15-3150

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

I. STEPHEN RABIN, On behalf of himself and all others similarly situated,

Plaintiff-Appellant,

RAYMOND A. BRAGAR,

Interested-Party-Appellant,

—against—

DOW JONES & COMPANY, INC.,

Defendant-Appellee,

THE NEW YORK TIMES COMPANY, FORBES INC.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT I. STEPHEN RABIN AND INTERESTED-PARTY-APPELLANT RAYMOND A. BRAGAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from a good faith effort to obtain a remedy for consumers who were fraudulently induced to renew subscriptions to various publications. The scam was perpetrated over several years by Circulation Billing Services and related companies ("CBS"). These companies were not affiliated with any publisher, but sent official-looking notices to subscribers of various publications to solicit subscription renewals. CBS collected fees that were much higher than the real renewal prices but never disclosed to the victims that they were being overcharged. CBS then paid the real renewal price to the publishers while keeping the excess. Appellant I. Stephen Rabin was defrauded of over $6,000 by this scam. Countless other victims likely lost similar amounts.

The publishers were aware of the fraud. They received payments from CBS, and processed the fraudulently procured renewals. Before they were sued, the publishers took no steps to individually advise subscribers of the fraud or advise them not to renew or subscribe through CBS. The publishers benefited from the fraud, because, for at least some period, they retained proceeds from the fraud, and because the scam enabled them to maintain subscribers who might have cancelled their subscriptions if they had known of the fraud.

Shortly after learning of the fraud, Rabin consulted with Appellant Raymond Bragar about the possibility of filing a class action lawsuit on behalf of the victims.

Both Rabin and Bragar are experienced class-action litigators. After further investigation, they decided to file a lawsuit against the three publishers of the magazines that Rabin had been duped into overpaying for, on behalf of a class of similarly situated subscriber-victims.

The litigation of the case took a mere three months from start to finish. It involved a motion to dismiss that was granted and some limited discovery. During that short period of time, Appellants obtained significant settlements from two of the three publisher defendants (The New York Times Company and Forbes, Inc.). These publishers agreed, among other things, to repay their defrauded subscribers, including Rabin.

After those settlements, and shortly after this action was filed, the district court granted the motion to dismiss of the third defendant-publisher, Appellee Dow Jones & Company, Inc. The court held that the complaint did not state a viable claim against Dow Jones. The court never suggested at oral argument or in its opinion that the action was frivolous, or that it was not a good-faith effort to bring necessary relief to a class of innocent fraud victims.

Dow Jones quickly avoided liability even though it received substantial proceeds from the fraud, and even though it had known of the fraud for years without ever individually warning subscribers about it. But apparently avoiding

liability at a very early stage of the litigation was not enough. Dow Jones insisted on trying to punish Appellants for bringing the action. Dow Jones sought and obtained sanctions under 28 U.S.C. § 1927 and the district court's inherent powers for "multipl[ying] the proceedings . . . unreasonably and vexatiously." It did so even though the entire litigation took only three months; even though it involved only the litigation of a simple motion to dismiss and some minimal discovery; even though the action was plainly a good-faith effort to remedy an egregious fraud on Dow Jones' unsuspecting subscribers; and even though the suit was brought by two accomplished lawyers who together had nearly 100 years' of class action experience and had never previously been sanctioned by any court.

The district court's decision sanctioning Appellants $180,000 was one of the highest awards we are aware of, and should be reversed. This Court has repeatedly taught that because of their punitive nature, sanctions under § 1927 and the inherent power are permissible only in those rare cases where there are specific, supported findings that a claim was *both* (1) entirely without color *and* (2) brought in bad faith, *i.e.* for improper purposes such as harassment or delay. Here, neither condition was satisfied. The district court applied the wrong legal standard on color and ignored most of the legal and factual bases for the claims in assessing both color and bad faith.

First, the court improperly found that the Amended Complaint lacked color solely because the court had granted Dow Jones' motion to dismiss, even though this is not a sufficient basis under this Court's precedents for finding a lack of color. This Court requires specific findings that a claim "is utterly devoid of a legal or factual basis"—findings that the district court did not make, and could not have made here. The court failed to adequately consider the evidence Rabin and Bragar discovered during the litigation that supported their allegations, and it disregarded their good faith argument for an extension of New York law. Even though this factual and legal support was ultimately insufficient to survive a motion to dismiss, it shows that the claims were far from so "utterly devoid" of support as to justify sanctions.

Second, the record showed that Rabin and Bragar brought the claims in good faith to remedy a real fraud, and they obtained meaningful relief from the other defendants. There was no valid basis to find any bad faith, and the district court's analysis was based on an unfair misreading of the evidence. At worst, there were a few honest mistakes—a brief, non-prejudicial delay in producing a few documents, and two errant words in a complaint (one was arguably inartful and the other a vestige of an earlier, abandoned allegation). But none of it shows any intent to

mislead, nor remotely rises to the level of conduct this Court has previously found sufficient to show bad faith.

As this Court has recognized, the need to discipline "those who harass their opponents and waste judicial resources by abusing the legal process" must be balanced against the important interest of encouraging "a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and the ethical rules."[1] The district court's decision to award sanctions was unwarranted and failed to balance those interests appropriately. To avoid deterring future litigants with colorable claims from pursuing those claims, and unfairly punishing two lawyers with unblemished records, the sanctions order should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). On July 30, 2015, the district court granted Dow Jones' motion for attorneys' fees and directed Dow Jones to submit a proposed judgment. (SPA-1-11). The court entered a final order and judgment on September 8, 2015. (SPA-12-15). Appellants filed a timely notice of appeal on October 5, 2015. (A-371). This Court has jurisdiction under 28 U.S.C. § 1291.

[1] *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 341 (2d Cir. 1999).

ISSUES PRESENTED

1. Whether the district court applied the wrong legal standard when it found the Amended Complaint entirely without color solely because it had been dismissed for failure to state a claim, and where there was no basis for, or specific finding that, the claims were utterly devoid of factual or legal support.

2. Whether the district court erroneously found that the claims lacked color even though one claim was based on a good faith argument for an extension of state law that was not controverted by any controlling authority, and all of the claims were supported by evidence.

3. Whether the district court erroneously found bad faith where the record did not support such a finding, and where its finding, if affirmed, would transform garden-variety innocent litigation mistakes into sanctionable misconduct.

STATEMENT OF THE CASE

A. Factual Background

Rabin is an 82-year-old graduate of Columbia Law School who has 56 years' experience as a litigator. (A-249 ¶ 1; A-330). Bragar is a 69-year-old graduate of Harvard Law School who has been practicing law for 42 years. (A-230 ¶ 2; A-330). Both of their practices focus on plaintiff-side class actions. Before

this case, neither of these experienced attorneys had ever been sanctioned by any court. (A-230 ¶ 2; A-330). They brought this action after Rabin learned he had been the victim of a far-reaching fraud on subscribers of periodicals published by defendants.

1. Rabin has subscribed to The Wall Street Journal, Barron's, The New York Times, and Forbes for many years. (A-278 ¶ 4). Beginning in approximately July 2011 and continuing through September 2013, Rabin began to receive official-looking documents in the mail relating to these publications sent by CBS. The documents were entitled "Renewal Notice" or "Renewal Notice/New Order," and appeared to be authorized by the publisher. The notices falsely claimed that the offered subscription renewal rates were the "lowest available rates" or "our lowest rates," when in fact they were significantly higher than the real renewal rates. (A-57-61).

Rabin's wife, who generally opens the mail and pays their household bills, assumed they were legitimate renewal notices and paid the renewal fees on Rabin's behalf.[2] (A-46 ¶ 8; A-278-79 ¶ 4). The payments totaled $6,360.02 and included

[2] The back of the notice contained some ambiguous language about the relationship between CBS and the publisher, which was not specific to any particular publisher, indicating that "we do not *necessarily* have a direct relationship with the publishers

duplicative renewals of Barron's for $1,069.80, Forbes for $1,561.42, The Wall Street Journal for $849, and The New York Times for $2,878.90. (A-50 ¶ 26). The defendant-publishers, *including Dow Jones*, accepted payments from CBS for these "renewals," and, prior to the filing of the lawsuit, did not refund any money to Rabin or ever directly advise him of the fraud. (*Id.*).

CBS's scam operated nationwide, occurring over a number of years and involving many publications. (*See* A-65-77). Documents produced in discovery show that Dow Jones was aware of the fraud on its subscribers *at least* as early as July 2010, when it sent a "cease-and-desist" letter to CBS. (A-119). Yet for months after that, until sometime in 2011, Dow Jones cashed the checks it received from CBS for fraudulent renewals and kept the funds it received. (A-97-98 ¶ 2).

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or publications that we offer." (*E.g.*, A-261). The full text on the back of the notice stated:

> We offer over 600 magazines as an independent subscription agent between the magazine publishers and clearinghouses in order to facilitate sales and service. As an agent we do not necessarily have a direct relationship with the publishers or publications that we offer. With your purchase you authorize us and our suppliers to process and clear your order with the publishers directly or by whatever means available. This is a magazine subscription offer, not a bill or invoice. You are under no obligation to either buy a magazine or renew at this time. However your business is greatly appreciated.

(*E.g.*, *id.*).

Moreover, though Dow Jones sent four cease-and-desist letters to CBS over four years, sent a handful of letters to investigatory agencies, and published a few general notices about the fraud, the scam continued unabated. Dow Jones failed to take the most obvious actions that could have substantially curtailed the fraud: it never directly notified defrauded subscribers that they had been victimized, never reached out to defrauded subscribers to volunteer refunds, and never sued CBS.

