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

REPLY BRIEF 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

Like thousands of other magazine subscribers, Stephen Rabin fell victim to CBS's subscription fraud. He lost thousands of dollars in two years. It is undisputed that Dow Jones was aware of that fraud for years while it continued unabated. Rabin and his attorney, Raymond Bragar, reasonably believed that the law should require Dow Jones and the other publishers to protect its subscribers from this pernicious fraud. The other publishers settled and provided relief to their subscribers, but Dow Jones pursued a motion to dismiss.

The district court ultimately found that the allegations against Dow Jones did not state a claim, and Appellants never appealed. The entire litigation took a mere three months from start to finish. Nonetheless, Dow Jones insisted on trying to punish Appellants because they advocated imposing a duty of care on publishers in these circumstances. As a result, the district court sanctioned Appellants for the outrageous sum of $180,000.

Appellants' opening brief demonstrates that the district court's sanctions order was deeply flawed, both legally and factually. Dow Jones's response is long on accusations and hyperbole, but short on substance. It maintains that the district court applied the right standard for determining lack of color, but cannot point to anything more than the boilerplate recitation of that standard. It fervently argues that the district court was correct to dismiss Rabin's claims, but ignores that a

losing argument is not the same as a sanctionable one. It also disregards record evidence supporting Appellants' arguments and providing them with a good faith reason for pursuing the claims.

Most disturbingly, Dow Jones takes substantial liberties with the record in an effort to shore up the district court's order. It misleadingly alters quotations from the order to try to paper over the district court's errors. At times, it relies on its own unsubstantiated assertions and "evidence" never presented to the district court in order to undercut the factual and legal support underlying the Amended Complaint. This information is not properly before the Court on appeal. It also serves to illustrate the weaknesses in the sanctions order: Dow Jones seeks to show that the allegations were unsupported or wrong, and that Appellants knew this by pointing to new, unsupported assertions that Appellants did not learn about until reading Dow Jones's appellate brief. By using material from outside the record to try to impugn Appellants, Dow Jones seeks to hold them to an impossible standard; it is faulting them for not knowing information they could not have known. That is not what the law requires, and cannot support the extraordinary sanctions meted out in this case.[1]

[1] Some of Dow Jones' extra-record material actually helps show that the Amended Complaint was not colorless. It now claims it had to spend millions to refund defrauded subscribers. (Dow Jones Br. at 2). If true, this illustrates that the lawsuit was aimed at remedying a very serious fraud that had significant repercussions for Dow Jones and its subscribers.

I. DOW JONES MISCHARACTERIZES THE STANDARD OF REVIEW

This Court has repeatedly held that the standard for appellate review of sanctions orders under 28 U.S.C. § 1927 and the court's inherent power is more rigorous than the ordinary abuse-of-discretion test. (*See* Appellants Br. at 17-18). Dow Jones attempts to paint the standard as deferential to the district court (Dow Jones Br. at 3, 27), but this Court has stressed that its review of district court sanctions order is "more exacting" than in other contexts. *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 113-14 (2d Cir. 2009) (citation omitted). The Court must "ensure that any [sanctions] decision is made with restraint and discretion." *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *accord United States v. Seltzer*, 227 F.3d 36, 39 (2d Cir. 2000). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Schlaifer Nance*, 194 F.3d at 333 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

II. THE CLAIMS DID NOT LACK COLOR

A. The District Court Did Not Apply The Correct Standard To Determine Whether The Claims Lacked Color

This Court requires a district court imposing sanctions under § 1927 or the court's inherent power to find with a "*high degree of specificity*" that "the

offending party's claims were entirely without color." *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) (per curiam) (emphasis added); *accord Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000). A claim lacks a colorable basis only "when it is utterly devoid of a legal or factual basis." *Schlaifer Nance*, 194 F.3d at 337. A mere failure to state a claim under Rule 12(b)(6) is not enough. (Appellants Br. at 20-21). For example, this Court recently held that meritless motion to vacate an arbitration award did not warrant sanctions where petitioner "tie[d] its reasoning, however flawed, to recognizable legal concepts." *Zurich American Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 591 (2d Cir. 2016). Here the district court never actually applied the governing standard, and instead merely conclusorily "reaffirm[ed] its finding, articulated in the Order dismissing the action, that each of plaintiff's alleged claims *fails as a matter of law*." (*See* SPA-4 (emphasis added); Appellants Br. at 21-22).

Dow Jones's efforts to divine the requisite specificity in the district court's conclusory statements is unavailing. It claims that the district court applied the correct standard because it quoted the caselaw. (Dow Jones Br. at 28-29). But boilerplate recitation of the standard is no substitute for applying that standard to the facts of the case, which the district court never did. (*See* Appellants Br. at 21-22).

