APPENDIX

APPENDIX

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APPENDIX A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
FED. R. APP. P. 32.1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 20-3221

[Filed April 8, 2022]

RAY A. BOVINETT, *Plaintiff*,

v.

HOMEADVISOR, INC., et al., *Defendants-Appellees*.

APPEAL OF: MARK BARINHOLTZ

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 06229

Harry D. Leinenweber, *Judge*.

App. 2

Submitted April 1, 2022*
Decided April 8, 2022

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

O R D E R

Attorney Mark Barinholtz incurred sanctions for repeatedly asserting baseless claims and disregarding a court order. He moved, unsuccessfully, for reconsideration and then filed a notice of appeal. The appeal is timely only with respect to the denial of the motion to reconsider. That decision was sound, so we affirm.

Barinholtz represented Ray Bovinett, a model and actor, in an action alleging the unauthorized use of photos of Bovinett. According to the complaint, Bovinett contracted with HomeAdvisor, Inc., to have photos of him used in the company's print advertisements. After a photo shoot in Chicago, Bovinett's talent agent signed a release permitting HomeAdvisor to use the photos "in any media, … including … television commercials," though HomeAdvisor represented that the photos would

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

appear only in print. Yet HomeAdvisor partnered with Hawthorne Direct, LLC, a media company, to feature Bovinett's image in television commercials. Bovinett sought relief against HomeAdvisor and Hawthorne under 14 legal theories.[1]

On the defendants' motions to dismiss for lack of personal jurisdiction and for failure to state a claim, the district judge dismissed the complaint. Notably, the judge concluded that there was no personal jurisdiction over Hawthorne (a limited liability company with a single member who had no relevant ties to Illinois). *See* FED. R. CIV. P. 12(b)(2). The judge explained that the complaint did not specify which allegedly unlawful acts Hawthorne took part in or how Hawthorne directed any activity toward Illinois. The judge also dismissed 11 counts that lacked supporting factual allegations. *See id.* R. 12(b)(6).

Barinholtz then filed an amended complaint on Bovinett's behalf asserting that Hawthorne had "hatched a plot" with HomeAdvisor to use Bovinett's photos in televised commercials. It allegedly chose the Chicago location for the photo shoot; told Bovinett and his talent agent "orally and in text messages" that despite the release, the photos would not appear in televised ads; and "travel[ed] to Chicago" to oversee the photo shoot. The complaint again contained 14 separate theories of relief and set out without meaningful change some counts that had been dismissed.

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[1] The remaining defendant, ANGI Homeservices, Inc., is the successor company to HomeAdvisor and assumed its liabilities.

In light of the assertions about Hawthorne, the judge allowed the parties to take limited discovery about personal jurisdiction and soon after granted Hawthorne's motion to compel discovery because Bovinett's responses were vague and evasive. For example, Bovinett answered every request for admission by stating he was "not in possession of sufficient knowledge or information to admit or deny." Barinholtz supplemented the responses after the judge's order, but to add only that Bovinett lacked "direct, in person knowledge" of the subjects.

The defendants moved to dismiss the amended complaint, and the judge granted their motion. First, he dismissed all claims against Hawthorne for lack of personal jurisdiction based on evidence that Bovinett's relevant allegations were untrue: Hawthorne's personnel did not attend or plan the Chicago photo shoot and in fact did not start working on HomeAdvisor's commercials until months after the photo shoot. And according to testimony from Bovinett and his talent agent, no one from Hawthorne ever communicated with them about the photo shoot, the intended use of his photos, or the release. The judge also dismissed 11 counts for failing to state a claim.

With the case pared down to three claims against HomeAdvisor, the defendants all moved for sanctions and costs under Rules 11 and 37 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. They sought sanctions against Barinholtz, arguing that he repleaded frivolous claims, made patently false allegations to establish personal jurisdiction, and disregarded the discovery order. The judge continued

the motions, stating that he would rule on sanctions "at the close of the case."

Barinholtz soon withdrew as counsel for Bovinett, and the parties settled and filed a stipulation of dismissal with prejudice. *See* FED. R. CIV. P. 41(a)(1)(A)(ii). The judge then granted the defendants' motions for sanctions. Citing Rule 11(b), the judge highlighted that in addition to repleading baseless claims, Barinholtz persisted in suing Hawthorne after Hawthorne furnished evidence showing no relevant ties to Illinois. Worse, Barinholtz appeared to have made false assertions to establish personal jurisdiction. Even if he did not do so in bad faith, the judge reasoned, Barinholtz inexcusably failed to investigate the jurisdictional facts. The judge determined that sanctions were also warranted under Rule 37(b)(2)(C) because Barinholtz flouted the order to respond to discovery requests and ordered Barinholtz to pay about $17,000 (much less than the defendants' request) to compensate the defendants for time spent on the motions to compel and for sanctions. The judge also ordered Barinholtz to attend 40 hours of continuing legal education: half "on federal civil procedure, including at least one course related to personal jurisdiction," and half on "professional conduct, … such as those offered in the Illinois State Bar Association's Basic Skills for Newly Admitted Attorneys."

Barinholtz timely moved for an extension of time either "to file notice of appeal and/or to request other post-order relief," and the judge granted the motion in part, extending the time to appeal until October 13, 2020. Barinholtz did not file a notice of appeal but on

the day of the deadline, filed a motion to reconsider in which he focused on the merits of the lawsuit and his already-raised objections to sanctions. He argued, for instance, that there was personal jurisdiction over Hawthorne, Rules 11 and 37 did not permit sanctions in this context, and sanctions were "unfair" because the defendants and Bovinett had teamed up to get Barinholtz to pay costs and fees. He also insisted that the defendants deserved sanctions and that requiring him, a seasoned litigator, to attend legal-education courses is demeaning. He requested a reduced monetary sanction (or none at all) and fewer hours of continuing education.

The judge denied the motion to reconsider. He explained that Barinholtz failed to identify any legal or factual error in the sanctions ruling and instead repeated previously rejected arguments about the underlying suit. The judge declined to address these "disheartening" arguments again, pointed Barinholtz to the underlying sanctions order, and repeated that sanctions were warranted for his "egregious" conduct.

On appeal Barinholtz seeks to reverse the entry of sanctions, but the defendants contend that his appeal is timely only with respect to the denial of his motion to reconsider. Because the timeliness of an appeal is jurisdictional, *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007), we address this issue first, *see Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Although prejudgment sanctions orders cannot be appealed until after final judgment is entered, *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), postjudgment sanctions are immediately appealable

independent of the merits, *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–98 (1990), provided that the order quantifies the amount of the sanction, *see Bell v. Vacuforce, LLC*, 908 F.3d 1075, 1079 (7th Cir. 2018) (noting that the appeal of a postjudgment sanctions order is timely from the "order actually entering the Rule 11 sanction"). Thus, Barinholtz's appeal was due within 30 days of the entry of sanctions. *See* FED. R. APP. P. 4(a). Because he timely sought and received an extension of time, his appeal was due October 13. But Barinholtz missed this deadline. And his motion to reconsider had no effect on his time to appeal sanctions. *See Blue v. Int'l Brotherhood of Elec. Workers Loc. Union 159*, 676 F.3d 579, 582 (7th Cir. 2012). Accordingly, the notice of appeal filed within 30 days of the denial of the reconsideration motion is timely with respect only to that decision.

