

## **APPENDIX**

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**APPENDIX A — SUMMARY ORDER OF THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT, DATED APRIL 24, 2024**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 23-1015-cv

DEREK SMITH LAW GROUP, PLLC,  
JOHNMACK COHEN,

*Appellants,*

JOHN DOE 1,

*Plaintiff-Counter-Defendant,*

v.

EAST SIDE CLUB, LLC, JOHN DOE 2,  
JOHN DOE 3,

*Defendants-Counter-Claimants-Appellees.*

April 24, 2024, Decided

PRESENT: RAYMOND J. LOHIER, JR., ALISON J. NATHAN, SARAH A. L. MERRIAM, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York. (Katherine Polk Failla, *Judge*).

*Appendix A***SUMMARY ORDER**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Appellants Derek Smith Law Group and Johnmack Cohen, an attorney of that firm, appeal from a judgment of the United States District Court for the Southern District of New York (Failla, J.) sanctioning them for engaging in bad faith misconduct in connection with this litigation. On appeal, the Appellants principally argue that the District Court erred in imposing sanctions and that its award of attorney's fees was excessive. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.<sup>1</sup>

**I. Sanctions**

We review a district court's decision to impose sanctions for abuse of discretion. *Va. Props., LLC v. T-Mobile Ne. LLC*, 865 F.3d 110, 113 (2d Cir. 2017). "Imposition of sanctions under a court's inherent powers [or 28 U.S.C. § 1927] requires a specific finding that an attorney [or law firm] acted in bad faith" and is "appropriate only if there is clear evidence that the conduct at issue is (1) entirely without color and (2) motivated by improper purposes." *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d

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1. This case was heard in tandem with *Cooper v. Upstairs, Downstairs of New York, Inc.*, No. 21-1032-cv.

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110, 114 (2d Cir. 2009); *see Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 178 (2d Cir. 2012). “Conduct is entirely without color when it lacks any legal or factual basis.” *Wolters Kluwer*, 564 F.3d at 114.

Here, the Appellants argue that the District Court’s finding that they engaged in bad faith misconduct is clearly erroneous, and that the District Court therefore abused its discretion when it sanctioned the Appellants pursuant to § 1927 and its inherent powers. We disagree. As the District Court noted, the Appellants’ tenth motion *in limine*, dated January 13, 2020, seriously misrepresented the nature of a concurrent action (the “Bronx Action”) that the plaintiff, John Doe 1, had commenced in New York State Supreme Court. The Appellants informed the District Court that the Bronx Action was merely a “fee dispute between Plaintiff and his attorney in another case” and asserted that any evidence related to it was “irrelevant” to the issues at trial in this case and would “mislead the jury. . . and [thus] serve no legitimate purpose.” Joint App’x 73. In fact, however, John Doe 1 “simultaneously . . . sought to recover for *the same purported emotional distress*” in the Bronx Action and in this case. *Doe 1 v. E. Side Club, LLC*, No. 18 CIV. 11324 (KPF), 2021 U.S. Dist. LEXIS 123497, 2021 WL 2709346, at \*21 (S.D.N.Y. July 1, 2021). Thus, as the District Court noted, “the Bronx Action was directly relevant to — if not dispositive of — the emotional distress damages sought in this case.” *Id.* at \*23. The Appellants thereafter continued to misrepresent the nature of the Bronx Action before the District Court. Indeed, once the facts of the Bronx

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Action came to light, the Appellants advised John Doe to voluntarily withdraw his emotional distress claim, which he agreed to do.

The District Court therefore had a strong basis to find that the Appellants “proactively made material misrepresentations in [their tenth] motion *in limine* to gain a strategic advantage [(i.e., for an improper purpose)],” *id.*, and thus engaged in bad faith misconduct. *See Schlaifer Nance & Co. v. Est. of Warhol*, 194 F.3d 323, 338 (2d Cir. 1999) (“Bad faith can be inferred when the actions taken are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose.” (quotations marks omitted)). We therefore conclude that the District Court acted within its discretion when it sanctioned the Appellants for the period from January 13, 2020 through the issuance of its sanctions opinion.

**II. Due Process**

Due process requires that before a court imposes sanctions on a party, that party “must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter.” *Wilson v. Citigroup, N.A.*, 702 F.3d 720, 725 (2d Cir. 2012) (quotation marks omitted). The Appellants claim that the District Court failed to give them specific notice that their motion *in limine* was sanctionable. But the record shows that the District Court gave them both specific notice and an opportunity to be heard. The Appellees’ sanctions motion

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specifically argued that the Appellants' misrepresentations regarding the Bronx Action constituted sanctionable conduct. Moreover, after the Appellants submitted their brief opposing the Appellees' sanctions motion, the District Court held several conferences on the matter and allowed the Appellants to submit supplemental letters regarding the sanctions motion.

We therefore reject the Appellants' due process argument.

**III. Attorney's Fees**

Lastly, the Appellants challenge the District Court's award of attorney's fees as excessive. "Given the district court's inherent institutional advantages in this area, our review of a district court's fee award is highly deferential." *McDonald ex rel Prendergast v. Pension Plan of the NYSA-ILA Pension Tr. Fund*, 450 F.3d 91, 96 (2d Cir. 2006). "Attorney's fees must be reasonable in terms of the circumstances of the particular case, and the district court's determination will be reversed on appeal only for an abuse of discretion." *Matthew Bender & Co. v. W. Pub. Co.*, 240 F.3d 116, 121 (2d Cir. 2001) (quotation marks omitted). Here, the District Court awarded \$81,439.34 in attorney's fees and \$1,123 in costs from January 13, 2020 through the issuance of its sanctions opinion. Before calculating these amounts, the District Court considered, among other things, the Appellees' counsel's experience and expertise, the hourly rates charged in similar cases, and the number of hours spent on the litigation. *See Doe 1 v. E. Side Club, LLC*, No. 18 CV. 11324 (KPF), 2023 U.S.

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Dist. LEXIS 109319, 2023 WL 4174141, at \*5-10 (S.D.N.Y. June 23, 2023). Taking these issues into consideration, the District Court substantially reduced the total attorney's fees awarded from the amount that the Appellees sought. *See id.* at \*8-10. We find no abuse of discretion in the District Court's decision.

**CONCLUSION**

We have considered the Appellants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:  
Catherine O'Hagan Wolfe,  
Clerk of Court

/s/

**APPENDIX B — OPINION AND ORDER OF  
THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK,  
FILED JUNE 23, 2023**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

No. 18 Civ. 11324 (KPF)

JOHN DOE 1,

*Plaintiff,*

v.

EAST SIDE CLUB, LLC.,  
JOHN DOE 2, and JOHN DOE 3,

*Defendants.*

Filed June 23, 2023

**OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

In a prior Opinion and Order, this Court ordered the imposition of sanctions—in the form of attorneys' fees and costs incurred by the defense—against Plaintiff John Doe 1 and his former counsel, Johnmack Cohen and the Derek Smith Law Group (with Cohen, “DSLG”), as a result of their misrepresentations to the Court and to Defendants in this litigation. *See Doe 1 v. E. Side Club, LLC.*, No. 18 Civ. 11324 (KPF), 2021 WL 2709346, at \*30 (S.D.N.Y.

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July 1, 2021) (the “Sanctions Opinion” or “*East Side Club I*”), *reconsideration denied sub nom. Doe 1 v. E. Side Club, LLC*, No. 18 Civ. 11324 (KPF), 2021 WL 4711249 (S.D.N.Y. Oct. 8, 2021). This Opinion resolves the amount of attorneys’ fees and costs imposed on each of Plaintiff and DSLG. Specifically, and for the reasons set forth herein, the Court awards attorneys’ fees in the amount of \$100,230.98 and costs in the amount of \$18,623.55 against Plaintiff, and attorneys’ fees in the amount of \$81,439.34 and costs in the amount of \$1,123.00 against DSLG.

**BACKGROUND<sup>1</sup>**

The Court presumes familiarity with the factual and procedural histories detailed in the Sanctions Opinion, all

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1. For ease of reference, the Court adopts the citing and abbreviation conventions set forth in the Sanctions Opinion. *See generally Doe 1 v. E. Side Club, LLC*, No. 18 Civ. 11324 (KPF), 2021 WL 2709346, at \*1 n.1 (S.D.N.Y. July 1, 2021), *reconsideration denied sub nom. Doe 1 v. E. Side Club, LLC*, No. 18 Civ. 11324 (KPF), 2021 WL 4711249 (S.D.N.Y. Oct. 8, 2021). In this Opinion, the Court refers to Defendants’ memorandum of law in support of their motion for attorneys’ fees and costs as “Def. Fee Br.” (Dkt. #170); to the Declaration of Thomas D. Shanahan in support of that motion as “Shanahan Fee Decl.” (Dkt. #167); to Plaintiff’s memorandum of law in opposition to Defendants’ motion as “Pl. Fee Opp.” (Dkt. #183); to Plaintiff’s declaration in opposition to Defendants’ motion as “Pl. Fee Decl.” (Dkt. #184); to DSLG’s memorandum in opposition to Defendants’ motion as “DSLG Fee Opp.” (Dkt. #199); to Defendants’ reply memorandum of law as “Def. Fee Reply” (Dkt. #200); to the Reply Declaration of Thomas D. Shanahan as “Shanahan Fee Reply Decl.” (Dkt. #201); and to the Declaration of Thomas D. Shanahan concerning the authentication of certain documents as “Shanahan Fee Auth. Decl.” (Dkt. #202).

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of which are incorporated by reference herein. In broad summary, the Court determined that sanctions were warranted after Plaintiff provided false and misleading information to the Court and to Defendants about a concurrent action in the New York State Supreme Court, Bronx County (the “Bronx Action”), that Plaintiff had brought against, among others, his former attorney, Fordham University, and several officials associated with Fordham University (collectively with Fordham University, “Fordham”). The adverse consequences for the instant litigation were manifold:

Plaintiff simultaneously pursued two cases in which he sought to recover for the same purported emotional distress; however, there was, and there could be, no overlap between the two theories of recovery. Nevertheless, in this action Plaintiff: (i) never disclosed the nature or even the existence of the emotional distress claims advanced in the Bronx Action; (ii) continued to seek emotional distress damages without any offset for the emotional distress purportedly attributable solely to the Bronx Action defendants; (iii) testified under oath that there were no other factors that contributed to his emotional distress; and (iv) testified that he did not suffer any emotional damage as a result of the conduct complained of in the Bronx Action.

*East Side Club I*, 2021 WL 2709346, at \*21. And while Plaintiff’s then-counsel at DSLG may not initially have been aware of Plaintiff’s deception at the time they

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filed the instant action on his behalf, the firm “failed to conduct even basic due diligence in investigating the Bronx Action,” *id.* at \*22, and later made key misrepresentations to the Court and Defendants in order “to gain a strategic advantage at trial, with reckless disregard for the truth,” *id.* at \*23.

Once Plaintiff’s lies and omissions were fully ventilated, he voluntarily withdrew the lawsuit.<sup>2</sup> What

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2. DSLG now suggests that “Plaintiff mainly withdrew this case because of the Court’s severe warnings regarding Plaintiff’s pending law license, not because this information [about the Bronx Action] came to light.” (DSLG Fee Opp. 11). While the Court is not privy to communications between DSLG and its client, it nonetheless believes counsel’s assertion to reflect an unduly myopic view of the record. At the February 27, 2020 hearing, the Court made clear that its singular concern was that Plaintiff had lied under oath and would continue to do so at trial:

Mr. Cohen, I appreciate what you are saying about confusing the jury and I will understand that but you cannot—you cannot at this stage in the game—say that it’s too late for us to begin looking at these things because from where I am sitting these are things that you or your client hid from the defense and from the Court and I am very disturbed. You reminded me that the plaintiff hasn’t yet been admitted into the State of New York and depending on how he is at this trial, I will refer the matter to the First Department. *If he is a liar, if it turns out that this is isn’t just confusion, that this is actually false statements and a deliberate effect, I will make sure that those who need to know, know, that he perjured himself before me.* And I am sure he doesn’t want that to happen.

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remained was Defendants' request for "reasonable fees and costs and expenses." (Feb. 28, 2020 Tr. 8). After extensive briefing from the parties—a process that was complicated by the Court's finding of a conflict of interest between Plaintiff and DSLG on the precise issues in play—the Court determined to award Defendants reasonable attorneys' fees and costs "to compensate Defendants . . . for the protraction and subversion of the litigation process in the runup to the trial." *East Side Club I*, 2021 WL 2709346, at \*26 n.20. In particular, the Court imposed costs and fees (i) on Plaintiff for the period from May 2, 2019, until the voluntary termination of the action on February 28, 2020, and from March 17, 2021, to the issuance of the Sanctions Opinion, and (ii) on DSLG for the period from January 13, 2020, through issuance of the Sanctions Opinion. *Id.* at \*25, 30-31; *see also id.* at \*25 (noting that sanctions imposed on DSLG include "the costs associated with seeking leave to file and filing the instant motion for sanctions"), 30 (noting that sanctions imposed on Plaintiff "also include[ ] the cost of Defendants'

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(Feb. 27, 2020 Tr. 25 (emphasis added)). Thus, to the extent the Court's admonitions caused Plaintiff to withdraw his action, Plaintiff could only have had a cause for concern if his statements regarding the Bronx Action were knowingly false, and if he planned on repeating those falsehoods in his trial testimony. For this reason, the Court stands by its original finding that "[d]isclosure of the Bronx Action and the nature of the claims asserted therein would have dramatically altered the instant litigation. On this point, the Court does not even need to hypothesize, since disclosure of this information on the eve of trial ultimately precipitated Plaintiff's voluntary dismissal of this case." *East Side Club I*, 2021 WL 2709346, at \*21.

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response to Plaintiff’s *pro se* opposition to the instant motion [for sanctions]”).

The Sanctions Opinion included a briefing schedule for Defendants’ fee petition. *East Side Club I*, 2021 WL 2709346, at \*31. Pursuant to that schedule, Defendants filed their memorandum of law and supporting documentation on July 16, 2021. (Dkt. #167-170). Five days later, on July 21, 2021, DSLG filed a notice of appeal with the United States Court of Appeals for the Second Circuit (Dkt. #172), and on July 29, 2021, it moved to stay further proceedings in this Court pending resolution of that appeal (Dkt. #175). For his part, Plaintiff filed a motion for reconsideration of the Court’s Sanctions Opinion on July 28, 2021. (Dkt. #173-174; *see also* Dkt. #176). Ultimately, after hearing from the parties, the Court allowed Plaintiff’s reconsideration motion to go forward, while granting DSLG’s request for a stay of the determination of fees and costs pending resolution of its appeal. (Dkt. #170 (order scheduling briefing on motion for reconsideration); Dkt. #182 (stay order)).<sup>3</sup> The Court issued an Order denying Plaintiff’s motion for reconsideration on October 8, 2021. (Dkt. #191).

On May 18, 2022, the Second Circuit dismissed DSLG’s appeal, finding that no final order had been issued by this Court as contemplated by 28 U.S.C. § 1291. (Dkt. #193 (mandate)). On June 10, 2022, this Court lifted the stay and reset the briefing schedule on Defendants’ fee petition. (Dkt. #195). DSLG filed its opposition memorandum on

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3. Plaintiff filed his opposition to Defendants’ fee petition on August 16, 2021. (Dkt. #183-184).

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August 22, 2022. (Dkt. #199). Defendants then filed a reply memorandum and several supporting declarations on October 16, 2022. (Dkt. #200-202).

After noting a discrepancy in the billing records submitted by Defendants, this Court issued an order on June 5, 2023, requesting additional substantiation for certain attorneys' fees claimed by the defense. (Dkt. #210). On June 9, 2023, counsel for Defendants submitted a supplemental declaration explaining the inadvertent omission of certain billings from Defendants' prior submissions. (Dkt. #211). The Court understands that all of the legal fees for which defense counsel seeks submission were in fact billed to Defendants.

