ORIGINAL

No. 24- 233

IN THE

Supreme Court of the United States

JOHNMACK COHEN, ESQ.,

Petitioner,

v.

DEREK SMITH LAW GROUP, PLLC, EAST SIDE CLUB LLC, JOHN DOE 2, AND JOHN DOE 3,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Courts must find subjective bad faith to impose sanctions under inherent powers or 28 U.S.C. §1927 ("1927"). *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323 (2d Cir. 1999). The District Court assumed bad faith without factual evidence by improperly utilizing the inapplicable Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"). The District Court found no bad faith prior to Petitioner Johnmack Cohen Esq.'s ("Cohen") January 13, 2020 motion *in limine,* only finding bad faith from "from this filing forward" because "[a]fter all [Rule] 11(b) was now implicated," specifically the "'affirmative duty to conduct a reasonable inquiry into the facts and the law before filing.'" Pet. App. 104a-110a(quoting *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551 (1991). The District Court further stated,

> ". . . . in signing the moving papers, [pursuant to the implicit Rule 11(b) certification], [Petitioner] attested that he had made the necessary inquiry into the factual allegations substantiating the claims. As such, any misrepresentations . . . [about Plaintiff's other litigation] from this filing forward could not have been made in good faith . . ." and since "the procedural prerequisites to impose sanctions under Rule 11 for this filing are not satisfied here, . . . the Court is forced to rely on its inherent power and [] 1927." *Id.* at 108a-110a.

The Second Circuit affirmed without analysis on this issue. *Id.* at 1a-4a, 131a-132a.

Question 1: Whether a court can use the implicit Rule 11(b) certification of the Federal Rules of Civil Procedure

that automatically attaches to all attorneys' paper submissions as a vehicle to find bad faith under the high standards of 1927 and inherent powers.

2. The linchpin to the District Court's bad faith finding was Petitioner Cohen's January 13, 2020 motion *in limine* wherein Petitioner Cohen described Plaintiff's previous litigation against his prior attorney as a fee dispute (Plaintiff's "Bronx Action"). Pet. App. 104a-110a. Petitioner Cohen's January 13, 2020 motion *in limine* that detailed Plaintiff's Bronx Action as a fee dispute was based on Plaintiff's sworn deposition testimony that detailed this other litigation as a fee dispute; Specifically, on September 23, 2019, Plaintiff testified at his deposition under oath under penalty of perjury generally describing Plaintiff's previous litigation against his prior attorney as a fee dispute, never stating this other litigation involved a relevant intentional infliction of emotional distress ("IIED") claim, Fordham University and resulted in two appeals. (Compare A[1]73-74 to A1232 at p.130:11-25—p.132:1-25, A1233 at p.133:1-25—p.136:1-13, A1262 at p.250:8-25—p.251:1-23). The District Court specifically " . . . credit[ed] [Petitioner Cohen's] representation that '[a]t all times material, [Petitioner Cohen] was only generally aware of a fee dispute between Plaintiff and his prior attorney, and nothing further', which impression was reinforced . . . by Plaintiff throughout the litigation," and that "Plaintiff consistently and systematically concealed relevant and unfavorable facts and documents . . . from [Petitioner Cohen and DSLG]." Pet. App. 121a

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1. Denotes Joint Appendix to Second Circuit Appeal, Case No.: 23-1015, Dkt#s37-42.

Question 2: Whether a court can sanction an attorney under a court's inherent powers and/or 1927 asserting bad faith sanctionable conduct for an attorney's genuine inaccurate representation where the attorney relied upon their client's sworn testimony.

3. In *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017), the Supreme Court held that courts must "establish a causal, [not temporal] link—between the litigant's misbehavior and legal fees paid by the opposing party," when fashioning sanctions under inherent powers and 1927. The District Court imposed a temporal blanket sanction requiring Petitioner Cohen and DSLG to reimburse Defendants/Appellees for all attorneys' fees reasonably incurred from January 13, 2020 through February 28, 2020, though many of the attorneys' fees incurred over that time period involved events unrelated to the sanctioned conduct. Pet. App. 112a-113a.

On April 24, 2024, the Second Circuit affirmed the District Court's blanket sanction award focusing on the District Court reducing in-part the ultimate sanction/attorney-fee reimbursement sought by Defendants. The District Court reduced the sanction/attorney-fee reimbursement sought by Defendants because Defendants' counsel sought an enhanced fee to allow Defendants to recover more than the fees actually incurred and because Defendants' counsel submitted some inflated bills. *Id.* at 5a. The District Court did not tailor the sanction to the alleged sanctionable conduct and required Petitioner Cohen and DSLG to reimburse Defendants for fees unrelated to the sanctioned conduct.

Question 3: Whether a court can impose a temporal blanket sanction award not tailored to the sanctioned conduct that requires the sanctioned party to reimburse the non-sanctioned party for attorneys' fees incurred unrelated to the sanctioned conduct.

LIST OF PARTIES

Petitioner Johnmack Cohen, Esq. ("Cohen"), pro se. Petitioner Cohen was an Appellant in the Second Circuit matter. Respondent Derek Smith Law Group, PLLC ("DSLG") was also an Appellant in the Second Circuit matter. DSLG and Cohen were counsel to Plaintiff in the case at the Southern District of New York.

Respondents East Side Club LLC, John Doe 2, and John Doe 3, were Appellees in the Second Circuit matter, and Defendants in the case at the Southern District of New York.

RELATED CASES

1.) *Doe 1 v. East Side Club, LLC* No. 18 CIV. 11324 (KPF), U.S. District Court For The Southern District of New York. Opinion and Order Issued July 1, 2021.