2. In late September 2013, in the course of perusing the family check register, Rabin noticed that there were multiple payments for Barron's, The Wall Street Journal, and Forbes. (A-279 ¶ 5; A-249-50 ¶ 3). Shortly thereafter, in November 2013, he saw a Dow Jones advertisement in Barron's warning readers of the fraud. (A-250 ¶ 3; A-55).[3] He was surprised that Dow Jones had not notified him earlier, since he had been defrauded six times since 2011 in connection with their publications (Barron's and The Wall Street Journal). (A-250 ¶ 3).

In April 2014, after conducting online research about the fraud, Rabin consulted with Bragar about the possibility of a lawsuit. (A-250 ¶ 4). Both Bragar and Rabin were aware that Dow Jones claimed to be fighting the fraud, but they

[3] A similar notice appeared in The Wall Street Journal in the same time period. (A-114).

found its claim unpersuasive, because Rabin had been defrauded six times over the course of two years, and Dow Jones had never directly informed him of the fraud. (*Id.*; A-231 ¶ 4). In addition, the widespread nature of the fraud, as reported on the internet, made it appear that the publishers had permitted the fraudsters to use their subscriber lists in order to boost circulation at no cost to themselves. (A-231 ¶ 4).

Rabin never contacted CBS about the fraudulent renewals at issue in this suit, nor did he ever ask CBS for a refund of the money paid for those renewals. However, in about May 2014, he also started to receive The Economist, a publication that is not at issue here and to which he never subscribed. In response, he called CBS and asked to have them stop that publication and refund any payments. (A-250 ¶ 6). During this call, he did not mention the issues with The Wall Street Journal or Barron's, because he was actively planning to pursue the class action litigation and did not want to jeopardize his ability to serve as class representative. (A-250-51 ¶¶ 6-7).

3. On June 23, 2014, Bragar filed a complaint in the United States District Court for the Southern District of New York (Rakoff, J.) on behalf of Rabin, the named plaintiff class representative, and a proposed class of victim-subscribers. The complaint named three publishers as defendants: The New York Times, Dow Jones, and Forbes and alleged three state-law claims against each of

them: (1) fraud, (2) violations of sections 349 and 350 of the New York General Business Law ("G.B.L."), and (3) negligence.[4]

4. On or about July 22, 2014, during a confidential, "off-the-record" settlement meeting, Dow Jones advised Bragar that since some unspecified date in "early 2011" it had been holding $1.4 million in checks it received from CBS and had not deposited them. (A-97-98 ¶ 2). This information did not change Bragar's and Rabin's view of the case. If anything, Dow Jones' representation confirmed that it had cashed checks for at least six months (and possibly longer) even after it learned about CBS's fraud. Appellants also concluded that by refusing to cash the checks—as opposed to placing the funds in escrow for defrauded subscribers—Dow Jones was actually rendering material assistance to the fraudsters by allowing them to use the $1.4 million to continue their fraudulent activities. (A-251 ¶ 8; A-231-32 ¶ 6; A-172/74).

Almost immediately after the lawsuit was filed, out-of-the-blue, Rabin received three unsolicited checks from CBS in the mail purporting to be refunds in connection with The Wall Street Journal and Barron's: one dated July 2, 2014 for

[4] Bragar decided not to name CBS as a defendant because factual research conducted by his paralegal suggested that service on CBS would be difficult, as others had tried and failed to serve CBS in the past. (A-231 ¶ 4).

$299.95 and two dated July 23, 2014 for $599.95 and $299.95. The total amount refunded was $1,199.85, $719.85 less than the amount of his loss from fraudulent renewals of Barron's and The Wall Street Journal. He did not deposit the checks, but instead brought them to Bragar in August 2014.[5] Because, among other things, he received the checks so soon after his action had been filed and because he had never requested a refund from CBS for subscriptions to any of the publications involved here, he believed the checks were sent to him as an improper effort by CBS to thwart his ability to obtain lead plaintiff status in the pending class action, and to insulate CBS from potential liability. (A-251-52 ¶ 9).

B. Procedural History

1. On July 24, 2014, defendants filed a joint motion to dismiss. In lieu of opposing the motion, on August 1, 2014, Rabin filed an amended complaint. The Amended Complaint reflected a good-faith effort to provide more particularity, while also acknowledging some new facts that Appellants had learned about Dow Jones. For example, Appellants added specific allegations that each defendant was not only aware that CBS was falsely purporting to act on their

[5] Rabin also received a fourth check from CBS in September 2014 for $680.40, which purported to be in connection with his Forbes subscription. (A-255 ¶ 19). Rabin never cashed this check either. (*Id.*).

behalf, but also was receiving fraudulently induced payments, and, that prior to the commencement of the action, "no defendant took any steps to return the funds it received that it knew were fraudulently obtained." (A-44-45 ¶ 1). In addition, Appellants alleged that "Defendants knew that they were maintaining their subscription base at no cost to them." (*Id.*). The Amended Complaint also specifically acknowledged that Dow Jones, unlike the other two defendants, had "attempted to publicize the fraud." (*Id.*).

The Amended Complaint also *removed* allegations of conspiracy that were in the original Complaint (*compare* A-46-47 ¶ 9 *with* A-11-12 ¶ 10), and replaced the fraud claim with a claim for aiding and abetting fraud, (*compare* A-50, *with* A-15). Rather than alleging that defendants conspired with CBS, the Amended Complaint alleged, more appropriately, that each defendant "knew that CBS had defrauded" Rabin and the class members (A-46 ¶ 9), and that "[b]y not returning the defrauded subscription payments to their defrauded subscribers, and not even directly notifying their defrauded subscribers, each defendant reasonably led" the subscribers to believe that the prices were the "lowest available" and that if the CBS renewal notice was not paid, the subscribers would no longer receive the publication. (A-47 ¶ 11).

The amendments also included language focusing on defendants' failure to

return the payments to their defrauded subscribers (A-47-48 ¶¶ 11-13), and allegations that defendants benefitted by retaining the proceeds of the fraud, that they each knew that CBS kept part of the proceeds itself, and that their "acquiescence incentivized CBS to continue its fraudulent scam." (*Id.* ¶ 13).

4. On August 14, 2014, defendants filed a joint motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6). The motion was not substantially different from the original motion to dismiss, except that the argument attacking the fraud/conspiracy claim was replaced with an argument attacking the new aiding and abetting claim.

Shortly thereafter, Appellants concluded settlements with both The New York Times and Forbes. The New York Times agreed to pay Rabin $760.90 for the fraudulent renewals and $40,000 for his legal fees, and agreed to fully refund the subscribers who were defrauded—refunds estimated to cost between $300,000 and $600,000. (A-195-96/305-07). Forbes agreed in its settlement to pay Rabin a small sum of money (under $1,000) and $50,000 for his legal fees, to extend his subscription until 2023, and to provide refunds to the other subscribers who were defrauded by CBS. (A-197/310-13). The settlements resulted in stipulations of dismissal entered on August 18, 2014 and September 16, 2014, respectively, which were later "so ordered" by the court. (A-90-91).

5. On September 17, 2014, the district court held oral argument on the motion to dismiss Dow Jones, the only defendant still contesting the suit. At the argument, the district court gave no indication that it viewed the Amended Complaint as entirely lacking in color. Rather, the court questioned both sides thoroughly about the merits of Appellants' theories of liability. The court even pressed defense counsel on whether Dow Jones' inaction could have lulled subscribers into believing the scam was legitimate and on whether its failure to notify its subscribers could be evidence of substantial assistance to the fraud. (A-216; A-220).

On September 24, 2014, the district court issued a memorandum order granting Dow Jones' motion to dismiss. The court dismissed the aiding and abetting fraud claim, reasoning that the Amended Complaint did not plead with particularity the facts necessary to show that Dow Jones' failure to directly notify or give refunds to its subscribers was intentionally designed to assist CBS's fraud. (A-93-94). The court held Dow Jones was not liable under G.B.L. § 349 because it had made no material misrepresentations itself, and because Rabin's allegations did not suggest Dow Jones was part of a "mutual deceptive scheme" with CBS. (A-94-95). Finally, the court dismissed the negligence claim, reasoning that Dow Jones owed no duty of care to Rabin or the class because there was no "special

relationship" between the publication and its subscribers. (A-95-96).

6. On October 10, 2014, Dow Jones filed a motion for sanctions under § 1927 and the court's inherent powers against Rabin and Bragar. Dow Jones sought $325,000 in attorneys' fees, an extraordinary amount to have incurred, given that the proceedings entailed only a motion to dismiss and very limited discovery (document production and depositions of Rabin and his wife totaling approximately 10 hours (*see* SOA-13)), over the span of just three months. Appellants opposed the motion, arguing that the claims were brought based on a reasonable belief in their viability, that they adduced additional factual support for the claims in discovery, and that the evidence showed that they never acted in bad faith.

On July 30, 2015, the district court issued an order granting sanctions. It found that the Amended Complaint "lacked an objectively reasonable basis," relying on its prior decision dismissing the claims. (SPA-4-5). The court also found bad faith, based on what it concluded were false allegations in the Amended Complaint, a failure to adjust the allegations based on facts learned in discovery, and three purported discovery violations. (SPA-5-9). However, the district court refused to impose sanctions for any proceedings before the filing of the Amended Complaint. It held that the original complaint was not "entirely baseless" and "was

not filed in bad faith." (SPA-10).

Even though the sanctions order covered only the proceedings after the Amended Complaint, Dow Jones sought an exorbitant $288,854.14 in fees and costs. Bizarrely, this amount accounted for nearly all of the $325,000 in fees and costs that Dow Jones had requested for *the entire case*. The district court concluded that this request was "overkill" and "excessive," and ordered Appellants to pay $180,000 in sanctions. (SPA-14-15).