**DISCUSSION****A. Applicable Law**

In the Sanctions Opinion, the Court found that sanctions were warranted against both DSLG and Plaintiff pursuant to the Court's inherent powers; against DSLG pursuant to 28 U.S.C. § 1927; and against Plaintiff pursuant to Rule 37 of the Federal Rules of Civil Procedure. *See East Side Club I*, 2021 WL 2709346, at \*19-20, 24-25, 27-31. To review, a court has the "inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct." *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). Separately, Section 1927 authorizes a court to require an attorney "who so multiplies the proceedings

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in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927; *see also Craig v. UMG Recordings, Inc.*, No. 16 Civ. 5439 (JPO), 2019 WL 2992043, at \*4-5 (S.D.N.Y. July 9, 2019). Finally, Federal Rule of Civil Procedure 37 provides that when "a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2) (A). In such circumstances, Rule 37 requires the court to "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." Fed. R. Civ. P. 37(b)(2)(C); *see generally Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302-03 (2d Cir. 2009).

"Attorneys' fees are typically awarded by determining the "presumptively reasonable fee," often (if imprecisely) referred to as the "lodestar." *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011) (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 522 F.3d 182, 183 (2d Cir. 2008)); *see also Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552-53 (2010); *Rossbach v. Montefiore Med. Ctr.*, No. 19 Civ. 5758 (DLC), 2021 WL 4940306, at \*1 (S.D.N.Y. Oct. 22, 2021) ("When a court imposes a monetary sanction against a party in the amount of its adversary's attorneys' fees, the familiar lodestar method is used to calculate the appropriate sum."). The lodestar is calculated by multiplying the "reasonable hourly rate and the reasonable number of hours required by the case." *Millea*, 658 F.3d

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at 166. Courts may, only after the initial calculation of the presumptively reasonable fee, adjust the total when it “does not adequately take into account a factor that may properly be considered in determining a reasonable fee.” *Lilly v. City of New York*, 934 F.3d 222, 230 (2d Cir. 2019) (quoting *Millea*, 658 F.3d at 167).<sup>4</sup> A district court possesses considerable discretion in awarding attorneys’ fees. *See Millea*, 658 F.3d at 166; *see also Arbor Hill*, 522 F.3d at 190.

“To determine the reasonable hourly rate for each attorney, courts must look to the market rates ‘prevailing

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4. The Second Circuit confirmed in *Lilly v. City of New York*, 934 F.3d 222, 233 (2d Cir. 2019), that while this Circuit has adopted the lodestar approach for fee determinations, the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)—which articulated a competing method for fee determinations—“remain important tools for helping district courts calculate the lodestar and, in exceptional cases, determining whether an enhancement or cut to the lodestar is warranted.” These twelve factors are: (i) the time and labor required; (ii) the novelty and difficulty of the questions; (iii) the level of skill required to perform the legal service properly; (iv) the preclusion of employment by the attorney due to acceptance of the case; (v) the attorney’s customary hourly rate; (vi) whether the fee is fixed or contingent; (vii) the time limitations imposed by the client or the circumstances; (viii) the amount involved in the case and results obtained; (ix) the experience, reputation, and ability of the attorneys; (x) the “undesirability” of the case; (xi) the nature and length of the professional relationship with the client; and (xii) awards in similar cases. *See Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cnty. of Albany*, 522 F.3d 182, 186 n.3 (2d Cir. 2008) (citing *Johnson*, 488 F.2d at 717-19, abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989)).

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in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”” *Heng Chan v. Sung Yue Tung Corp.*, No. 03 Civ. 6048 (GEL), 2007 WL 1373118, at \*2 (S.D.N.Y. May 8, 2007) (quoting *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998)). The Second Circuit’s “forum rule” requires courts to “generally use ‘the hourly rates employed in the district in which the reviewing court sits’ in calculating the presumptively reasonable fee.” *Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009) (quoting *Arbor Hill*, 493 F.3d at 119).

“A district court has discretion to determine a reasonable hourly rate based on considerations such as the complexity of the case, the prevailing rates in similar cases in the district, and the quality of representation.” *Pasini v. Godiva Chocolatier, Inc.*, 764 F. App’x 94, 95 (2d Cir. 2019) (summary order) (citing *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 59 (2d Cir. 2012)); *accord Lilly*, 934 F.3d at 231-32. In this setting, “the district court does not play the role of an uninformed arbiter but may look to its own familiarity with the case and its experience generally as well as to the evidentiary submissions and arguments of the parties.” *Bliven v. Hunt*, 579 F.3d 204, 213 (2d Cir. 2009) (quoting *DiFilippo v. Morizio*, 759 F.2d 231, 236 (2d Cir. 1985)).

When determining the reasonable number of hours, a court must make “a conscientious and detailed inquiry into the validity of the representations that a certain number of hours were usefully and reasonably expended.” *Haley v. Pataki*, 106 F.3d 478, 484 (2d Cir. 1997) (internal quotation

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marks and citation omitted). In addition, a court should examine the hours expended by counsel with a view to the value of the work product to the client's case. *See Lunday v. City of Albany*, 42 F.3d 131, 133-34 (2d Cir. 1994) (per curiam). The court is to exclude "excessive, redundant[,] or otherwise unnecessary hours, as well as hours dedicated to severable unsuccessful claims." *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999).

In determining whether hours are excessive, "the critical inquiry is 'whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.'" *Samms v. Abrams*, 198 F. Supp. 3d 311, 322 (S.D.N.Y. 2016) (quoting *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992)). And where "the billing records are voluminous, it is less important that judges attain exactitude, than that they use their experience with the case, as well as their experience with the practice of law, to assess the reasonableness of the hours spent." *Yea Kim v. 167 Nail Plaza, Inc.*, No. 05 Civ. 8560 (GBD) (GWG), 2009 WL 77876, at \*4 (S.D.N.Y. Jan. 12, 2009) (internal quotation marks and citation omitted); *see also Fox v. Vice*, 563 U.S. 826, 838 (2011) (observing that the calculation of attorneys' fees "should not result in a second major litigation," because "[t]he essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection" (citation omitted)). A court retains the discretion to make across-the-board percentage reductions to exclude unreasonable hours, colloquially referred to as "trimming the fat." *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 237 (2d Cir. 1987); *accord McDonald ex rel. Prendergast v. Pension*

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*Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006).

The burden is on the fee applicant—here, Defendants—to “document[ ] the appropriate hours expended and hourly rates.” *Dancy v. McGinley*, 141 F. Supp. 3d 231, 235 (S.D.N.Y. 2015) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Requested fees “must be supported with contemporaneous time records establishing for each attorney for whom fees are sought, the date on which work was performed, the hours expended, and the nature of the work done.” *Abdell v. City of New York*, No. 05 Civ. 8453 (RJS), 2015 WL 898974, at \*2 (S.D.N.Y. Mar. 2, 2015)). “[C]ounsel . . . [are] not required to record in great detail how each minute of [their] time was expended,” but “counsel should identify the general subject matter of [their] time expenditures.” *Hensley*, 461 U.S. at 437 n.12.

**B. The Court Awards Reasonable Attorneys’ Fees****1. Overview**

Plaintiff and DSLG argue strenuously that Defendants should receive no attorneys’ fees and costs or, at most, a fraction of what Defendants now seek. Several of these arguments are addressed *infra*, in the sections discussing reasonable hourly rates and reasonable hours billed. However, several of these arguments can be addressed, and rejected, at the outset. To begin, the Court rejects any efforts by Plaintiff and DSLG to re-argue the Court’s Sanctions Opinion. (See, e.g., Pl. Fee Opp. 3; DSLG Fee Opp. 1, 3-6). Plaintiff already filed an unsuccessful motion

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for reconsideration; DSLG elected not to, and instead took an appeal from the decision.

Relatedly, the Court rejects DSLG's efforts to understate its liability under the Sanctions Opinion. In particular, DSLG argues that “[t]he Court solely sanctioned us regarding Plaintiff's Bronx Action, which impacted only emotional distress damages, not substantive liability.” (DSLG Fee Opp. 11). From this proposition, DSLG reasons that “at most the Court should only require us to reimburse Defendants for reasonable fees and costs incurred for events solely related to Plaintiff's Bronx Action.” (*Id.* at 11-12). Not so, as the Court made clear in its Sanctions Opinion:

In sum, DSLG's misrepresentations to the Court—starting with the tenth motion in limine, continuing with an affirmative misrepresentation to the Court on February 21, 2020, and concluding with repeated failures to correct or investigate the very misrepresentations the Court had already brought to DSLG's attention—demonstrates a complete disregard for the judicial process. *As a result of Plaintiff's counsel's conduct, the Court and the parties expended significant resources preparing for trial, investigating Plaintiff's other litigation, preparing letters about and repeatedly conferring about this litigation, and separating DSLG's misrepresentations from the truth.* Because Mr. Cohen and DSLG “acted in bad faith, vexatiously, wantonly, [and]

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for oppressive reasons,” the Court finds that sanctions should be imposed in order “that those who create unnecessary costs also bear them[.]”

*East Side Club I*, 2021 WL 2709346, at \*24 (emphasis added) (internal citations omitted); *see also id.* at n.20 (“[T]he sanctions the Court imposes in this Opinion are designed to compensate Defendants, not for the various discovery disputes in the matter, but rather for the protraction and subversion of the litigation process in the runup to the trial.”).

Finally, the Court rejects DSLG’s efforts to shift blame to Defendants for not discovering DSLG’s and Plaintiff’s lies and misrepresentations earlier. (*See, e.g.*, DSLG Fee Opp. 16-18). Quite obviously, DSLG was in a better position than Defendants or their counsel to investigate Plaintiff’s claims, and DSLG does not deny that it was aware of the fact (if not the full scope) of the Bronx Action at or shortly after the filing of the instant case. *See East Side Club I*, 2021 WL 2709346, at \*22 (“[B]y May 2019, Plaintiff had disclosed the existence of the action to DSLG, noted that he intended to pursue intentional infliction of emotional distress damages against Sewell, and given DSLG enough information to have discovered the true nature and scope of his claims in the Bronx Action.”). Despite that access to information that could easily resolve the truth of Plaintiff’s representations, by January 2020, DSLG was “proactively ma[king] material misrepresentations [in the tenth] motion *in limine* to gain a strategic advantage, as [counsel] sought to keep evidence of the Bronx Action and

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Plaintiff's other litigation from the jury at trial." *Id.* at \*23. These material misrepresentations were contained in filings submitted pursuant to Federal Rule of Civil Procedure 11, and were then repeated to the Court in response to direct questions in pretrial conferences. *Id.* With the record now complete, which record demonstrates the ease with which Plaintiff and his counsel responded to requests for information and clarification with lies and half-truths, this Court will not fault Defendants for not having filed a motion to compel earlier. (See, e.g., DSLG Fee Opp. 16-17 ("Defendants would have greatly mitigated their losses had they utilized the Federal Rules of Civil Procedure and filed a motion to compel this information after Plaintiff submitted his May 2, 2019 objection.")). In short, the Court has no confidence that Plaintiff would have provided a truthful response had earlier requests been made. Finally, and perhaps most importantly, the Court stands by its prior statements to the parties about its own contemporaneous difficulties (and, at times, inability) to access court documents filed in the Bronx Action, a difficulty that was shared by defense counsel. (*Cf.* Def. Fee Opp. 5 n.6 (discussing accessibility of Bronx Action docket)). As it did in the Sanctions Opinion, the Court rejects DSLG's current attempts at victim-blaming.

**2. Determining a Presumptive Reasonable Rate**

In Defendants' opening fee memorandum, counsel for Defendants, Thomas D. Shanahan, outlined his education and his experience in the 26 years since his graduation from law school, as well as the hourly rates that he charges and has been awarded by other judges in analogous cases.

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(See Def. Fee Br. 2-5).<sup>5</sup> Mr. Shanahan advised that his customary hourly rate was \$425 to \$475, but that he had discounted that rate for Defendants because they were long-time clients, charging them \$350 and, beginning in September 2021 (and reflected on invoices from October 2021 forward), \$425 per hour. (*Id.* at 5; Def. Fee Reply 7). Mr. Shanahan requests that the Court impose an enhanced hourly rate of \$475, reasoning that to award fees at the discounted rates would amount to Mr. Shanahan “subsidizing the bad behavior of Plaintiff” and DSLG. (Def. Fee Br. 6; *see also id.* (“They [(Plaintiff and DSLG)] should absorb the full value of their sanctionable conduct which will serve to deter future similar behavior.”)).

DSLG objects to Mr. Shanahan’s request for an enhancement of his hourly rates (*see* DSLG Fee Opp. 7 n.9), but does not question the reasonableness of the rates themselves (*id.* at 9 (“Therefore, \$350.00 should be the rate used in calculating the reimbursement.”)). Plaintiff also objects to the request for enhancement, and goes so far as to intimate that Mr. Shanahan engaged in unethical, if not criminal, conduct in the forms of (i) defrauding his clients by billing them for administrative tasks or (ii) keeping two sets of books, one of which was used to bill his clients and the other of which was used for the instant fee petition. (Pl. Fee Opp. 4-12, 15-16). The Court will address the specifics

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5. Though the Court would have preferred receiving this information in a sworn statement, it will accept the factual statements in Defendants’ opening brief, many of which statements have been confirmed by the Court by referring to Mr. Shanahan’s website and to the dockets and/or citations of the cases to which he cites.

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of Mr. Shanahan's billing entries in the next section of its Opinion, but notes at this juncture that it does not agree with Plaintiff's characterizations.

The Court has written and reviewed many fee petition decisions over the years, and it recognizes that there has not been perfect consistency in assessing the reasonableness of attorneys' rates. *See, e.g., Tessema's LLC v. Atlantis Capital LLC*, No. 18 Civ. 4902 (KHP), 2019 WL 2635956, at \*4 (S.D.N.Y. June 27, 2019) ("Courts in this District have determined that hourly rates ranging from \$250 to \$1,260 per hour, for attorneys' work on a commercial litigation matter, were reasonable."). The discounted rates of \$350 and \$425 fall comfortably within the range of rates approved by sister courts in this District in employment discrimination and civil rights cases. *See, e.g., Casmento v. Volmar Constr., Inc.*, No. 20 Civ. 944 (LJL), 2022 WL 17666390, at \*4 (S.D.N.Y. Dec. 14, 2022) (awarding hourly rates in employment discrimination case of \$500 and \$300, respectively, to attorneys with 16 and 20 years' experience); *Olaechea v. City of New York*, No. 17 Civ. 4797 (RA), 2022 WL 3211424, at \*13 (S.D.N.Y. Aug. 9, 2022) ("[C]ourts in this District have awarded experienced civil rights attorneys, including those practicing alone or in small firms, hourly rates ranging from \$200 to \$650 per hour." (collecting cases)).

The reasonableness of the \$350 and \$425 rates is further confirmed by the fact that those are the rates that were actually charged to and paid by Defendants. (*See* Def. Fee Br. 5-6 (discussing rates charged to Defendants); Dkt. #169 ("From June 11, 2019, to July 1, 2021, East Side paid

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the amount of \$135,332.15."); *see also, e.g.*, Shanahan Fee Auth. Decl., Ex. FF, HH (ledgers and cancelled checks reflecting payments by Defendants to Mr. Shanahan for fees incurred in this case)). Courts in this District have recognized that an "attorney's customary billing rate for fee-paying clients is ordinarily the best evidence of" a reasonable hourly rate. *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 962 (RCC), 2006 WL 3498590, at \*9 (S.D.N.Y. Dec. 4, 2006); *see also Infinity Transportation MSN 6651, LLC v. Synergy Aerospace Corp.*, No. 19 Civ. 209 (RA) (SN), 2023 WL 2789516, at \*8 (S.D.N.Y. Feb. 24, 2023) ("The fact that a sophisticated client has represented that it would and did pay these rates is strong evidence that they are reasonable." (citations omitted)), *report and recommendation adopted*, No. 19 Civ. 209 (RA), 2023 WL 2787994 (S.D.N.Y. Apr. 5, 2023).