The only "analysis" of the claims' merit in the sanctions order is a one-paragraph summary of the district court's reason for dismissing the aiding and abetting claim. (*See* SPA-4-5 (describing what "the Court concluded" or "noted" in motion to dismiss order (citing A-93-94))). Contrary to Dow Jones's mischaracterization (Dow Jones Br at 30), this paragraph and the order it cites did not apply the standard for determining lack of color. The dismissal order contains no suggestion that the claims were utterly devoid of factual or legal merit. (*See* Appellants Br. at 21-22 & n.7). Nor did the district court suggest as much during oral argument. (*Id.* at 15; A-208-29).

Dow Jones's argument that the district court made an "explicit finding" that "'plaintiff's *claim[s]* had no color'" (Dow Jones Br. at 30 (misquoting SPA-10)) is equally baseless. Adding an "s" that was not in the lower court's order does not transform a sentence about one claim into a finding about all three. The only "analysis" of any claim was the paragraph alluding to the dismissal order, and that paragraph mentions only the aiding and abetting claim. (*See* SPA-4 (holding that plaintiff failed to "plead facts showing that the defendants had an affirmative duty to act or that the inaction was intentionally designed to aid the fraud," as required to allege substantial assistance for aiding and abetting fraud)). Nor is the added "s" somehow justified by the false assertion that the district court "noted" that Rabin's

claims were based on "a single . . . theory" (Dow Jones Br. at 31 (citing SPA-4)); the district court never "noted" any such thing.

Furthermore, the "explicit" finding Dow Jones points to was not a finding, but a naked conclusion that "having found that plaintiff's *claim* had no color," it could impose sanctions. (SPA-10 (emphasis added)). This conclusion, unsupported by any reasoned analysis, is far short of the "high degree of specificity" necessary to justify sanctions. *Revson*, 221 F.3d at 79. Saying the magic words is not a substitute for specific findings, and this Court has not hesitated to reverse awards based on similarly conclusory findings. *See*, *e.g.*, *Eisemann*, 204 F.3d at 396-97 (reversing sanctions for lack of specificity even though district court said that "the motion was brought in bad faith").

B. None Of The Claims Was Utterly Devoid Of A Factual Or Legal Basis

Contrary to Dow Jones's arguments, each of the claims in the Amended Complaint had some factual support and/or was based on a good-faith argument for an extension of the law not barred by precedent. (*See* Appellants Br. at 23-34).

1. The Negligence Claim Was Based On A Good-Faith Argument For Extending The Law

Dow Jones concedes that a claim based on an argument for a good faith extension of the law does not lack color. (Dow Jones Br. at 39). It argues, however, that Appellants were not seeking a good faith extension of the law on

special relationships because their argument was unlikely to succeed. (*Id.* at 38-39).

This misses the point. Any attempt to extend the law faces long odds; it is only colorless if some precedent forecloses the attempt—which was not the case here. (*See* Appellants Br. at 24-26); *Strom v. United States*, 641 F.3d 1051, 1059 (9th Cir. 2011) ("a suit raising a novel issue of law as to which there is no caselaw to the contrary would not be" frivolous "even if it was subject to dismissal on the pleadings for failure to state a claim for relief"); *see also Zurich*, 811 F.3d at 591 (§ 1927 sanctions not warranted where "unconvincing arguments" were "tie[d] . . . to recognizable legal concepts" and relied on the legal "framework . . . applied in" analogous cases). (Indeed, litigants may even argue in good faith without fear of sanctions that precedent should be overturned). Here, based on the caselaw on special relationships, Appellants argued that the specific circumstances of Dow Jones's relationship with its subscribers vis-à-vis CBS's fraud should lead the district court to recognize a duty of care. That argument may have been a stretch, but it certainly had not been rejected, or even directly addressed, by the courts.

The very length of Dow Jones's argument on this issue shows that the negligence claim did not lack any color. Dow Jones expends six pages and cites numerous cases, including a number that the district court did not even mention in its dismissal order (the only order addressing the negligence claim), to argue that

the relationship between Rabin and Dow Jones differs from the circumstances in which New York law recognizes a special relationship. (*See* Dow Jones Br. at 39-44). If it was so obvious that the proposed extension of the doctrine was foreclosed, Dow Jones would have been able to demonstrate that in a paragraph or two with a few controlling citations. It could not, because there is no case on point foreclosing the extension, and Dow Jones's arguments are about why the law *should not* be extended to cover the publisher-subscriber relationship.

For example, Dow Jones argues that the publisher-subscriber relationship differs from that between common carrier and passenger (*id.* at 39-40), and that a duty of care should not be recognized because there would be too many potential plaintiffs (*id.* at 43-44). Even if these arguments support dismissal, they do not show that it was frivolous to argue that a special relationship should be recognized on the facts of this case. The common law of torts is constantly evolving, and how doctrines apply to particular issues is generally fact-intensive, not fixed.