Barinholtz's arguments to the contrary are unavailing. First, he contends that the extension of time to appeal also extended the 28-day window to seek relief under Rule 59(e), meaning he could wait to appeal the sanctions until a ruling on that motion. He is wrong about the record and the law. The judge did not extend Barinholtz's time to file a motion to reconsider; rather, the judge granted an extension only "to file a notice of appeal." Nor could he have: the deadline to file a Rule 59(e) motion cannot be extended. FED. R. CIV. P. 6(b)(2); *Blue*, 676 F.3d at 582. And in any case, Rule 59(e) is inapplicable (as is Rule 60(b), also cited by Barinholtz) because it governs challenges to a judgment, not to orders like a ruling on sanctions. *See Cooter & Gell*, 496 U.S. at 395–98 (holding that a

sanctions order is separate from the judgment); *Terry v. Spencer*, 888 F.3d 890, 893 (7th Cir. 2018) (explaining that Rule 59(e) applies only to a reconsideration of a final judgment, not to other interlocutory or collateral orders). A judge is free to revisit such rulings but doing so does not extend the time to appeal the underlying order.

Second, Barinholtz contends that we may construe his motion for an extension of time as a timely notice of appeal, but we do so only when the motion "was filed within the original 30-day window for a notice of appeal and let the defendant know about his intent to appeal." *Owens v. Godinez*, 860 F.3d 434, 437 (7th Cir. 2017) (citing *Smith v. Barry*, 502 U.S. 244, 248–49 (1992)). Barinholtz's motion for an extension was filed within 30 days of the sanctions order, but it did not signal clear intent to appeal; instead, Barinholtz expressly kept his options open, seeking more time either "to file a notice of appeal and/or … post-order relief." We cannot consider the propriety of the sanctions.

Therefore, we turn to whether the judge unreasonably denied Barinholtz's motion to reconsider sanctioning him. Neither Rule 60(b) nor Rule 59(e) applies to obtaining review of a ruling that is separate from the judgment, but (subject to the doctrine of law of the case) a judge can reconsider a previous ruling such as a sanctions order if there is a compelling reason to do so. *See Terry*, 888 F.3d at 893; *Mintz v. Caterpillar Inc.*, 788 F.3d 673, 679 (7th Cir. 2015). A judge abuses his discretion only when no reasonable person could agree with the decision to deny relief.

Barrington Music Prods., Inc. v. Music & Arts Ctr., 924 F.3d 966, 968 (7th Cir. 2019).

Here, the judge reasonably ruled that Barinholtz lacked a good reason for vacating the sanctions. He did not cogently explain why his conduct was not sanctionable, he did not demonstrate any mistake of law or fact in the sanctions order, and he provided no excuse or explanation—or apology—for his actions. For example, he did not argue that he complied with the discovery order, that he had a strategic reason for repleading baseless claims (such as preserving them), or that it was reasonable to press claims against Hawthorne after it showed that it had no ties to Illinois generally and did not take part in any alleged offense that occurred there.

Instead, Barinholtz dedicated most of his motion to arguments that the judge previously considered and rejected when ruling on sanctions. A judge does not abuse his discretion by refusing to reconsider a litigant's already-rejected contentions. *See Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 408 (7th Cir. 2018). In any case, each of his arguments is frivolous. Barinholtz insists, for instance, that the judge erred by saying that Barinholtz falsely alleged that Hawthorne attended the photo shoot. But the amended complaint, which Barinholtz certified, alleges that Hawthorne "travel[ed] to Chicago … to oversee and manage the production and creation of the still photographs and the [s]hoot." And, anyway, the judge did not sanction Barinholtz for a single allegation but for raising a series of baseless assertions about Hawthorne's involvement, failing to investigate his allegations, and

pressing them even after it was clear that they were doomed.

Barinholtz also argues that the sanctions were unlawful because Rule 11(d) does not permit sanctions for discovery conduct and Rule 37(c)(2) permits sanctions against parties, not counsel. But the judge imposed Rule 11 sanctions for the assertion of baseless claims and allegations—not discovery violations. Nor did the judge invoke Rule 37(c)(2); the order cites Rule 37(b)(2), which permits sanctions against an attorney for failing to comply with a court order. FED. R. CIV. P. 37(b)(2)(C).

The judge also did not err in rejecting Barinholtz's argument that Bovinett "flipped" to the defendants' side and is now in cahoots with them to get Barinholtz to pay both sides' costs. The parties' settlement agreement states that they must bear their own costs and fees. The amount of the sanction is directly tied to the expenses that the defendants incurred in moving to compel discovery and moving for sanctions: motions necessitated by Barinholtz's conduct. Bovinett is not relieved of any expense, nor does he receive anything, so it would make no sense for him to conspire with the defendants.

Finally, Barinholtz contends that the judge should have imposed fewer than 40 hours of continuing legal education because he has decades of experience. But the requirement directly addresses the sanctionable conduct: Barinholtz raised baseless allegations about Hawthorne's involvement, pursued frivolous claims, and dodged valid discovery requests; it is reasonable that he be ordered to refresh his knowledge in civil

procedure and professionalism despite his proficiency in certain areas.

We have considered Barinholtz's other arguments, and none has merit.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois –
CM/ECF LIVE, Ver 6.3.3
Eastern Division

Case No.: 1:17–cv–06229
Honorable Harry D. Leinenweber

[Filed October 19, 2020]

Ray Alan Bovinett, et al.	)
Plaintiff,	)
	)
v.	)
	)
HomeAdvisor, Inc., et al.	)
	)
Defendant.	)
	)

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, October 19, 2020:

MINUTE entry before the Honorable Harry D. Leinenweber: The Court denies attorney Mark Barinholtz's motion for reconsideration [179]. It is unclear whether Barinholtz moves for reconsideration under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b). Regardless, the result is the same. Barinholtz's motion largely repeats previously rejected arguments and

theories about the substantive claims in the underlying lawsuit and the Court's purported misunderstanding of this case. The Court already rejected these arguments and theories, and it declines to revisit them here. The Court refers Barinholtz to its prior opinion [164] and order [176]. As previously explained, the Court imposed Rule 37 sanctions for failure to obey a discovery order and Rule 11 sanctions for certifying, filing, and advocating an Amended Complaint with no legal or factual basis to assert personal jurisdiction over former Defendant Hawthorne or to support several key allegations against the Former Defendants. Barinholtz fails to raise any mistake of law or fact that justifies reversal of the Court's prior decisions. The Court steadfastly rejects Barinholtz's suggestion that its approach to these proceedings is, or has ever been, sarcastic, demeaning, unprofessional, or discourteous. The Court carefully and thoughtfully fashioned appropriate sanctions tailored to these unique circumstances, and its previous opinion [164] and order [176] stand as written. Mailed notice(maf)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 17 C 06229

Judge Harry D. Leinenweber

[Filed August 14, 2020]

RAY ALAN BOVINETT, t/a ALAN BOVINETT,

Plaintiff,

v.