The Court declines Mr. Shanahan's request, however, for an enhanced hourly rate. It is true that "after this initial calculation of the presumptively reasonable fee is performed[,] a district court may, in extraordinary circumstances, adjust the presumptively reasonable fee when it 'does not adequately take into account a factor that may properly be considered in determining a reasonable fee.'" *Lilly*, 934 F.3d at 230 (quoting *Millea*, 658 F.3d at 167). But the Court has considered Mr. Shanahan's rate in light of the facts of this case and the *Johnson* factors listed above, *see supra* at n.4, and does not believe this case to involve extraordinary circumstances warranting an enhanced hourly rate. While the length and detail of the Court's Sanctions Opinion was designed to make clear precisely what the Court found objectionable about

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the conduct of Plaintiff and of DLSG, in the hopes that such conduct would not be repeated, the Court intended the sanctions principally to make Defendants whole, such that reimbursement of the attorneys' fees actually paid by Defendants would suffice. *See Agudath Israel of Am. v. Hochul*, No. 22-38, 2023 WL 2637344, at \*3 (2d Cir. Mar. 27, 2023) (summary order) (upholding district court decision not to enhance fees based on the specifics of the case). Accordingly, the Court finds that Mr. Shanahan's rates of \$350 and \$425 are reasonable.

### **3. Determining the Reasonable Number of Hours Expended**

In their opening fee petition, Defendants sought \$117,313.62 from DLSG (comprising \$97,720.23 in legal fees and \$19,593.39 in costs), and \$119,690.08 from Plaintiff (comprising \$102,374.27 in legal fees and \$17,315.81 in costs). (Def. Fee Br. 7-8).<sup>6</sup> Defendants contend that, of these figures, Plaintiff and DLSG are jointly and severally

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6. The substantiation for the attorneys' fees and costs sought by Defendants is idiosyncratic, and at times inconsistent. For example, certain of the summary billing and expense sheets submitted by Mr. Shanahan include an entry for a previous balance that is outside the scope of the Court's Sanctions Opinion. (*See, e.g.*, Shanahan Fee Decl., Ex. D-F; Shanahan Fee Auth. Decl., Ex. FF). In addition, Mr. Shanahan agrees with DLSG that certain time entries for May 11, 2020 (for 1.33 hours), May 12, 2020 (for 1.25 hours), and May 13, 2020 (for 1.75 hours) are incorrect and should be stricken. (*See* DLSG Fee Opp. 22-23; Shanahan Fee Reply Decl. 7-8). The Court has not considered these erroneous entries, and has done its best to isolate those entries that are within the scope of the Sanctions Opinion.

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liable for \$40,404.33 (comprising \$37,807.00 in legal fees and \$2,597.33 in costs). (*Id.* at 8). In their reply submission, Defendants seek an additional \$20,093.77 in legal fees, reflecting fees incurred after the submission of their initial fee petition. (Shanahan Fee Auth. Decl., Ex. FF). In further support of Defendants' position, Mr. Shanahan has explained that (i) because of the vexatiousness of Plaintiff and DSLG, he was required to do all of the legal work on the case himself, rather than referring tasks to a paralegal or associate; (ii) the invoices he submitted in support of Defendants' fee petition already exclude time billed by his paralegal, "discussions with colleagues relating to this case," and "other, traditionally billable activity"; and (iii) he did not bill his client, and thus did not seek reimbursement here, for approximately 24 hours spent redrafting the fee petition that the Court struck from the docket for being oversize. (Def. Fee Br. 6-8; *see also* Def. Fee Reply 6 ("As I address in my answers to the specific objections, none of the entries are ministerial. Almost all were work relating to discovery violations and motions filed with this Court or substantial pre-trial preparation that took full days and 'blocks' of time."); *id.* ("I would not allow anyone in my office to speak to either Plaintiff or Mr. Cohen given they both have the propensity to make untrue statements and Plaintiff, the most serious of accusations without any evidence whatsoever."))).

Unsurprisingly, Plaintiff and DSLG advance a host of challenges to the hours billed by Mr. Shanahan. As noted previously, Plaintiff suggests that Mr. Shanahan has defrauded either his clients or the Court. He contends that Mr. Shanahan has billed (and, by extension, that

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Defendants seek improperly to recover for work that was performed (or should have been performed) by a paralegal; that Mr. Shanahan's billing entries include "phantom" entries with a "deviating hourly rate"; and that Mr. Shanahan's submitted invoices are themselves suspect. (Pl. Fee Opp. 4-11). Indeed, Plaintiff has so little confidence in Defendants' fee petition, or in Mr. Shanahan's substantiation therefor, that he requests investigation of those bank accounts to which Defendants transferred funds in payment of Mr. Shanahan's invoices. (*Id.* at 11-12). The Court finds that Plaintiff's suggestions of unethical or criminal behavior on the part of defense counsel are not borne out by the record, and thus rejects them without extensive discussion. To the extent Plaintiff contests the hours billed as excessive, the Court will address that claim *infra*.

DSLG contends that Mr. Shanahan's billing entries are "vague, duplicative and unjustified." (DSLG Fee Opp. 8; *see also id.* at 21-25). As one example, DSLG notes that Mr. Shanahan billed in excess of 62 hours for a fee petition that was struck by this Court as oversize, and argues that he was in fact ethically obligated to exclude those hours from his request. (*Id.* at 8 (citing *Hensley*, 461 U.S. at 434); *see also id.* at 20 n.23)). DSLG also rebuffs Defendants' suggestion that it should be made to pay for post-February 2020 submissions relating to Plaintiff's *pro se* status and submissions. (*Id.* at 19-20). Finally, DSLG argues that it should not be made to pay for the entirety of Defendants' sanctions motion because, it claims, "a large part of that motion was unsuccessful regarding" DSLG. (*Id.* at 20).

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As with Plaintiff's analogous claims, the Court will address DSLG's claims of excessive hours momentarily. However, the Court rejects DSLG's other challenges to the number of hours billed. While some portion of the litigation immediately following the Sanctions Opinion was focused on Plaintiff's status and representation, the conflict of interest that the Court identified in DLSG's continued representation of Plaintiff ultimately finds its roots in the conduct of Plaintiff and DSLG in this litigation. To put a finer point on it, as between them and Defendants, the Court believes that Plaintiff and DSLG should bear those costs. Separately, the Court finds that DSLG both understates Defendants' lack of success in moving for sanctions and overstates the degree to which Defendants' motion "relitigated matters the Court previously denied sanctions for." (DSLG Fee Opp. 20). For this reason, the Court rejected an identical claim by DSLG in the Sanctions Opinion:

As an initial matter, the Court rejects DSLG's argument that Defendants are improperly seeking reconsideration of the Court's prior denials of sanctions motions for Plaintiff's failures to produce various HIPAA releases, medical care providers, and his asylum application. The Court denied each of those motions based on the record before the Court at that time. After reviewing the parties' submissions in connection with the instant motion, the Court understands Defendants to be aggregating Plaintiff's and DSLG's repeated failures to disclose relevant information and

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asking the Court to consider this misconduct in its totality. The Court will do so; to do otherwise would only serve to incentivize accretive misconduct.

*East Side Club I*, 2021 WL 2709346, at \*26 (internal citations omitted).

The fact remains that there is some merit to Plaintiff's and DSLG's claims of excessive hours. To be clear, the Court appreciates that Mr. Shanahan took a crack at "trimming the fat" from his invoices, but based on what the Court observed while presiding over this litigation, the invoices still reflect an unreasonable amount of hours billed. For starters, while the Court accepts that Mr. Shanahan excluded paralegal time from his invoices, the fact remains that he billed—at his attorney rate—such administrative and clerical tasks as Bates stamping, mailing, and uploading materials to a flash drive. (See, e.g., June 1, 2019 Invoice; July 30, 2019 Invoice; November 2, 2019 Invoice). Because of counsel's use of block-billing, the Court is unable to ascertain precisely how much time was spent on what the Court considers to be administrative tasks. *See generally LV v. N.Y.C. Dep't of Educ.*, 700 F. Supp. 2d 510, 525 (S.D.N.Y. 2010) ("Block-billing, the practice of aggregating multiple tasks into one billing entry, is not prohibited," but it "can make it exceedingly difficult for courts to assess the reasonableness of the hours billed." (internal quotation marks omitted)).

Further—and while acknowledging the additional work created for Mr. Shanahan by Plaintiff's malfeasance

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and by DSLG's virtually non-existent investigation of the *bona fides* of its client's claims—the Court finds that some of that work should have been performed by a more junior attorney.<sup>7</sup> Even if Mr. Shanahan may have been justifiably concerned about the perils of others in his office speaking with Plaintiff or Mr. Cohen, the Court nonetheless believes that legal research and initial drafting of submissions could have been done at a lower hourly rate. (See, e.g., April 1, 2020 invoice; May 6, 2020 invoice). *See K.E. v. N.Y.C. Dep't of Educ.*, No. 21 Civ. 2815 (KPF), 2022 WL 4448655, at \*14 (S.D.N.Y. Sept. 23, 2022) (reducing fees to account for top-heavy staffing). The Court also agrees in part with DSLG's specific criticism of the invoices for the stricken fee petition, and would have preferred that Mr. Shanahan write off the initial fees and charge for the revisions, rather than the inverse. *See Murray v. UBS Sec., LLC*, No. 14 Civ. 927 (KPF), 2020 WL 7384722, at \*26 (S.D.N.Y. Dec. 16, 2020) (discussing cases in which courts have reduced attorneys' fees awards based on lack of success), *rev'd on other grounds*, 43 F.4th 254 (2d Cir. 2022), *cert. granted*, No. 22-660, 2023 WL 3158354 (U.S. May 1, 2023).

All of that said, the Court continues to believe that it is unfair for Defendants to bear the costs of Plaintiff's

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7. It is unclear whether Mr. Shanahan employed, or could have employed on a contract basis, a more junior attorney to perform tasks such as legal research and drafting of submissions. However, while the Court will not penalize Mr. Shanahan for being a sole practitioner, neither will it let him charge his full partner rate for tasks that could have been performed at a lower cost by a more junior attorney.

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and DSLG's misconduct. In that regard, the Court finds guidance in the analysis of Judge Denise Cote, who addressed similar arguments in a different employment discrimination case in which a *different* attorney at DSLG facilitated his client's fabrication of evidence and spoliation of other evidence. *See Rossbach v. Montefiore Med. Ctr.*, No. 19 Civ. 5758 (DLC), 2021 WL 3421569 (S.D.N.Y. Aug. 5, 2021) (discussing misconduct by client and counsel).<sup>8</sup> In assessing sanctions, Judge Cote was presented with arguments similar to those raised by DSLG today—that the sanctions imposed should be narrowly circumscribed, and that the hours billed were simply too high. She largely rejected those arguments, and this Court echoes her sentiments:

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8. The conduct ascribed to the DSLG lawyer is also disturbingly similar:

Even after he was made aware that his client had likely fabricated evidence, [the DSLG attorney] made no serious effort to investigate the allegations, and if necessary to withdraw from his representation of his client. Instead, even after he should have realized that [the plaintiff's] complaint was based on her false allegations, he stood by the complaint. He submitted to the Court his client's false [d]eclaration and a largely speculative expert declaration that did not address key evidence of fabrication identified by the defendants' expert. He also submitted a frivolous motion for sanctions against the defendants which necessitated a response from the defendants.

*Rossbach v. Montefiore Med. Ctr.*, No. 19 Civ. 5758 (DLC), 2021 WL 3421569, at \*9 (S.D.N.Y. Aug. 5, 2021).

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In their remaining objection, [plaintiff] and her counsel assert that the defendants billed an excessive number of hours to this matter. They contend that, with the elimination of excessive hours and certain categories of work, the overall sum of monetary sanctions should be reduced to \$86,378.27. *This argument has a fundamental flaw: it was largely the actions of [plaintiff] and [the DSLG attorney] that dictated the kinds of work and the amount of work undertaken by defense counsel.* As the August 5 Opinion explains, [plaintiff] attempted to stymie the defendants in their efforts to uncover her fabrication through a lengthy campaign of perjury and spoliation. Instead of acting in accordance with his professional obligations, [the DSLG attorney] facilitated that campaign. And at every step of the way, [plaintiff] and [the DSLG attorney] opted to prolong this litigation—and, by extension, increase the defendants' legal bills—in an effort to evade accountability for their misdeeds.

*Id.* at \*2 (emphasis added).

In assessing the reasonableness of hours billed in prior fee petitions, this Court has alternated between the use of an across-the-board percentage reduction and the disallowance of certain hours billed. *Compare Gamaro v. Koodo Sushi Corp.*, 328 F. Supp. 3d 165, 175 (S.D.N.Y. 2018) (disallowing certain time entries billed), *with Marzullo v. Karmic Release Ltd.*, No. 17 Civ. 7482 (KPF), 2018

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WL 10741649, at \*3 (S.D.N.Y. Apr. 24, 2018) (imposing across-the-board reduction of 15%). Both are acceptable methods of arriving at a reasonable number of hours. The Court has carefully reviewed Defendants' substantiation for the attorneys' fees they request, which substantiation includes detailed invoices, records of payment, third-party invoices, and explanations of billing from Mr. Shanahan. (See, e.g., Def. Fee Br.; Shanahan Fee Decl.; Shanahan Fee Reply Decl.; Shanahan Fee Auth. Decl.; Def. Fee Reply). Balancing Mr. Shanahan's preemptive reductions and the Court's concern for making Defendants whole with the block-billing and top-heavy staffing issues identified above, the Court will impose an across-the board reduction of 18%.

Before calculating the relevant attorneys' fees, the Court pauses to address Mr. Shanahan's "billing and costs since the filing of our sanctions motion in July 2020 to the present excluding matters in the Second Circuit." (Shanahan Fee Auth. Decl. ¶ 18 & Ex. FF). After reviewing these billings, the Court will include them in its award of attorneys' fees after imposing an across-the-board reduction of 18%. Most of the billings in this section seek recovery for "fees on fees," or "the attorney's fees . . . incurred in litigating the application for an award of attorney's fees." *Lilly*, 934 F.3d at 226-27. In the Sanctions Opinion, the Court authorized the reimbursement of fees incurred in making the motion for sanctions; here, the Court will permit recovery of the reasonable attorneys' fees incurred in preparing and submitting the instant fee petition. *See generally Weyant v. Okst*, 198 F.3d 311, 316 (2d Cir. 1999) ("[A] reasonable fee should be awarded

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for time reasonably spent in preparing and defending an application for . . . fees[.]"); *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1059-60 (2d Cir. 1995) (finding that "unless there are reasons to the contrary, motion costs should be granted whenever underlying costs are allowed," but noting that Circuit precedent permits reductions for exorbitant claims). The remaining time entries concern the Defendants' review of and responses to Plaintiff's motion for reconsideration and DSLG's motion for a stay pending appeal. These entries are inextricably intertwined with the Court's sanctions award, and will similarly be assessed against Plaintiff and DSLG.<sup>9</sup>

For DSLG, the resulting attorneys' fees award is as follows:

Time Period	Attorneys' Fees Sought	Percentage Reduction	Reasonable Fees Awarded
1/13/2020- 5/4/2021	\$79,222.50	18%	\$64,962.45
7/22/2021- 10/15/2022	\$20,093.77	18%	\$16,476.89
		<b>Total:</b>	<b>\$81,439.34</b>

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9. Mr. Shanahan clarifies that the time entries referencing DSLG's appeal "include[ ] matters before this Court but not the appeal presently pending in the Second Circuit." (Shanahan Fee Auth. Decl. ¶ 16).

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For Plaintiff, the resulting attorneys' fees award is as follows:

Time Period	Attorneys' Fees Sought	Percentage Reduction	Reasonable Fees Awarded
5/2/2019- 2/28/2020 &3/17/2021- 5/4/2021	\$102,139.14	18%	\$83,754.09
7/22/2021- 10/15/2022	\$20,093.77	18%	\$16,476.89
		<b>Total:</b>	<b>\$100,230.98</b>

Of these figures, Plaintiff and DSLG are jointly and severally liable for \$46,410.00.

