas Smith dealt with § 330(a), which
4 involved compensation for debtors' attorneys. It managed to
5 reconcile Wind N' Wave and Smith, however, by determining that,
6 although the two provisions dealt with different kinds of
7 attorney's fees, they had the same meaning because they both
8 contained nearly identical language. Wind N' Wave, 509 F.3d at
9 944-45.

10 The Ninth Circuit in Higgins took a different tack in
11 dealing with an award of appellate attorney's fees incurred in
12 defending an award of attorney's fees under § 303(i)(1). There,
13 the Ninth Circuit held that, although § 303(i)(1) gave bankruptcy
14 courts discretionary authority to award attorney's fees at the
15 trial level, it did not grant them similar authority to award
16 attorney's fees at the appellate level. Higgins, 379 F.3d at
17 709. The Ninth Circuit cited Del Mission in support of its
18 holding.

19 Del Mission dealt with this Panel's award of appellate fees
20 as a sanction under § 105(a). In Del Mission, the bankruptcy
21 court earlier ordered the California Employment Development
22 Department and the State Board of Equalization (collectively, the
23 "State") to repay the chapter 7 bankruptcy estate certain taxes,
24 as the State had violated the automatic stay under § 362(a)(3).
25 The State failed to comply while the underlying bankruptcy case
26 was on appeal. The chapter 7 trustee consequently sought to hold
27 the State in civil contempt and to impose sanctions in the form
28 of his attorney's fees and costs for having to enforce the

1 automatic stay on appeal. The bankruptcy court denied the
2 chapter 7 trustee's request to impose sanctions, determining that
3 it had no legal authority to award fees incurred on prior
4 appeals. This Panel reversed the bankruptcy court, awarding the
5 chapter 7 trustee the fees and costs he incurred in the prior
6 appeals.

7 The Ninth Circuit in Del Mission reversed this Panel,
8 holding that § 105(a) did not authorize bankruptcy courts to
9 award previously incurred appellate fees. It relied on Vasseli
10 v. Wells Fargo Bank (In re Vasseli), 5 F.3d 351 (9th Cir. 1993),
11 which held that bankruptcy courts lacked authority to award
12 appellate attorney's fees under § 523(d). In Vasseli, the Ninth
13 Circuit relied on FRAP 38 in support of its holding. The Ninth
14 Circuit determined that FRAP 38 authorizes only appellate courts,
15 not bankruptcy courts, to award attorney's fees and other
16 expenses incurred by an appellee in response to a frivolous
17 appeal. Vasseli, 5 F.3d at 353. The Ninth Circuit held that
18 while § 523(d) authorized attorney's fees for the debtor, "it
19 [did] not grant the bankruptcy court authority to award
20 attorney's fees to the debtor for appellate representation
21" Id. The Ninth Circuit moreover determined that
22 appellate courts lacked authority "to delegate this power" to
23 bankruptcy courts. Id.

24 Applying the holding of Vasseli, the Ninth Circuit in Del
25 Mission concluded that a bankruptcy court's express discretionary
26 authority under § 105(a) to award fees at the trial level did not
27 extend to allow it to award fees at the appellate level. Del
28 Mission, 98 F.3d at 1153-54. The Ninth Circuit further reasoned

1 that using § 105(a) as a device to award appellate fees would
2 overlap with FRAP 38. Id. at 1154.

3 The Ninth Circuit in Del Mission noted that its holding was
4 "limited to awards of discretionary appellate fees in bankruptcy
5 proceedings." Id. at 1154 n.7 (emphasis added). It did not
6 consider whether other bankruptcy provisions might expressly
7 authorize an award of appellate fees. Id.

8 The Ninth Circuit in Higgins acknowledged in a footnote that
9 its holding created "a discrepancy." Id. at 709 n.3. It
10 recognized that "[d]espite Congress's clear intent to award
11 attorney's fees and costs to an alleged debtor who successfully
12 defends [against] an involuntary bankruptcy [petition], the
13 debtor remain[ed] exposed to appellate attorney's fees unless it
14 [could] be demonstrated that the appeal was frivolous under
15 [FRAP] 38." Id. The Ninth Circuit concluded, however, that only
16 Congress could rectify the discrepancy. Id.