Although Dow Jones also claims that New York courts "reject[] the contention that a 'special relationship' exists between publishers and their subscribers" (*id.* at 38, 41-42), the negligent misrepresentation cases it cites do not support this overbroad assertion. Rather, they hold only that a publisher does not owe a duty to protect subscribers *who rely on the contents of a publication*—a very different sort of claim from the one asserted here. *See, e.g.*, *Jaillet v. Cashman*,

115 Misc. 383, 384 (Sup. Ct. 1921) (no duty of care owed by stock ticker service to subscriber who sold stocks based on erroneous report in ticker), *aff'd*, 202 A.D. 805 (1st Dep't 1922), *aff'd*, 235 N.Y. 511 (1923).[2] These cases do not hold, or even suggest, that a publisher never owes a duty of care to its subscribers in any context.

New York tort law does not categorically exclude certain relationships from creating a duty of care regardless of the context. Rather, negligent misrepresentation cases, like all negligence cases, assess whether a duty exists based on the particular circumstances of the relationship at issue. (*See* Appellants Br. at 23-24, 27); *see also Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 795-96 (3d Dep't 2002) (recognizing that "there typically is no fiduciary relationship between a borrower and a bank," but finding special relationship could exist between borrower and bank "under the particular circumstances presented here"); *see also SEC v. Lee*, 720 F. Supp. 2d 305, 329 (S.D.N.Y. 2010) (though "[b]rokers do not ordinarily have a 'special relationship' with non-discretionary account holders," an "ongoing special relationship may exist between a broker and client upon a proper

[2] Contrary to Dow Jones's argument (Dow Jones Br. at 42), the court in *Abraham v. Entrepreneur Media, Inc.*, No. 09-cv-2096 (JS)(MLO), 2009 WL 4016515, at *1-2 (E.D.N.Y. Nov. 17, 2009), did not find that a negligent-misrepresentation claim against a publisher was "frivolous." What the court found "frivolous" was an argument that the motion to dismiss should have been denied because the plaintiffs had "not been afforded the opportunity to conduct discovery." *Id.*at *2.

set of facts"). Even in the context of the publication of erroneous information, a publisher may owe a duty of care depending on the factual circumstances. *See, e.g.*, *McMillan v. Togus Reg'l Office Dep't of Veterans Affairs*, 120 F. App'x 849, 852 (2d Cir. 2005) (summary order) ("In the absence of fraud *or a special relationship* between them, which is not alleged, publishers owe no duty of due care to readers or to the public at large." (emphasis added)).

In sum, Appellants argued that a highly fact-intensive test, in an evolving area of law (*see* Appellants Br. at 27), could be satisfied in an entirely new factual setting. In situations like these, where the law is unclear or an issue is unaddressed, the chilling effect of sanctions is particularly stark. (*See id.* at 26-27). Dow Jones offers nothing other than its own conclusory say-so to address this concern. (Dow Jones Br. at 47).

Dow Jones also argues that Rabin was in the best position to protect himself from CBS's fraud and his negligence claim was therefore frivolous. (*Id.* at 42-43). This is a non-starter. It is undisputed that many, many people were defrauded, and that CBS's fraud was a successful, nationwide fraud that continued for years. (A-65-77). Dow Jones itself purports to have spent $2.6 million in free subscriptions for its defrauded subscribers (though it has offered no record evidence for that proposition). (Dow Jones Br. at 2). If it was so "simple" to detect, then why were so many other subscribers also duped? The truth is that Dow Jones admits it knew

about the fraud before Rabin was first defrauded, and claims it was trying to fight the fraud, but never bothered to contact Rabin or many other similarly situated subscribers to warn them individually of the fraud.

Dow Jones also argues for the first time that the negligence claim was colorless because Dow Jones "clearly fulfilled" any duty to protect its defrauded subscribers by supposedly making some efforts to combat CBS's fraud. (*Id.* at 44-46).

As an initial matter, this argument cannot support the sanctions order, because Dow Jones did not raise it below. This Court has refused to address alternative grounds for sanctions that the district court did not consider in the first instance. *See Zappulla v. Annucci*, No. 15-1903-cv, 2016 WL 851809, at *1 (2d Cir. Mar. 4, 2016) (summary order). It should do so here too.