This appeal followed.

ARGUMENT

I. THIS COURT APPLIES "EXACTING" SCRUTINY TO SANCTIONS AWARDED UNDER SECTION 1927 AND THE COURT'S INHERENT POWERS

This Court has directed lower courts to construe 28 U.S.C. § 1927[6] "narrowly and with great caution," *Mone v. Comm'r of Internal Revenue*, 774 F.2d 570, 574 (2d Cir. 1985), in light of its "punitive thrust," *Cresswell v. Sullivan &*

[6] Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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.

Cromwell, 922 F.2d 60, 70 (2nd Cir. 1990). Similarly, because of "their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). As the Court has observed, it is "troublesome" that when adjudicating a sanctions motion, "the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed." *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128 (2d Cir. 1998).

This Court's review of sanctions orders is therefore '"more exacting than under the ordinary abuse-of-discretion standard,'" *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 113-14 (2d Cir. 2009) (internal quotation marks omitted), and "not as simple as it may appear at first blush," *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 333 (2d Cir. 1999). The Court reviews "all aspects of a District Court's decision to impose sanctions . . . to ensure that any such decision . . . is made with restraint and discretion," *United States v. Seltzer*, 227 F.3d 36, 39 (2d Cir. 2000) (internal quotation marks omitted), and to ensure that sanctions are not based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence," *Schlaifer Nance*, 194 F.3d at 333 (internal quotation marks omitted).

Sanctions under either § 1927 or the court's inherent powers should not be granted unless there is "clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith—that is, motivated by improper purposes such as harassment or delay." *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) (per curiam) (internal quotation marks omitted); *see also Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000); *Oliveri v. Thompson*, 803 F.2d 1265, 1272-73 (2d Cir. 1986). Both the absence of color and bad faith must be supported by a "high degree of specificity" in the factual findings. *Schlaifer Nance*, 194 F.3d at 338; *see also Eisemann*, 204 F.3d at 396 (same).

The district court's sanctions order does not remotely satisfy either of these requirements.

II. THERE WAS NO VALID BASIS FOR THE DISTRICT COURT'S FINDING THAT THE AMENDED COMPLAINT WAS NOT COLORABLE

The district court's conclusion that the Amended Complaint was entirely lacking in color was legally and factually flawed. The court applied the wrong legal standard for determining whether the claims were colorless, disregarded the good faith legal basis for Rabin's negligence claim, and ignored the uncontroverted facts supporting the aiding and abetting fraud and G.B.L. § 349 claims. Even if the

Amended Complaint failed to state a claim against Dow Jones, it was not "entirely without color." Sanctions were unwarranted.

A. The District Court Applied The Wrong Legal Standard For Determining Lack of Color

Dismissal of a complaint for failure to state a claim is a routine occurrence in civil litigation. The fact that claims fail as a matter of law does not mean that they are entirely without color. Indeed, if that were the case, our civil justice system would be transformed in large measure into a fee-shifting system resembling the "English Rule." But it is well-settled that the general "American Rule" requires all parties to bear their own fees and costs. *See Oliveri*, 803 F.2d at 1271.

As this Court has explained:

> [A] claim that fails as a matter of law is not necessarily lacking *any* basis at all. A claim is colorable when it reasonably *might* be successful, while a claim lacks a colorable basis when it is utterly devoid of a legal or factual basis. Accordingly, judgment as a matter of law against a claim is a necessary, *but not a sufficient*, condition for a finding of a total lack of colorable basis.

Schlaifer Nance, 194 F.3d at 337 (emphasis added); *accord Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) ("[N]ot all unsuccessful legal arguments are frivolous or warrant sanctions."); *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785 (2d Cir. 1988) (same).

In order to establish that a claim is entirely without color for purposes of establishing the first prerequisite to an award of sanctions under § 1927 or the court's inherent powers, a court must find "clear evidence" that the claim is "utterly devoid of a legal or factual basis." *Schlaifer Nance*, 194 F.3d at 337. "A claim is colorable when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Revson*, 221 F.3d at 78-79 (internal quotation marks omitted); *see also Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir 1980) ("The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established."). Moreover, "[w]hen divining the point at which an argument turns from merely losing to losing *and* sanctionable" this Court has "instructed district courts to *resolve all doubts in favor*" of the party who made the losing argument. *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993) (emphasis added) (internal quotation marks omitted).

The court below committed reversible error by failing to apply this well-settled standard. Indeed, the court never made any specific finding—let alone any finding supported by the requisite "high degree of specificity"—that the claims lacked color. Instead, it merely pointed out that it had previously dismissed the claims and was "reaffirm[ing] its finding, articulated in the *Order dismissing the*

action, that each of plaintiff's alleged claims fails as a matter of law." (SPA-4 (emphasis added)). The only other discussion of the supposed lack of color was a brief one-paragraph summary of the court's dismissal opinion, which contained no analysis whatsoever of why the claims were supposedly "utterly devoid of a legal or factual basis," as opposed to simply insufficient to state a claim.[7]

By relying exclusively on its order granting Dow Jones' motion to dismiss, the district court applied the wrong standard. For this reason alone, its decision granting sanctions should be reversed. *See Eisemann*, 204 F.3d at 396-97 (2d Cir. 2000) (reversing where court failed to "make sufficiently specific factual findings to support its conclusion that [plaintiff's] motion for reconsideration, or any other motion filed in the course of this litigation, was entirely without color" (internal quotation marks omitted)); *Int'l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2d Cir. 1996) (affirming denial of sanctions even where party made "barely non-frivolous argument[s]" in motion to vacate arbitration award).

[7] Although the court claimed to have previously found that "plaintiff's action lacked an objectively reasonable basis," its dismissal order said no such thing. (*See* A-92-96).

B. The Negligence Claim Was Based On A Good Faith Argument For An Extension Of New York Law

The Amended Complaint alleged that Dow Jones was liable for negligently failing to warn or protect its subscribers from CBS's fraud. (A-51 ¶¶ 34-35). The viability of this claim depended on whether Dow Jones owed a duty of care to Rabin and the putative class members.

When assessing whether a defendant owes a duty of care, "[c]ourts traditionally 'fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (quoting *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994)). A duty of care to "warn another of known dangers or, in some cases, of those dangers which he had reason to know," *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 246 (1983), or "to control the conduct of others" arises "where there is a special relationship: a relationship . . . between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others." *Kazanoff v. United States*, 945 F.2d 32, 36 (2d Cir. 1991) (quoting *Purdy v. Pub.*

Adm'r of Westchester Cnty., 72 N.Y.2d 1, 8 (1988)). "A critical consideration in determining whether a duty exists is whether the defendant's relationship with . . . the plaintiff places the defendant in the best position to protect against the risk of harm." *Davis v. S. Nassau Cmty. Hosp.*, --- N.E.3d ----, 2015 WL 8789470 (N.Y. 2015) (internal quotation marks omitted).

Here, the argument for a special relationship was based on two factors: (1) the long-term, recurring nature of the subscriber-publisher relationship, and (2) Dow Jones' unique position to protect its subscribers from CBS's fraud. (A-51-52 ¶ 33). It is true that special relationships are generally found in "narrow settings," such as master-servant or "common-carrier passenger" relationships, (A-95-96), and that New York courts have expressed hesitation in recognizing special relationships in new factual contexts. *See Davis*, 2015 WL 8789470. But crucially, Appellants' argument was not foreclosed by any case.[8] The district court

[8] Indeed, in the related negligent misrepresentation context, New York courts have often found special relationships between counterparties to a commercial transaction, even where the party to whom the duty is owed is more sophisticated than the average subscriber/consumer. *See, e.g.*, *Kimmell v. Schaefer*, 89 N.Y.2d 257, 264-65 (1996) (special relationship existed between officer of company and potential investors); *Steinhardt Grp., Inc. v. Citicorp*, 272 A.D.2d 255, 257 (1st Dep't 2000) (where sophisticated plaintiff was induced by defendant to invest $41.5 million in residential mortgage-backed securities, special relationship existed because defendant had superior knowledge and expertise about accuracy of value and future performance of mortgage loans); *see also Fraternity Fund Ltd. v.*

itself conceded as much, stating at oral argument: "So you, in effect, want me to . . . infer that *if this matter were to come before the New York Court of Appeals*, the New York Court of Appeals would allow this cause of action?" (A-227 (emphasis added)).