HOMEADVISOR, INC., ANGI HOMESERVICES, INC., and HAWTHORNE DIRECT, LLC,

Defendants.

HOMEADVISOR, INC.,

Third-Party Plaintiff,

v.

JULIE TALLARIDA, and)
PLANET EARTH AGENCY, LLC,)
Third-Party Defendants.)
_____)

ORDER

Attorney Mark Barinholtz is ordered to pay HomeAdvisor $16,966.50 and complete forty (40) hours of accredited continuing legal education courses as specified in this Order.

I. BACKGROUND

On March 23, 2020, the Court granted HomeAdvisor, Inc.'s, ANGI Homeservices, Inc.'s, and Hawthorne Direct, LLC's (collectively "Former Defendants") Motions for Sanctions (Dkt. Nos. 83, 107 & 131-1) and entered Rule 37 and Rule 11 sanctions against Plaintiff's former counsel, Mark Barinholtz. (*See generally* Sanctions Op., Dkt. No. 164.) The Court also directed Former Defendants to compile and submit certain costs and fees information. (*Id.* at 20.) In the Sanctions Opinion, the Court detailed the relevant facts, law, and findings, which it hereby incorporates by reference.

II. DISCUSSION

The Court has jurisdiction to grant Rule 11 and Rule 37 sanctions against Barinholtz even after the Plaintiff and Former Defendants filed a stipulation to dismiss pursuant to FED. R. CIV. P. 41(a)(1)(A)(ii). *Dunn v. Gull*, 990 F.2d 348, 350 (7th Cir. 1993) ("The Supreme Court has held that the district court retains jurisdiction over a sanctions motion presented after a

Rule 41(a)(1) dismissal.") (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990)); *see also Martinez v. City of Chicago*, 823 F.3d 1050, 1056 (7th Cir. 2016) (finding the litigants' agreement was "separate from the sanctions motion" filed against a third party's lawyer and noting "the sanctions order serves not only as a means of collecting money from a malefactor to compensate the plaintiffs but also of punishing (and in turn deterring) wrongdoing by attaching a price tag to it").

While it is true that the litigants settled, that agreement expressly excluded the Former Defendants' claims against Barinholtz, "including claims for attorneys' fees, costs, and sanctions." (Settlement Agreement ¶ 1.2, Dkt. No. 156; Stipulation at 1–2, Dkt. No. 150.) The Settlement Agreement does not provide complete relief. *Cf. Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 818–19 (7th Cir. 1992), *overruled on other grounds by Martinez*, 823 F.3d at 1050 (finding that plaintiff, the "beneficiary of a compensatory sanction," bargained away the "court's interest in having the rules of procedure obeyed" when the parties completely settled the underlying case and the defendant agreed to pay "*all* of the sanctions imposed against them and their counsel," even those owed personally by the defendant's sanctioned counsel who did not participate in the settlement). Here, the sanctions motions are the one thing left for the Court to resolve.

The sanctioned conduct is not "perceived or imagined," and the Court's decision to sanction Barinholtz is well-supported by the record. (Resp. at

n.1 & ¶ 26, Dkt. No. 174; *see generally* Sanctions Op.) Despite the Court's findings, Barinholtz revisits several unsubstantiated allegations. For example, Barinholtz complains that the Former Defendants will not provide him or the Court with full copies of transcripts for depositions in which he participated as an attorney. (Resp. ¶¶ 10 & 15–19.) Specifically, Barinholtz claims the Former Defendants "cherry-picked" testimony for their motions and omitted "essential" passages. (*Id.*) There is nothing nefarious about submitting deposition excerpts as opposed to full transcripts in a Court filing. Further, the Court is unaware of any cost sharing agreement, law, or other duty that requires the Former Defendants to share transcripts they purchased with Barinholtz. If portions of those transcripts exonerate Barinholtz, the reasonable thing to do would have been to order and pay for his own copies or offer to split the cost of copies with the Former Defendants. There is no indication of that happening here. Barinholtz has not shown that the Former Defendants violated any obligation nor that the transcripts are unavailable from the reporter. As far as the Court can see, nothing prevents Barinholtz from obtaining these transcripts except his own unwillingness to pay the reporter's fee.

Barinholtz's attempt to resurrect allegations that the Court previously rejected is disheartening. Barinholtz continues to argue, among other things, that Plaintiff and Former Defendants' counsel have aligned against him so that Plaintiff can avoid paying fees and costs owed to Barinholtz while Former Defendants' counsel gets a "windfall," see *id.* ¶¶ 40–42 & 58, and that Former Defendants' counsel abused confidentiality to block him from the Court, see *id.*

¶¶ 67–75. There is no evidence that Former Defendants' counsel represents Plaintiff, that Plaintiff's financial obligations to Barinholtz are in any way affected by the litigants' settlement agreement, nor that Former Defendants' motions to seal have been abusive or served to block Barinholtz's access to the Court. These arguments are unsubstantiated and unhelpful. Indeed, Barinholtz's continued pursuit of these and other baseless theories only bolsters the Court's decision to sanction him.

A. The Fees Award

The Court granted Former Defendants' motions for sanctions pursuant to Rule 37 and Rule 11, and it now determines the penalties. The "starting point in a district court's evaluation of a fee petition is a lodestar analysis; that is, a computation of the reasonable hours expended multiplied by a reasonable hourly rate." *Houston v. C.G. Sec. Servs., Inc.*, 820 F.3d 855, 859 (7th Cir. 2016) (citation omitted). Determination of a "reasonable hourly rate" is based on the "market rate" for the services rendered. *Domanus v. Lewicki,* No. 08 C 4922, 2012 WL 13070818, at *6 (N.D. Ill. Nov. 5, 2012). The Seventh Circuit "presume[s] that an attorney's actual billing rate for similar litigation is appropriate to use as the market rate." *Pickett v. Sheridan Health Care Ctr.,* 664 F.3d 632, 640 (7th Cir. 2011). Reasonably expended hours do not include those hours spent responding to conduct not subject to the sanctions. *See Golden v. Helen Sigman & Assocs.,* 611 F.3d 356, 365 (7th Cir. 2010) (requiring district court to apportion fee award to avoid penalizing for non-sanctionable conduct).