In any event, Dow Jones provides no support for the proposition that any duty to protect its subscribers was "clearly fulfilled," or that Appellants lacked any colorable basis for arguing that the law should require Dow Jones to do more. Dow Jones undisputedly knew of CBS's fraud; claims that it identified and withheld checks from defrauded subscribers; and CBS's fraud had continued for years and very likely had defrauded thousands of Dow Jones subscribers. In light of these facts, Appellants had a good faith basis to argue that "reasonable care" required Dow Jones to take more active steps to curtail CBS's years-long

fraudulent scheme than sending a handful of letters and publishing an occasional notice in its publications. This argument may not have carried the day in the district court, but it was not frivolous to make it.

2. The Aiding And Abetting Claim Had Factual Support

In addition to arguing that Dow Jones owed a duty to protect its defrauded subscribers, Rabin alleged that Dow Jones substantially assisted the fraud by taking actions to further CBS's fraud. (*See* Appellants Br. at 29-33). Dow Jones argues that the Amended Complaint did not use the word "intent," and so could not have been alleging that Dow Jones intended to assist in CBS's fraud. (Dow Jones Br. at 33). This is form over substance. Regardless of whether the Amended Complaint included the word "intent," the substance of the allegations was that Dow Jones's deliberately chose not to act in order to reap a financial benefit from the fraud. *See, e.g.*, *Wight v. BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000) (fraudulent intent is adequately alleged where plaintiff contends that defendant had "clear opportunity and a strong financial motive to aid the . . . fraud").

The Amended Complaint alleges that Dow Jones had actual knowledge of CBS's fraud (A-46 ¶ 9); assisted in the fraud by refusing to notify or refund defrauded subscribers and by processing fraudulently procured renewals and retaining funds from CBS (A-47 ¶¶ 11-12); benefitted from the fraud (A-47-48 ¶ 13); and that this conduct "rendered substantial assistance" (A-50 ¶ 25). The

substance of the allegations was that Dow Jones's inaction was a deliberate choice to aid CBS's fraud. *See, e.g.*, *United Fid. Life Ins. Co. v. Law Firm of Best, Sharp, Thomas & Glass*, 624 F.2d 145, 148 (10th Cir. 1980) (plaintiff pleaded "fraudulent concealment" even though "those exact words are not in the complaint"); *Lemmon v. Cedar Point, Inc.*, 406 F.2d 94, 97 n.5 (6th Cir. 1969) ("Although plaintiff never use[d] the precise words 'without cause,'" "complaint as a whole" adequately alleged "that his discharge was without cause").

As explained, Appellants developed evidence supporting their substantial assistance argument. (Appellants Br. at 29-30). Dow Jones does not dispute that it continued to process many of the subscription renewals fraudulently procured by CBS. Dow Jones also benefitted from the fraud because it maintained its subscriber base at a low cost.[3] (*Id.* at 31). Most importantly, there was evidence that for at least the period between July 2010 and early 2011, Dow Jones was cashing renewal checks it received from CBS even though it had actual knowledge that CBS was procuring them through fraud. (Appellants Br. at 8, 11, 31).

[3] Dow Jones claims that "the subscribers at issue would have renewed their subscriptions" anyway (Dow Jones Br. at 34), but that misses the point. The Amended Complaint alleged that Dow Jones benefitted from the fraud by retaining its subscriber base without having to spend the money to do so itself. (*See* A-47 ¶ 13). Moreover, Dow Jones's argument that it lost millions because of the fraud is based on evidence outside the record on appeal—an affidavit filed in a different case six months after Appellants' suit was dismissed. (Dow Jones Br. 34-35). Obviously, this was not something Appellants could have known about during the proceedings, and is not a proper basis on which to affirm sanctions.

For the first time in its brief, Dow Jones asserts that in July 2010, it was only aware that one CBS-related entity was engaged in the fraudulent renewal scheme, and that in early 2011 it became aware of and stopped cashing checks fraudulently procured by another CBS-related entity. (Dow Jones Br. at 34 n.12). These assertions are completely unsupported; Dow Jones cites no evidence at all for them. These unsupported factual claims are improper, and this Court has sanctioned other litigants for such conduct. *See Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127-28 (2d Cir. 1989) (imposing sanctions on attorney for making factual representations in appellate brief). At a minimum, the Court should disregard these statements. "[A]bsent extraordinary circumstances, federal appellate courts will not consider rulings or evidence which are not part of the trial record." *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975); *accord* Fed. R. App. P. 10(a)(1) (record on appeal contains only "the original papers and exhibits filed in the district court").[4]

Dow Jones's attempt to supplement the record by making new factual assertions in its appellate brief is particularly out-of-bounds because this is an appeal of a sanctions order. Appellants' conduct must be judged based upon what

[4] For that matter, if Dow Jones only learned gradually that certain entities were tied to the CBS fraud, it is difficult to see how Dow Jones is so confident it never cashed checks from the entity that defrauded Rabin.

they learned during the litigation of the case, not some new factual assertions they are learning about for the first time in a brief defending the sanctions order.