In sum, the theory underlying the negligence claim was that New York law should be extended to recognize a duty of care in a novel factual setting. (*See* Tr. at 20 ("Your Honor, we have no case on special [relationships]—it is an argument . . . based on the underlying cases that describe when these special relationships should take place.")). Whether this argument was strong or not, it was not sanctionable. *By definition*, a legal argument is only colorless if it "has 'no chance of success,' and there is '*no reasonable argument to extend, modify or reverse the law as it stands*.'" *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 177 (2d Cir. 2012) (quoting *Fishoff v. Coty Inc.*, 634 F.3d 647, 654 (2d Cir. 2011)) (emphasis added); *Mareno*, 910 F.2d at 1047 ("[T]o constitute a frivolous legal position for purposes of Rule 11 sanction, it must be *clear under existing precedents* that there is no chance of success and no

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Beacon Hill Asset Mgmt. LLC, 376 F. Supp. 2d 385, 411 (S.D.N.Y. 2005) (special relationship adequately alleged between plaintiff prospective investors and defendant hedge fund managers and principals, where defendants were "uniquely positioned" to know overall values of the hedge funds).

reasonable argument to extend, modify or reverse the law as it stands." (emphasis added)); *Gardner v. St. Bonaventure Univ.*, 171 F. Supp. 2d 118, 134 (W.D.N.Y. 2001) ("[T]he absence of any Second Circuit authority on this issue indicates the law is not necessarily settled as required to support finding such claim frivolous.").[9]

In short, Appellants' decision to advance an argument to expand the "special relationship" category to include the relationship between the publisher and its subscribers in the context here was a reasonable one. The district court's rejection of that argument does not justify a finding that the argument was colorless or justified merited sanctions. Rather, as this Court has repeatedly emphasized, in imposing sanctions, courts must take care not to "'stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.'" *Oliveri*, 803 F.2d at 1268 (internal quotation marks omitted). "Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law

[9] These cases concern sanctions under Federal Rule of Civil Procedure 11, but courts have viewed the concept of "frivolousness" under Rule 11 as essentially the same as the lack of color requirement under § 1927 and the court's inherent power. *See, e.g.*, *Int'l Telepassport*, 89 F.3d at 86; *Peer v. Lewis*, 571 F. App'x 840, 844-45 (11th Cir. 2014).

itself. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

That concern is particularly apt in the context of special relationships. The New York Court of Appeals has recognized that "[d]uring the last century, liability for 'nonfeasance' has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. *It is not likely that this process of extension has ended*." *Schumacher*, 59 N.Y.2d at 247 (quoting Prosser, Torts § 56 (4th ed.)) (emphasis added). If lawyers and their clients could be sanctioned for filing an action that is based on an argument that the law should be extended to a new context, plaintiffs would be reluctant to bring such claims and advance new theories of liability, and tort law would stagnate. This would cause exactly the sort of chilling effect this Court has warned district courts to avoid when considering sanctions. *See, e.g.*, *Oliveri*, 803 F.2d at 1268 (courts must be "acutely aware" of the chilling effect of imposing sanctions).

C. There Was A Factual Basis To Claim That Dow Jones Aided And Abetted CBS's Fraud On Dow Jones' Subscribers

The district court erroneously concluded that the Amended Complaint failed to plead any facts to support its allegation that Dow Jones "had an affirmative duty

to act or that the inaction was intentionally designed to aid the fraud." (SPA-4-5). It reached this conclusion only by ignoring much of the evidence Appellants learned during the course of the litigation.

In order to state a claim for aiding and abetting fraud under New York law, a plaintiff must demonstrate "(1) the existence of a fraud; (2) [the] defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006) (internal quotation marks omitted). It is undisputed that CBS had committed a fraud on Dow Jones' subscribers, and that, at least by July 2010, Dow Jones knew the fraud was occurring. The sole disputed issue was whether Dow Jones provided substantial assistance to advance CBS's fraud.

Substantial assistance "merely requires that the defendant affirmatively assisted, concealed, or failed to act when required to do so, in order to enable others' acts of fraud to proceed." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 100 (1st Dep't 2003). Inaction by an aider and abettor constitutes substantial assistance if "designed intentionally to aid the primary fraud." *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983). Moreover, intent "need not be alleged with great specificity . . . for the simple reason that a plaintiff realistically cannot be expected to plead a defendant's actual state of mind." *Wight*

v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir. 2000) (internal quotation marks omitted).

The Amended Complaint alleged that Dow Jones assisted CBS's fraud in a number of ways. First, even after it learned of the fraud, Dow Jones continued to process the subscription renewals that CBS fraudulently procured. Second, it never directly notified any defrauded subscriber that he or she had been the victim of CBS's fraud. And third, it refused to refund the money to defrauded subscribers. Moreover, the Amended Complaint alleged that Dow Jones benefitted from the fraud by receiving fees for fraudulent subscription renewals from CBS and by boosting or sustaining its subscriber base at no cost to itself. (A-47-48 ¶ 13); *see also Wight*, 219 F.3d at 92 (plaintiff adequately pleaded fraudulent intent where it alleged defendant had "both a clear opportunity and a strong financial motive to aid the . . . fraud").

Rabin and Bragar were able to develop some factual support for each of these allegations. Dow Jones never disputed that it processed many fraudulently procured subscription renewals. Nor did Dow Jones present any evidence that it ever directly notified its defrauded subscribers or that it provided refunds to all but a few defrauded subscribers. (*See* A-159). And Dow Jones conceded that it retained fraudulent proceeds from CBS, including for a period from at least July

2010 to "early 2011," when it cashed checks it received from CBS even though it had actual knowledge of the fraud. (*Compare* A-97-98 ¶ 2, *with* A-119).

Thus, far from being "utterly devoid" of a factual basis, Rabin's argument that Dow Jones substantially assisted the fraud had some factual support. *See Schlaifer Nance*, 194 F.3d at 337, 340 (sanctions not warranted unless argument "lacks *any* legal or factual basis" or there is "utterly no basis" for "subjective belief in the merits of the[] case" (internal quotation marks omitted)). To be sure, Rabin and Bragar also learned facts during discovery that undermined the strength of their substantial assistance argument. But this Court has recognized that a party (and its attorney) are not required to abandon an argument or face sanctions just because they learn facts that "undercut" their argument. *See, e.g.*, *id.* at 337-38 (fraud claim still had colorable basis even though "certain facts in this case undercut the vitality" of the claim); *Motown Prods.*, 849 F.2d at 785 ("While it is true that certain facts revealed during discovery weakened [defendant's] position, those facts did not require [counsel] to withdraw the counterclaims."); *Herzlinger v. Nichter*, No. 09 Civ. 192 (JSG)(PED), 2011 WL 4585251, at *6-7 (S.D.N.Y. Sept. 8, 2011) (argument for alter ego liability was not colorless where plaintiff "developed some evidence . . . relevant, albeit not dispositive, on the issue," even though evidence was "insufficient" as a matter of law to establish liability).

Crucially, none of the facts undercutting the substantial assistance argument conclusively disproved or contradicted the facts supporting the argument. During confidential settlement negotiations, counsel for Dow Jones represented to Bragar that Dow Jones was no longer cashing checks it received from CBS, and had ceased this practice in "early 2011." (A-97-98). However, by Dow Jones' own admission, it was aware of CBS's fraud at least as early as July 2010 when it sent CBS a cease and desist letter asserting "[i]t appears . . . that you are engaged in fraud." (A-119). It was thus undisputed that for months after it knew that CBS was "engaged in fraud," Dow Jones continued cashing checks received from CBS and keeping the money. And since discovery was not complete, Rabin and Bragar could reasonably believe that they would be able to develop evidence that Dow Jones knew of the fraud even earlier than July 2010. Moreover, Dow Jones benefitted from the fraud in other ways, including by boosting its subscriber base, which would necessarily impact its advertising revenue. Finally, both Rabin and Bragar believed that Dow Jones' decision not to cash the checks and place them in escrow for the subscribers helped facilitate the fraud by enabling CBS to continue to use the funds. (A-251 ¶ 8; A-231-32. ¶¶ 6-7).

Similarly, though Dow Jones had published notifications in Barron's and The Wall Street Journal and online about CBS's fraud, it presented no evidence

that it ever "notified directly any defrauded subscriber . . . that his or her subscription had been obtained by fraud," as the Amended Complaint alleged. (A-44-45 ¶ 1). Furthermore, these notices were prospective warnings only; they did nothing to rectify fraud that had already taken place. Thus, the existence of these general public notices were not inconsistent with Rabin's allegations. Rabin and Bragar had every reason to inquire, at a time when discovery was still open and they had not yet had the chance to depose any Dow Jones employee, about why it did not send direct notices to individual subscribers.

Finally, Dow Jones did produce documents showing that it had sent four cease-and-desist letters to CBS between 2010 and 2013, and had sent a handful of letters to state and federal investigatory agencies about CBS's practices during this period. (A-118-59). But it was undisputed that CBS's renewal subscription fraud proceeded unabated during this period. Dow Jones elected not to provide any individualized notice to its subscribers or offer any of them refunds. Given the ease with which Dow Jones could have identified defrauded subscribers and notified them directly,[10] Appellants had sufficient reason to question why Dow Jones failed to take more direct actions to stop the fraud.

[10] When Dow Jones received payments from CBS for renewals involving particular subscribers, it would know immediately that something was amiss because the

In sum, Rabin and Bragar identified facts supporting their claim that Dow Jones had intentionally assisted CBS's fraud. Although they were also aware of facts undercutting the strength of this argument, they were entitled to pursue the aiding and abetting fraud claim based on their good-faith belief that the supporting facts were sufficient to state a claim.

D. The G.B.L. § 349 Claim Also Had An Adequate Factual Basis

For similar reasons, the G.B.L. § 349 claim had a sufficient factual basis to preclude the imposition of sanctions under § 1927 or the court's inherent power.

New York General Business Law § 349 creates a private right of action for "any person who has been injured by" "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Section 349 "app[lies] to virtually all economic activity, and [its] application has been correspondingly broad," in order to "cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers" in New York. *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 290-91 (1999) (internal quotation marks omitted). Accordingly, while governing conduct "aptly characterized as *similar* to fraud claims," § 349 "contemplates actionable

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subscription was not due for renewal. Additionally, the payments came from CBS, which Dow Jones knew was engaged in fraud.

conduct that *does not necessarily rise to the level of fraud*." *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 343 (1999) (emphases added); *see also, e.g., Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995) ("[I]t is not necessary under the statute that a plaintiff establish the defendant's intent to defraud or mislead . . . .").