Former Defendants, via their attorney Evan Rothstein, submit costs and fees from Arnold & Porter Kaye Scholer LLP ("Arnold & Porter") and Irwin IP LLC ("Irwin IP"), co-counsel to Arnold & Porter. This same defense counsel represented all three Former Defendants and billed them together. Thus, HomeAdvisor paid the fees and costs of its affiliate, ANGI, and Hawthorne, its indemnitee. Barinholtz does not challenge the billing rates, which Former Defendants establish are akin to market rates for law firms performing similar work in this District. (Rothstein Decl. ¶ 11(c).) Instead, Barinholtz argues the claimed fees are excessive, redundant, and unnecessary. (Resp. at 6–8.) These arguments, however, are not relevant to the Court's ultimate award as detailed below.

1. Rule 37

Rule 37 authorizes sanctions when a party "fails to obey an order to provide or permit discovery." FED. R. CIV. P. 37(b)(2). When a party fails to obey a court order, the court must "order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.* at 37(b)(2)(C).

The Court found that Barinholtz failed to obey a discovery order and his conduct was not substantially justified nor are there circumstances that make an award of expenses unjust. (Sanctions Op. at 6–10.) The Court also found Hawthorne entitled to its expenses for prevailing on its motion to compel and in connection

with its motion for sanctions. (*Id.* at 10.) Practically, this includes the expenses Hawthorne incurred to pursue sanctions for Barinholtz's failure to comply with discovery by August 23, 2018. (*See* 8/16/18 Discovery Order, Dkt. No. 82.)

From a review of the Former Defendants' time entries between August 23, 2018 and August 28, 2018, the Court finds that Arnold & Porter billed 29.10 hours and Irwin IP billed 5.2 hours on this task. (Compiled Spreadsheet at 15–16 & 124, Rothstein Decl., Ex. C, Dkt. No. 169-3.) This includes time spent by three Arnold & Porter attorneys and one Irwin IP lawyer to pursue sanctions against Barinholtz for the discovery failure. (*Id.* at 15–16 (listing eight complete time entries and 1.8 hours' worth of one time entry between August 23, 2018 and August 28, 2018 detailing Arnold & Porter work on the motion for sanctions) & 124 (listing four complete time entries between August 23, 2018 and August 28, 2018 detailing Irwin IP work on the motion for sanctions).) These time entries amount to $16,966.50 in reasonable expenses. (*Id.* (totaling $15,146.50 in Arnold & Porter time and $1,820.00 in Irwin IP time).) Although there were other entries that may have related to the sanctions motion, the Court awards only time clearly caused by Barinholtz's failure. As mandated by Rule 37, Barinholtz shall pay HomeAdvisor $16,966.50.

2. Rule 11

Federal Rule of Civil Procedure 11 requires that an attorney certify to the best of his "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that any pleading

or motion presented to the court (1) is not being presented for any improper purpose; (2) is warranted by existing law; and (3) has evidentiary support. FED. R. CIV. P. 11(b). Violation of these provisions is grounds to impose "an appropriate sanction," which "may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* at 11(c)(1) & (4). The ultimate "purpose of Rule 11 sanctions is to deter rather than to compensate." FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

The Court found that "Barinholtz violated Rule 11 by certifying, filing, and advocating an Amended Complaint with no legal or factual basis to assert personal jurisdiction over Hawthorne or to support several key allegations against the Former Defendants." (Sanctions Op. at 19.) Then, the Court found Hawthorne entitled to its expenses incurred in connection with its motion to dismiss the Amended Complaint, the jurisdictional discovery conducted after filing of the Amended Complaint, including the motion to compel, and its Rule 11 sanctions motion. (*Id.* at 19.) Similarly, the Court found HomeAdvisor and ANGI entitled to their expenses incurred in connection with their motion to dismiss the Amended Complaint, the discovery conducted after the filing of the Amended Complaint, and their Rule 11 sanctions motion. (*Id.*) Subsequently, the Former Defendants calculated these expenses to equal $661,425.20—$235,597.88 ($227,168.28 in fees; $8,429.60 in costs) in Hawthorne

expenses, including the $16,966.50 awarded on Rule 37, and $425,827.32 ($401,559.69 in fees; $24,267.63 in costs) in HomeAdvisor/ANGI expenses. (Rothstein Decl. ¶¶ 12–13.)

Upon careful review, the Court finds that an award of $661,425.20 would not reasonably serve the purpose of Rule 11 sanctions. *See Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999) (noting that district courts have "wide latitude in fashioning appropriate sanctions"). Such an award would effectively convert the sanction into a compensatory award. And, compensation is not Rule 11's sole or even main purpose. *See Divane v. Krull Elec. Co.*, 200 F.3d 1020, 1030–31 (7th Cir. 1999) (understanding the desire to compensate but noting that imposition of all attorney's fees is "an inappropriate attempt to calculate a reasonable sum for purposes of deterrence"); *Johnson v. A.W. Chesterton Co.*, 18 F.3d 1362, 1366 (7th Cir. 1994) (noting that Rule 11 does not entitle a party to any particular form of sanction); *see also* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (writing the "purpose of Rule 11 sanctions is to deter rather than to compensate"). The Court's goal is to deter Barinholtz from such conduct in the future via the least severe sanction necessary.

Former Defendants state that "[a]n award of the full amount claimed is necessary and appropriate given the grave nature of Barinholtz's actions." (Rothstein Decl. ¶ 13.) Though the Court agrees that Barinholtz's conduct was egregious, it disagrees that an award of well over half a million dollars is appropriate. *See Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 932 (7th

Cir. 1989) ("Rule 11 is not a fee-shifting statute in the sense that the loser pays."). The serious nature of the violations notwithstanding, there is no evidence that Barinholtz acted in bad faith or with improper intentions. In fact, Barinholtz's briefing on these sanctions motions implies a belief, albeit mistaken, that his actions constitute vigorous advocacy. The Court already awarded $16,966.50 worth of monetary sanctions in accordance with Rule 37. That is a significant amount. Instead of piling on additional monetary sanctions, the Court considers an appropriate non-monetary sanction.

Among the non-monetary sanctions expressly contemplated by Rule 11 is compelling the offending attorney to attend seminars or other legal education programs. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment. Many federal courts have imposed continuing legal education sanctions in somewhat similar circumstances. *See, e.g.*, *Steeger v. JMS Cleaning Servs., LLC*, No. 17CV8013(DLC), 2018 WL 1363497, at *1 (S.D.N.Y. Mar. 15, 2018) (ordering counsel to complete ethics and professionalism courses); *McGough v. Wells Fargo Bank, N.A.*, No. C12-0050 TEH, 2012 WL 6019108, at *6 (N.D. Cal. Dec. 3, 2012) (ordering counsel to attend twenty hours of continuing legal education courses); *Balthazar v. Atl. City Med. Ctr.*, 279 F. Supp. 2d 574, 595–96 (D.N.J. 2003) (ordering counsel to attend federal practice and procedure and ethics courses); *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 131–32 (D.N.J. 1998) (ordering counsel to attend federal practice and procedure and attorney professionalism and professional conduct courses); *Crank v. Crank,* No.