As Appellants have acknowledged, the record did contain evidence that Dow Jones took some steps to combat the CBS fraud. (*See* Appellants Br. at 30-31; Dow Jones Br. at 7-9). But that evidence did not disprove the evidence underlying the fraud claim. (*See* Appellants Br. at 31-32). Nor did that evidence explain why Dow Jones had opted not to take more substantial steps to curtail the fraud, such as refunding defrauded subscribers or individually notifying them they had been defrauded. (*Id.* at 32). With discovery not yet complete, Appellants were entitled to believe that these limited efforts to combat the fraud were mere window-dressing, given the benefits Dow Jones reaped from the fraud and its choice not to take more aggressive action against it. That Dow Jones made some (unsuccessful) effort to combat the fraud does not necessarily relieve it from the duty of making additional efforts.

Dow Jones also now protests, again for the first time on appeal, that it did actually "directly contact[] numerous subscribers about the scam." (Dow Jones Br. at 9). Below, however, Dow Jones only identified certain prospective warnings in its publications or posted online. (*See* A-99-100 ¶¶ 9-11; *see also* Dkt. No. 37 at 4, 8 (citing only published notifications, not direct notifications)).[5] That is

[5] All citations to docket entry numbers refer to the district court's docket below.

unsurprising, because the evidence Dow Jones now cites as proof of its direct notifications is ambiguous at best. Dow Jones cites two letters it sent to law enforcement in which it represented that it had contacted subscribers (Dow Jones Br. at 9 (citing A-153 and A-159)), but these letters at most indicate that Dow Jones was in contact with defrauded subscribers, not that it affirmatively notified them of the fraud. Dow Jones also relies on an "internal document" which it says describes "subscriber outreach" (*id.* (citing A-246-48)), but the document's meaning is unclear on its face, and Dow Jones never offered any explanation (testimonial or otherwise) about the document (other than in its appellate brief). Finally, Dow Jones claims that Bragar "conceded" at oral argument that direct notifications were sent out (*id.*), when in fact Bragar actually stated that "I have no idea if they have been sent out." (A-218). Dow Jones's labored efforts to cobble together evidence supporting an argument it never made below is telling. In any event, Dow Jones never notified Rabin during the two-year period in which he was defrauded six times to renew subscriptions to their publications. (Appellants Br. at 40-41).

In sum, the allegations underlying the aiding and abetting claim found support in the record. When the Amended Complaint was dismissed, discovery was still ongoing, and Appellants had not had the opportunity to take any depositions. (*Id.* at 41). They were under no obligation to abandon their claims,

and the unrebutted facts supporting them, simply because there was evidence undermining the strength of their arguments. (*Id.* at 30).

3. The § 349 Claim Had A Factual Basis

Dow Jones does not meaningfully address Rabin's New York General Business Law § 349 claim in its brief. It does not dispute that § 349 covers any "deceptive acts or practices in the conduct of any business," and applies to conduct that falls short of fraud. (*See* Appellants Br. at 33-34). As explained, Rabin's § 349 claim was based on the same allegations as his aiding and abetting fraud claim. (*Id.* at 34). Because Appellants were able to develop factual support for those allegations, the § 349 claim was not utterly devoid of a factual basis. (*Id.*).

III. APPELLANTS DID NOT ACT IN BAD FAITH

Because Rabin's claims were colorable, this Court need not reach the issue of bad faith. (*Id.* at 35). But even if it does, the sanctions order should still be reversed because Appellants did not bring the claims in bad faith. (*Id.* at 36-48).

A. The District Court Did Not, And Could Not Have, Inferred Bad Faith From The Claims' Purported Lack of Color

Dow Jones asserts that the district court inferred bad faith "from the claims' utter lack of merit." (Dow Jones Br. at 48 (citing *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 116 (2d Cir. 2000)). This is not true. The district court said no such thing, even though it was well aware of the caselaw permitting such an inference in appropriate circumstances. (SPA-5 (citing *Schlaifer Nance*, 194 F.3d at 338)).

The bad faith conclusion cannot be affirmed based on a finding the district court never made, especially since the claims did have some factual and legal basis, as explained in Point I.