2.) *Doe 1 v. East Side Club, LLC.*, No. 18 CIV. 11324 (KPF), U.S. District Court For The Southern District of New York. Opinion and Order Issued June 23, 2023. Judgment Entered June 26, 2023.

3.) *Derek Smith L. Grp., PLLC v. E. Side Club, LLC*, No. 23-1015-cv, 2024 U.S. App. LEXIS 9908 (2d Cir. Apr. 24, 2024), U.S. Court of Appeals for the Second Circuit Opinion Issued April 24, 2024. Rehearing Petition Order Denied May 28, 2024. Pet. App. 131a-132a. Judgment Entered June 4, 2024.

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INTRODUCTION

Petitioner Cohen respectfully requests the Court grant this petition regarding the Second Circuit's affirmance of the District Court's imposition of sanctions against Petitioner Cohen and DSLG under 1927 and inherent powers. The District Court imposed sanctions against Petitioner Cohen and DSLG for Petitioner Cohen's genuine mistaken statement when Petitioner Cohen described Plaintiff's Bronx Action as solely an attorney/client fee dispute. The record and District Court's own factual findings showed that Petitioner Cohen did not know, nor foresee that Plaintiff's Bronx Action went beyond an attorney/client fee dispute and somehow contained an ancillary relevant IIED claim, named Fordham University, and resulted in two appeals.

The District Court improperly utilized the inapplicable Rule 11, that has a different framework and lower negligence standard, to arbitrarily assume bad faith to impose sanctions under the higher bad faith standards of 1927 and inherent powers. Specifically, the District Court credited Petitioner Cohen's representation that at all time material, he was only aware the Bronx Action entailed solely an attorney/client fee dispute and that Plaintiff consistently misled Petitioner Cohen as to the nature of the Bronx Action. Pet. App. 105a, 56a, 121a, 123a. It is clear from the District Court's own factual findings that Petitioner Cohen did not act in bad faith as his inaccurate representation was based upon their genuine, good faith, beliefs in those moments.

The District Court recognized that Petitioner Cohen's inaccurate representation was based upon

Petitioner Cohen's genuine belief that Plaintiff's Bronx Action was solely limited to a fee dispute, which extinguishes any bad faith necessary for sanctions under 1927 and inherent powers. Specifically, the District Court:

i.) " . . . credit[ed] [Petitioner Cohen's] representation that '[a]t all times material, [Petitioner Cohen] was only generally aware of a fee dispute between Plaintiff and his prior attorney, and nothing further', which impression was reinforced . . . by Plaintiff throughout the litigation," as shown most notably through Plaintiff's sworn deposition testimony. Pet. App. 105a; See also A1232 at p.130:11-25—p.132:1-25, A1233 at p.133:1-25—p.136:1-13, A1262 at p.250:8-25—p.251:1-23

ii.) found that Petitioner Cohen did not review the Bronx Action or any of its filings until the "Thursday evening before trial", which is after the alleged sanctionable conduct took place further showing Petitioner's lack of knowledge. Pet. App. 104a-105a(quoting District Court Dkt.141 at p.2[A1105]); A257-258¶¶3-5.

iii.) "Plaintiff's disclosures to his former counsel . . . show him directing [DSLG and Johnmack Cohen, Esq.] to object to the production of information and documents . . . and misleading his counsel as to the

contents of certain of the documents he sought to shield from disclosure." Pet. App. 123a;

iv.) "Plaintiff consistently and systematically concealed relevant and unfavorable facts and documents . . . from [DSLG and Johnmack Cohen, Esq.]." *Id.* at 121a;

v.) In "response to [Defendants'/Appellees' discovery requests regarding Plaintiff's Bronx Action/other litigation], Plaintiff disclosed no information to his counsel [DSLG and Petitioner Cohen] and instructed [Petitioner] Cohen to object on relevance grounds." Pet. App. 56a

Submitting an inaccurate representation based upon genuine belief, as the record and District Court's factual findings establish, is not bad faith necessary to justify sanctions under the high standards of 1927 and inherent powers. As is clear from the record and District Court's own factual findings, Petitioner Cohen did not act in bad faith as his inaccurate representation was based upon his genuine, good faith, beliefs in those moments. And furthermore, the District Court factually found that Plaintiff misled Petitioner Cohen and DSLG as to the nature of the Bronx Action, as shown above and further below.

Ultimately, the Second Circuit affirmed the District Court's unsound analysis without providing any reasoning regarding the District Court's improper Rule 11 analysis to assume bad faith. This sets a dangerous

precedent as litigants are enticed to circumvent Rule 11's self-regulating safe harbor procedures opening the floodgates to claims under 1927 and inherent powers and ii.) eviscerating 1927's and inherent powers' standard that requires "a high degree of specificity in the factual findings" to find subjective bad faith. *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986)(quoting *Dow Chem. Pac. Ltd. v. Rascator Mar. S.A.*, 782 F.2d 329, 345 (2d Cir. 1986)). This also raises a question of exceptional importance as to whether a court can use the implicit Rule 11(b) certification that automatically attaches to all submissions as a vehicle to find bad faith under the high standards of 1927 and inherent powers. Accordingly, this Petition should be granted and the affirmance reversed.