CIV.A. 3:96-CV-1984D, 1998 WL 713273, at *1 (N.D. Tex. Oct. 8, 1998) (ordering counsel complete thirty hours of continuing legal education in federal civil rights law and Texas tort law).

Accordingly, the Court orders Barinholtz to attend forty (40) hours of accredited continuing legal education courses as follows: (1) twenty (20) hours on federal civil procedure, including at least one course related to personal jurisdiction; and (2) twenty (20) hours on attorney professionalism and professional conduct, including courses in professional responsibility and/or the Model Rules of Professional Conduct such as those offered in the Illinois State Bar Association's Basic Skills for Newly Admitted Attorneys annual program. These forty hours shall be in addition to any compliance hours regularly required by the Illinois State Bar Association. Barinholtz shall complete the forty hours within one year of this decision, and he shall file an affidavit or declaration with this Court attesting to his attendance at, satisfactory completion of, and lessons learned from the required courses. Hopefully, these courses will assist Barinholtz in re-familiarizing himself with foundational legal principles that seemingly escaped him in this litigation.

III. CONCLUSION

For the foregoing reasons, Barinholtz shall pay HomeAdvisor $16,966.50 and complete forty (40) hours of accredited continuing legal education courses as specified in this Order.

IT IS SO ORDERED.

s/_____
Harry D. Leinenweber, Judge
United States District Court

Dated: 8/14/2020

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 17 C 06229

Judge Harry D. Leinenweber

[Filed March 23, 2020]

RAY ALAN BOVINETT,
t/a ALAN BOVINETT,

Plaintiff,

v.

HOMEADVISOR, INC., ANGI
HOMESERVICES, INC., and
HAWTHORNE DIRECT, LLC,

Defendants.

HOMEADVISOR, INC.,

Third-Party Plaintiff,

v.

JULIE TALLARIDA, and)
PLANET EARTH AGENCY, LLC,)
Third-Party Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

Hawthorne Direct, LLC brings a Motion for Sanctions pursuant to FED. R. CIV. P. 37 (Dkt. No. 83). HomeAdvisor, Inc., ANGI Homeservices, Inc., and Hawthorne (collectively "Former Defendants") bring a Motion for Sanctions, Attorney's Fees, and Costs pursuant to FED. R. CIV. P. 11, and alternatively 28 U.S.C. § 1927 or the Court's inherent authority (Dkt. No. 107), and a Supplemental Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 131-1). For the reasons stated herein, the Motion for Sanctions (Dkt. No. 83), Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 107), and Supplemental Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 131-1) are granted.

I. BACKGROUND

In August 2017, Plaintiff Ray Alan Bovinett, through his former counsel, Attorney Mark Barinholtz, sued the Former Defendants alleging a myriad of claims that stem from the alleged improper use of Plaintiff's image in the background of video commercials. Specifically, the 150-paragraph Complaint consisted of fourteen claims and sought damages of "not less than $2.8 million." (*See generally* Compl., Dkt. No. 1.) Former Defendants moved to dismiss—ANGI and Hawthorne under Rule 12(b)(2) for lack of jurisdiction and HomeAdvisor under Rule

12(b)(6) for failure to state a claim. Hawthorne's Motion to Dismiss "respectfully reserve[d] the right to pursue Bovinett and counsel for its fees and costs in what can only be characterized as an extortion attempt." (Dkt. No. 21 at 1 n.1.)

Former Defendants also presented an early settlement offer, stating that they "believe[d] that this lawsuit is being brought in bad faith, or is at least frivolous and unjustified." (Hall Decl. ¶ 2, Dkt. No. 107-1.) The Court granted the Former Defendants' Motions to Dismiss in full, leaving just the three claims Former Defendants had not moved on for future resolution. Plaintiff, through Barinholtz, followed with a Motion for Reconsideration, which the Court swiftly denied.

Because the dismissals were without prejudice, Plaintiff, through Barinholtz, filed a 203-paragraph Amended Complaint containing fourteen claims and seeking damages of "not less than $4.65 million." (Am. Compl. at 38, Dkt. No. 54.) Former Defendants again moved to dismiss—this time HomeAdvisor and ANGI under Rule 12(b)(6) for failure to state a claim and Hawthorne under Rule 12(b)(2) for lack of jurisdiction. The parties also worked through discovery issues that included resolving each party's previously granted motion to compel. (Dkt. Nos. 59, 63, 80 & 82.) Eventually, Hawthorne filed a Motion for Sanctions arguing that Plaintiff and Barinholtz failed to identify, in response to the Court's order on Former Defendants' motion to compel, any facts supporting a good faith basis for jurisdiction over Hawthorne. (Hawthorne's Mot., Dkt. No. 83.) The Court took the Motion under advisement and subsequently granted Former

Defendants' Motion to Dismiss the Amended Complaint—this time with prejudice.

In dismissing Hawthorne for lack of jurisdiction, the Court rejected the Amended Complaint's allegations of an "elaborate conspiracy" amongst the Former Defendants. (Dkt. No. 95 at 3.) The Court also dismissed all eleven claims for relief upon which Former Defendants moved, including the nine new causes of action. (*See id.* at 7–16.) This left three causes of action remaining. Former Defendants then filed an Answer and a Motion for Sanctions, Attorney's Fees, and Costs. The Court entered and continued that Motion to be decided along with Hawthorne's prior Sanctions Motion.

After taking the depositions of three key individuals, Former Defendants filed a Supplemental Motion for Sanctions, Attorney's Fees, and Costs, which the Court entered and continued along with the other two Motions to resolve at the end of the case. Barinholtz then withdrew as Plaintiff's counsel, and Plaintiff proceeded *pro se*. Plaintiff and Former Defendants' counsel appeared at a December 3, 2019 status hearing. (12/3/19 Tr. at 2:4–9, Dkt. No. 143.) At the hearing, Former Defendants' counsel advised the Court that they had resolved all matters as to Plaintiff but that the Motions against Barinholtz were still pending. (*Id.* at 2:12– 24.) Plaintiff settled with Former Defendants for about .06% of the monetary damages demanded in the Amended Complaint. (*See* Dkt. No. 156 ¶ 2; Settlement Agreement, Dkt. No. 156-1.) The Court instructed Former Defendants' counsel to attempt to resolve the remaining claims with

Barinholtz and set another status hearing two weeks later. (*Id.* at 3:9–11.)

On December 17, 2019, Barinholtz, Former Defendants' counsel, and Plaintiff, via telephone, appeared for the second status hearing. (12/17/19 Tr. at 2:4–18, Dkt. No. 147.) Former Defendants' counsel informed the Court that the attempt to resolve the remaining claims with Barinholtz had been unsuccessful and that a briefing schedule was necessary. (*Id.* at 2:20–3:4.) Barinholtz then mentioned Plaintiff's previously filed combined motion to compel and for sanctions against Former Defendants (Dkt. No. 59) and objections (Dkt. No. 85) that he believed to still be pending. (12/17/19 Tr. at 3:5–13.) The Court clarified that the parties, meaning Plaintiff himself and the Former Defendants, had resolved "whatever disputes existed between them," and the only pending claims requiring resolution were Former Defendants' sanctions claims against Barinholtz. (*Id.* at 3:14–21.)