B. The Settlements Belie Bad Faith

The settlements with the two other defendants show that the suit was not brought for an improper purpose. (*See* Appellants Br. at 36-37). Dow Jones wants the Court to ignore these settlements, but provides no compelling reason to do so. (Dow Jones Br. at 46-47). It speculates that the other defendants may have been motivated to settle because Rabin and Bragar likely had "stronger grounds" against those defendants, or because of the "in terrorem" effect of the lawsuit.[6] (*Id.*). This speculation is at odds with Dow Jones's own depiction of Rabin's case. If, as Dow Jones asserts, Rabin's claims were all based on a theory that defendant-publishers owed a duty to protect Rabin from CBS's fraud and that theory was legally colorless, then how could there be "stronger grounds" for a claim against any of

[6] Dow Jones also claims that Appellants sued the defendant-publishers rather than CBS to "extort a settlement from a perceived deep pocket." (Dow Jones Br. at 11-12 (citing A-214); *id.* at 47). But the cited statement does not remotely support this contention. What Bragar said was that because of the difficulty in serving CBS, which perpetrated the fraud through numerous entities (*see* A-63 (notification from non-party Catholic Digest identifying CBS entities)), Appellants believed that they would be unable to obtain any recovery and unable to stop the fraud by suing CBS. (*See* A-214 (asserting that "[w]e tried to find" CBS entities); A-230-31 ¶ 3 (stating that Bragar's firm did research on CBS and "concluded that service on CBS would be difficult" and that CBS could "continue the fraud" by creating new entities)).

the defendants? Similarly, while in the abstract defendants may choose to settle a case rather than press a "meritorious defense" (*id.*), it does not follow that a defendant would settle a claim that was so meritless that it had no chance of success and was utterly devoid of a legal and factual basis.

C. Appellants Did Not Withhold Evidence In Bad Faith

The district court erroneously found bad faith based on its misunderstanding of three purported discovery violations. (SPA-8-9; Appellants Br. at 42-46). Dow Jones merely repeats the district court's errors.

1. Dow Jones continues to argue that Appellants tried to "hide" the reverse sides of CBS's fraudulent renewal notices. (Dow Jones Br. at 53; *see also id.* at 11). But Appellants produced the entire fraudulent renewal notices, including the reverse sides, in their initial disclosures less than three weeks after filing the *original* complaint. (*See* Appellants Br. at 44; *see also* A-257-59, A-261-65 (initial disclosures dated July 11, 2014); A-2 (complaint filed June 23, 2014)). And the district court expressly found that "the initial complaint was *not* filed in bad faith." (SPA-10 (emphasis added)). Thus, by the time the Amended Complaint was filed (on August 1, 2014 (A-5)), Appellants had already produced the reverse side of the notices; they obviously were not trying to "conceal" them.

2. Appellants conceded that they mistakenly delayed their disclosure of two pieces of evidence that, although relevant, were not particularly material: a

phone call between Rabin and CBS regarding a subscription for The Economist and three unsolicited and uncashed checks CBS had sent to Rabin purporting to refund him for a portion of his renewal payments for The Wall Street Journal and Barron's. (Appellants Br. at 44-45). Because of their marginal significance to the case, including the issues relevant to Dow Jones's then-pending motion to dismiss, Appellants simply forgot about them. (*Id.*). Once their memories were refreshed, they promptly disclosed the information. (*Id.*).

Dow Jones greatly exaggerates the relevance of the phone call regarding The Economist and the refund checks. (Dow Jones Br. at 49-51). First, Dow Jones repeatedly and misleadingly contends that Rabin's call to CBS seeking a refund for The Economist was somehow linked to the partial refund checks he received for the Dow Jones's publications. (*See* Dow Jones Br. at 49 ("Rabin contacted CBS . . . to request a refund and then received three refund checks from CBS . . . ."); *id.* at 3)). These assertions are completely false, and the district court did not suggest that the two were connected in any way. It was undisputed that Rabin never requested a refund for any publication other than The Economist.

Second, it is undisputed that Rabin's call to CBS concerned only The Economist, and not any defendant or its publications. Nonetheless, Dow Jones speculates that CBS used money that Rabin paid for the fraudulent renewal of Dow Jones's publications to purchase a subscription to The Economist (all because Dow

Jones supposedly was not accepting payment from CBS), and thus by requesting a refund for The Economist, Rabin was in fact requesting a refund for Dow Jones's publication. This bizarre tale highlights the inherent weaknesses in Dow Jones's argument, and underscores how difficult it is to ascribe any significance to the CBS call.

Third, Dow Jones maintains that the phone call and the checks could have had a "potential effect" on "the propriety of class certification." (*Id.* at 50-51). But Dow Jones is unable to explain what effect the call or the checks, which only partially refunded Rabin for his losses from his fraudulent renewals of Dow Jones's publications, would have had on the class certification inquiry. Moreover, Dow Jones could not have been prejudiced in any way because no motion for class certification was ever filed. This is yet another basis for reversal. *See, e.g.*, *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997) (reversing sanctions order under § 1927 where plaintiffs failed to file amended complaint within time required because delay "did not unduly prejudice defendants").