Secondly, the District Court imposed a temporal blanket sanction requiring Petitioner Cohen and DSLG to reimburse Defendants for all fees incurred from January 13, 2020 through February 28, 2020, despite Supreme Court precedent, in *Goodyear*, 581 U.S. at 108, specifically holding that sanctions under these standards must be tailored to the sanctionable conduct. The Second Circuit focused on the District Court reducing the sanction award sought by Defendants. Pet. App. 5a. However, the District Court only reduced the fees sought by Defendants because Defendants' counsel sought an enhanced hourly fee and submitted inflated bills. *Id.* at 22a-27a, 29a-30a, 33a-36a. Though the District Court reduced the ultimate sanction award, the District Court still never tailored the sanction/fee reimbursement to the sanctioned conduct and unjustly required Petitioner Cohen and DSLG to reimburse Defendants for numerous fees

unrelated to the sanctionable conduct. *Id.* at 22a-27a, 29a-30a, 33a-36a. The District Court unfairly forced Petitioner Cohen and DSLG to reimburse Defendants an exorbitant $82,616.43 for many fees incurred wholly unrelated to the sanctioned conduct in clear violation of Supreme Court precedent. Second Circuit 23-1015, Dkt. 106 at p.10-11[2]. Accordingly, this Court should accept certiorari and reverse to ensure uniformity with Supreme Court standards.

OPINIONS BELOW

1.) *Doe 1 v. East Side Club, LLC* No. 18 CIV. 11324 (KPF), 2021 WL 2709346 (S.D.N.Y. July 1, 2021), reconsideration denied sub nom. *Doe 1 v. East Side Club, LLC* No. 18 CIV 11324 (KPF), 2021 WL 4711249 (S.D.N.Y. Oct. 8, 2021);

2.) *Doe 1 v. East Side Club, LLC.*, No. 18 CIV. 11324 (KPF), 2023 WL 4174141 (S.D.N.Y. June 23, 2023);

3.) *Derek Smith L. Grp., PLLC v. E. Side Club, LLC*, No. 23-1015-cv, 2024 U.S. App. LEXIS 9908 (2d Cir. Apr. 24, 2024);

On July 1, 2021, The District Court issued its Opinion and Order sanctioning Petitioner Cohen and DSLG. Pet. App. 46a-130a. *Doe 1 v. East Side Club, LLC* No. 18 CIV. 11324 (KPF), 2021 WL 2709346 (S.D.N.Y. July 1, 2021), reconsideration denied sub nom, *Doe 1 v. East Side Club, LLC* No. 18 CIV 11324 (KPF),

2. This corresponds to the page numbers at the bottom of the brief.

2021 WL 4711249 (S.D.N.Y. Oct. 8, 2021). On June 23, 2023, the District Court issued an Opinion and Order setting the monetary sanction. *Id.* at 7a-38a (*Doe 1 v. East Side Club, LLC*, No. 18 CIV. 11324 (KPF), 2023 WL 4174141 (S.D.N.Y. June 23, 2023).

On April 26, 2024, the Second Circuit issued a Summary Non-Precedential Order affirming the District Court's decision. *Derek Smith L. Grp., PLLC v. E. Side Club, LLC*, No. 23-1015-cv, 2024 U.S. App. LEXIS 9908 (2d Cir. Apr. 24, 2024); *Id.* at 1a-6a. On May 28, 2024, the Second Circuit denied Petitioner Cohen's and DSLG's Rehearing Petition. *Id.* at 131a-132a.

JURISDICTION

On April 26, 2024, the Second Circuit affirmed the District Court's decision. *Id.* at 1a-6a. On May 8, 2024, Petitioner Cohen filed a timely rehearing petition to the Second Circuit. Second Circuit 23-1015, Dkt. 106. On May 28, 2024, the Second Circuit denied Petitioner Cohen's and DSLG's Rehearing Petition. Pet. App. 131a-132a. Pursuant to Rule 13 of the Supreme Court Rules, Petitioner Cohen is filing this Petition for Writ of Certiorari within ninety (90) days of the Second Circuit denying Petitioner Cohen's rehearing petition. Pursuant to *28 U.S.C. § 1254(1)*, the Supreme Court has jurisdiction.

STATUTORY PROVISIONS INVOLVED

Pursuant to 28 U.S.C. §1927, [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so

multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

The District Court sanctioned Petitioner Cohen and DSLG under 1927 and its inherent powers. The District Court submitted Petitioner Cohen acted in bad faith for filing the January 13, 2020 motion *in limine* wherein Petitioner Cohen detailed Plaintiff's, pro se, other litigation against his prior attorney, Dayrel Sewell ("Sewell") (the "Bronx Action")[3] as an irrelevant fee dispute and for Petitioner Cohen's mistaken representation at the February 21, 2020 Court conference not stating that the Bronx Action also named Fordham University as a defendant and resulted in two appeals.[4] Pet. App. 103a-113a. However, as the record reflects, Petitioner Cohen did not know the full extent of Plaintiff's Bronx Action at those times and made all representations based upon their genuine, reasonable beliefs that the Bronx Action involved solely a fee dispute between Plaintiff and his prior attorney

3. Captioned [*John Doe 1*] v. *Law Firm of Dayrel Sewell, PLLC*, et al. Index No. 300163/2018 (N.Y. Sup. Ct. Bronx Cnty.)

4. The District Court also took issue with Petitioner Cohen not investigating the Bronx Action after Defendants'/Appellees' February 26, 2020 letter and for not knowing the Bronx Action resulted in two appeals (Pet. App. 110a-113a), disregarding Petitioner Cohen only had one day's notice to investigate prior to the February 27, 2020 conference and that Petitioner Cohen's father was in the hospital during this time. (A257-258, ¶5). Regardless, failure to investigate is not bad faith.

that resulted in one appeal. Accordingly, Petitioner Cohen did not and in fact could not have (given our lack of knowledge of the extent of Plaintiff's Bronx Action) acted in bad faith sanctionable conduct.