**C. The Court Awards Reasonable Litigation Costs**

“[A]ttorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.” *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998) (citation omitted); *see generally Chen v. E. Market Rest., Inc.*, No. 13 Civ. 3902 (HBP), 2018 WL 3970894, at \*4-5 (S.D.N.Y. Aug. 20, 2018) (discussing compensable costs). In its Sanctions Opinion, the Court awarded reasonable litigation costs incurred by Defendants as a result of Plaintiff's and DSLG's misconduct. *See East Side Club I*, 2021 WL 2709346, at \*25, 30-31. In response, Defendants request the reimbursement of \$21,065.21 in costs. (See Def. Fee

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Br. 9 (“Total expenses incurred during this litigation by Defendants are \$21,065.21. See Exhibit H.”).

Defendants’ counsel has assembled a chart of expenses for which Defendants seek reimbursement, many of which expenses are substantiated by invoices from the respective service providers. (Shanahan Fee Decl., Ex. H; *see also id.*, Ex. I-N). Significantly, however, while the invoice attached as Exhibit H to Mr. Shanahan’s declaration recites a total of \$21,065.21 in costs, it begins with an opening balance of \$2,441.66, for which there is neither explanation nor substantiation. Because the Court cannot determine whether these expenses fall within the period specified in the Sanctions Opinion, it will deduct them from the costs sought, leaving a balance of \$18,623.55 in costs that are fairly traceable to Plaintiff’s and DSLG’s misconduct, and include messenger fees, process servers, transcript fees, and rebuttal expert witness expenses. Each of these expenses was incurred during the period of liability attributed to Plaintiff in the Sanctions Opinion; accordingly, the Court finds that Plaintiff is liable for this entire amount. The Court limits the costs attributable to DSLG to those costs incurred by Defendants between January 14, 2020, through February 28, 2020, the period of liability identified in the Sanctions Opinion, which amounts to \$1,123.00 in costs.

**D. The Court Declines to Award Prejudgment Interest**

For the first time in their reply submission, Defendants seek prejudgment interest as to each of the awards. (Def. Fee Reply 7-8). As an initial matter, it is unclear that the

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Court has the discretion to award interest on sanctions awards. *See Remington Prods., Inc. v. N. Am. Philips, Corp.*, 763 F. Supp. 683, 685 (D. Conn. 1991) (“On its face, Rule 37(a) doe[s] not authorize recovery of prejudgment interest.” (citation omitted)); *see also* 28 U.S.C. § 1927 (“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally *the excess costs, expenses, and attorneys’ fees* reasonably incurred because of such conduct.” (emphasis added)). However, to the extent that the Court has discretion with respect to the imposition of prejudgment interest, it declines to do so here. The Court recognizes that Defendants are entitled to reimbursement of legal fees and expenses that were incurred as a consequence of Plaintiff’s and DSLG’s misconduct. However, the fact remains that while the Court found sanctions to be warranted back in July 2021, it did not quantify those damages until this Opinion, which is being issued concurrently with the entry of judgment in this case. In addition, to award prejudgment interest would, in the Court’s estimation, penalize Plaintiff and DSLG for the Court’s own delays—many of which were attributable to the COVID-19 pandemic—in resolving both the sanctions motion and the fee petition. Thus, to the extent it has discretion, the Court exercises that discretion not to award prejudgment interest. In contrast, the Court will award post-judgment interest. *Tru-Art Sign Co. v. Loc. 137 Sheet Metal Workers Int’l Ass’n*, 852 F.3d 217, 223 (2d Cir. 2017) (“Pursuant to 28 U.S.C. § 1961, ‘[t]he award of post-judgment interest is mandatory on awards

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in civil cases as of the date judgment is entered.” (internal citation omitted)).

**CONCLUSION**

For the reasons set forth above and in the Court’s prior Sanctions Opinion, the Court awards attorneys’ fees in the amount of \$100,230.98 and costs in the amount of \$18,623.55 against Plaintiff, and attorneys’ fees in the amount of \$81,439.84 and costs in the amount of \$1,123.00 against DSLG.

Accordingly, for the reasons set forth in this Order, the Court ORDERS that judgment be entered against Plaintiff and DSLG in those amounts. The Court further directs the Clerk of Court to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: June 23, 2023  
New York, New York

/s/ Katherine Polk Failla  
KATHERINE POLK FAILLA  
United States District Judge

**APPENDIX C — ORDER OF THE UNITED  
STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK, FILED  
AUGUST 10, 2021**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

18 Civ. 11324 (KPF)

JOHN DOE 1,

*Plaintiff,*

-v.-

EAST SIDE CLUB, LLC, JOHN DOE 2,  
AND JOHN DOE 3,

*Defendants.*

KATHERINE POLK FAILLA, District Judge:

**ORDER**

On July 1, 2021, this Court issued an order imposing sanctions on Plaintiff John Doe 1 and his former attorneys, Johnmack Cohen, Esq. and the Derek Smith Law Group (“DSLG”), for a pattern of deceitful conduct and bad faith misrepresentations to the Court. (Dkt. #166 (the “Sanctions Order” or the “Order”)). In its Order, the Court did not calculate the amount that each of the sanctioned parties was to pay Defendants, but rather set a schedule for a fee petition by which Defendants would file their

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initial submission within 30 days of the Sanctions Order and Plaintiff John Doe 1, Mr. Cohen, and DSLG would reply within 30 days of Defendants' submission. (*Id.* at 74).

On July 16, 2021, Thomas Shanahan, Esq., counsel for Defendants, filed a fee petition, which comprised a memorandum of law (Dkt. #170), supporting documentation (Dkt. #167), and affidavits from Defendant John Doe 2 (Dkt. #169) and medical expert Dr. Michael Stone (Dkt. #168), all in support of his initial calculation of attorneys' fees and costs for the applicable sanctions periods. On July 21, 2021, DSLG filed a notice of appeal to the United States Court of Appeals for the Second Circuit, seeking review of this Court's Order imposing sanctions against the firm and Mr. Cohen. (Dkt. #172).<sup>1</sup>

Separately, on July 28, 2021, Plaintiff John Doe 1 filed a motion seeking this Court's reconsideration of its Sanctions Order. (Dkt. #173-174).<sup>2</sup> The following day, July 29, 2021, DSLG submitted a letter seeking (i) an interlocutory order from this Court to stay this matter pending the Second

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1. The Court understands that DSLG's filings in this case following issuance of the Sanctions Order are on behalf of the firm and Mr. Cohen.

2. On July 29, 2021, Plaintiff John Doe 1 submitted a letter asking the Court to accept the filing of his motion for reconsideration, despite what he understood to be his non-compliance with Rule 4(A) of this Court's Individual Rules of Practice in Civil Cases. (Dkt. #176). The Court accepts Plaintiff's filing and further notes that his motion for reconsideration is not a motion for which a pre-motion submission is required under Rule 4(A).

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Circuit's decision on its appeal and (ii) the Court's leave to respond to Plaintiff's motion for reconsideration. (Dkt. #175).<sup>3</sup> On August 2, 2021, Defendants submitted a letter in opposition to both Plaintiff's motion for reconsideration and DSLG's application for a stay pending appeal. (Dkt. #177). By endorsement dated August 4, 2021, the Court granted DSLG's request to submit a reply to Plaintiff John Doe 1's motion for reconsideration on or before September 13, 2021, and took under advisement its request for a stay of the proceedings. (Dkt. #179). For the reasons discussed herein, DSLG's request for an interlocutory stay pending appeal is hereby granted, subject to the condition that DSLG post bond in the amount of \$20,000.<sup>4</sup>

Although DSLG cites no legal authority and provides no substantive analysis for its stay request, this Court will nevertheless analyze the request using the governing precedent for stays pending appeal. In deciding such a motion, courts generally consider whether “[i] the applicant will be irreparably injured absent a stay; [ii] issuance of the stay will substantially injure the other parties interested in the proceeding; [iii] the stay

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3. On August 2, 2021, the Second Circuit issued a notice of stay of DSLG's appeal, pending the resolution of Plaintiff's motion for reconsideration. (Dkt. # 178).

4. This Order also resolves DSLG's pending letter motion, dated August 6, 2021, seeking an extension of its deadline to file a response to Defendants' fee petition. (Dkt. #180). As the proceedings are stayed, DSLG's response is no longer governed by the schedule set by the Court in its Sanctions Order. The Court will issue a new schedule, as appropriate, based on the outcome of the appeal pending in the Second Circuit.

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applicant has made a strong showing that he is likely to succeed on the merits; and [iv] the stay is in the public interest" *Plummer v. Quinn*, No. 07 Civ. 6154 (WHP), 2008 WL 383507, at \*1 (S.D.N.Y. Feb. 12, 2008) (citing *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007)). These factors are assessed on a "sliding scale," pursuant to which "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors ... [and] [t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (internal quotation marks omitted).

Rather than addressing specifically the propriety of a stay, what argument is provided in DSLG's letter is more appropriately construed as a reply to Defendants' fee petition or additional appellate arguments to the Second Circuit. Even so, the Court has a record on which it can consider the factors it just listed, and it has carefully reviewed the record in light of those factors. Ultimately, while the Court does not believe that DSLG has demonstrated a likelihood of success on appeal to overturn the entirety of the sanctions award against it, the Court does find that DSLG has presented colorable arguments that could result in the Second Circuit's limiting or modifying that award. Given the possibility of modification to the Sanctions Order, the Court does not believe it would benefit these proceedings to require further briefing that may become superfluous. Relatedly, the Court fully expects that the parties will have to

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prepare submissions concerning, and that the Court will have to resolve, Defendants' request for attorneys' fees and costs attributable to the sanctioned parties' misconduct; it chooses to conduct these proceedings only once. While it is unfortunate that DSLG elected not to file its notice of appeal or its request for a stay pending appeal until after Defendants had filed their opening fee petition submission, the Court does not regard this delay as a compelling reason to require the further expenditure of potentially redundant effort. Accordingly, the Court finds that the third and fourth factors counsel in favor of granting a stay pending appeal in this matter.<sup>5</sup>

What remains is the crafting of sufficient safeguards for Defendants and their counsel during the pendency of the appeal. Under Federal Rule of Civil Procedure 62(b), a party may stay the execution of a judgment as a matter

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5. The Court is left guessing as to DSLG's arguments regarding the irreparable harm it may face if a stay is not granted. Presumably, DSLG believes that the payment of a higher-than-appropriate amount of sanctions would present irreparable economic or reputational harm. The Court is mindful that such an argument could be made in relation to any appeal of an order for monetary sanctions. As such, the Court's decision to grant a stay pending appeal is motivated primarily by the possibility that its Sanctions Order could be modified on appeal.

In contrast, the principal harm that may befall Defendants if a stay were to be granted is that they or defense counsel might be delayed in receiving reimbursement of fees and costs until after the Second Circuit makes a decision. Such a delay is unfortunate, but the Court believes this harm is sufficiently mitigated by the supersedeas bond that DSLG must post in order to effectuate the stay.

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of right “by providing a bond or other security.” Fed. R. Civ. P. 62(b). The purpose of the bond is to ensure “that the prevailing party will recover in full, if the decision should be affirmed, while protecting the other side against the risk that payment cannot be recouped if the decision should be reversed.” *In re Nassau Cty. Strip Search Cases*, 783 F.3d 414, 417 (2d Cir. 2015).

The common practice is for a court “to require the appellant to post a supersedeas bond in the full amount of the judgment ... [but] the district court has discretion to grant a stay of judgment with no supersedeas bond or with only a partial supersedeas bond if doing so does not unduly endanger the judgment creditor’s interest in ultimate recovery.” *Morgan Guar. Tr. Co. of New York v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988). Here, where certain of the sanctioned parties noticed an appeal of the Sanctions Order prior to the Court’s issuance of a monetary judgment, the Court believes it appropriate to condition the stay in this case upon the posting of a bond in the amount of \$20,000. Defense counsel estimates that DSLG owes between \$117,313.62 and \$141,041.39 in attorney’s fees for the applicable sanctions periods (see Dkt. #170 at 10), and the required bond represents more than an 80% reduction of Defendants’ lower estimate. The Court believes that this amount properly accounts for the possibility of a favorable outcome to DSLG on appeal, while also providing adequate protection for Defendants, whose recovery will be delayed by this stay.

For the foregoing reasons, DSLG’s request for a stay of the proceedings in this matter, pending the appeal to the

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Second Circuit is hereby GRANTED, subject to DSLG's posting of bond in the amount of \$20,000. The matter is STAYED pending further order of the Court. The Clerk of Court is directed to terminate the motion pending at docket entry 180.

SO ORDERED.

Dated: August 10, 2021

New York, New York

/s/

KATHERINE POLK  
FAILLA  
United States District  
Judge

**APPENDIX D — OPINION AND ORDER OF THE  
UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK, FILED JULY 1, 2021**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

18 Civ. 11324 (KPF)

JOHN DOE 1,

*Plaintiff,*

v.

EAST SIDE CLUB, LLC., JOHN DOE 2,  
AND JOHN DOE 3,

*Defendants.*

July 1, 2021, Decided  
July 1, 2021, Filed

**OPINION AND ORDER**

KATHERINE POLK FAILLA, District Judge:

Plaintiff John Doe 1, proceeding anonymously, brought this lawsuit more than three years ago alleging egregious, wide-ranging sexual harassment and discrimination by his former employers. From its inception, however, this litigation has been marked by the efforts of Plaintiff — with the unwitting or unwitting assistance of his then-counsel, Johnmack Cohen and the Derek Smith Law

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Group (“DSLG”) — to conceal unfavorable facts, thus requiring Defendants to pursue multiple rounds of motion practice to obtain even the most basic information. Despite those efforts, the record in this case is littered with Plaintiff’s false statements, half-truths, cover-ups, and misrepresentations. Indeed, once the extent of his perfidy had become clear, Plaintiff voluntarily dismissed his claims on the eve of trial. Now before the Court is Defendants’ motion for sanctions pursuant to 28 U.S.C. § 1927, Federal Rules of Civil Procedure 11 and 37, and the Court’s inherent powers. For the reasons discussed below, the Court grants the motion in part, and imposes sanctions against both Plaintiff and his former counsel.

**BACKGROUND<sup>1</sup>****A. Factual Background****1. Plaintiff’s Allegations**

Plaintiff John Doe 1 worked as an attendant at Defendant East Side Club (the “Club”), a “social relaxation club for gay and bisexual men,” during the approximate time frame of July 27, 2015, through April 7, 2017. (FAC ¶¶ 9, 16, 39). Plaintiff’s job duties included greeting and escorting customers to their rooms and cleaning rooms and toilets. (*Id.* at ¶ 17). During Plaintiff’s employment at the Club, Defendant John Doe 2 was the Club’s manager, and Defendant John Doe 3 was the Club’s owner and general manager. (*Id.* at ¶¶ 10, 14).

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1. The facts stated herein are drawn primarily from the Amended Complaint, the operative pleading in this matter (“FAC”

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In brief, Plaintiff alleges that shortly after he began working at the Club, Doe 2 began sexually harassing him — making sexually explicit remarks, touching Plaintiff inappropriately, and propositioning Plaintiff for sex — and states that this harassment caused him to suffer from depression and anxiety. (*Id.* at ¶¶ 18-24). Plaintiff alleges that, as a result of Defendants' behavior, he was constructively discharged on or around April 7, 2017. (*Id.* at ¶ 39).

A key issue in this case concerned the damages Plaintiff had allegedly suffered as a result of his employers'

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(Dkt. #23)), as well as from the declaration of Thomas D. Shanahan in support of Defendants' motion for sanctions ("Shanahan Decl." (Dkt. #129)); the declaration of John Doe 2 in support of Defendants' motion for sanctions ("Doe 2 Decl." (Dkt. #127)); the declaration of John Doe 3 in support of Defendants' motion for sanctions ("Doe 3 Decl." (Dkt. #126)); the declaration of Johnmack Cohen in opposition to Defendants' motion for sanctions ("Cohen Decl." (Dkt. #133)); the reply declaration of Thomas D. Shanahan in further support of Defendants' motion for sanctions ("Shanahan Reply Decl." (Dkt. #136)); the declaration of Plaintiff John Doe 1 in opposition to Defendants' motion for sanctions ("Pl. Decl." (Dkt. #140-1)); and all of the exhibits attached thereto. The transcripts of conferences in this case are referred to as "[Date] Hr'g Tr.>"; deposition transcripts are referred to as "[Deponent] Dep.", and the parties' proposed trial exhibits are referred to as "Pl. Trial Ex." and "Def. Trial Ex."