Finally, Dow Jones's overblown suggestion of a pattern of delays indicative of bad faith (Dow Jones Br. at 51-52) ignores that Appellants fully disclosed the evidence very soon after they were first reminded of it. (*See* A-99 ¶ 5 (Bragar produced the checks from CBS on the same day he was reminded of them); A-233 ¶¶ 10-11 (Rabin disclosed the phone call one week later)). Likewise, Dow Jones's

attacks on the credibility of Appellants' genuine failure to recall (Dow Jones Br. at 53) are simply unfair. Dow Jones's only other example of the supposed "pattern" of memory lapses is the district court's inaccurate assertion that Rabin failed to recall "at least six out of eight different lawsuits he had brought since 2006" at his deposition. (SPA-9 (cited by Dow Jones Br. at 53)). Dow Jones apparently concedes that the district court was wrong on the facts (Dow Jones Br. at 53 n.14), and that at most, Rabin momentarily forgot one class action filed in 2006 and two cases from the 1970s. (A-181-82/145-48; A-194/301). Neither Dow Jones nor the district court has ever pointed to anything suggesting that the inability of an 82-year-old lawyer with over 50 years' experience to recall a couple of cases (including two filed 40 years earlier) was anything but genuine. (*See* Appellants Br. at 46).

3. Finally, as Appellants explained, the district court mischaracterized Appellants' response to a Dow Jones document request. (*Id.* at 42-43). Dow Jones apparently concedes that the district court misunderstood the response, for it does not dispute Appellants' argument on this point.

C. Appellants Did Not Intentionally Make False Allegations

The district court abused its discretion by inferring bad faith from two imprecisely worded sentences in the Amended Complaint and an allegation that

was supported by record evidence. (*Id.* at 37-42). Dow Jones's attempt to salvage these erroneous findings is unavailing.

1. Dow Jones claims that Appellants should have modified their allegation that it had knowingly received proceeds from CBS's fraud after Dow Jones's counsel represented in confidential settlement negotiations that it had stopped cashing CBS checks. (Dow Jones Br. at 54). But record evidence indicated that the allegation was true (at least between July 2010 and "early 2011"), and Dow Jones is unable to point to anything in the record refuting that evidence. (*See* Appellants Br. at 8, 11, 31); *see also supra* pp. 13-14. The only "evidence" Dow Jones relies on to purportedly show that it did not knowingly retain fraudulent proceeds from CBS is *extra-record assertions* in its brief that in July 2010 it was only aware that one CBS entity was engaged in fraud. (Dow Jones Br. at 54 (citing *id.* at 34 n.12)). The district court's findings cannot be affirmed based on unsubstantiated assertions made in violation of the Federal Rules of Appellate Procedure for the first time in an appellate brief. There is no way Appellants could have known of the "facts" alleged in the appellate brief when they filed the Amended Complaint, much less disregarded them in bad faith.

Dow Jones also argues that Appellants should have abandoned their claims because Rabin was first defrauded in July 2011, and Dow Jones's counsel

represented that it had stopped cashing checks in "early 2011."[7] (*Id.* at 54-55). But Appellants were not required to simply accept this representation without proof, and drop their suit. After all, even as late as its sanctions motion, Dow Jones continued to deny knowingly benefitting from the fraud, even though the evidence belied this claim. (*Compare* Dkt. No. 37 at 4 (representing that Dow Jones "has not cashed any checks it identified as originating with CBS after becoming aware of the scheme"), *with* A-119 (showing Dow Jones had notice of fraud in July 2010), *and* A-97-98 ¶ 2 (Dow Jones counsel told Appellants that it stopped cashing CBS checks in "early 2011"); *see also* Appellants Br. at 8, 31 (citing A-119 and A-97-98 ¶ 2)). Dow Jones offered its counsel's representation and a "draft affidavit" to show that it was no longer cashing checks. (*See* A-97-98 ¶ 2). That affiant, however, had not been deposed, and Dow Jones had not presented Appellants with any documentary evidence substantiating that claim. A party is not required to accept all of its opponent's representations, without any opportunity to verify them, or risk being accused of bad faith. *See Cohen v. Fox*, 122 F.3d 1060, at *4 (4th Cir. 1997) (unpublished) (reversing imposition of

[7] Dow Jones claims it was "entirely appropriate" for its counsel to represent to the district court that "'for the entire period of time' relevant to Rabin's claims, Dow Jones 'didn't cash [CBS's] checks.'" (Dow Jones Br. at 55 n.15 (quoting A-220)). But when counsel made the misleading argument to the district court (*see* Appellants' Br. 40), the statement was much broader; it was not limited to the time period "relevant to Rabin's claim," as Dow Jones misleadingly suggests. (*See* A-219-20).

sanctions on plaintiff's counsel for pursuing case despite affidavits from defendants that foreclosed plaintiff's theory of liability; attorney "had an obligation to zealously represent his client which required him to attempt to verify the accuracy of the defendants' affidavits [through depositions], rather than accept them at face value").