Specifically, throughout this litigation, Petitioner Cohen genuinely believed Plaintiff's Bronx Action was solely an irrelevant attorney/client fee dispute that resulted in one appeal based on Plaintiff's representations to Petitioner Cohen through Plaintiff's own discovery objections on this topic based on relevance ("representations to us/discovery objections") (A603-606, A691-693, A697-703, A793-794), Plaintiff's mental health treatment records that detailed solely a fee dispute (A1296, A1324, A1326, A1332), and most notably Plaintiff's sworn deposition testimony identifying the Bronx Action as merely a fee dispute and one appeal. (A1232 at p.130:11-25—p.132:1-25, A1233 at p.133:1-25—p.136:1-13, A1262 at p.250:8-25—p.251:1-23). However, completely unexpectedly, Plaintiff's Bronx Action, although centering on an attorney/client fee dispute, also contained an ancillary IIED, additional entities and resulted in two appeals. Petitioner Cohen never examined Plaintiff's Bronx Action, the extent of which was unforeseeable, based upon the above-mentioned information that made it reasonably seem the Bronx Action was solely an irrelevant fee dispute. (Compare *id.* to A73-74 and A106 at p.19:23-25—p.20:1-22).

Ultimately, the District Court assumed bad faith based on an *alleged* violation of the Rule 11(b) that Petitioner Cohen's failed to make "an inquiry reasonable under the circumstances" prior to filing our January 13, 2020 motion *in limine*, which does

not meet the stringent standard of *subjective bad faith* under 1927 and inherent powers. Pet. App. 105a-110a. The District Court speculated, making unsupported conclusions, desiring to "force[ ]" an avenue to impose sanctions under 1927 and its inherent powers. *Id.* at 108a, footnote 15.

The District Court's conclusory claim that Petitioner Cohen "proactively made material misrepresentations in this motion *in limine* [and at the February 21, 2020 court conference] to gain a strategic advantage . . . to keep evidence of the [IIED claim, the additional entities, and two separate appeals in the] Bronx Action . . . from the jury at trial" and submitted "lies and half-truths" is meritless and contradicts the District Court's own factual findings. Id. at 108a; 21a). The District Court specifically:

i.) " . . . credit[ed] [Petitioner Cohen's] representation that '[a]t all times material, [Petitioner Cohen] was only generally aware of a fee dispute between Plaintiff and his prior attorney, and nothing further', which impression was reinforced . . . by Plaintiff throughout the litigation," as shown most notably through Plaintiff's sworn deposition testimony. Pet. App. 105a; See also A1232 at p.130:11-25—p.132:1-25, A1233 at p.133:1-25—p.136:1-13, A1262 at p.250:8-25—p.251:1-23

ii.) found that Petitioner Cohen did not review the Bronx Action or any of its filings until

the "Thursday evening before trial", which is after the alleged sanctionable conduct took place further showing Petitioner Cohen's lack of knowledge. Pet. App. 104a-105a(quoting District Court Dkt.141 at p.2[A1105]); A257-258¶¶3-5.

iii.) "Plaintiff's disclosures to his former counsel . . . show him directing [DSLG and Petitioner Cohen] to object to the production of information and documents . . . and misleading his counsel as to the contents of certain of the documents he sought to shield from disclosure." Pet. App. 123a;

iv.) "Plaintiff consistently and systematically concealed relevant and unfavorable facts and documents . . . from [DSLG and Petitioner Cohen]." *Id.* at 121a;

v.) In "response to [Defendants'/Appellees' discovery requests regarding Plaintiff's Bronx Action/other litigation], Plaintiff disclosed no information to his counsel [DSLG and Petitioner Cohen] and instructed [Petitioner] Cohen to object on relevance grounds." Pet. App. 56a

It is clear Petitioner Cohen did not and in fact could not "proactively ma[ke] material misrepresentations" or "lie[ ]"/submit "half-truths" because Petitioner Cohen did not possess knowledge to and made all representations based upon genuine belief that Plaintiff's Bronx Action entailed solely a fee dispute. The District Court's own

finding that Petitioner Cohen was only aware of a fee dispute at the material times, which is true and shown in the record, itself establishes no bad faith/improper motive, making sanctions unwarranted.

Factual Background

Plaintiff previously filed the Bronx Action against his prior attorney, Dayrel Sewell of the Law Firm of Dayrel Sewell, PLLC (collectively referred to as "Sewell"), Fordham University, and other entities, Index No. 300163/2018 (N.Y. Sup. Ct. Bronx Cnty). Plaintiff's Bronx Action was wholly sperate and distinct from the underlying litigation here, Doe 1 v. East Side Club LLC et al. Plaintiff's Bronx Action centered on a fee dispute between Plaintiff and Sewell, and also contained an ancillary intentional infliction of emotional distress claim ("IIED"). Ultimately Plaintiff's Bronx Action was dismissed, and Plaintiff appealed. *Id.* Petitioner Cohen and DSLG never represented Plaintiff in and had no involvement or relation to Plaintiff's Bronx Action or in Plaintiff's appeal of the Bronx Action.

On April 25, 2019, Plaintiff submitted his independent objections to Defendants' discovery requests regarding Plaintiff's Bronx Action/other litigation based upon relevance. (A603-606, 691-693, A697-703, A793-794). On May 2, 2019, at Plaintiff's instruction, Petitioner Cohen submitted Plaintiff's objections to Defendants/Appellees. (A305, A311-312, A1124, A1137; Pet. App. 123a)

Prior to submitting these, Petitioner Cohen reviewed Plaintiff's mental health records for

production that repeatedly detailed solely a fee dispute between Plaintiff and his prior attorney. (*i.e.* A1332-John Doe_0073: "*[his lawyer] . . . is suing him for fees.*"; A1296-John Doe_0037; A1324-John Doe_0065, A1326-John Doe_0067) On May 2, 2019, Petitioner Cohen voluntarily produced Plaintiff's mental health records, including these unfavorable records, to Defendants/ Appellees. (A1124, A1136, A1286-1373).