For ease of reference, the Court refers to Defendants' amended memorandum of law in support of their motion for sanctions as "Def. Br." (Dkt. #128); Derek Smith Law Group's opposition brief as "DSLG Opp." (Dkt. #134); Defendants' reply brief as "Def. Reply" (Dkt. #135); Plaintiff's brief as "Pl. Opp." (Dkt. #140); and Defendants' sur-reply as "Def. Sur-Reply" (Dkt. #152).

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conduct. According to Plaintiff, he began seeking medical treatment on or about October 9, 2017, for the emotional distress that “he has suffered and is suffering from as a result” of Defendants’ mistreatment. (FAC ¶¶ 43-44; *see also id.* at ¶ 43 (“Plaintiff continues to suffer long-lasting psychological affects as a result of Defendants’ unlawful conduct.”)). Plaintiff further claimed to have continuously required treatment for such emotional distress since that time. (*Id.* at ¶ 44). Specifically, Plaintiff alleged that as a result of the “severe emotional and physical distress” he experienced, he “has suffered and will continue to suffer the loss of income, the loss of salary, bonuses, benefits and other compensation which such employment entails, and Plaintiff also suffered future pecuniary losses, emotional pain, humiliation, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses.” (*Id.* at ¶ 46). Plaintiff “claim[ed] aggravation, activation, and/or exacerbation of any preexisting condition[,]” as a result of Defendants’ conduct. (*Id.* at ¶ 53).

**2. The Criminal Complaint Against John Doe 2**

Plaintiff’s disputes with his former employers ultimately played out in both criminal and civil arenas. In or around May 2017, Plaintiff filed a criminal complaint against Doe 2. (Def. Trial Ex. G; Cohen Decl., Ex. 1). In late May 2017, Doe 2 was charged by the New York County District Attorney’s Office (“DANY”) with three misdemeanors. (Cohen Decl., Ex. 1). Thereafter, Doe 2 was arrested and detained for two days, before being released on his own recognizance. (Def. Trial Ex. G). On November 20, 2017, DANY dismissed the criminal charges against

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Doe 2. (Def. Trial Ex. W). In submissions filed in this case, Defendants suggest that Plaintiff fabricated his sexual harassment allegations in anticipation of being fired from the Club, after Doe 2 repeatedly reprimanded Plaintiff at work for his unprofessional behavior and poor work performance. (Def. Br. 3). Defendants similarly contend that the criminal charges against Doe 2 were dropped after DANY determined Plaintiff was not credible. (See *id.* at 2-3; *see also* Def. Trial Ex. G).

### **3. The State Court Actions**

Defendants responded by filing a civil action against Plaintiff in New York State Supreme Court, New York County, captioned [*John Doe 2 v. John Doe 1*], Index No. 161069/2017 (N.Y. Sup. Ct. N.Y. Cnty.) (the “NY County Action”). The suit was filed on December 14, 2017 (Pl. Decl., Ex. M), but discontinued in July 2018 (*see* NY County Action, Dkt. #68; *see also* Pl. Decl., Ex. P). As relevant to the instant motion, Plaintiff received a referral to the Law Firm of Dayrel Sewell, PLLC (“Sewell”) from a contact at Fordham Law School — where Plaintiff was then a student — for representation in the NY County Action, and Plaintiff ultimately retained Sewell for that purpose. (*See* Pl. Decl., Ex. G).<sup>2</sup> During the pendency of the NY County Action, Sewell filed an order to show cause against Plaintiff seeking unpaid attorneys’ fees, which motion was denied. (*See* NY County Action, Dkt. #62; *see also* Pl. Decl. ¶ 25; Pl. Dep. 133:23-134:20).

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2. References to Dayrel Sewell throughout the record utilize several spellings. Court filings from the NY County Action confirm that the proper spelling is “Dayrel Sewell” and the Court uses that spelling throughout this Opinion for consistency.

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On September 19, 2018, approximately three months before initiating the instant action, Plaintiff filed a *pro se* lawsuit against Sewell, Fordham University and associated individuals (collectively, “Fordham”), and an entity called the Schutzer Group, PLLC, in New York State Supreme Court, Bronx County, captioned [John Doe 1] v. *Law Firm of Dayrel Sewell, PLLC*, Index No. 300163/2018 (N.Y. Sup. Ct. Bronx Cnty.) (the “Bronx Action”). (*See generally* Bronx Action, Dkt. #1 (the “Bronx Action Complaint” or “Bronx Action Compl.”)). In it, Plaintiff alleged that these defendants had schemed to induce Plaintiff to retain Sewell to defend him in the NY County Action, and then overcharged Plaintiff for legal services. (*See generally id.*).

As relevant to the instant motion, Plaintiff sought to recover extensive emotional distress damages in the Bronx Action that were strikingly similar to those sought in this case. (*See, e.g.*, Bronx Action Compl. ¶¶ 450, 457, 471-507, Ex. J, K). Of note, Plaintiff’s complaint in the Bronx Action alleged that Plaintiff’s emotional health had in fact improved significantly from the time he left the Club, but that because of his dealings with Sewell, Fordham, and the other Bronx Action defendants, any progress he had made in overcoming emotional distress had eroded away. (*Id.*). In point of fact, specifically as a result of the conduct of the Bronx Action defendants, Plaintiff had tripled his medication and suffered a nervous breakdown:

[T]he stress endured by [Plaintiff] because of [the Bronx Action defendants’] malicious

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actions resulted in the following impact on Plaintiff[‘s] physical and mental health: [i] failure of Plaintiff[‘s] successful medical psychiatric treatment and of psychotherapy, [ii] resurgence of all of the following negative health symptoms that had been significantly reduced by psychotherapy and psychiatric treatment: depression, anxiety, panic attacks, nightmares, and insomnia, [iii] two-step increase of Plaintiff[‘s] dosage of antidepressants as a response to failure of his successful medical psychiatric treatment and of psychotherapy ..., [iv] appearance and exacerbation of negative side effects currently suffered by [Plaintiff] ... [and,] [v] beginning of Plaintiff[‘s] additional treatment to reduce the side effects caused by his medical psychiatric treatment.

(*Id.* ¶ 499 (internal citation omitted); *see also id.* at ¶¶ 72, 450, 457, 471-507, Ex. J, K). In other words, in the Bronx Action, Plaintiff asseverated that he had overcome the emotional distress caused by the conduct at issue in this case, but that he suffered new and completely distinct emotional distress damages as a result of the Bronx Action defendants’ conduct in early 2018. (See *id.* at ¶¶ 72, 450, 457, 471-507; *see also id.* at ¶¶ 112-114).

**B. Procedural History**

Plaintiff initiated this suit on December 5, 2018 (Dkt. #1), and that same day moved to proceed anonymously (Dkt. #3-4), which motion the Court granted (Dkt.

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#8). Plaintiff sought “compensatory damages, punitive damages, statutory damages, lost wages, back pay, front pay, attorney’s fees, costs, interest[,] and all other damages as are just and proper to remedy Defendants’ unlawful employment practices.” (FAC at 16). Plaintiff later specified that he sought \$214,466 in economic damages, \$3,000,000 in emotional distress damages, and \$6,000,000 in punitive damages. (See Shanahan Decl., Ex. C, D).

Defendants filed an answer, which included counterclaims arising out of Doe 2’s arrest, on January 8, 2019. (See Dkt. #16). On January 11, 2019, the Court granted the parties’ request that the named individual defendants be permitted to proceed anonymously. (Dkt. #21). That same day, the parties were automatically referred to mediation. (Dkt. #20). On January 17, 2019, Plaintiff filed an anonymized amended complaint (Dkt. #22-23), and on January 22, 2019, Defendants filed an anonymized amended answer with counterclaims (Dkt. #25).

Plaintiff filed a pre-motion letter seeking to dismiss Defendants’ counterclaims on January 22, 2019 (Dkt. #26), and thereafter, Defendants voluntarily withdrew their counterclaims, conceding that the counterclaims were time-barred but otherwise disputing the factual allegations in Plaintiff’s pre-motion letter (Dkt. #29; *see also* Mar. 19, 2019 Hr’g Tr. 19:2-11 (Dkt. #36)). On March 14, 2019, the Court was informed that mediation had been unsuccessful. (Dkt. #33). The Court subsequently held an initial pretrial conference with the parties on March 19,

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2019. (*See generally* Mar. 19, 2019 Hr'g Tr.). At the initial conference, Defendants conceded that pre-trial motion practice would not resolve the factual issues at the heart of Plaintiff's case and therefore agreed with the Court that the case should proceed to trial (rather than motion practice) after the close of discovery. (*Id.* at 21:18-22:3). Later that day, the Court issued a civil case management plan and scheduling order (Dkt. #35), and the parties proceeded to discovery. Pursuant to the scheduling order, the parties were to complete fact discovery by July 17, 2019, and expert discovery by August 31, 2019. (*Id.*).

### **1. The Discovery Disputes**

Over the course of the next year, the parties acrimoniously litigated numerous discovery disputes. Each of Defendants' motions to compel yielded additional relevant material that should have been disclosed earlier; over time, these motions revealed a systematic campaign of obstruction by Plaintiff and his now-former counsel. Indeed, it would take several rounds of motion practice, Plaintiff's deposition, and the revelation of previously undisclosed litigation to uncover the full scope of this misconduct. The procedural history in this case is complex and the docket includes extensive submissions that are not germane to the resolution of the instant motion. Accordingly, the Court relates only the procedural history relevant to resolving Defendants' pending motion for sanctions.

*Appendix D***a. Initial Discovery Requests and Responses**

On February 22, 2019, Plaintiff served his initial disclosures pursuant to Rule 26(a) of the Federal Rules of Civil Procedure. (Shanahan Decl., Ex. B). As relevant here, Plaintiff disclosed nine non-party witnesses: three fact witnesses, Plaintiff's life partner, and five mental health care providers (the "Initial Providers"). (*Id.*). The Initial Providers purportedly furnished mental health care to Plaintiff and could "speak to Plaintiff's severe emotional distress." (*Id.*). Although not disclosed to Defendants until September 2019, Plaintiff's expert on psychological and emotional distress damages, Dr. Yaakov Siegel, issued an expert report concerning Plaintiff's mental health issues on March 6, 2019. (*See* Def. Trial Ex. J (the "Siegel Report")).<sup>3</sup>

On April 5, 2019, Defendants served document demands and interrogatories on Plaintiff. In their first set of interrogatories, Defendants sought, *inter alia*: "[t]he name, address[,] and contact information for all individuals and/or entities that provided medical care or services to the Plaintiff for [the] period of 2009 to the present" (Interrogatory 4), and "[t]he names and contact information of all individuals and/or entities that Plaintiff has sued or otherwise filed a complaint against for the period January 1, 2016 to present" (Interrogatory 10). (Cohen Decl., Ex. 18). On April 25, 2019, Plaintiff emailed Mr. Cohen with responses to Defendants' interrogatories,

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3. Plaintiff filed an amended Rule 26(a) disclosure on September 30, 2019, that included Dr. Siegel. (Shanahan Decl., Ex. D).

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and in response to Interrogatory 4 disclosed only the Initial Providers. (Pl. Decl., Ex. B).<sup>4</sup> In response to Interrogatory 10, Plaintiff disclosed no information to his counsel and instructed Mr. Cohen to object on relevance grounds. (*Id.*).<sup>5</sup>

Plaintiff's formal interrogatory responses were served on May 2, 2019. (Cohen Decl., Ex. 18). Plaintiff

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4. In an email dated May 22, 2019, Plaintiff told Mr. Cohen that Plaintiff's initial response to Interrogatory 4 only "provided information partially," and suggested that "we may add that [Plaintiff's] immigration case contains information about relevant medical institutions, including in Russia." (Pl. Decl., Ex. T). On May 28, Plaintiff emailed Mr. Cohen a list of additional medical providers, including those later uncovered at Plaintiff's deposition and through his asylum application. (*Id.*). Among the medical care providers disclosed by Plaintiff to Mr. Cohen in these subsequent emails, but not disclosed to Defendants in response to Interrogatory 4, were Plaintiff's primary care physician, providers who furnished mental health services to Plaintiff, providers disclosed in Plaintiff's asylum application, and providers who consulted with Plaintiff prior to his submission of a workers' compensation claim. (*Id.*). Mr. Cohen ultimately opted not to include this information in Plaintiff's interrogatory responses. (See Cohen Decl., Ex. 18).

5. By email to Plaintiff dated May 22, 2019, Mr. Cohen requested that, "[f]or any litigation outside of East Side Club (i.e. against your previous attorney for fees), please forward documents — complaint, answer." (Pl. Decl., Ex. R). Plaintiff sent over the case number and name of the Bronx Action, but did not provide any documents. (*Id.*). Plaintiff also did not disclose any information about the NY County Action, a workers' compensation claim filed against another former employer in New York, or complaints filed against former employers in Russia. (*Id.*; *see also* Pl. Decl., Ex. B (objecting to disclosure of any information in response to Interrogatory 10 on relevance grounds)).

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objected to Interrogatory 10 on relevance grounds (*id.*), and Defendants did not move to compel a further response. Plaintiff also objected to Interrogatory 4 on relevance and proportionality grounds, and limited his response “to the time period from July 2015 through April 2017.” (*Id.*). Subject to these objections and limitations, Plaintiff’s interrogatory response disclosed only the Initial Providers. (*Id.*). Defendants had no reason to know that Plaintiff’s response to Interrogatory 4 was incomplete and/or misleading, and therefore did not move to compel a further response to Interrogatory 4.

In their first set of document demands, as relevant to instant motion, Defendants requested:

51. Any and all documents contained in Plaintiff’s political asylum application filed with the United States Government.
52. Any and all documents drafted by or executed by Plaintiff in any legal proceeding in which the Plaintiff has been a litigant for the period 2016 to the present.
53. Any and all documents filed in support of Plaintiff’s application to be admitted as an attorney to practice before the bar of the State of New York or any other state in the United States.

(Dkt. #38-2). Plaintiff objected to the request for his political asylum application on relevance grounds, and

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objected to the other two requests on relevance, privilege, and proportionality grounds. (See Shanahan Decl., Ex. E; *see also* Dkt. #39). On May 16, 2019, Defendants moved to compel production of Plaintiff's asylum and bar applications, noting that both documents were directly relevant to Plaintiff's request for emotional damages. (Dkt. #38). Specifically, Defendants stated that a review of medical records provided by the Initial Providers revealed that Plaintiff had not discussed his reasons for seeking asylum, and that Plaintiff's answers to questions on the asylum application would clearly be relevant to Plaintiff's mental health and claimed emotional distress damages. (*Id.*).<sup>6</sup> As for the bar application, Defendants theorized that it would provide information about Plaintiff's employment history, pending litigation and judgments, interactions with law enforcement, and mental health — all of which would be relevant to Plaintiff's claimed economic and emotional distress damages, as well as to his credibility. (*Id.*).<sup>7</sup>

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6. For example, questions on the asylum application include: “[h]ave you ... ever experienced harm or mistreatment or threats in the past by anyone”; “[d]o you fear harm or mistreatment if you return to your home country”; and “[h]ave you ... ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned[?]” (Dkt. #38-5).

7. Defendants did not move to compel with respect to their request for documents related to Plaintiff's litigation history. However, Defendants' motion to compel production of Plaintiff's bar application explicitly highlighted that disclosure of the bar application would include “pending litigation and judgments,” “interactions with law enforcement,” and “disclosure of civil litigation.” (Dkt. #38).