Nor was it somehow in bad faith not to "qualify" the allegation to "acknowledge" that Dow Jones said it stopped cashing checks after early 2011. (Dow Jones Br. at 54-55). That was not an "undisputed fact," as Dow Jones claims. Discovery was still ongoing. In any event, the allegation as written was true. Dow Jones cites no authority requiring a plaintiff who makes a true allegation to include additional language containing other assertions his opponent in the lawsuit would like to make.

2. Dow Jones continues to allege that the Amended Complaint said that the CBS "notices 'stated that they . . . were authorized by the defendants,' and that Dow Jones needed to be 'enjoin[ed] . . . from conspiring with CBS.'" (*Id.* at 56 (citations omitted)). But it fails to rebut Appellants' arguments showing that this is not what the Amended Complaint actually said, and that the district court misconstrued these allegations. (Appellants Br. at 37-40).

First, contrary to Dow Jones's representation of the record, the Amended Complaint never *alleged* "that Dow Jones needed to be 'enjoin[ed] . . . from

conspiring with CBS." (Dow Jones Br. at 56 (citing A-52)). The Prayer for Relief included a request that the district court issue "[a]n injunction enjoining defendants from conspiring with CBS" (A-52), but this was just a vestige of the conspiracy claim that Appellants had removed from the Amended Complaint. (*See* Appellants Br. at 13, 37-38). Because it did not purport to allege any fact, it could not have been false.

Second, the Amended Complaint never suggested that Dow Jones (or any defendant) actually authorized CBS's renewal notices. It would have made no sense to say that, because Appellants' entire theory was that CBS's notices were *not* actually authorized by the defendants, but *appeared to be*. (*Id.* at 38). There would have been no reason for Appellants to intentionally allege otherwise. Dow Jones offers no meaningful response. The language used in the allegation was perhaps imprecise, but not in bad faith. (*Id.*).[8]

D. This Court Has Never Previously Found Similarly Innocuous Conduct In Bad Faith

Dow Jones is unable to muster any response to the overwhelming authority showing that Appellants' conduct does not remotely approach the sort of egregious

[8] In a footnote, Dow Jones claims that the district court "did not even fully catalog Rabin's and Bragar's misconduct." (*See* Dow Jones Br. at 57 n.16; *see also id.* at 4-5). Each of these supposed acts of "misconduct" were fully raised in Dow Jones's motion for sanctions filed below (*see* Dkt. No. 37 at 1-2), but the district court apparently found them unconvincing, as it did not rely on them.

misconduct this Court has found indicative of bad faith. (*See* Appellants Br. at 47-48 (collecting cases)). Moreover, the two district court cases Dow Jones cites for its bad faith argument (Dow Jones Br. at 48-49, 54, 56) only highlight how much worse conduct has to be in order to justify a finding of bad faith.

In *Reichmann v. Neumann*, the plaintiff and his attorneys repeatedly refused to acknowledge the existence and authenticity of a settlement agreement foreclosing the plaintiff's claims; "fundamentally" and "inconsistent[ly]" changed their "version of events several times" "to accommodate the new facts and documents being produced;" and intentionally limited their document requests to a third-party in order to avoid the production of documents that would foreclose the plaintiff's claims. 553 F. Supp. 2d 307, 321-26 (S.D.N.Y. 2008). Similarly, in *Baker v. Urban Outfitters, Inc.*, the sanctioned attorney pressed claims that were barred as a matter of law by the Copyright Act, even though that attorney had previously litigated these issues and lost; sought damages in an amount over 66 times greater than actual damages, even though he knew the plaintiff could only recover actual damages; and objected to discovery of certain documents, falsely represented to court that no such documents existed after the court ordered production, and only produced them on the last day of discovery. 431 F. Supp. 2d 351, 363-67 (S.D.N.Y. 2006), *aff'd*, 249 F. App'x 845 (2d Cir. 2007).

Here, Appellants were trying to extend the law where no precedent precluded them. They may have made one or two mistakes, but their conduct does not remotely approach the type of misbehavior that this Court has found can justify sanctions under § 1927 or the court's inherent powers.

CONCLUSION

The district court failed to apply the governing standard, failed to make the specific findings required to justify the extraordinary sanctions it awarded, and made a series of other factual and legal errors. Its decision has created an unjustified stain on the unblemished reputations of two well-regarded members of the bar who have practiced law for a collective century, and should be reversed.

Dated: New York, New York
May 24, 2016

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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 6,943 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: May 24, 2016

/s/ Alexandra A.E. Shapiro