The Court ordered that Barinholtz respond to the outstanding Motions identified on the record as Dkt. Nos. 83, 107, 131 by February 3, 2020. (*Id.* at 6:15–19; 7:1–6.) A week before that response came due, Barinholtz filed a motion for miscellaneous relief. The Court denied that motion and ordered Barinholtz to respond to the outstanding Motions by March 5, 2020. On March 5, 2020, instead of filing a response, Barinholtz filed a motion to extend. The Court also denied that motion and ordered Barinholtz to respond by March 11, 2020. Finally, the Court is in receipt of Barinholtz's response.

The Court now rules on the Motion for Sanctions pursuant to FED. R. CIV. P. 37 (Dkt. No. 83), Motion for Sanctions, Attorney's Fees, and Costs pursuant to FED. R. CIV. P. 11, and alternatively 28 U.S.C. § 1927 or the Court's inherent authority (Dkt. No. 107), and the Supplemental Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 131-1) as follows.

II. DISCUSSION

Former Defendants argue that this case presents rare circumstances in which sanctions are appropriate. In support, Former Defendants focus on three broad instances of misconduct: (1) failing to obey a Court discovery order; (2) re-pleading Hawthorne in the Amended Complaint after it was clear that no facts or law supported its continued inclusion; and (3) proliferating frivolous arguments in the Amended Complaint. The Court addresses these arguments under the appropriate standards below.

A. Rule 37

Former Defendants seek Rule 37 sanctions for failure to obey a Court order. Rule 37 authorizes sanctions when a party "fails to obey an order to provide or permit discovery." FED. R. CIV. P. 37(b)(2). When a party fails to obey a court order, the Rule requires that the court "order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.* 37(b)(2)(C). District courts have

"wide latitude in fashioning appropriate sanctions." *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999).

The Court previously granted Hawthorne's Motion to Compel, agreeing that Plaintiff's evasive and speculative answers to Hawthorne's first set of jurisdictional discovery requests were insufficient. (Dkt. No. 82; *see also* 8/16/18 Tr. at 5:15–24, Dkt. No. 90.) For example, Hawthorne asked Plaintiff to "[a]dmit that you, Ray Alan Bovinett, have never communicated with an employee of Hawthorne concerning the Shoot [the October 8, 2014 photo shoot underlying Plaintiff's claims.]" (Request for Admission ("RFA") No. 1 at 3, Dkt. No. 80, Ex. 1.) In response, Plaintiff asserted that he was "not in possession of sufficient knowledge or information to admit or deny" this statement. (*See id.* at 3–5.) All of Plaintiff's RFA responses were the same. (*See id.*)

Similarly, Hawthorne asked Plaintiff to identify the facts supporting his allegations, such as that Hawthorne was "determined to dramatically keep their current and future costs down, by hiring Chicago based modeling and acting talent and by creating still photography content to use in the Commercials in what they perceived to be a less sophisticated production community than Los Angeles or New York City." (Interrogatory ("ROG") No. 4 at 6–7, Dkt. No. 80, Ex. 1.) Plaintiff responded that, "due to the level of professional experience of Jessica Hawthorne Castro in managing talent for television and motion pictures as disclosed through publicly accessible sources, the Hawthorne CEO *would have* been aware of, and sensitive to ways and means by which to minimize the

cost of producing the commercials, as well as how to avoid paying residuals and fringes to union actors." (*Id.* (emphasis added).) Each of Plaintiff's ROG responses contained this "would have" speculation. (*See id.* at 4–13.)

The Court ordered Plaintiff to supplement these deficient responses with actual admissions or denials and facts by August 23, 2018. Barinholtz served supplemental responses by that date, but they contained the same deficiencies as the initial responses. For example, in response to requests for admission about Plaintiff's personal experiences, Plaintiff declined to respond and specified that he lacks "direct, in-person knowledge." (Hawthorne's Mot. ¶ 9, Dkt. No. 83.) As Hawthorne correctly notes, "[m]erely adding 'direct, in-person' does not relieve" a party from its discovery obligations. (*Id.* ¶ 10.) Also, the responses to Hawthorne's interrogatories again contained "would have" speculation as opposed to facts. (*Id.* ¶¶ 11–13.)

These deficient supplemental responses demonstrate a clear failure to comply with the Court's order to provide Hawthorne with actual admissions or denials and facts. *See e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 642–43 (7th Cir. 2011) (finding that failure to comply with a district court's order was a sufficient basis to impose sanctions under Rule 37(b)(2)(A)). Barinholtz does not offer any justification for this failure, nor are there circumstances that would make an award of expenses unjust. *See* FED. R. CIV. P. 37(b)(2)(C); *see also Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 909 (7th Cir. 2007) (finding no applicable exception when sanctioning attorneys for

failure to comply with a court order). Indeed, Barinholtz's long-awaited response reads like an entirely new motion, outlining several strange and unsubstantiated allegations. For example, Barinholtz alleges that Former Defendants' counsel developed an improper attorney client relationship with Plaintiff and that Plaintiff, Former Defendants, and Former Defendants' counsel are now engaged in an elaborate scheme to, among other things: (1) help Plaintiff avoid paying fees and costs owed to Barinholtz; (2) improperly withhold deposition transcripts; (3) abuse confidentiality to block Barinholtz from the Court; and (4) submit a defective stipulation to dismiss the case. These rambling allegations are unsupported and make no logical sense.

Just as at the December 17, 2019 status hearing, Barinholtz again attempts to revive certain motions that he claims were "based on obstructive behavior by Defendants in discovery, including Hawthorne . . . ." (Resp. ¶ 14, Dkt No. 162.) Specifically, he cites "Plaintiff's" "own claims for sanctions (Dkt. No. 59) and for protective order (Dkt. No. 72)." (Resp. ¶¶ 4, 14 (emphasis in original).) Yet, none of these motions remain pending. First, the Court denied the motion for protective order without prejudice. Second, Plaintiff's motion to compel was granted and the sanctions motion entered and continued. Then, Plaintiff resolved all his claims, including those for sanctions, against the Former Defendants. (*See* 12/3/19 Tr. at 2:12–24; Settlement Agreement, Dkt. No. 156-1.) A claim for sanctions belongs to the client, not his counsel. *See Soliman v. Ebasco Servs. Inc.*, 822 F.2d 320, 322– 23 (2d Cir. 1987) (finding attorney's belief that client's

sanctions claim belonged to him to be "thoroughly mistaken"). Thus, Barinholtz cannot offer Plaintiff's now-settled sanctions claims as his own.