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On May 21, 2019, the Court overruled Plaintiff's objections and ordered Plaintiff to produce the documents under seal and for attorneys' eyes only. (Dkt. #40). However, due to the delay occasioned by the motion to compel, the parties were unable to complete fact discovery on time. (*See* Dkt. #41-42). The Court granted the parties' request for an extension of fact discovery. (Dkt. #43). Plaintiff produced the asylum application on or about June 20, 2019, but did not produce his bar application because Plaintiff had not at that time applied to the bar. (*See* Pl. Decl., Ex. T; *see also* Dkt. #42). Thereafter, the Court endorsed a revised case management plan and scheduling order, pursuant to which fact discovery was to close on September 30, 2019, and expert discovery on October 31, 2019. (Dkt. #45).

**b. Plaintiff's Asylum Application**

Plaintiff's asylum application contained references to numerous medical providers that Plaintiff had failed to disclose in his Rule 26 disclosures and for which he had never provided HIPAA releases. (*See* Dkt. #46). The application also included sworn statements made by Plaintiff regarding the extensive trauma, discrimination, and emotional distress that Plaintiff had experienced in Russia as a result of his sexual orientation, medical conditions, and political activism. (Dkt. #48-1). However, as Defendants noted, this information was completely absent from the medical records provided by the Initial Providers, who were represented by Plaintiff to be his exclusive mental health care providers. (Def. Br. 4-5). Furthermore, review of the application not only

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established that the information contained in it was clearly relevant to Plaintiff’s emotional distress claims (*see* Dkt. #48-1), but also suggested that Plaintiff’s arguments in opposition to Defendants’ motion to compel its production had been grossly misleading.

Shortly after receiving Plaintiff’s asylum application and after recognizing that Plaintiff and his counsel had failed to disclose medical care providers directly responsive to their initial discovery requests, Defendants moved to compel the disclosure of *all* providers who furnished medical care to Plaintiff from 2014 to the present, and sought HIPAA releases as to each medical provider not previously disclosed. (Dkt. #46). Plaintiff refused, arguing that Defendants failed to show how evidence related to Plaintiff’s “physical ailments” was relevant to emotional distress damages. (Dkt. #47). Plaintiff did not, however, raise any grounds for objecting to the disclosure of previously undisclosed mental health service providers. (*Id.*). Worse yet, Plaintiff’s counsel misrepresented the contents of Plaintiff’s asylum application, in which Plaintiff had explicitly argued that his chronic medical conditions caused him great emotional distress and subjected him to discrimination and abuse in Russia. (Dkt. #48). The Court ordered the parties to appear for a conference to resolve the motion to compel. (Dkt. #49).

At the conference, Defendants explained that medical records from these previously undisclosed providers were relevant to Plaintiff’s claim for damages for, *inter alia*, “aggravation, activation, and/or exacerbation of any pre-existing condition.” (Aug. 6, 2019 Hr’g Tr. 12:14-15

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(Dkt. #58) (quoting FAC ¶ 53)). Defense counsel argued that Plaintiff's conduct evinced an effort to conceal unfavorable facts despite their relevance to Plaintiff's claims for damages. (*Id.* at 14:15-15:6). In opposition, Mr. Cohen reiterated Plaintiff's argument that the previously undisclosed medical providers and medical records were irrelevant and would authorize a fishing expedition into Plaintiff's medical history. (*Id.* at 17:15-18:19). The Court granted Defendants' motion to compel, explaining that Plaintiff's conditions "are tied sufficiently to the emotional distress claims that [Plaintiff] is making in this litigation, including at paragraph 53 of the first amended complaint, that ... it is warranted that they be produced." (*Id.* at 19:11-14). In so doing, the Court explicitly found that the records were relevant to Plaintiff's claims for emotional distress and the exacerbation of existing conditions. (*Id.* at 18:23-19:14).

On August 28, 2019, Defendants were forced to file yet another motion to compel because Plaintiff had still not produced the HIPAA releases that were the subject of the August 6, 2019 conference. (See Dkt. #55). Defendants also sought an order compelling Plaintiff to cover the expenses incurred in pursuing the motion to compel and in serving expedited subpoenas as sanctions for Plaintiff's continued failure to comply with the Court's discovery orders. (*Id.*). The same day, the Court granted Defendants' motion in part and ordered Plaintiff to produce the releases the following day. (Dkt. #59).<sup>8</sup>

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8. After receiving the executed HIPAA releases, Defendants renewed their request for sanctions (Dkt. #61-62), which request the Court denied due in part to Defendants' failure to meet and confer

*Appendix D***c. Plaintiff's Deposition and Subsequent Discovery**

Due to the delays occasioned by the aforementioned discovery disputes, Defendants did not depose Plaintiff until September 23, 2019. Although Plaintiff's counsel disclosed the Siegel Report on the eve of the deposition, counsel did not disclose treatment notes and other materials upon which the report was based. (*See* Shanahan Decl., Ex. J, K).

At his deposition, Plaintiff revealed still more medical care providers that had not been previously disclosed in response to Defendants' Interrogatory 4, in Plaintiff's Rule 26(a) disclosures, or in response to the Court's August 6, 2019 Order, even though Plaintiff testified that he furnished information about these providers to his counsel at DSLG. (Pl. Dep. 116:17-119:4; *see also* Pl. Decl., Ex. T (disclosing this information to DSLG in May 2019)). Plaintiff also disclosed for the first time that he had been supporting himself almost entirely with funds obtained from his life partner since he stopped working at the Club. (Pl. Dep. 112:2-113:25).

Additionally, Plaintiff provided new information concerning his mitigation efforts. Plaintiff had previously disclosed that he worked at a Trader Joe's store from approximately April to June 2017 (*see* Cohen Decl., Ex.

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with Mr. Cohen in advance of moving for sanctions (Dkt. #65). The Court also noted that the record then before it did not support an award of costs and attorneys' fees. (*Id.*).

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18), but at his deposition, Plaintiff disclosed for the first time a workers' compensation action alleging that he had developed carpal tunnel syndrome while working at the store (Pl. Dep. 121:5-122:10). Plaintiff further testified that due to his carpal tunnel syndrome, his "ability to look for a job was limited." (*Id.* at 114:25-115:11; *see also id.* at 125:17-21). Plaintiff explained that "because of [the] physical specifics of [his] body, [he] wasn't able to substitute [employment at the Club] with something else. However, [he] could keep working at the East Side Club because this type of job doesn't have repetitive motion which did not affect [his] carpal tunnel." (*Id.* at 140:11-16).

At his deposition, Plaintiff volunteered limited information about the Bronx Action. (*See* Pl. Dep. 130:12-136:13, 250:8-251:22). Plaintiff testified that he initiated the Bronx Action against Sewell alleging fraud arising out of a debt he owed Sewell, and that he was in the process of appealing the dismissal of his suit against Sewell to the Appellate Division, First Department. (*Id.* at 131:18-136:13). Plaintiff testified that he owed Sewell approximately \$70,000, arising out of Sewell's representation of him in the NY County Action. (*Id.* at 133:15-134:20). However, Plaintiff failed to clarify that the Bronx Action and its appeal also involved a number of claims against Fordham and the Schutzer Group, or that it sought to recover extensive emotional distress damages similar to those sought in this case. (*See* Bronx Action Compl. ¶¶ 450, 457, 471-507, Ex. J, K).

Later in the deposition, Plaintiff again failed to disclose his claims against Fordham and again withheld

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material information about the emotional distress damages sought in the Bronx Action:

Q. You sued your ex-lawyer for fraud. Right? [...]

A. I'm suing my ex-lawyer for fraud.

Q. I'm trying to keep all the actions you have going on.

A. Only this and that, two.

Q. It's just two right now?

A. It[']s two in my life.

(Pl. Dep. 272:7-17; *see also id.* at 175:8-15). Plaintiff further opined that defense counsel's questions regarding his other litigation were irrelevant and inadmissible as character evidence, and instructed defense counsel to "move on with [his] questions[.]" (*Id.* at 177:10-17).

Separately, Plaintiff was questioned about his claimed psychiatric problems and the connections between those problems and his employment at the Club. To begin, Plaintiff unequivocally testified that he had not suffered from psychiatric problems prior to his employment at the Club:

Q. So given there is no reference to Downtown Psychiatric [an Initial Provider] in [Dr. Siegel's] report, I again go back to that sentence —

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"[Plaintiff] reported no history of psychiatric problems, explaining he was always able to deal with the stressors of life prior to discrimination and sexual assault." So that's not an accurate statement, is it? [...]

A. This is an accurate statement.

Q. This is an accurate statement?

A. Yes.

(Pl. Dep. 203:10-23). Plaintiff issued a similar denial a few minutes later:

Q. [Y]ou represented to Dr. Siegel that this was — this being after working at the East Side Club was the first time that you struggled with anxiety and depression. Isn't it true you suffered from anxiety and depression since moving to the United States or coming to the United States in 2014?

A. No, it's not true.

(*Id.* at 207:14-22; *see also id.* at 198:17-199:24). Critically to the instant motion, Plaintiff disclaimed suffering *any* emotional damage as a result of his interactions with or lawsuit against Sewell (*id.* at 324:15-325:15), and testified that there were no other factors that contributed to his emotional distress:

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Q. So my question to you is, are there other factors contributing to the alleged emotional distress that you claim to be suffering from? [...]

A. The answer is no.

(*Id.* at 326:12-17).

Plaintiff also testified about his 2019 consultation with expert witness Yaakov Siegel. He testified that he met with Dr. Siegel for roughly one-and-a-half to two hours. (Pl. Dep. 142:11-17). According to Plaintiff, they discussed, *inter alia*, Plaintiff's psychiatric history, including his brief stay at a psychiatric hospital in Russia, his asylum application, mental health treatment provided by the Initial Providers, medical care obtained from providers revealed as a result of Defendants' prior motions to compel, and the fact that Plaintiff's life partner had financially supported him since the termination of his employment at the Club. (*Id.* at 198:24-212:11, 249:13-21).

Following Plaintiff's deposition, and despite the close of fact discovery on September 30, 2019 (see Dkt. #45), Defendants sought to continue discovery, citing the raft of information disclosed for the first time at Plaintiff's deposition (Shanahan Decl., Ex. M).<sup>9</sup> Plaintiff

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9. For example, at his deposition, Plaintiff disclosed several additional medical providers and his workers' compensation claim for the first time, necessitating further requests for production, requests for HIPAA authorizations, and subpoenas. Plaintiff also testified that he had told Dr. Siegel about his mental health, medical, and employment history (see Pl. Dep. 198:24-212:11, 249:18-21), and

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did not initially respond to Defendants' requests, but at a status conference on October 15, 2019, objected to same on timeliness grounds. (*See* Oct. 15, 2019 Hr'g Tr. 8:17-9:16 (Shanahan Decl., Ex. P)). The Court overruled Plaintiff's objection, explaining that Defendants could not be penalized for seeking discovery after the close of fact discovery when Defendants were not aware that such discovery existed precisely because Plaintiff and/or his counsel had failed to disclose it. (*Id.* at 8:17-24). The Court extended the expert discovery deadline and ordered Plaintiff to produce the HIPAA releases, certain material related to the Siegel Report, and other documents sought as a result of new information disclosed in Plaintiff's deposition. (*Id.* at 9:19-10:21, 11:6-14, 17:19-18:6).

Plaintiff also objected to Defendants' request for documents relating to mitigation of damages, arguing that Defendants should have requested this information earlier. (Oct. 15, 2019 Hr'g Tr. 12:1-5, 13:18-14:3). Here, too, Defendants explained that they had requested information regarding mitigation previously, that such information had not been produced, and that these specific requests were directly related to information disclosed by Plaintiff for the first time at his deposition. (*Id.* at 12:11-13:8; *see also id.* at 14:6-10). The Court overruled Plaintiff's objections

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as such Defendants sought discovery as to the records and notes Dr. Siegel used to prepare his expert report, which information was not included in Plaintiff's September 19, 2019 production of the report. (*See generally* Siegel Report; *see also* Shanahan Decl., Ex. K, M). Additionally, Defendants sought documentation of the \$70,000 in loans that Plaintiff had received from his life partner since leaving the Club. (*See* Pl. Dep. 113:23-114:8).

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to this request for the same reasons it overruled his objections to producing previously undisclosed material. (*See id.* at 13:9-12, 14:11-16, 17:19-18:6).

Thereafter, on October 29, 2019, Dr. Siegel issued an addendum to his report stating that his “office requested [Plaintiff’s] medical records from the Derek Smith Law Group but received none.” (Shanahan Reply Decl., Ex. AA). Additionally, among the discovery produced in response to this motion to compel were records demonstrating that Plaintiff had abandoned his workers’ compensation claim after, *inter alia*, being told by a New York State investigator that he “could not develop the carpal tunnel syndrome in just 1 month of employment.” (Def. Trial Ex. S). By email dated November 15, 2019, just weeks after the Court ordered the New York State Workers’ Compensation Board to produce Plaintiff’s file (see Dkt. #69), Plaintiff withdrew his claim for economic damages, leaving only his emotional distress claims (Dkt. #73-12; *see also* Nov. 26, 2019 Hr’g Tr. 22:21-24:17 (Dkt. #77)).<sup>10</sup>

**d. The Expert Deposition**

On November 18, 2019, Defendants filed a pre-motion letter notifying the Court of a dispute over the fees that Dr. Siegel sought to charge Defendants for his deposition and for the preparation of an updated list of cases for which he had been retained by DSLG as an expert. (Dkt.

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10. Plaintiff also continued to seek damages for ancillary issues, such as attorneys’ fees, interest, and punitive damages. (Nov. 26, 2019 Hr’g Tr. 22:21-24:17 (Dkt. #77)).

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#73). Defendants also sought sanctions, arguing that: (i) Plaintiff's position on Dr. Siegel's fees was unreasonable in light of prior litigation over this identical issue; (ii) Dr. Siegel had been retained as an expert by DSLG in more than 140 cases over the previous three years; and (iii) DSLG and Dr. Siegel were engaging in an improper scheme whereby DSLG hired Dr. Siegel to write favorable reports on behalf of its plaintiffs with scant information or investigation in order to force a favorable settlement. (*Id.*). Plaintiff's counsel countered that it did not exercise control over Dr. Siegel or his fees, and disputed Defendants' characterization of its relationship with Dr. Siegel. (Dkt. #74).

The Court addressed this disagreement at a November 26, 2019 conference, and ordered that Defendants pay a reduced flat fee for deposition preparation, the deposition, travel, and an updated case list. (Nov. 26, 2019 Hr'g Tr. 29:13-21). The Court denied the motion for sanctions after determining that — on the record then before it — DSLG did not exercise “actual control” over Dr. Siegel. (*Id.* at 30:12-13). But the Court nevertheless expressed concern with several elements of DSLG’s relationship with Dr. Siegel:

THE COURT: ... I think it is quite troubling to me, and I mentioned and I began this conference by speaking of Dr. Siegel’[s] practices as something of a loss leader where he has a plaintiff whom he can charge a modest fee towards and then make up the fees on the back end by charging or overcharging, as the case

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may be, a lot of extra money to the defendants who will necessarily want to be taking his deposition.

(*Id.* at 30:1-8). The Court also expressed skepticism as to Dr. Siegel's methodology in this specific case:

THE COURT: I guess at some point, if I ever have the pleasure of meeting Dr. Siegel, I will question him at long length about how much time it takes him to put together a[n expert] report because ... I think I would be concerned if he only spent two hours, soup to nuts, with your client coming up with this report in which he is making very, very serious statements about the mental and emotional health of your client. But, I suppose I will leave that for someone else's deposition or cross-examination.

(*Id.* at 11:8-16). With these issues resolved, the parties proceeded to the deposition of Dr. Siegel.