The basis of the § 349 claim was similar to the basis for the aiding and abetting fraud claim: that by failing to directly notify subscribers that they had been defrauded, Dow Jones concealed the fraud, thereby deceiving Rabin and other subscribers and causing injury. The district court found these allegations were insufficient to state a claim because there was no showing that Dow Jones "itself misrepresented anything" or that it "deceptively contributed to CBS's fraud through its inaction." (SPA-94-95). But that is not enough to justify a finding that they lacked any color. As explained, Appellants had facts supporting their allegations and reasonably sought to advance the argument that those facts established liability under § 349. Although the district court was not persuaded, the claim clearly was not without color. *See, e.g., Mareno*, 910 F.2d at 1047 (arguments were not frivolous even where "not persuasive" and "faulty").

* * *

Finally, the district court entirely ignored the settlements Appellants reached with The New York Times and Forbes, each of whom agreed to provide relief not only to Rabin personally, but also to other putative class members, and to pay some of Bragar's attorneys' fees. (A-95-96/305-07; A197/310-13). These defendants found the claims viable enough that they agreed to provide substantial monetary relief to injured class members, further proving that the Amended Complaint was not wholly lacking in color. *Cf. Schlaifer Nance*, 194 F.3d at 338 (jury verdict that was set aside by grant of judgment as a matter of law was evidence that claim was colorable).

III. APPELLANTS PURSUED THE CLAIMS AGAINST DOW JONES IN GOOD FAITH

The test for sanctions under § 1927 and the court's inherent power "is conjunctive and neither meritlessness alone nor improper purpose alone will suffice." *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir. 1985). Because the Amended Complaint was not entirely lacking in color, the district court's sanctions order cannot stand. *See, e.g., Sussman v. Bank of Israel*, 56 F.3d 450, 460 (2d Cir. 1995) (reversing grant of sanctions based on inherent power where claims were not colorless).

But even if the claims had been colorless, the sanctions order would have to be reversed, because Appellants did not pursue the claims in bad faith, *i.e.*, there was no showing that they were "motivated by improper purposes such as harassment or delay." *Schlaifer Nance*, 194 F.3d at 336. This Court "interpret[s] the bad faith standard restrictively," *Eisemann*, 204 F.3d at 396, and even conduct that can be characterized as "improvident," "distrustful and combative," or even "negligent" is insufficient. *See Schlaifer Nance*, 194 F.3d at 340-41 (reversing district court's finding of bad faith); *see also Seltzer*, 227 F.3d at 41.

Appellants' conduct of the litigation does not come close to satisfying this exacting standard. There is no doubt that they were motivated to file suit out of a genuine concern that Rabin had been victimized by the CBS subscription renewal fraud and had suffered damages as a result, and that there were likely to be many other similarly situated victim-subscribers. As detailed above, the claims against Dow Jones were based on factual support and on a good faith argument for an extension of tort law. Though these claims may have been longshots, they were not "so completely without merit" as to suggest that they were brought in bad faith. *Oliveri*, 803 F.2d at 1273; *see also Eisemann*, 204 F.3d at 397 (reversing bad faith finding that "rested almost entirely on [motion's] lack of merit"). Indeed, the fact that Rabin and Bragar were able to reach settlements with the other defendants that

provided for personal and class relief strongly suggests that Appellants brought the claims out of a good faith belief in their viability, not for any improper purpose. In any event, there is no rule that only cases likely to be successful may be filed. Sometimes plaintiffs end up winning what initially seems like a weak case.

The district court ignored these facts, and instead rested its bad faith finding on a series of exaggerated or mischaracterized events, which at their worst, amounted to nothing more than honest mistakes—the types of errors parties and their lawyers often make during the course of any case. These minor missteps did not cause any real prejudice to Dow Jones, and do not remotely support a finding of bad faith.

1. The district court inferred bad faith purportedly because "two allegations central to the viability" of the aiding and abetting fraud claim were "demonstrably false": an allegation that "Dow Jones was 'conspiring' with CBS," and an allegation that Dow Jones had "'authorized' [the] fraudulent CBS Notices." (SPA-5). The district court was flat wrong and mischaracterized both allegations.

As to the first point, the Amended Complaint did *not* allege that Dow Jones "conspir[ed]" with CBS. In fact, as the district court acknowledged (SPA-2), the Amended Complaint contained no factual allegations at all about conspiracy, a claim that was asserted in the original complaint, but removed from the Amended

Complaint. (*Compare* A-11-12 ¶ 10, *with* A-46-47 ¶ 9). The language the district court seized upon appeared only in the Prayer for Relief, which requested that the court "enjoin[] defendants from conspiring with CBS." (A-52). This statement was not a factual allegation, let alone one "central to the viability of [Rabin's] claim," and was only a vestige of the original complaint's conspiracy allegations. It was mere surplusage; there was no bad faith involved.

The district court's conclusion on the second issue was equally off-base. Contrary to the court's finding, the Amended Complaint did not allege that "Dow Jones had 'authorized'" CBS's renewal notices. The allegation was that the notices stated that they were authorized by Dow Jones, not that Dow Jones had in fact authorized them. (*See* A-47 ¶ 10 (alleging that "[t]he Notices stated that they were sent out by CBS and were authorized by the defendants")). The reason the notices were fraudulent was that they were *not* authorized by Dow Jones, but appeared to be. The language could have been improved by alleging that the Notices *appeared* to be authorized by Dow Jones, as Rabin conceded at his deposition, (A-190/254-55), but the allegation, as it stood, was understandable and plainly in good faith.

It bears emphasis that if bad faith can be inferred from a pair of stray imprecise words in a complaint, then many litigants will be subject to sanctions for

similar routine "nits" common in virtually every lawsuit. That result would contravene this Court's directive that sanctions should be sparingly imposed in order to avoid deterring zealous advocacy. *See Motown Prods.*, 849 F.2d at 785 (cautioning courts to "allow[] innovation and zealous representation while punishing only those who would manipulate the federal court system for ends inimicable to those for which it was created" (internal quotation marks omitted)); *see also Schlaifer Nance*, 194 F.3d at 341 (parties and their counsel must be given space "to pursue a claim zealously within the boundaries of the law and ethical rules").

Moreover, it is a bit much for Dow Jones to hurl accusations of misconduct at Appellants, given its own apparent misstatements to the district court during oral argument on the motion to dismiss. During that argument, defense counsel represented that whenever Dow Jones received money from CBS, it notified the defrauded subscriber "to the effect that: We have received this check. We think that you have been the victim of this scam. We are not processing your check." (A-218). However, Dow Jones never identified any evidence indicating that it reached out directly to defrauded subscribers. (*Cf.* A-99-100 ¶¶ 9-11 (asserting only that Dow Jones published notices in Barron's and The Wall Street Journal and posted them online)). And Dow Jones certainly never contacted Rabin to apprise

him of the fraud. Defense counsel also represented that "*for the entire period of time*, we didn't benefit from this in any way. We didn't cash the checks. We didn't have that financial benefit." (A-220 (emphasis added)). But, as discussed *supra*, Dow Jones cashed checks it received from CBS for at least six months, if not longer, after it unequivocally knew CBS was committing a fraud. Having itself apparently made "demonstrably false" representations during the litigation, Dow Jones is not in the best position to complain about a couple of inapt, but immaterial words in the Amended Complaint.

2. The district court also held that Bragar "failed to conduct a good faith investigation" into evidence that Dow Jones had been "fighting the fraud" and had not been retaining fraudulent proceeds. (SPA-6-7). According to the district court, Bragar's failure to adjust allegations that Dow Jones was involved with the fraud and retained financial benefits from it in light of these facts warranted an inference of bad faith. (SPA-7).

Before he filed the Amended Complaint, Bragar knew that Dow Jones claimed it was fighting CBS's fraud, specifically by publishing notices and "open letters" to subscribers, sending cease-and-desist letters to CBS, and notifying some investigatory agencies of the fraud. (A-111-59). Bragar never denied this. He and Rabin simply believed that this evidence was inconclusive because CBS's fraud

had continued for years after these notices and letters were sent, and because Rabin himself had been defrauded six times in the intervening years without ever receiving any notice from Dow Jones. (A-231 ¶ 4; *see also* A-250 ¶ 4).

Moreover, Dow Jones could have immediately taken steps that might have substantially curtailed CBS's fraud. For example, it could have directly notified defrauded subscribers; it could have refused to process any fraudulently procured subscription renewals; it could have deposited CBS's checks into an escrow account instead of holding them and permitting CBS to use the funds; or it could have sued CBS. But for some reason it chose not to do any of these things. Under these circumstances, it was not unreasonable at this stage of the case, before a single deposition of a Dow Jones employee occurred, for Bragar to continue to pursue allegations that Dow Jones aided and abetted the fraud. *See Motown Prods.*, 849 F.2d at 785 (counsel acted "appropriate[ly]" where it did not "abandon its position" in light of evidence "revealed during discovery [that] weakened [defendant's] position"); *Herzlinger*, 2011 WL 4585251, at *6-7 (plaintiff did not act in bad faith where she "developed some evidence" in favor of liability, even though that evidence was "insufficient" as a matter of law); *Gamla Enters. N. Am., Inc. v. Lunor-Brillen Design U. Vertriebs GMBH*, No. 98 Civ. 992 (MGC), 2000 WL 193120, at *5 (S.D.N.Y. Feb. 17, 2000) (plaintiff did not act in bad faith when

it pursued trademark claim despite evidence of defendant's prior use as plaintiff contended that evidence was "inconclusive" and that "it was entitled to disbelieve" defendant's assertions).