Because Barinholtz served deficient supplemental responses in violation of the Court's order granting Hawthorne's Motion to Compel, Hawthorne is entitled to its expenses, including attorney's fees, for prevailing on its motion to compel and in connection with this Motion.

B. Rule 11

Former Defendants seek Rule 11 sanctions for re-pleading Hawthorne in the Amended Complaint despite a dearth of facts and law to support its inclusion. Former Defendants also seek sanctions for the proliferation of frivolous arguments in the Amended Complaint. Federal Rule of Civil Procedure 11 requires that an attorney certify to the best of his "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that any pleading or motion presented to the court (1) is not being presented for any improper purpose; (2) is warranted by existing law; and (3) has evidentiary support. FED. R. CIV. P. 11(b). Violation of these provisions is grounds for the imposition of "an appropriate sanction," which may include "payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* at 11(c)(1) & (4).

One of the primary purposes of Rule 11 is "to deter baseless filings in the district court." *Cooter & Gell v. Hartmarx Corp., et al.*, 496 U.S. 384, 393 (1990). A

"court may impose sanctions on a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose." *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998). A frivolous argument or claim is one that is "baseless and made without a reasonable and competent inquiry." *Id.*

"To impose Rule 11 sanctions, the court need only find that the signor acted unreasonably in signing the pleadings based upon available factual information which a reasonable inquiry could have discovered." *ATA Info Servs., Inc. v. J.C.I., Inc.*, No 89 C 9615, 1992 WL 122799, at *1 (N.D. Ill. May 26, 1992). Whether an inquiry is reasonable is determined by an objective standard. *Id.* Rule 11 sanctions are especially appropriate where a party "chose to file a complaint naming a defendant who had virtually no connection to the alleged wrongful conduct and failed to conduct a reasonable investigation to ensure that the allegations had merit." *Id.* at *2. The filing of an amended complaint is sanctionable where the filer "knew or reasonably should have known that any claim against [defendant] was not well grounded in law and fact." *Id.* at *3.

Barinholtz signed both the Complaint and Amended Complaint. Accordingly, the question is whether "he made reasonable inquiry into the facts and law supporting the . . . allegations" therein. *Phoenix Airway Inn Assocs. v Essex Fin. Servs., Inc.*, 741 F. Supp. 734, 734 (N.D. Ill. 1990). It is obvious that he did not. First, the Complaint did not contain facts that would support a finding of personal jurisdiction over Hawthorne. Even

after this Court dismissed Hawthorne from the Complaint for lack of personal jurisdiction and denied a motion for reconsideration on that dismissal, the Amended Complaint re-pleaded Hawthorne. It also repeated much of the previously dismissed Complaint while tacking on fifty-three paragraphs of new material. Forced back into the lawsuit, Hawthorne then offered clear evidence that jurisdiction did not exist, including verified discovery responses and a sworn declaration. Yet, Barinholtz continued to assert personal jurisdiction and argued, without presenting any evidence, that Hawthorne was lying.

The Court again dismissed Hawthorne and dismissed all nine of the Amended Complaint's new causes of action, two of which ran afoul of the one-year statute of limitations. (*See* Dkt. No. 95 at 13.) The Court also dismissed the Amended Complaint's re-pleaded claims for common law fraud (Count 1) and against the Doe defendants (Count XIV) with prejudice because they contained the same deficiencies that resulted in their dismissal on the first round of motions to dismiss. (*See id.* at 7–11, 15–16.) The most basic pre-filing inquiry, had it been conducted, would have prevented all of this.

Barinholtz also prolonged the case by dodging Hawthorne's routine discovery requests. First, Barinholtz filed a motion for a protective order, looking to avoid responding to Hawthorne's requests seeking the factual basis for the Amended Complaint's allegations. The Court denied this motion. Then, Barinholtz served deficient discovery responses, discussed in depth above, that resulted in Hawthorne's

successful motion to compel. In those responses, Plaintiff claimed to not have knowledge of "facts" alleged in the Amended Complaint, and only speculated as to what Plaintiff thought "would" have happened. (*See* Dkt. No. 80.) Later served supplemental responses did nothing to remedy these deficiencies, forcing Hawthorne to move for discovery sanctions.

Despite numerous requests from counsel to produce facts establishing jurisdiction or to voluntarily dismiss Hawthorne, Barinholtz refused and pushed the case onward. This obstructionist behavior evidences a lack of good faith. This Court can find no basis to plead Hawthorne in the Complaint, let alone to re-plead Hawthorne in the Amended Complaint. And, Barinholtz had several opportunities to present evidence that he properly investigated the jurisdictional allegations before signing and filing those pleadings. Yet, the Court has seen nothing that justifies the pursuit of Hawthorne.

There is no excuse for failing to investigate the relevant jurisdictional facts prior to filing the Complaint or for the continuing failure to investigate those facts prior to filing the Amended Complaint. *See Phoenix Airway*, 741 F. Supp. at 736. But there are several other allegations in these pleadings, beyond jurisdiction, that a basic pre-filing inquiry would have exposed as baseless. The deposition testimony of the talent agent, the photographer, and the Plaintiff model establishes the following allegations as unsubstantiated and mis-pleaded: (1) the talent agent entered into an oral agreement with HomeAdvisor that

only permitted the use of photos in print but not television advertisements or broadcasts (*See, e.g.*, Am. Compl. ¶¶ 52, 54, 56–57, 59–61, 70, 76, & 119); (2) the consent and release form signed by the talent agent was not valid because she had authority to enter into only certain kinds of agreements on Plaintiff's behalf and HomeAdvisor used duress and coercion to obtain her signature (*See, e.g.*, *id.* ¶¶ 60–62); and (3) Hawthorne conspired with HomeAdvisor to procure the talent agent's oral agreement and arrange the photo shoot (*See, e.g.*, *id.* ¶¶ 42 & 44–54.)

As to the first set of allegations, Plaintiff testified that the talent agent never told him the photos were not going to be used in broadcasts. (Bovinett Dep. at 193:24–194:5, Ex. A to Jones Decl., Dkt. No. 131-3.) Likewise, the talent agent testified that HomeAdvisor never told her that. (Planet Earth Dep. at 48:2–49:6, Ex. B to Jones Decl., Dkt. No. 131-4.) As to the second set of allegations, both Plaintiff and the talent agent testified that they never discussed or agreed upon her authority to enter into agreements on Plaintiff's behalf. (Bovinett Dep. at 122:2–8, 125:14–21, 126:13–23, 127:16–128:1, 133:7–134:8; Planet Earth Dep. at 165:8–166:4, 173:14–21.) Plaintiff even testified that this was possibly the first engagement booked through the talent agent, and she had no authority to enter into any type of contract on his behalf. (Bovinett Dep. at 117:4–7; 119:11–17; 352:1–22, 355:2–10.) The talent agent disagreed, testifying that she had authority because her agency represented Plaintiff. (Planet Earth Dep. at 172:14–173:13.) She also flat out rejected the duress allegations. (*Id.* at 185:19–186:7, 186:19–187:2, 190:13–191:7.) As to the third set of allegations, both

the talent agent and photographer testified that they had never heard of Hawthorne or its representatives. (*Id.* at 53:24–54:14; 157:23–158:2; Rosenberg Dep. at 65:16–66:3, Ex. C to Jones Decl., Dkt. No. 131-5.) This testimony demonstrates that Barinholtz did not test several of the Amended Complaint's allegations prior to filing and that there were not discussions about the underlying events or allegations with the talent agent, photographer, and potentially even the Plaintiff.