Around early May 2019, Defendants'/Appellees' Counsel and Petitioner Cohen had a meet-and-confer regarding various discovery objections, including Plaintiff's objections to Defendants'/Appellees' requests for Plaintiff's other litigation/Bronx Action. Subsequently, on May 22, 2019, Petitioner Cohen emailed Plaintiff requesting Plaintiff's other litigation documents anticipating a motion to compel as Defendants/Appellees had recently filed motions to compel on other discovery issues. (A1065; A1105; District Court Dkt.38). In this email, Petitioner Cohen referred to Plaintiff's other litigation as "*against your previous attorney for fees,*" showing my genuine beliefs. (A1065). In response, Plaintiff provided instructions on how to access the case online. *Id.* Petitioner Cohen never responded, moving onto pressing matters, including compiling Plaintiff's lengthy and sensitive asylum application for production. (A1065-1066; A1105-1107; District Court Dkts.40, 42).

Since Defendants/Appellees never filed a motion to compel, Petitioner Cohen did not backstep to examine Plaintiff's Bronx Action, as Petitioner Cohen's focus was taken by the other current pressing matters in the case and Petitioner Cohen believed it was nothing more

than the attorney/client fee dispute shown in Plaintiff's mental health records. Pet. App. 105a. (citing [A541-542], District Court Dkt.141[A1104-1108])(District Court noted Petitioner Cohen did not review " . . . any [ ] filings in the Bronx Action until the Thursday evening before trial", which is after the alleged sanctionable events showing Petitioner Cohen's lack of knowledge).

On September 23, 2019, Plaintiff testified under oath at his deposition detailing the Bronx Action as solely an attorney/client fee dispute, ***never stating*** it contained a relevant intentional infliction of emotional distress ("IIED") claim, involved Fordham, and resulted in two appeals. (A1232-A1233, A1262).

On January 13, 2020, Petitioner Cohen filed a motion *in limine* to exclude Plaintiff's Bronx Action from evidence describing it as an attorney/client fee dispute, as Petitioner Cohen believed that was all it entailed and that it was irrelevant based on the record and Plaintiff's recent sworn deposition testimony. (A73-74). At the January 30, 2020 conference, the District Court examined the motions *in limine* and reserved decision on this topic. (A89, A96-97).

On February 21, 2020, the District Court inquired regarding one of Plaintiff's mental health records (A1312) that referenced a student grade dispute between Plaintiff and Fordham. (A106 at p.19:23-25—p.20:1-22). In response to the District Court's question, Petitioner Cohen stated, " . . . The one grade issue *I don't believe* was actually in fact a lawsuit . . . Other than the litigation we just discussed, *I don't believe* there's any currently active." (A106 at p.20:18-22). This was based

upon Petitioner Cohen's genuine belief as everything to that point indicated Plaintiff's Bronx Action was solely an attorney/client fee dispute.

On February 26, 2020, Defendants'/Appellees' Counsel filed a letter detailing Plaintiff's Bronx Action, Petitioner Cohen's first notice that Plaintiff's Bronx Action contained an IIED claim and named Fordham. (District Court Dkt.96). At the February 27, 2020 telephonic conference, Petitioner Cohen informed the District Court that Petitioner Cohen had not yet reviewed the Bronx Action; The District Court represented it reviewed Plaintiff's Bronx Action and its appeal, detailing it at-length. (A541).

The District Court's and Defendants'/Appellees' Counsel's affirmative representations seemed to detail the full nature of Plaintiff's Bronx Action and that it resulted in only one appeal such that there was nothing further to uncover. (District Court Dkt.96, A541-542). However, on February 28, 2020, Defendants'/Appellees' letter notified the Court and Petitioner Cohen that Plaintiff's Bronx Action resulted in two appeals. (District Court Dkt.98).

At the February 27, 2020 and February 28, 2020 telephonic conferences, Petitioner Cohen explained that Petitioner Cohen did not know the full extent of Plaintiff's Bronx Action (A542, A109, A110), and the District Court " . . . [accept][ed] [Petitioner Cohen] had no intention to mislead the Court. . . ." (A110 at p.5:11-15).

At the February 27, 2020 conference, the District Court warned Plaintiff regarding Plaintiff's pending

law license:

> "... depending on how he is at this trial, I will refer the matter to the First Department.... I will make sure that those who need to know, know . . . And I am sure he doesn't want that to happen. So, he best be thinking long and hard before he opens his mouth at this trial. . . ." (A547 at p.25:17-25—p.26:1).

In response, on February 28, 2020, Plaintiff emailed Petitioner Cohen, "... if the judge still insists that it's a perjury, then I would withdraw the suit as a precaution [to not] deal with the problems that may follow [from] such accusation." (District Court Dkt.173-5). Subsequently, at the February 28, 2020 conference, Plaintiff voluntarily dismissed his case precautionarily due to the District Court's warnings. (A19-2/28/20 minute entry).

Plaintiff's Bronx Action had no effect on substantive liability, only impacting emotional distress damages. The case could have continued to trial even with Plaintiff's Bronx Action and Plaintiff's testimony regarding Plaintiff's Bronx Action being admitted. Ultimately, Plaintiff withdrew this case because of the District Court's severe warnings regarding Plaintiff's pending law license. (District Court Dkt. 173-5).

On July 1, 2021, the District Court granted-in-part Defendants'/Appellees' motion for sanctions and Ordered reimbursement to Defendants/Appellees for fees and costs from January 13, 2020 through February 28, 2020 and for costs of Defendants'/Appellees' motion

for sanctions. (SPA58). The District Court directed Defendants/Appellees to submit bills for reimbursement and for Petitioner Cohen's and DSLG's Opposition thereafter ("Defendants'/Appellees' Fee Application"). (A27-28, District Court Dkt.166).