Nor was it in bad faith to allege that Dow Jones "received monies" and "fraudulent proceeds" from CBS's scam. (A-47-48 ¶¶ 13-14). This was true. As discussed, Dow Jones *did* knowingly receive fraudulent proceeds from CBS's fraud, and it cashed CBS's checks, at least from July 2010 to "early 2011." Even after Dow Jones apparently stopped cashing checks, it retained the checks, rather than placing them in escrow on behalf of defrauded subscribers, which Bragar and Rabin believed enabled CBS to continue using those funds. And Dow Jones also benefitted financially from the fraud by keeping up its subscriber base at no cost. These allegations were not only not in bad faith, they were accurate. *See Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 110-11 (2d Cir. 1998) (reversing imposition of inherent power sanctions "for the consequences of a statement that may have been correct").

3. Finally, the district court erroneously inferred bad faith from three purported discovery violations.

First, the district court castigated Rabin and Bragar for replying "[n]one" to a document request that asked for "[a]ll documents upon which each claim at issue

. . . is or was based." (SPA-8 (citing A-203 ¶ 19)). The court's implicit suggestion was that this response indicated that Bragar and Rabin were aware they lacked factual support for the claims in the Amended Complaint. (*Id.*).

The district court took this response wildly out of context. The discovery response explicitly stated that each response excluded "documents that are attached to the amended complaint or [that] have been disclosed in the parties' Initial Disclosures." (A-200). The Amended Complaint had attached, among other things, parts of the fraudulent renewal notices Rabin had received and the general notice published in Barron's. (A-55; A-57-61). And the initial disclosures produced full versions of those fraudulent renewal notices. (*See* A-257-65). These were the only documents Rabin possessed that supported his allegations. Indeed, they were the only documents that he, as merely a defrauded subscriber, could be expected to possess. The district court's criticism of Rabin's discovery responses was unwarranted.

Second, the district court accused plaintiff of withholding "relevant evidence from defendant throughout this litigation." (SPA-8). The supposedly withheld evidence fell into three categories: the reverse side of the CBS renewal notices, a communication that Rabin had with CBS prior to filing suit regarding a

subscription for The Economist magazine, and three checks CBS sent to Rabin for a portion of the amount of his losses. (*Id.*).

The district court's bad faith finding with respect to this evidence is at odds with the record. The renewal notices were never "withheld;" they were produced to Dow Jones in Rabin's initial disclosures. (*See* A-257-65). Moreover, though Rabin's communication with CBS and the checks he received from CBS were not immediately disclosed, they were duly disclosed without the need for any motion to compel. (*See* A-251-52 ¶¶ 7, 9; A-232-33 ¶¶ 9-11). The delay in this disclosure, while regrettable, occurred because both Rabin and Bragar reasonably believed that this evidence was not relevant to the dispute. Rabin had a single, brief telephone call with CBS regarding his receipt of The Economist, a magazine not published by any of the defendants and to which Rabin had never subscribed. (A-250-51 ¶ 6). In this call, Rabin did not discuss Dow Jones or any of its publications with CBS, and he did not seek any refund for fraudulent renewals. (A-250-51 ¶¶ 6-7; *see also* A-233 ¶ 11). Because of the call's tangential connection to this case, Rabin simply forgot about it until his memory was refreshed. (A-251 ¶ 7).

Similarly, neither Bragar nor Rabin believed the checks sent by CBS—which were unsolicited and did not amount to a full refund of Rabin's losses (A-

251-52 ¶ 9; A-254-55 ¶ 17; A-232-33 ¶¶ 9-10)—were relevant. Rabin never cashed them, and both he and Bragar viewed them as an improper attempt to pay off Rabin to get rid of the class action. (A-251-52 ¶ 9; A-255 ¶ 19; A-232-33 ¶¶ 8-9; A-234 ¶ 13). Once their memories were refreshed about the documents, they immediately produced them. (A-251-52 ¶ 9; A-233 ¶ 10).

In any event, this evidence was far from central to the proceedings. The telephone call with CBS was unrelated to the claims against defendants, and the checks, if significant at all, only concerned the amount of damages to be proven at trial. Rabin and Bragar's brief delay in disclosing this evidence was indicative of nothing more than an honest mistake, which, as a matter of law, does not warrant sanctions. *See, e.g.*, *Salovaara v. Eckert*, 222 F.3d 19, 35 (2d Cir. 2000) (counsel's misguided reassertion of previously dismissed claim was insufficient for sanctions under § 1927); *Schlaifer Nance*, 194 F.3d at 340 (bad faith finding not warranted where conduct was "the result of poor legal judgment"); *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997) (sanctions under § 1927 could not be awarded where attorney's failure to file amended complaint within allotted time "did not unduly prejudice defendants and was the result of 'excusable neglect'"); *Wilson v. Citigroup, N.A.*, 702 F.3d 720, 723-24 (2d Cir. 2012) (late filing of opposition brief

was not sanctionable where it "disobeyed no order of the district court and caused no prejudice to opposing counsel").

Third, the district court simply got the facts wrong when it questioned Rabin's inability to recall "at least six out of eight different lawsuits he had brought since 2006" at his deposition. (SPA-9). The record shows that Rabin was a plaintiff in only four such lawsuits, three of which he recalled at his deposition. (*See* A-177-78/124-28; A-179/137; A-181-82/145-46; A-194/300). Moreover, although Rabin forgot about one class action in which he was involved as a plaintiff (A-181-82/145-48), as well as two cases from the 1970s (A-194/301), he has been a lawyer for 56 years and has been involved as counsel in approximately 100 cases (A-169/10-11). There was no evidence, let alone clear evidence, that he was intentionally lying about his failure to recall these cases, and Dow Jones never even suggested this minor lapse of memory was evidence of bad faith. *Cf. Schlaifer Nance*, 194 F.3d at 340 (permitting witness to testify to facts inconsistent with testimony in prior proceeding was not "deceptive absent additional evidence indicating that the testimony's inconsistencies were intentional lies and that the appellants were aware of this").

4. In sum, the alleged misconduct amounted to an imprecisely worded allegation, a failure to delete a vestigial reference to a voluntarily withdrawn

conspiracy claim, a short delay in disclosing some evidence due to a misunderstanding as to its significance, and a lapse in Rabin's recollection regarding some irrelevant prior litigation. There was no "multipli[cation of] the proceedings" in this case, as is typical for sanctions under § 1927 and the court's inherent power. *See, e.g.*, § 1927 (applying to any person "who so multiplies the proceedings in any case unreasonably and vexatiously").

Moreover, we are aware of no case in which this Court has affirmed an award of sanctions under § 1927 or the inherent power for analogous conduct. On the contrary, this Court has reserved such sanctions for cases where the sanctioned party engaged in vituperative or intemperate conduct,[11] relitigated previously decided issues or pursued meritless arguments after being instructed of their meritlessness,[12] made knowingly false representations to the court or falsified

[11] *See, e.g.*, *Ransmeier v. Mariani*, 718 F.3d 64, 69-70 (2d Cir. 2013); *Gallop v. Cheney*, 660 F.3d 580, 584-86 (2d Cir. 2011), *vacated in part on other grounds*, 667 F.3d 226 (2d Cir. 2012); *In re 60th E. 80th St. Equities, Inc.*, 218 F.3d 109, 116-17 (2d Cir. 2000).

[12] *See, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 369-71 (2d Cir. 2009); *People of State of N.Y. ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 69, 72-73 (2d Cir. 1996).

evidence,[13] refused to comply with court orders,[14] or engaged in a pattern of baseless conduct such as repetitive filings or noncompliance with discovery obligations.[15]

What the district court criticized in this case does not remotely approach the type of egregious misconduct in these and other cases where sanctions were justified under the governing legal standard. The finding of bad faith here was completely unwarranted and an abuse of discretion, and should be reversed.

CONCLUSION

Rabin and Bragar obtained relief from Forbes and The New York Times. They lost to Dow Jones. They now also stand to lose their reputations, which are more valuable than any money involved. Rabin has had a spotless reputation for over half a century; Bragar has had a spotless reputation for nearly as long. There is no justification for now staining those records.

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[13] *See, e.g.*, *SEC v. Smith*, 710 F.3d 87, 97-98 (2d Cir. 2013); *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 144-46 (2d Cir. 2012); *Johnson v. Univ. of Rochester Med. Ctr.*, 642 F.3d 121, 125-26 (2d Cir. 2011); *Gollomp*, 568 F.3d at 370.

[14] *See, e.g.*, *Wolters Kluwer*, 564 F.3d at 118-19.

[15] *See, e.g.*, *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134-36 (2d Cir. 1998); *Sassower v. Field*, 973 F.2d 75, 78 (2d Cir. 1992); *Apex Oil Co. v. Belcher Co. of New York*, 855 F.2d 1009, 1020 (2d Cir. 1988); *Tedeschi v. Smith Barney, Harris Upman & Co.*, 579 F. Supp. 657, 663 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir. 1985).

The sanctions orders should be reversed.

Dated: New York, New York
February 2, 2016

/s/ Alexandra A.E. Shapiro

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Plaintiff-Appellants certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 10,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2013.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font of Times New Roman.

Dated: February 2, 2016

/s/ Alexandra A.E. Shapiro

SPECIAL APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

I. STEPHEN RABIN, on behalf of himself and on behalf of all others similarly situated,

Plaintiffs,

-v-

DOW JONES & COMPANY, INC.,

Defendant.

14-cv-4498 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Defendant Dow Jones & Company, Inc. ("Dow Jones") brings this motion for sanctions pursuant to 28 U.S.C. § 1927 and the Court's inherent authority against plaintiff I. Stephen Rabin and plaintiff's attorney, Raymond A. Bragar, for unjustifiably multiplying the proceedings in the above-captioned matter. After full consideration of the parties' submissions, the Court finds that Mr. Rabin's and Mr. Bragar's conduct in pursuit of this action warrants sanctions, because the lawsuit, at least as of the time of the amended complaint, was entirely without color and the evidence shows it was brought for improper purposes.