17 **B. SCSD and IBT's arguments on appeal**

18 SCSD and IBT insist that Higgins does not apply because it
19 is factually distinguishable from their case. They contend that,
20 contrary to the bankruptcy court's determination, Higgins is not
21 the controlling Ninth Circuit authority because it dealt with
22 appellate fees incurred from the appeal of an order by the
23 bankruptcy court dismissing the involuntary chapter 7 petition.
24 Their case deals, however, with appellate fees incurred in
25 defending an award of attorney's fees and costs granted by the
26 bankruptcy court. SCSD and IBT urge us to read Higgins narrowly;
27 it should be read only as precluding an award of appellate fees
28 incurred in an appeal of the merits of an involuntary bankruptcy

1 petition. They argue that because the facts of their case are
2 nearly identical to those in Wind N' Wave, Wind N' Wave should
3 control.

4 **C. Higgins controls**

5 As SCSD, IBT and the petitioning creditors recognize,
6 circuit law "binds all courts within a particular circuit." Hart
7 v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001). Once a panel
8 of circuit judges "resolves an issue in a precedential opinion,
9 the matter is deemed resolved, unless overruled by the [circuit]
10 court itself sitting en banc, or by the Supreme Court." Id.

11 Binding authority within this regime cannot be
12 considered and cast aside; it is not merely evidence of
13 what the law is. Rather, caselaw on point is the law.
14 If a court must decide an issue governed by a prior
15 opinion that constitutes binding authority, the later
16 court is bound to reach the same result, even if it
17 considers the rule unwise or incorrect. Binding
18 authority must be followed unless and until overruled
19 by a body competent to do so.

20 Id. at 1170 (emphasis in original). See also id. at 1175 ("A
21 district court bound by circuit authority, for example, has no
22 choice but to follow it, even if convinced that such authority
23 was wrongly decided.").

24 In determining whether we are bound by an earlier decision,
25 we must consider the "reason and spirit of the cases" and "the
26 letter of particular precedents." Id. (quoting Fisher v. Prince,
27 97 Eng. Rep. 876, 876 (K.B. 1762)(internal quotation marks
28 omitted)). We thus consider "the rule announced . . . the facts
giving rise to the dispute, other rules considered and rejected
and the views expressed in response to any dissent or
concurrence." Id. "Insofar as there may be factual differences
between the current case and the earlier one, [we] must determine

1 whether those differences are material to the application of the
2 rule or allow the precedent to be distinguished on a principled
3 basis. [We] occasionally must reconcile seemingly inconsistent
4 precedents and determine whether the current case is closer to
5 one or the other of the earlier opinions." Id. at 1172.

6 We recognize the tension between Wind N' Wave and Higgins.
7 We agree with the bankruptcy court that a party should be able to
8 recover appellate fees and costs if that party can recover trial
9 fees and costs. As the Ninth Circuit in Wind N' Wave reasoned,
10 any litigation over an award of attorney's fees should be
11 compensable. Otherwise the attorney's fees awarded will be
12 diluted. But, like the bankruptcy court, we are bound to follow
13 Higgins, a Ninth Circuit decision that directly addresses the
14 issue before us: whether the bankruptcy court has the authority
15 to award appellate attorney's fees incurred in defending against
16 an appeal of an award of attorney's fees already granted under
17 § 303(I).¹² The Ninth Circuit in Higgins decreed that a
18 bankruptcy court lacks such authority.

19 As the bankruptcy court pointed out, the Ninth Circuit in
20 Higgins expressed uneasiness with its ruling. The Ninth Circuit
21 realized that its ruling in Higgins created a discrepancy in the
22 case law. But it felt constrained by the language of
23 § 303(i)(1), which the Ninth Circuit read as providing a
24

25 ¹² SCSD and IBT argue that the circumstances underlying the
26 appeal of the award of attorney's fees and costs are the
27 distinguishing factor. Unlike Higgins, their case does not
28 involve appellate fees and costs incurred from the appeal of a
dismissal of an unwarranted involuntary bankruptcy petition. But
we consider this to be a distinction without a difference.

1 bankruptcy court only discretionary authority to award fees at
2 the trial level and not on appeal. It thus called upon Congress
3 to remedy the inconsistency in the law.

4 We cannot read Higgins as narrowly as SCSD and IBT ask us to
5 do. It is a case that is directly on point with the issue before
6 us on appeal. We cannot and will not attempt to circumvent it.
7 The bankruptcy court did not err in applying Higgins to determine
8 that it lacked authority to award SCSD and IBT appellate fees and
9 costs.

10 **CONCLUSION**

11 Based on our reading of Higgins, we conclude that it is the
12 controlling authority in the appeal before us. The bankruptcy
13 court thus did not err in declining to award SCSD and IBT
14 appellate fees and costs incurred in defending against the appeal
15 of the § 303(I) fee judgment. We AFFIRM.