On July 21, 2021, Petitioner Cohen and DSLG filed a notice of appeal of the Court's July 1, 2021 Opinion and Order. (District Court Dkt.172). On July 29, 2021, Petitioner Cohen and DSLG requested to Stay Defendants'/Appellees' Fee Application pending outcome of the prior Appeal 21-1771 it to the *alleged* misconduct as required, disregarding its prior August 10, 2021 Order. (Dkt.182 at p.3-4).

On August 10, 2021, the District Court granted this to avoid unnecessary briefing, recognizing our strong likelihood of success on the merits where "the Second Circuit [could] limit[ ] or modify[ ] th[e] [sanction] award . . . " Pet. App. 42a. The Second Circuit dismissed without prejudice Appeal 21-1771 for lack of jurisdiction as the Court had not issued a Final Order. (21-1771, Dkts.139-140, 142).

Subsequently, Petitioner Cohen and DSLG completed briefing of Defendants'/Appellees' Fee Application. (Dkts.199-203, 211). On June 23, 2023, the District Court issued its Final Order awarding Defendants $81,439.34 in attorneys' fees and $1,123.00 in costs against Petitioner Cohen and DSLG. Pet. App. 8a. The District Court awarded temporal blanket fees and costs, without tailoring it to the *alleged* misconduct as required, disregarding its prior August 10, 2021 Order. (District Court Dkt.182 at p.3-4).

On April 26, 2024, the Second Circuit issued a Summary Non-Precedential Order upholding the District Court's decision without engaging in meaningful analysis on these issues. *Id.* at 1a-4a. On May 28, 2024, the Second Circuit denied Petitioner Cohen's and DSLG's Rehearing Petition on this issue without further analysis. *Id.* at 131a-132a.

REASONS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI

I. The Second Circuit Affirming the District Court's Decision to Sanction Petitioner Cohen and DSLG Whereby The District Court Assumed Bad Faith Under Rule 11 Regarding Petitioner Cohen's Representations About Plaintiff's Bronx Action Despite the District Court Factually Finding These Representations Were Based Upon Petitioner Cohen's Genuine Beliefs Conflicts With The Standards To Impose of Sanctions Under Inherent Powers and 1927.

For sanctions under the Court's inherent powers and/or 1927, "a court must find clear evidence . . . (2) the claims were brought in bad faith—[ ], 'motivated by improper purposes such as harassment or delay.'" *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) (*quoting Schlaifer Nance & Co.*, 194 F.3d at 336). "Bad faith is the touchstone [to the analysis]" and cannot be found without a "high degree of specificity in the factual findings." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000) (*quoting United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345 (2d Cir.1991)); *Oliveri*, 803 F.2d at 1272(*quoting Dow Chem. Pac Ltd.*, 782 F.2d at 345).

In *Schlaifer*, the court found "although the District Court concluded [the] claim was objectively frivolous and that [plaintiff's] own documents and witnesses indicated so, . . . the continuation of [plaintiff's] action . . . [was just] poor legal judgment. . . . [T]here is no evidence to suggest that they had utterly no basis for their ***subjective belief*** in the merits of their case."; The Second Circuit vacated sanctions because "the record [showed] appellants did indeed possess some concrete grounding for their belief [in] their fraud claim . . . and [g]iven . . . appellants' subjective good faith [belief] in [the] action, . . . [there can be no] . . . bad faith." 194 F.3d 323 at 340-41.

The Second Circuit's quotation of *Schlaifer* that "[b] ad faith can be inferred when the actions taken are so completely without merit . . . " to uphold the sanction unjustly employs hindsight. Compare Pet. App. 4a to *Gust, Inc. v. Alphacap Ventures, LLC*, 905 F.3d 1321, 1327 (Fed. Cir. 2018)(*quoting Oliveri*, 803 F.2d at 1275) (The "'court is to avoid hindsight and resolve all doubts in favor' of the non-movant.") The record showed that Petitioner Cohen "possess[ed] some concrete grounding for [Petitioner Cohen's] belief in" Petitioner Cohen's statements at those times when describing Plaintiff's Bronx Action as an attorney/client fee dispute most notably through Plaintiff's mental health treatment records and sworn deposition testimony. (A1296 A1324, A1326, A1332; A1232-A1233, A1262). *Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu*, No. 11CV043842015, 2015 WL 4389893, at *16 (S.D.N.Y. July 10, 2015)(citing *Optical Commc'ns Grp., Inc. v. M/V AMBASSADOR*, 938 F.Supp.2d 449, 465 (S.D.N.Y.2013), *aff'd* 558 F.App'x 94 (2d Cir. 2014))(An

attorney who relies on their client's sworn testimony "made under the penalty of perjury is not acting in bad faith; indeed, it is unlikely that such reliance would even [be] objective[ly] unreasonable[ ]"); *See Gust*, 905 F.3d 1321 at 1331-2 (Abuse of discretion when no basis to show attorneys "***knew*** that the patents were invalid" in continuing the litigation).

Additionally, Petitioner Cohen never reviewed Plaintiff's Bronx Action during this case because Defendants/Appellees never filed a motion to compel. Petitioner Cohen's focus was taken by the many other pressing issues in real-time, and Petitioner Cohen did not foresee or fathom that an attorney/client fee dispute would somehow contain an IIED claim, have two appeals, and involve Fordham. *See Supra. Gust*, 905 F.3d at 1327 (*quoting Oliveri*, 803 F.2d at 1275). Petitioner Cohen's failure to review Plaintiff's Bronx Action is at best "poor legal judgment"/negligence, not subjective bad faith. *Schlaifer Nance & Co.*, 194 F.3d at 340-41.