The relevant facts and procedural history are as follows:

Plaintiff Mr. Rabin initially brought this putative class action complaint against publishers The New York Times Company, Forbes, Inc., and Dow Jones for their alleged participation in a fraudulent subscription renewal scheme, orchestrated by Circulation Billing Services and its related entities (collectively, "CBS").

Class Action Complaint ("Compl.") ¶ 1. The plaintiff asserted three claims against defendants: (1) "conspir[acy] . . . to defraud," *id.* ¶ 23; (2) "deceptive acts or practices" in violation of the New York General Business Law § 349, *id.* ¶ 30; and (3) "negligen[ce]" in disclosing subscribers' information to third parties and "failing to notify" subscribers about the CBS fraud, *id.* ¶¶ 33-35.

In response to defendants' motion to dismiss the complaint for, *inter alia*, suing "the wrong parties," *see* Memorandum of Law in Support of Defendants' Joint Motion to Dismiss Complaint under Fed. R. Civ. P. 12(b)(6) and 9(b) at 1, plaintiff filed an amended complaint, which reasserted the allegations made in the initial complaint with the exception of a few minor changes to Count I — transforming "fraud" to "aiding and abetting fraud," and eliminating the word "conspiracy." *See* Amended Class Action Complaint ("Am. Compl.") ¶ 25. Following defendants' motion to dismiss the amended complaint, plaintiff reached settlement agreements with The New York Times and Forbes, leaving Dow Jones as the sole defendant.

On September 23, 2014, after a hearing on Dow Jones's motion, the Court dismissed the case in its entirety, for failure to plead "specific facts . . . as required by Fed. R. Civ. P. 9(b)" to support plaintiff's "conclusory allegations" with respect to Dow Jones's liability. *See* Memorandum Order dated Sept. 23, 2014 ("Mem. Or."), at 3–4. Now Dow Jones moves for sanctions against plaintiff and plaintiff's attorney, pursuant to 28 U.S.C. § 1927 ("Section 1927") and the Court's inherent authority, requesting that the Court

order Mr. Rabin and Mr. Bragar to pay Dow Jones's attorneys' fees incurred in defense of plaintiff's unsubstantiated claims. *See* Memorandum of Law in Support of Defendant's Motion for Sanctions under 28 U.S.C. § 1927 and the Court's Inherent Authority ("Def. Br.") at 1–2.

Section 1927 authorizes a court to require an attorney, "who so multiplies the proceedings in any case unreasonably and vexatiously" to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Similarly, the court may also impose sanctions pursuant to its "'inherent power' to award attorneys' fees against the offending party and his attorney when it determines a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Agee v. Paramount Commc'ns, Inc.*, 114 F.3d 395, 398 (2d Cir. 1997) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir. 1985)). The only distinction between an award made under Section 1927 and one made pursuant to the court's inherent power is that Section 1927 applies only to attorneys, while the court's inherent power allows the court to assign liability to "an attorney, a party, or both." *See Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986).

To impose sanctions under either authority, a court must find "clear evidence" that (1) the offending party's claims were "entirely without color," and (2) the party acted for "reasons of harassment or delay or for other improper purposes." *Id.* at 1272.

The Second Circuit has interpreted this discretion narrowly, requiring "a high degree of specificity in the factual findings of [the] lower courts." *See id.* at 1272–73 (quoting *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 344 (2d Cir. 1986)).

Turning first to the action's merits, the Court reaffirms its finding, articulated in the Order dismissing the action, that each of plaintiff's alleged claims fails as a matter of law. *See* Mem. Or. at 2. A claim is colorable when it "'has some legal and factual support,'" leading to a reasonable conclusion that "it might be successful, while a claim lacks a colorable basis when it is utterly devoid of a legal or factual basis." *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 337 (2d Cir. 1999) (quoting *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980)); *see also Reichmann v. Neumann*, 553 F. Supp. 2d 307, 320 (S.D.N.Y. 2008) ("The question is whether a reasonable attorney or reasonable plaintiff could have concluded that facts supporting the claim *might be established*." (emphasis in original; internal quotation marks omitted)).

After extensive briefing and oral argument, the Court concluded that plaintiff's amended complaint pled "no actual facts" to support the purported "conclusory allegation[s]" of Dow Jones's liability in the CBS fraud. *See* Mem. Or. at 3. The Court noted that plaintiff's "failure to act" theory of the case required plaintiff to "plead facts showing that the defendant had an affirmative duty to act or that the inaction was intentionally designed to aid the fraud." *Id.* at 2. Not able to discern either, the Court concluded that insofar

as the plaintiff's complaint had no factual support, plaintiff's action lacked an objectively reasonable basis.[1]

Turning to the second prong of the test, the Court finds that the record contains sufficient evidence to show that Mr. Rabin and Mr. Bragar litigated this action in bad faith. A suit is brought in "bad faith" if it is "'motivated by improper purposes such as harassment or delay.'" *Reichmann*, 553 F. Supp. 2d at 320 (quoting *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000)). Furthermore, subjective bad faith can be inferred "when the actions taken are 'so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose.'" *Schlaifer Nance*, 194 F.3d at 338 (quoting *New York v. Operation Rescue Nat'l*, 80 F.3d 64, 72 (2d Cir. 1996)).

Here, at least two allegations central to the viability of plaintiff's claim were demonstrably false. During the course of Mr. Rabin's deposition, when plaintiff was asked about the factual basis for the allegations that Dow Jones was "conspiring" with CBS, Compl. ¶ 10; Am. Compl. at 9, and that Dow Jones had "authorized" fraudulent CBS Notices, Am. Compl. ¶ 10, Mr. Rabin admitted these assertions were no more than "overstatement[s]." *See* Declaration of Clifford Thau in Support of Defendant's Motion for Sanctions under 28 U.S.C. § 1927 and Inherent Authority dated Oct. 10, 2014 ("Thau

[1] In fact, the Court found that the plaintiff's "[a]mended [c]omplaint show[ed] just the opposite – that defendant published notices warning its customers of the fraud." *Id.* at 3 (citing Am. Compl., Exhibit ("Ex.") 1 (Barron's Open Letter to Subscribers Regarding Fraudulent Renewal Notices)).

Decl."), Ex. I (Deposition of I. Stephen Rabin dated Sept. 9, 2014) ("Rabin Dep.") at 254:17–20, 289:8–13. In *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351 (S.D.N.Y. 2006), *aff'd*, 249 F. App'x 845 (2d Cir. 2007), the court held that plaintiff's "actual personal knowledge that the . . . allegations were not true" was sufficient to "manifest bad faith," thus entitling defendant to "a full award of its costs and fees." *Id.* at 358. Similarly here, Mr. Rabin's admission that his allegations were unsubstantiated justifies an inference of bad faith, especially considering that the false allegations were not corrected in the amended complaint.

Furthermore, Mr. Bragar failed to conduct a good faith investigation into evidence that Dow Jones had been "fighting the fraud." *See* Declaration of Raymond A. Bragar in Opposition to Dow Jones' Motion for Sanctions dated Oct. 24, 2014 ("Bragar Decl.") ¶ 4 (stating that "[he] was aware that Dow Jones claimed to be fighting the fraud, but found its claim unpersuasive"); Thau Decl. ¶ 2 (citing Exs. C, D, E (open letters to subscribers and online fraud alert notices posted by Dow Jones in 2011–2013)). This evidence was in direct conflict with plaintiff's overbroad allegations alleging Dow Jones's authorization of, involvement in, and benefit from the CBS scheme. *See* Am. Compl. ¶¶ 8–15. Furthermore, at the parties' "meet and confer" session on July 22, 2014, Dow Jones's attorneys informed Mr. Bragar that the publisher had not cashed any of CBS-generated checks after it learned of the fraud scheme. Thau Decl. ¶¶ 2–3; Bragar Decl. ¶ 6. They confirmed this in a signed affidavit on

July 31, 2014. Thau Decl. ¶ 2. Nonetheless, the amended complaint reasserted the over-generalized allegation that Dow Jones "received monies" and "ret[ained] [] the fraudulent proceeds" for subscriptions obtained by CBS.[2] Am. Compl. ¶¶ 13–14. Mr. Bragar's failure to investigate or adjust the pleadings in the amended complaint according to the facts known at the time supports an inference of bad faith. *See Reichmann*, 553 F. Supp. 2d at 320 (finding that counsel's failure "to investigate whether there was any factual support at all for the claims, beyond the representations of the client . . . . and turn[ing] a blind eye to the inconvenient facts and documents" permitted an inference of bad faith).[3]

Plaintiff's counsel asserts that "[a]s the facts developed, [they] believed that, *factually*, they had a better action against Dow Jones, than [against] the other two defendants, who readily settled." Plaintiff's Memorandum of Law in Opposition to Defendant Dow Jones Motion for Sanctions of $325,000 ("Pl. Br.") at 6 (emphasis added). But, the Court finds, there were no material facts

[2] Mr. Bragar argues that he "did not plead these facts in the amended complaint because [he] learned them in the 'off the record' conversation." Bragar Decl. ¶ 6. Although a plaintiff has no obligation to account for a defendant's version of the facts in his pleadings, Rule 11 stipulates that "[b]y presenting to the court a pleading, . . . an attorney . . . certifies that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support." Fed. R. Civ. P. 11.