Defendants deposed Dr. Siegel on December 5, 2019. (*See generally* Siegel Dep.). As relevant to the instant motion, Dr. Siegel testified that in preparing his expert report, he had not reviewed any of Plaintiff's medical or mental health records, nor had he spoken with any collateral sources. (*Id.* at 28:21-23, 43:8-19; *see also id.* at 72:12-84:10 (denying that he reviewed records from each mental health and medical care provider disclosed to Defendants at the time of the deposition)). Dr. Siegel testified that his office requested "any psychiatric records

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of prior treatment or any records of chronic or [non-] chronic illness that might affect the patient's mood and functioning or major medical events that might have contributed to the Plaintiff's emotional functioning," from DSLG in advance of his evaluation of Plaintiff. (*Id.* at 18:4-15). However, Dr. Siegel said he never received any material from DSLG, and that he was told by DSLG that the reason why he was not provided with such records was because they "don't have any." (*Id.* at 47:15-48:2).

Nor was Dr. Siegel informed generally about Plaintiff's medical history, mental health history, or asylum application, beyond what Plaintiff self-reported at Dr. Siegel's two-hour evaluation. (Siegel Dep. 81:11-20, 98:8-101:9). For example, Dr. Siegel was not informed that Plaintiff had been sent for psychiatric evaluation as a result of a purported suicide attempt in Russia. (*Id.* at 96:8-97:8).<sup>11</sup> Nor was Dr. Siegel told about any of Plaintiff's medical history or history of mental health treatment, besides the fact that Plaintiff was generally receiving therapy and medication (*id.* at 98:8-101:9; *see also* 72:12-81:10), though Dr. Siegel considered it "entirely plausible" that he may have been aware of the existence of one of the Initial Providers (*id.* at 100:25-101:9). Importantly, Dr. Siegel testified that Plaintiff told him he was not involved in any other litigation:

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11. Plaintiff disputes that he attempted to commit suicide. (Pl. Opp. 3-4). However, Dr. Siegel testified that such information would be relevant to his evaluation even if Plaintiff disputed the characterization of those events. (See Siegel Dep. 96:8-97:8).

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Q. Did Plaintiff disclose to you that he was being sued by his then attorney or ex-attorney?

A. Oh, no. ... And, specifically, where it says "legal, none", this is shorthand. These are my internal notes.

Q. Right.

A. The question that I asked him was: "Please tell me any legal history that you have, including arrests and lawsuits." And he said "none" or "I don't have any" and that is what that reflects.

Q. He didn't mention to you that he was a Defendant in a breach of contract action commenced against him by his former attorney?

A. Correct.

Q. And he didn't mention to you that he was a Plaintiff in a fraud action that he then commenced against his former attorney?

A. Correct.

\* \* \*

Q. If he is a Plaintiff in a ... litigation against his former Counsel, would you have expected him to disclose that to you? [...]

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A. Yes. I asked him directly. That was the question. I was looking for him to disclose to me any legal proceeding that he has been or is involved in. I wanted to know that information. And I would have expected him to have told me that.

(*Id.* at 58:6-59:20; *see also id.* at 73:17-75:17 (denying any knowledge of Plaintiff's criminal complaint against Doe 2); *id.* at 105:6-106:18 (refuting Plaintiff's deposition testimony that Plaintiff disclosed to him the Bronx Action)). Dr. Siegel also testified that Plaintiff did not disclose his workers' compensation claim against Trader Joe's, the complaints he filed against other former employers, or his claimed carpal tunnel syndrome. (*Id.* at 61:2-62:12, 91:22-92:3).

Dr. Siegel concluded his deposition, in response to a question as to whether Plaintiff was fabricating or exaggerating his purported psychological damage, by stating:

A: [A]t the time that I wrote my report, I concluded that [Plaintiff] was not malingering and ... that my opinion was valid and reliable. Today, you presented to me some information that suggests that he might not have disclosed to me everything that he could have. I would have to consider that and take it under advisement, whether that changes my opinion or not.

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(Siegel Dep. 142:18-143:3). As Dr. Siegel testified, he was never told of the existence of — or provided medical records from — any of the Initial Providers or from any of the other mental health or medical care providers disclosed as a result of Defendants' motions to compel. (*See id.* at 98:8-101:9). Nor was Dr. Siegel told about any of the specific information in Plaintiff's asylum application, though he testified that Plaintiff told him generally about discrimination he had experienced in Russia. (*See id.* at 56:19-57:20, 81:11-20).

## 2. The Pretrial Revelations

On October 16, 2019, the Court set a trial date of February 24, 2020 (Dkt. #67), which date was adjourned to March 2, 2020, to allow Plaintiff to sit for the New York State bar examination in late February (see Dkt. #68, 70). The parties submitted pretrial motions, including motions *in limine*, on January 13, 2020 (Dkt. #83-88), and filed their oppositions on January 20, 2020 (Dkt. #89-90). According to the parties' Joint Pretrial Order, Plaintiff sought \$6,000,000 in emotional distress damages and \$9,000,000 in punitive damages at trial. (Dkt. #85 at 18).

Plaintiff filed seventeen motions *in limine* (Dkt. #86), while Defendants filed three (Dkt. #84, 91). Of relevance to the instant motion is Plaintiff's tenth motion *in limine* — seeking to exclude evidence regarding Plaintiff's other litigation — in which motion Plaintiff's counsel described the Bronx Action as "a fee dispute between Plaintiff and his attorney in another case." (Dkt. #86). The parties' motions *in limine* were resolved in part at a conference

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held on January 30, 2020. (*See generally* Jan. 30, 2020 Hr'g Tr. (Dkt. #101)). However, after discussing the issues raised by Plaintiff's other litigation and their relevance *vel non* to the instant case, the Court reserved judgment on the tenth motion *in limine*. (*Id.* at 36:21-24).

On February 14, 2020, Plaintiff's counsel wrote to the Court seeking a modification to the trial schedule to end the trial day several hours early on March 3, 2020, with the stated purpose of allowing Plaintiff to "argue before the Appellate Division in another matter (Appellate Division (First Department) 2019-1059 ([John Doe 1] v Law Firm of Dayrel Sewell, PLLC, et al.)" (Dkt. #93). As with Plaintiff's deposition testimony regarding the Bronx Action and appeal, the February 14 letter did not mention that Plaintiff had sued Fordham and other parties, or that Plaintiff had sought emotional distress damages in the Bronx Action that conflicted with the damages sought in the instant litigation; in so doing, counsel perpetuated the misrepresentation that the Bronx Action was simply a dispute over attorneys' fees. (*See id.*). Nor did the letter specify that the appeal to be argued on March 3, 2020, was against the Fordham defendants, and not against the Sewell defendants, as was to be revealed later. (*See* Dkt. #98; *see generally* Feb. 28, 2020 Hr'g Tr. (Dkt. #108)). The Court granted the schedule modification on February 18, 2020. (Dkt. #94).

On February 21, 2020, the parties attended a teleconference with the Court to address several of the outstanding motions *in limine* and other pretrial issues. (*See generally* Feb. 21, 2020 Hr'g Tr. (Dkt. #114)). At the

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conference, the Court asked Plaintiff's counsel specific questions about the nature of the Bronx Action:

THE COURT: ... There's reference to a lawsuit or a dispute with a prior attorney by the name of Dayrel Sewell, and I was wondering ... was there, in fact, a lawsuit brought?

\* \* \*

MS. SMITH: ... I believe, if I'm not mistaken, that the litigation is what plaintiff has scheduled for oral argument that we address in our letter brief to end proceedings early one day. Yes, litigation was brought, and it is still active litigation.

(*Id.* at 17:25-18:17). Later in the conference, the Court explicitly inquired whether Plaintiff was engaged in litigation against Fordham or any other parties, to which Plaintiff's counsel responded in the negative:

THE COURT: ... But there is reference as well to a lawsuit against a professor at Fordham University. Maybe it was just an administrative proceeding, but there was something in plaintiff's proposed Exhibit 5 in the June or May 2018 records ... where there is a discussion about a dispute that the plaintiff is having with Fordham University ....

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I don't know if there's an actual lawsuit related to this or whether that was done administratively so I don't know that it matters at all. But I suppose my question to Ms. Smith and Mr. Cohen is, what lawsuits right now or in the very recent past has the plaintiff filed other than the ones we have been speaking about, this case and the case as to which there is an appeal upcoming? Is there anything else?

MR. COHEN: No, your Honor. The one grade issue I don't believe was actually in fact a lawsuit. That may have been just been an internal school issue. *Other than the litigation that we just discussed, I don't believe there's any currently active.*

(*Id.* at 20:1-22 (emphasis added)). The following week — the week before trial was to commence — the parties attended another pretrial conference at which Plaintiff's counsel indicated that Plaintiff did not intend to call Dr. Siegel as a trial witness. (Feb. 25, 2020 Hr'g Tr. 12:5-13 (Dkt. #110)).

On February 26, 2020, Defendants filed a letter with the Court revealing, for the first time, Plaintiff's previously undisclosed litigation against Fordham, the Schutzer Group, and other associated individuals. (Dkt. #96). Specifically, Defendants explained that:

After reviewing [recently produced mental health] treatment records for Plaintiff,

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[defense counsel] was confused regarding references to a potential “litigation” involving Fordham University. [At the February 21, 2020 conference, Plaintiff’s counsel] confirmed that there was no litigation commenced against Fordham but rather Plaintiff had a dispute with a professor. This is not accurate at all. Given substantial questions were raised by references to Fordham in recently produced psychiatric records, [defense counsel] conducted due diligence yesterday and reviewed the file at the Appellate Division First Department.

(*Id.* (footnote omitted)). Defendants’ review of the record at the First Department revealed that:

[Plaintiff] failed to disclose that he had also sued Fordham University, a professor at Fordham University, and ... the [Schutzer] Group, PLLC. In his appeal, he alleges two law firms, a number of lawyers, a professor at Fordham Law School and Fordham University are all working in collusion to defraud him as part of a civil conspiracy. Moreover, in his self-styled fraud action, [Plaintiff] seeks very substantial emotional distress damages, similar to this matter.

(*Id.* (emphasis and internal citations omitted)).

Defendants argued that the failure by Plaintiff or his counsel to disclose litigation against Fordham was part

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of a pattern of concealing unfavorable facts throughout the litigation, offering as a prior example the fact that “Plaintiff withheld critical information from Dr. Siegel and [Defendants’ expert].” (Dkt. #96). Defendants sought leave to add newly-discovered court filings from the Bronx Action appeal to their potential trial exhibits, both because of the overlap in the emotional damages sought in the two cases and as evidence of Plaintiff’s and his counsel’s persistent practice of concealing unfavorable facts. (*Id.*).

The Court convened a conference the following day, February 27, 2020, to address the previously undisclosed litigation uncovered by Defendants. (Dkt. #97; *see generally* Feb. 27, 2020 Hr’g Tr. (Dkt. #106)). In a colloquy with Mr. Cohen, the Court explored the scope and limits of DSLG’s knowledge of Plaintiff’s other litigation:

THE COURT: Mr. Cohen, have you read your client’s complaint in that case in the Bronx Supreme Court?

MR. COHEN: I have not, your Honor.

THE COURT: Okay. I have. Separately, have you reviewed the materials, the briefs to the Appellate Division First Judicial Department in this case? Have you reviewed your client’s appeal in this case sir?

MR. COHEN: I have not had a chance to. I have a general understanding and idea of it but I have not been able to go through it in depth.

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THE COURT: Okay. I have. Have you reviewed the docket sheet for the underlying Bronx action, sir?

MR. COHEN: I have not, your Honor.

THE COURT: I have done that too. Let me tell you a few things about this case that you either knew and did not tell me about on Friday, or should have known and told me about on Friday. Your client filed an approximately 200-page-complaint naming as defendants the law firm of Dayrel Sewell, an associate of Mr. Sewell's ..., an entity called the Schutzer Group, a gentleman named Rikin Desai, a gentleman named Anthony Agolia, and Fordham University. In that litigation, in case you are wondering, among other things, your client alleges ..., in substance and in part, that he was doing better with respect to any issues of emotional distress that he may have been feeling as a result of his employment experiences at the East Side Club, he was on the road to getting stable, but precisely, primarily, and perhaps exclusively, because of his dealings with Mr. Sewell, Fordham University, and the defendants in [the Bronx Action], those contacts eroded. All of the progress he had made required him to triple his medication, led to a nervous breakdown, and lead to continuing side effects as a consequence of the increased medication he is taking.

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\* \* \*

But, even today, in the very appeal that he is going to be arguing on Tuesday when he leaves my courtroom — assuming this case still exists by then — he is going to be arguing that it was inappropriate to dismiss the intentional infliction of emotional distress claims against [the Bronx Action defendants] because he believes that the fraudulent conduct in which they engaged contributed to or caused him emotional distress. Now, Mr. Cohen, I'm going to stop talking for a moment and you are going to tell me why none of that was called to my attention prior to my having to get the documents from the First Department in order to understand this. Please begin, sir.

MR. COHEN: Your Honor, I apologize. I mean, you know, obviously we have been focused on this case. I was aware of this other litigation involving a fee dispute between him and his attorney but ... I wasn't aware of the extent of it and, quite frankly, I didn't review the papers in that case. I knew generally what the matter entailed and I didn't know exactly what [Plaintiff] was suing for, what claims he was suing for.

(Feb. 27, 2020 Hr'g Tr. 4:3-6:17). The Court then asked Mr. Cohen to explain his misrepresentation to the Court at the February 21, 2020 conference:

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THE COURT: I see. But, sir, I asked you on Friday a specific question about Fordham University and you spoke falsely to me. Why did you do that? And why is it that I have to, in order to keep this case honest, why am I out there digging up dockets from other cases? Why can't I trust that when I ask you a question about a litigation that you will answer me correctly and honestly about it[?]

MR. COHEN: Absolutely, your Honor. And when I spoke to you on Friday I really had no idea that Fordham was a named party in this suit. I just thought, you know, from speaking to my client, that there was a litigation between him and his former attorney. I had no idea that Fordham was named, that Fordham was involved.

(*Id.* at 7:13-25).

At the February 27, 2020 conference, Mr. Cohen argued that his false statement to the Court regarding Plaintiff's litigation against Fordham was a good faith mistake because he had been simply unaware of Plaintiff's litigation against Fordham. But Mr. Cohen also conceded that he had not conducted any due diligence into the issue, and had never reviewed the complaint, briefing, or any other documents from the Bronx Action and appeal (Feb. 27, 2020 Hr'g Tr. 4:3-17) — despite affirmatively representing to the Court in Plaintiff's tenth motion *in limine* that the Bronx Action was "irrelevant" and was

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solely “a fee dispute between Plaintiff and his attorney in another case” (see Dkt. #86), and despite making a similar representation to the Court on this issue at the February 21, 2020 conference (see Feb. 21 Hr’g Tr. 20:1-22).

The Court next pressed Mr. Cohen on whether Plaintiff had perjured himself at his deposition, wherein Plaintiff testified that there were no other factors contributing to the alleged emotional distress from which Plaintiff claimed to be suffering (see Pl. Dep. 326:12-17):

THE COURT: ... [E]ven now, in submissions that [Plaintiff] made in November of 2019 that I am staring at as I am talking to you, he is talking about why it is [that] the emotional distress claims that he filed in [the Bronx Action] are the cause of his emotional distress. ... [Plaintiff] makes the point in his complaint of separating them out and saying that it is the fight that he is having with Mr. Sewell and his law firm and the fraudulent manner in which they dealt with him that is causing him emotional distress. So, I guess I just don’t understand how you could allow him to testify to that at his deposition when he was simultaneously bringing a lawsuit against other entities in which he was claiming emotional distress. ...

\* \* \*

MR. COHEN: So ... [Plaintiff] does state that he is suffering to some extent regarding

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this lawsuit and, in addition to that, I mean I think the question isn't the most artful and Mr. Shanahan had the opportunity to follow up and really dig in and specify exactly what he is talking about but he doesn't. My client addressed the other litigation. He said that he was suffering from it somewhat, we don't like lawsuits, sure, is what he said, and the[n] Mr. Shanahan asks about the medical records and asks why he is discussing this other litigation in medical records and he is saying because it is what's going on with my life and outlining it like that. So, he does state that; he doesn't definitively say no, he is not suffering from this, he actually does. And Mr. Shanahan doesn't clarify the factors, yes.