At oral argument, the Second Circuit posed a question analogizing "someone handing you a bag that's really heavy and they promise you it's only got a pillow in it and you say to the cops . . . , I didn't look inside" and further "no matter how many signs and signals there were . . . counsel closed their eyes to it." 7:12-8:35. This misapprehended the record as the Second Circuit's hypothetical allows for this person to actually feel and know that the bag is heavy and could not contain a pillow. Contrastingly, Petitioner Cohen had no inkling or indication that Plaintiff's Bronx Action went beyond an attorney/client fee dispute as all "signs and signals"

indicated it was an attorney/client fee dispute, most notably Plaintiff's sworn deposition testimony. It was completely unforeseeable and unfathomable that an attorney/client fee dispute would involve Fordham University, result in two appeals, and contain an IIED claim, as IIED claims are reserved for the most outrageous situations. Plaintiff's Bronx Action was also public record and accessible to Appellees/Defendants, which further supports no bad faith.

Based upon the record, the District Court credited Petitioner Cohen's representation that at all times material, Petitioner Cohen was only aware that Plaintiff's Bronx Action involved solely an attorney/client fee dispute and nothing further. Pet. App. 105a. Petitioner Cohen also submitted a sworn declaration attesting to this. A257-258, ¶¶3-4. It is a legal impossibility to find subjective bad faith if Petitioner Cohen was only aware that the Bronx Action involved solely an attorney/client fee dispute as the District Court found; And, Petitioner Cohen could not have been motivated by improper purposes and "proactively made material misrepresentations in [the January 13, 2020 Bronx Action] motion *in limine* to gain a strategic advantage," as the District Court conclusory, baselessly, and contradictorily stated Pet. App. 108a. Accordingly, this petition should be granted and sanctions should be reversed.

Additionally, "Rule 11 requires only a showing of objective unreasonableness . . . , but § 1927 requires more: subjective bad faith by counsel." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL–CIO*, 948 F.2d 1338, 1340 (2d Cir.1991).

The District Court only found bad faith after Petitioner Cohen filed the January 13, 2020 motion *in limine*, because "[a]fter all, Federal Rule of Civil Procedure 11(b) was now implicated," specifically the "'affirmative duty to conduct a reasonable inquiry into the facts and the law before filing.'" Pet. App. 105a-110a(quoting *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551 (1991). The District Court further stated:

> "... in signing the moving papers, [pursuant to Rule 11(b)], [Petitioner] Cohen attested that he had made the necessary inquiry into the factual allegations substantiating the claims. As such, any misrepresentations about ... the Bronx Action from this filing forward could not have been made in good faith and could only have been made with improper purpose ..." and since "the procedural prerequisites to impose sanctions under Rule 11 for this filing are not satisfied here, ... the Court is forced to rely on its inherent power and [] 1927." *Id.*

The District Court directly linked its finding that Rule 11(b) was implicated to why there was bad faith to impose sanctions under the higher standards of inherent powers and 1927, speculating and unjustifiably assuming that "this filing forward could not have been made in good faith. . . ." (SPA54). Rule 11, which the District Court improperly utilized here, employs a completely different framework and has no part in the analysis under the higher standards of 1927 and inherent powers. Tellingly, the District Court cited to only one

case to support its decision—its own noncomparable case dealing with Rule 11 sanctions, which the Second Circuit since vacated in-part. (SPA55)(citing *Malvar Egerique v. Chowaiki* No 19 Civ. 3110 (KPF), 2020 WL 1974228, at *32 (S.D.N.Y. Apr. 24, 2020)), *vacated in part sub nom. Weiss v. David Benrimon Fine Art LLC*, No. 20-3842-CV, 2021 WL 6128437 (2d Cir. Dec. 28, 2021) A tenuous finding that Rule 11(b) was implicated cannot be the basis for bad faith under 1927 and the Court's inherent powers. *See i.e. Eisemann*, 204 F.3d at 396 (2d Cir. 2000)("[C]onclusory determination that [counsel's] motion was filed in bad faith rested almost entirely on its lack of merit, . . . but absent greater specificity from the District Court . . . is not . . . a proper basis [for sanctions].")

The District Court also applied the lower Rule 11 standard and stated "[Petitioner] Cohen's ***failure to investigate*** resulted in unnecessary expenditures. . . .", repeatedly referring to negligence/ objective unreasonableness. I.e. Pet. App. 46a, 105a-110a; *Muhammed v. Walmart Stores East, L.P.*, 732 F.3d 104, 109 (2d Cir. 2013)(District court applied "objective reasonableness test, [which] is not enough [for] subjective bad faith.")

The District Court's leap in "implicating" Rule 11(b) to arbitrarily assume bad faith detrimentally strips the self-regulating, procedural protections of Rule 11, as well as the standards of 1927 and the court's inherent powers, raising questions of exceptional importance. The Second Circuit did not even address the District Court's unsound analysis of using the inapplicable Rule 11 to speculatively assume bad faith. Pet. App.

1a-6a. Accordingly, this petition should be granted and sanctions should be reversed.