[3] Not only had Mr. Bragar failed to investigate the evidence provided in the parties' first meet and confer session, but plaintiff continued to pursue the claim against the publisher, despite accruing additional evidence showing that Dow Jones had not engaged in the CBS scheme. *See, e.g.*, Thau Decl. ¶ 2 (confirming that Dow Jones did not cash subscription checks originating from CBS); Ex. F (Dow Jones's "cease and desist" letters sent to CBS); Ex. G (Dow Jones's letters to law enforcement and consumer protection agencies regarding the CBS fraud).

supporting this statement. On the contrary, the factual evidence presented in both the initial and amended complaints was, as the court found, insufficient to support an inference that Dow Jones engaged in "misleading acts or practices," or "itself misrepresented anything." Mem. Or. at 3. Moreover, plaintiff responded to Dow Jones's discovery request for "[a]ll documents upon which each claim at issue in this [l]awsuit is or was based," — with "[n]one." Thau Decl., Ex. J (Plaintiff's Response to Defendant Dow Jones & Company, Inc.'s First Demand for Documents) ¶ 19.

Further still, plaintiff withheld relevant evidence from defendant throughout this litigation, suggesting that Mr. Rabin and Mr. Bragar sought to "suppress the truth" underlying the viability of their action against Dow Jones. *See Reichmann*, 553 F. Supp. 2d at 321. The withheld evidence included: the reverse side of the CBS Renewal Notices, which state that there is "not necessarily . . . a direct relationship" between CBS and Dow Jones, Thau Decl., Ex. B; Mr. Rabin's communications with CBS two months prior to the filing of the suit about his receipt of a magazine he did not order, *compare* Thau Decl., Ex. H (Plaintiff's Response to Dow Jones & Company, Inc.'s First Set of Request for Admissions) ¶ 5 (failing to disclose Mr. Rabin's communications with CBS), *with* Rabin Dep. at 77:7–14 (admitting to having contacted CBS); and the three checks plaintiff received from CBS refunding a portion of the payments Mr. Rabin's wife made in response to the CBS Notices, *see* Thau Decl., Ex. A. With respect to the three checks, at some point during the

course of this litigation, Mr. Rabin presented them to Mr. Bragar, who considered the checks "of no consequence" and decided to put them in a file instead of disclosing them to Dow Jones, even though the checks, albeit uncashed, were among the payments plaintiff sought as damages against Dow Jones. *See* Bragar Decl. ¶¶ 8–9.

And there is still more. When Mr. Rabin was confronted with evidence during his deposition that called into question the truthfulness of a dozen or so assertions he had made earlier in the deposition and in his responses to Dow Jones's requests for admissions, Mr. Rabin claimed that he "forgot," or that the true circumstances "must have slipped [his] memory." *See, e.g.*, Rabin Dep. at 142:6–143:16, 149:15–150:2. For example, Mr. Rabin was "unable to recall" at least six out of eight different lawsuits he had brought since 2006, including other class-action suits where Mr. Rabin was the named plaintiff, and suits where he was represented by Mr. Bragar's firm. *See, e.g.*, *id.* at 141:19–142:10, 146:12–147:6. Given that Mr. Rabin himself is an experienced class-action attorney, the Court finds suspect his inability to recall and accurately testify to his personal involvement in prior litigation.

Finally, the Court finds no merit in plaintiff's argument that there can be no finding of "vexatious multiplication" of proceedings because the case only lasted three months. *See* Pl. Br. at 8. As already noted, the Court has the discretion to consider the totality of the factual evidence contained in the record to determine whether sanctions are appropriate in any given case. *See Chambers v. NASCO,*

Inc., 111 S. Ct. 2123, 2137 (1991); *United States v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991).

Accordingly, having found that plaintiff's claim had no color, and having identified multiple aspects of this lawsuit that show plaintiff and his counsel acted in bad faith, the Court finds that sanctions against Mr. Rabin and Mr. Bragar are appropriate.

Turning to the amount of the award, defendant urges the Court to order plaintiff and plaintiff's attorney to pay the entirety of the costs Dow Jones accrued in defense of this lawsuit. Def. Bf. at 2. While the Court agrees that, ultimately, the plaintiff's suit was shown to be without color and pursued in bad faith, it hesitates to conclude that the initial complaint was entirely baseless. Considering that, at the time of the initial filing, plaintiff may not have had any reasonable method to differentiate between the three original defendants and had not had the benefit of initial discovery, the Court affords plaintiff the presumption, weak though it may be, that the initial complaint was not filed in bad faith.

However, such presumption of good faith with respect to plaintiff and his counsel does not extend much further. In light of the Court's factual findings above, the Court considers Mr. Rabin's and Mr. Bragar's conduct to be sanctionable from the time of the filing of the amended complaint on August 1, 2014. Accordingly, defendants' motion for sanctions in the amount of its attorneys' fees and costs incurred following the filing of the amended complaint (including this motion for sanctions) is granted.

Defendant is directed to submit to the Court a detailed calculation of the amount of such fees and costs within two weeks from the date of this Order. Plaintiff may then submit, no later than one week thereafter, any challenge to that calculation, following which the Court will determine the amount of the sanction.

The Clerk of the Court is directed to close docket number 36.

SO ORDERED.

Dated: New York, NY
July 30, 2015

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

I. STEPHEN RABIN, on behalf of himself and on behalf of all others similarly situated,

Plaintiffs,

-v-

DOW JONES & COMPANY, INC.,

Defendant.

14 Civ. 4498(JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On July 30, 2015, the Court granted a motion for sanctions brought by defendant Dow Jones & Company, Inc. ("Dow Jones") against plaintiff I. Stephen Rabin and plaintiff's attorney, Raymond A. Bragar, in the amount of defendant's attorneys fees and costs incurred following the filing of the amended complaint on August 1, 2014 (including the motion for sanctions). See Memorandum Order dated July 30, 2015 at 10. The Court directed the defendant to submit a detailed calculation of the amount of such fees and costs within two weeks from the date of the Court's order. Memorandum Order dated July 30, 2015 at 11. Having considered defendant's submission regarding its attorneys' fees and costs, as well as plaintiffs' memorandum contesting defendants' submission, the Court hereby holds Messrs. Rabin and Bragar jointly and severally liable to defendant in the amount of $180,000.

In its submission, Dow Jones indicated that it had incurred attorneys' fees for its defense of the action following the filing of plaintiff's amended complaint in the amount of $261,498.24 and that it had incurred costs in the amount of $19,855.90 for the same period. See Dow Jones's Submission of Its Attorneys' Fees and Costs Pursuant to Court Order Granting Sanctions ("Def. Br.") at 2. Dow Jones also estimated that an additional $7,500 in attorneys' fees had been incurred in the preparation of the aforementioned submission itself, although the client had not yet been billed for this work. Def. Br. at 2. Thus, the total amount claimed by Dow Jones is $288,854.14.

Plaintiff Rabin and his counsel Bragar contest defendant's application for fees and costs, arguing that Dow Jones's sanctions should be no more than $144,000. See Answering Memorandum in Opposition to Dow Jones' Application for Fees and Costs (Pl. Br.) at 4. Plaintiffs allege that Dow Jones overstaffed the case with "two partners, three associates, four paralegals, and three persons from their Practice Support Department." Pl. Br. at 1-2. Plaintiffs also claim that Dow Jones expended unnecessary hours preparing the case. Pl. Br. at 1. Specifically, plaintiffs indicate that it was unnecessary for Dow Jones's attorneys to spend about 30 hours preparing for depositions that took 10 hours, to spend almost 38 hours on the motion to dismiss the amended complaint, to spend almost

177 hours on discovery, and to spend about 87 hours in conversations, meetings, and conferences. Pl. Br. at 2-3. Plaintiff Rabin and plaintiff's attorney Bragar further note that they must pay any sanction individually and have been practicing law with hitherto unblemished records for careers spanning 56 and 42 years, respectively. Pl. Br. at 4.

In the Second Circuit, when a court awards attorneys' fees to a prevailing defendant in the form of Rule 11 sanctions, "a lodestar [i.e., hourly billing] amount need not be routinely awarded." Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 122 (2d Cir. 1987). While the sanctions in the instant case were not awarded pursuant to Rule 11, but pursuant to 28 U.S.C. § 1927 and the Court's inherent authority, the mandate of Eastway that sanctions' "severity be carefully calibrated by those entrusted with the responsibility for imposing them," Eastway, 821 F.2d at 122, reasonably applies as well to attorneys' fees awarded as sanctions pursuant to provisions other than Rule 11.

In the instant case, the Court finds that awarding the full amount of fees incurred by Dow Jones would be overkill. While the time spent by defendant's counsel in preparing for and conducting depositions, drafting and pursuing the motion to dismiss, and conducting discovery does not appear unreasonable, the great many hours spent in meetings, phone calls, and email conversations among

the numerous attorneys and staff tasked with defending against the plaintiffs' lawsuit does appear excessive. See, e.g., Pl. Exhibit 5. More important, under all the facts and circumstances, a sanction of nearly $300,000 strikes the Court as too severe. On the other hand, the calculation of $144,000 by Messrs. Rabin and Bragar takes a mincing approach not in accord with the equities.

Upon full consideration, therefore, the Court concludes that Messrs. Rabin and Bragar must be, and hereby are, held liable, jointly and severally, to Dow Jones in the amount of $180,000, which must be paid by no later than October 30, 2015.

SO ORDERED.

Dated: New York, NY
September 7, 2015

JED S. RAKOFF, U.S.D.J.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 123. Fees and Costs (Refs & Annos)

28 U.S.C.A. § 1927

§ 1927. Counsel's liability for excessive costs

Currentness

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 957; Sept. 12, 1980, Pub.L. 96-349, § 3, 94 Stat. 1156.)

Notes of Decisions (1057)

28 U.S.C.A. § 1927, 28 USCA § 1927
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

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