Barinholtz disregarded clear evidence establishing a lack of jurisdiction over Hawthorne and ignored the lack of support for several of the Amended Complaint's central allegations. Even after requests from Former Defendants' counsel to voluntarily dismiss Hawthorne and a warning that it may seek Rule 11 sanctions for the bad faith pursuit of frivolous claims in its motion to dismiss (*See* Hall Decl. ¶ 2), Barinholtz pressed onward. *See United States v. Rogers Cartage Co.*, 794 F.3d 854, 863 (7th Cir. 2015) (finding "substantial compliance" with Rule 11 notice requirements where motion to dismiss contained arguments that the complaint was frivolous and a request for attorney's fees). This kind of unjustifiable pursuit is precisely the kind of behavior Rule 11 seeks to deter. *See, e.g.*, *Burda v. M. Ecker Co.*, 2 F.3d 769, 775–76 (7th Cir. 1993) (affirming district court's sanctions against lawyer under Rule 11 for making objectively unreasonable and frivolous arguments); *Phoenix Airways*, 741 F. Supp. at 734–35 (sanctioning counsel who failed to reasonably inquire into the relevant jurisdictional facts prior to filing complaint); *Carter v. Johnson*, No. 89 C 5207, 1989 WL 134290, at *2 (N.D. Ill. Oct. 20, 1989) ("The Court finds that plaintiff's counsel violated Rule 11 by

filing a complaint with no legal or factual basis for asserting personal jurisdiction."). The fact that the settlement payment from Former Defendants to Plaintiff equals about .06% of the Amended Complaint's monetary demand and constitutes a "tiny fraction" of the defense costs accumulated over the past two-plus years further demonstrates the frivolity of this litigation. (*See* Dkt. No. 156 ¶ 2; Settlement Agreement, Dkt. No. 156-1.)

This Court is not persuaded by Barinholtz's argument that it is not him but actually Former Defendants' counsel who "unreasonably multiplied the proceedings by filing multiple unnecessary motion to dismiss, by advancing vexatious and harassing motions for sanctions, by obstructing the orderly process of discovery, by concealing Defendants' involvement in at least one other matter involving dangerously misleading behavior, and otherwise making false statements to the Court." (Resp. at ¶ 26.) One need only look at the docket to know this is false. (*See, e.g.*, Dkt. Nos. 43 (granting Former Defendants' motion to dismiss Complaint), 82 (granting Former Defendants' motion to compel), & 95 (granting Former Defendants' motion to dismiss Amended Complaint).)

What worries the Court most, however, is Barinholtz's refusal to accept that these claims are not viable, most starkly illustrated by the failure to acknowledge let alone explain himself on this issue in response to this Motion. Despite being put on notice of these deficiencies by Former Defendants' counsel on "nearly a dozen occasions over the course of a year" and by the Court prior to both dismissals, Barinholtz

persisted on these claims. (Sanctions Mot. at 4.) Burying one's head in the sand is not an acceptable litigation tactic. *See Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 905 F.3d 537, 544 (7th Cir. 2018) ("Ignorance is sanctionable, not bliss."); *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 753 (7th Cir. 1988) (reversing denial of sanctions against party and counsel for "employing the ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist, unprofessional behavior this Circuit refuses to tolerate") (citations omitted). This stubborn refusal forced Former Defendants to expend significant time and resources on discovery and to obtain dismissal.

Barinholtz violated Rule 11 by certifying, filing, and advocating an Amended Complaint with no legal or factual basis to assert personal jurisdiction over Hawthorne or to support several key allegations against the Former Defendants. Former Defendants' counsel has been forced to incur costs as a result of the improper filing of this lawsuit, and the Former Defendants should not be required to sustain these costs. Therefore, Hawthorne is entitled to its expenses, including attorney's fees, incurred in connection with its motion to dismiss the Amended Complaint, the jurisdictional discovery, including the motion to compel, conducted after filing of the Amended Complaint, and this Motion. Similarly, HomeAdvisor and ANGI are entitled to their expenses, including attorney's fees, incurred in connection with their motion to dismiss the Amended Complaint, the written and fact witness discovery conducted after filing of the Amended Complaint, and this Motion.

III. CONCLUSION

For the reasons stated herein, the Motion for Sanctions (Dkt. No. 83), Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 107), and Supplemental Motion for Sanctions, Attorney's Fees, and Costs (Dkt. No. 131-1) are granted. Former Defendants' counsel is directed to submit declarations detailing the following:

a. The amount of reasonable attorney's fees and costs Hawthorne incurred in connection with its Motion to Dismiss the Amended Complaint, the jurisdictional discovery, including the Motion to Compel, conducted after filing of the Amended Complaint, the Motion for Sanctions under Rule 37, the Motion for Sanctions under Rule 11 and Section 1927, and the Supplemental Motion for Sanctions.

b. The amount of reasonable attorney's fees and costs HomeAdvisor and ANGI incurred in connection with their Motion to Dismiss the Amended Complaint, the written and fact witness discovery conducted after filing of the Amended Complaint, the Motion for Sanctions under Rule 11 and Section 1927, and the Supplemental Motion for Sanctions.

The Court will determine the amount of sanctions to be awarded upon review of those declarations and any response Barinholtz wishes to file.

IT IS SO ORDERED.

s/_____
Harry D. Leinenweber, Judge
United States District Court

Dated: 3/23/2020

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 20-3221

[Filed May 31, 2022]

RAY A. BOVINETT,
Plaintiff,

v.

HOMEADVISOR, INC., et al.,
Defendants-Appellees.

APPEAL OF: MARK BARINHOLTZ

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17 C 06229

Harry D. Leinenweber, *Judge*.

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing en banc is DENIED.

APPENDIX F

Fed. R. Civ. P. 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous

argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Fed. R. Civ. P. 36

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party

qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An

admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Fed. R. Civ. P. 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order

compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the

motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard,

apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Fed. R. Civ. P. 59

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new

trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed. R. Civ. P. 60

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or

omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1),

(2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Fed. R. App. P. 3

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the

plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) An order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such

an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk sends copies, with the date of sending. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

Fed. R. App. P. 4

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule

measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the

judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing

of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is

then considered filed in the district court on the date so noted.