II. The Second Circuit's Affirmance of the District Court's Temporal Blanket Sanction That Required Petitioner Cohen and DSLG to Reimburse Defendants For Fees Unrelated To The Sanctioned Conduct Clearly Violates Supreme Court Precedent

In *Goodyear*, the Supreme Court ruled that courts must "establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party" when imposing sanctions. *Id.* at 108. "The Court made clear in *Goodyear* that an award of costs and attorney's fees and sanctions must be related *causally*—and not simply *temporally*—to the sanctionable conduct." *Virginia Properties, LLC v. T- Mobile Ne. LLC*, 865 F.3d 110, 114 (2d Cir. 2017)(citing *id.* at 1189). ". . . . [T]he fee award may go no further than to redress the wronged party 'for losses sustained'. . . ." *Goodyear*, 581 U.S. 109 (quoting *United States v. Mine Workers*, 330 U.S. 258, 304

(1947)). The District Court solely sanctioned Petitioner Cohen and DSLG regarding Petitioner Cohen's statements on Plaintiff's Bronx Action, which impacted only Plaintiff's emotional distress damages, not substantive liability[5]. Pet. App. 96a-120a. The

5. The District Court acknowledged that the Bronx Action had no effect on substantive liability, only emotional distress damages. Pet. App. 108a. Also, the Bronx Action was not dispositive of Plaintiff's emotional distress damages, as the District Court suggested, as Plaintiff's mental health records separately detailed Plaintiff's emotional distress from his experiences at

District Court's improper temporal sanction of blanket fees and costs from January 13, 2020—February 28, 2020 (*Id.* at 112a-113a) totaling $82,616.43 is significant, and unjustly forces us to reimburse Defendants/Appellees for fees on many issues unrelated to the sanctioned conduct in direct violation of Supreme Court precedent, which requires fee reimbursement to be ***causally, not temporally*** related to the sanctioned conduct.

Between January 13, 2020—February 28, 2020, Defendants/Appellees incurred fees on many matters unrelated to Plaintiff's Bronx Action, the only sanctioned issue, for example, including but not limited to:

i.) Defendants'/Appellees' counsel opposing sixteen of our motions *in limine* wholly unrelated to the Bronx Action (A79-A88); On January 16 and 17, 2020, Appellees'/ Defendants' counsel billed 11 hours opposing our motions *in limine.* (A1404).

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the East Side Club and the Bronx Action. (Compare *id.* to i.e. A1286, A1304, A1296). And even if it was, Plaintiff's case was still substantively viable such that the District Court should not have imposed blanket fees.

Additionally, the District Court's unsound circular commentary on SPA85-86, which conclusory cites an excerpt of its July 1, 2021 opinion to possibly suggest the Court imposed sanctions for matters other than Issue 1-Plaintiff's Bronx Action directly contradicts the Court's July 1, 2021 opinion, which clearly shows that the Court only imposed sanctions for Issue 1-Plaintiff's Bronx Action and thus blanket sanctions should not have been imposed. (Compare Pet. App. 19a to Pet. App. 96a-120a).

I filed seventeen motions *in limine*, only one was on the Bronx Action. (A63-A78).

ii.) On January 19, 2020, Defendants'/ Appellees' counsel billed 2 hours "[p]roof read[ing] motions *in limine* and index[ed] exhibits." (A1404).

iii.) On January 22, 2020, Defendants'/ Appellees' counsel billed .58 hours "[s]en[ding] motions to clients with explaination [sic] Respond[ing] to JM email." (A1404).

iv.) On January 30, 2020, Defendants'/ Appellees' counsel billed 4 hours participating at the January 30, 2020 conference, which was primarily focused on the motions *in limine* unrelated to the Bronx Action (A89-100); (A1404).

v.) On January 23, 2020, Defendants'/ Appellees' counsel billed .58 hours "Review[ing] email SEO Johnmack to court," which is difficult to decipher and seemingly unrelated to the Bronx Action. (A1404).

vi.) Defendants'/Appellees' counsel billed 8.42 hours preparing and defending our deposition of Defendants'/Appellees' expert. (A1404).

vii.) On February 18, 2020, Defendants'/ Appellees' counsel billed 1.5 hours "[c] ompl[ying with request by court to refile spreadsheet with trial ex." (A1404).

viii.) Plaintiff's Bronx Action had no impact on substantive liability, only emotional distress damages. There were many topics unrelated to the Bronx Action for trial and so Defendants/Appellees are not entitled to reimbursement for all fees incurred for their attorney's entire trial preparation. Defendants'/Appellees' counsel billed around 33 hours for trial preparation of which the great majority would have been on topics unrelated to the Bronx Action. (A1404-1/28/2020 entry, 2/15/2020 entry, 2/16/20 entry, 2/17/2020 entry, 2/24/20 entry, 2/26/2020 entry).

Ultimately, pursuant to Supreme Court precedent, Petitioner Cohen and DSLG cannot be liable for blanket fees associated with matters unrelated to Plaintiff's Bronx Action, the only sanctioned issue.

Tellingly, Petitioner Cohen raised these points to the District Court (District Court Dkt.179) and the District Court itself recognized that its temporal blanket sanction was improper and that there was a strong likelihood that "the Second Circuit [could] limit[] or modify[] th[e] [sanction] award . . . " (District Court Dkt.182 at p.3- 4).

The Second Circuit focused on the fact that the District Court reduced the fees sought by Defendants. Pet. App. 5a. However, the District Court only reduced the fees sought by Defendants because Defendants' counsel sought an enhanced hourly fee and submitted inflated bills and never tailored the sanction/fee reimbursement to the sanctioned conduct. *Id.* at 22a-27a, 29a-30a, 33a-36a. The District Court's reduction of the fee award sought by Defendants, which the Second Circuit keened in on to support their affirmance does not negate the District Court's outright failure to "establish a causal link" between the sanctionable conduct and the legal fees incurred by Defendants/ Appellees. The District Court forced Petitioner Cohen and DSLG to reimburse Defendants an exorbitant $82,616.43 for many fees incurred wholly unrelated to the sanctioned conduct. This blatantly violates Supreme Court precedent and 1927. *Goodyear*, 581 U.S. at 108. The Supreme Court should great certiorari to ensure consistency with clear Supreme Court precedent that a sanction under 1927 or inherent powers needs to be tailored to the sanctioned conduct.

CONCLUSION

For the foregoing reasons, Petitioner Cohen respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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