THE COURT: Mr. Cohen, I am really not sure why it is that you feel compelled to pawn off responsibility on everybody else in this case other than your client. ... But you have made this strange distinction in the questioning between emotional distress and emotional suffering but the point remains that when [] Mr. Shanahan asked whether the emotional distress that your client claims to be suffering, whether that was entirely attributed to the East Side Club and its employees or something else, when asked whether there was anything else to the emotional distress for which he is seeking large sums of money in this case, he says the answer is no. ... [P]erhaps there is later [testimony],

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but I don't know how he can say that when he has another lawsuit in which there is a claim for intentional infliction of emotional distress that he continues to maintain at the First Department.

(Feb. 27, 2020 Hr'g Tr. 8:17-11:4). In addition to arguing that the emotional distress damages sought in the Bronx Action were completely distinct from Plaintiff's \$6,000,000 claim for emotional distress damages in this case (and thus did not need to be disclosed), Mr. Cohen also sought to blame defense counsel for failing to uncover the full scope of Plaintiff's other litigation. Mr. Cohen argued that defense counsel failed to ask appropriate follow-up questions at Plaintiff's deposition and failed to more fully investigate Plaintiff's case against Sewell. (See *id.* at 6:24-7:7, 9:8-10:13).

In response to the Court's questions on this issue, defense counsel noted that the Bronx Action had been repeatedly described by Plaintiff and his attorneys as a dispute over attorneys' fees. (See Feb. 27, 2020 Hr'g Tr. 13:15-14:1; *see also* Dkt. #86; Feb. 21, 2020 Hr'g Tr. 17:25-18:17; Pl. Dep. 130:15-136:13, 250:8-251:22). Defense counsel also explained that when he tried to investigate the First Department appeal after Plaintiff's deposition, he was unable to view the information about the case online, due to the manner in which the New York Unified Court System docketed filings in cases with *pro se* litigants, and as such could only review limited information about the appeal. (Feb. 27, 2020 Hr'g Tr. 14:7-15:19). In consequence, defense counsel only learned of Fordham's involvement

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after he physically visited the First Department to view the filings made in the case. (*Id.* at 15:20-24).

Hoping to pivot from defense to offense, Mr. Cohen objected to the introduction at trial of information about Plaintiff's other litigation, citing the last-minute nature of the revelations about the scope of the Bronx Action. The Court disagreed:

THE COURT: [Y]ou cannot at this stage in the game [] say that it's too late for us to begin looking at these things because from where I am sitting these are things that you or your client hid from the defense and from the Court and I am very disturbed. ... [H]owever much you want to blame Mr. Shanahan for me not knowing about this information, I don't think that's especially fair.

(Feb. 27, 2020 Hr'g Tr. 25:14-26:3). At the close of the conference, Plaintiff confirmed that he would not call Dr. Siegel to testify at trial, and Defendants agreed not to call their expert as well. (*Id.* at 26:11-16).

The next day — the Friday before trial was to begin — Defendants filed a letter containing information discovered after still further investigation into the Bronx Action, namely “that Plaintiff has not one, but two appeals, currently pending in the First [D]epartment”: the first against Fordham and related individuals and the second against Sewell and related defendants. (Dkt. #98). Although Plaintiff's letter requesting an adjustment of

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the trial schedule on March 3, 2020, to allow Plaintiff to argue his appeal had noted that the appeal was against Sewell (*see* Dkt. #93), and although Plaintiff's counsel had subsequently confirmed that the March 3rd oral argument addressed claims against Sewell (Feb. 21, 2020 Hr'g Tr. 17:25-18:17), Defendants' letter revealed that the March 3rd argument in fact pertained to the Fordham defendants (Dkt. #98). Approximately one hour later, Plaintiff submitted a letter to the Court withdrawing his claim for emotional distress damages entirely, leaving only claims for nominal damages, punitive damages, attorneys' fees, and costs. (Dkt. #99). Plaintiff claimed this was done to "remove the need to inquire into Plaintiff's other litigation" and "to simplify the issues and focus on the facts of this case." (*Id.*). The Court convened another conference later that day to address the latest developments. (*See generally* Feb. 28, 2020 Hr'g Tr.).

At the conference, the Court confirmed, after its independent investigation of the docket of the Bronx Action and related appeals, that the following information was not accessible online: (i) filings from the Bronx Action and related appeals, and (ii) information about parties to the action other than Sewell. (Feb. 28, 2020 Hr'g Tr. 2:15-21). Indeed, this Court obtained information about the Bronx Action and related appeals only after speaking with the judge presiding over the Bronx Action. (*See id.* at 2:18-21). Thus, absent disclosure by Plaintiff and/or his counsel, it would have been extremely difficult, even had Defendants or the Court immediately investigated the Bronx Action, to determine that this oft-described "dispute over attorneys' fees" included parties other than

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Plaintiff's former counsel and sought extensive emotional distress damages that overlapped significantly with the damages sought here.

The Court also confirmed that the appeal to be argued on March 3, 2020, concerned the Fordham defendants, not the Sewell defendants, revealing yet another misrepresentation by Plaintiff's counsel to the Court:

THE COURT: Mr. Cohen, let me now turn to you, sir. I'm now even more confused than I was yesterday, or perhaps not, because I did find those documents I was reciting to you which referenced an appeal against what I will call the Sewell group of defendants but not the Fordham group. I had understood, because I understood that there was only one appeal, that the argument on next Tuesday was of that matter. I now understand that that argument is of the Fordham defendants. I'm not really enjoying this learning by accretion, so could you tell me, please, how this came about or what you knew and when you knew it?

MR. COHEN: Sure, your Honor. And I apologize to the Court for any confusion that there may have been. As I stated, I think it was yesterday, I had no idea — I knew there was a dispute with his former attorney, and that's really kind of what I knew. I didn't think that it would be all of these 900-page complaint, 200-page complaint, I thought it was a fee

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dispute, and I was kind of focused on this case and pushed this case forward. I didn't know that there were two appeals. I didn't know that Fordham was a named party, I just assumed it was a dispute with his attorney and that was that. I didn't think there was an allegation of emotional distress. I didn't know.

(Feb. 28, 2020 Hr'g Tr. 3:3-25). In the same breath, however, Mr. Cohen faulted Defendants for not uncovering the undisclosed information about the Bronx Action earlier, arguing that “generally speaking, [defense counsel] was also aware of this dispute with my client and his former attorney. This wasn’t anything like hiding the ball.” (*Id.* at 4:1-9). The Court disagreed with Mr. Cohen’s characterization of the situation, stating that “[g]iven the deposition of your client, which I reread, I don’t think it’s fair to assume that Mr. Shanahan could have known about the Fordham matter.” (*Id.* at 5:9-11; *see also id.* at 5:11-18). Defense counsel underscored that he had only discovered the misrepresentations by Plaintiff and his counsel here because of similarities between this case and DSLG’s conduct in another case in which defense counsel participated. (*Id.* at 12:24-13:15).

After the Court turned to Plaintiff’s request to abandon his claim for emotional distress damages, Plaintiff’s counsel disclosed that they sought not just to withdraw Plaintiff’s claim for emotional distress damages, but to have the Court dismiss the case in its entirety:

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MS. SMITH: ... Now having reviewed everything and as the discovery is coming to light, I have counseled the client that I believe it is in his best interest [that] we move the Court to dismiss the entire case and do not seek to move forward to a jury trial. ... We do not believe this was brought frivolously or that ... the plaintiff[] misrepresented anything, but in how the discovery came out, some of the issues that have arisen in the last few days, again I have counseled the client that I believe it is in his best interest to walk away from this.

(Feb. 28, 2020 Hr'g Tr. 6:6-18). Defendants joined in the request that Plaintiff's claims be dismissed, but sought leave to pursue the instant motion for sanctions against Plaintiff, Mr. Cohen, and DSLG. (*Id.* at 8:6-12, 11:25-12:23, 15:9-12). The Court then dismissed the case with prejudice, cancelled the jury trial, and granted Defendants leave to pursue the instant motion for sanctions. (*Id.* at 18:10-18).

### **3. The Instant Motion**

On March 3, 2020, the Court adopted the parties' proposed briefing schedule on Defendants' anticipated motion for sanctions. (Dkt. #103). On May 4, 2020, Defendants filed their motion for sanctions (Dkt. #116-120), including a 51-page memorandum of law, which was 26 pages in excess of the limit set by the Court's Individual Rules of Practice in Civil Cases (Dkt. #119).

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On May 14, 2020, Plaintiff filed a pre-motion letter seeking permission to file a cross-motion for sanctions, arguing that Defendants' motion exceeded the page limit set by the Court's individual rules and that Defendants improperly sought to relitigate prior unsuccessful motions for sanctions. (Dkt. #121). Defendants filed a letter in opposition on May 17, 2020, and additionally moved for leave, *nunc pro tunc*, to have the Court accept the oversize memorandum of law. (Dkt. #122). On May 20, 2020, Plaintiff filed a letter in reply and opposition to Defendants' motion. (Dkt. #123). By Order dated May 22, 2020, the Court denied Plaintiff's request to pursue a cross-motion for sanctions, noting that the Court could award to the person who prevails on a motion under Rule 11 reasonable expenses, obviating the need for a cross-motion. (Dkt. #124). The Court also denied Defendants' application for the Court to accept their 51-page memorandum of law, ordered Defendants' motion for sanctions to be stricken from the docket, set a briefing schedule for a revised motion for sanctions, and granted Defendants leave to file a 35-page memorandum of law in support of their revised motion for sanctions. (*Id.*).

Defendants filed their revised motion for sanctions and supporting papers on June 5, 2020 (Dkt. #125-129); Plaintiff's counsel filed their opposition papers on July 9, 2020 (Dkt. #133-134); and Defendants filed a reply on July 22, 2020 (Dkt. #136). Defendants' moving papers clearly recited their intent to seek an order "sanctioning Plaintiff, his counsel ..., and the Derek Smith Law Group, jointly and severally." (Dkt. #125; *see also* Def. Br. 35; Def. Reply 10). However, in DSLG's memorandum of law in opposition to

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the motion for sanctions, it inexplicably recharacterized Defendants' motion as *not* seeking sanctions against Plaintiff (*see* DSLG Opp. 1 n.1 (citing Doe 2 Decl. ¶¶ 19-20; Doe 3 Decl. ¶ 18)), and as such did not seriously address allegations of misconduct directed at Plaintiff.

On March 12, 2021, the Court convened a conference with DSLG and Defendants to discuss whether Defendants in fact sought sanctions against Plaintiff, and if so, whether Plaintiff needed to file an independent opposition to the motion. (*See generally* Mar. 12, 2021 Hr'g Tr. (Dkt. #149)). Mr. Cohen requested leave to speak with his client and the Court set a conference for the following week to discuss the issue. (*Id.* at 9:13-24). On March 17, 2020, Plaintiff stated his intent to file, *pro se*, an independent opposition to the motion for sanctions, and the Court set a briefing schedule on Plaintiff's opposition and a sur-reply from Defendants. (*See* Minute Entry for March 17, 2021). The Court declined to grant Plaintiff's counsel an opportunity to respond. (*See* Mar. 17, 2021 Hr'g Tr. 13:25-14:4 (Dkt. #138)).

Plaintiff filed his *pro se* opposition on April 15, 2021. (Dkt. #140). In his submission, Plaintiff cited to audio recordings he had made of conversations with Mr. Cohen — without Mr. Cohen's knowledge — wherein Plaintiff and Mr. Cohen purportedly discussed how to respond to the motion for sanctions. (*See* Pl. Opp. 18).<sup>12</sup> Later that day, DSLG filed a letter brief seeking to withdraw as

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12. Given the Court's concerns about the genesis and provenance of these recordings, it has not considered them in resolving Defendants' sanctions motion.

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Plaintiff's counsel, which letter responded to many of the factual allegations laid out in Plaintiff's *pro se* opposition and restated its arguments in opposition to Defendants' motion for sanctions. (Dkt. #141). The next day, on April 16, 2021, Defendants filed a letter in response, which letter also revealed that defense counsel had communicated directly with Plaintiff to obtain copies of Plaintiff's audio recordings of his conversations with Mr. Cohen. (Dkt. #142). Plaintiff filed an unauthorized sur-reply the same day, and DSLG filed an unauthorized sur-reply on April 19, 2021. (Dkt. #143-144).

The Court accepted the unauthorized sur-replies (Dkt. #146) and discussed the motion to withdraw and any potential issues regarding defense counsel's contact with Plaintiff at an April 21, 2021 conference (*see generally* Apr. 21, 2021 Hr'g Tr. (Dkt. #161)). In a colloquy with the Court, DSLG responded to the arguments Plaintiff advanced in his *pro se* opposition to the motion for sanctions. (*See id.* at 20:12-28:12, 39:15-40:11). Additionally, the Court granted DSLG's motion to withdraw and the parties discussed the extent to which Plaintiff had waived the attorney-client privilege and whether defense counsel's communications with Plaintiff were improper. (*See generally id.*). The Court ordered Defendants to submit a letter addressing (i) defense counsel's communications with Plaintiff, and (ii) whether any putative waiver of Plaintiff's attorney-client privilege warranted additional discovery. (*Id.* at 35:21-37:12).

On April 23, 2021, Defendants submitted a letter disclaiming a need to pursue additional discovery and

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provided the Court with documentation of counsel's communications with Plaintiff. (Dkt. #147). Later that day, after reviewing the documents submitted by defense counsel, the Court issued an order declining to sanction defense counsel for communicating with Plaintiff, because the documents revealed that Plaintiff, who has legal training, explicitly and unequivocally instructed defense counsel to communicate directly with Plaintiff with respect to the pending motion for sanctions. (Dkt. #148). The Court also set a briefing schedule on Defendants' sur-reply, noting that it would determine after receiving the sur-reply whether to accept any further submissions on the pending motion for sanctions. (*Id.*). Defendants submitted their sur-reply on April 29, 2021. (Dkt. #151-152).

Thereafter, on May 3, 2021, DSLG filed a renewed motion for sanctions against Defendants, claiming that Defendants' sur-reply contained false statements, and sought permission to file its own sur-reply. (Dkt. #153). In support of their motion, DSLG included documents intended to disparage the character of defense counsel, which documents were completely unrelated to the instant motion. (*Id.*). The following day, the Court denied DSLG's motions, noting that Mr. Cohen failed to explain why a sur-reply was warranted and explaining that defense counsel's purportedly sanctionable behavior in this case was, at base, a disagreement over the merits of the underlying sanctions motion currently pending before the Court. (Dkt. #156). Although the Court had already denied DSLG's motions, on May 5, 2021, Defendants filed an opposition and a motion to strike the exhibits

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disparaging defense counsel that were attached to DSLG's letter. (Dkt. #157).

On May 10, 2021, DSLG filed a letter opposing the motion to strike and requesting that the Court reconsider its decision to deny DSLG's motion to file a sur-reply, arguing that a sur-reply was required to respond to, *inter alia*, certain issues raised by Plaintiff's audio recordings of conversations with Mr. Cohen. (Dkt. #158). Later that day, Defendants filed a second motion to strike, this time arguing that DSLG's latest letter constituted an unauthorized sur-reply. (Dkt. #159). On May 11, 2021, the Court denied both of Defendants' motions to strike, explaining that to the extent DSLG had improperly attempted to supplement its June 2020 briefing in opposition to the pending motion for sanctions, the Court would discount any submissions accordingly, and noting that defense counsel had responded to allegations of misconduct on the record and that the documents filed by DSLG contained publicly available information. (Dkt. #160). The Court also denied DSLG's renewed request to file a sur-reply, noting that: (i) Mr. Cohen's disagreements with the characterization of several discovery disputes in Defendants' sur-reply were not new areas of disagreement between the parties; and (ii) Mr. Cohen had ample opportunity to address Plaintiff's allegations, and had in fact shared his position with the Court on multiple occasions, including on the record on April 21, 2021, and in four letters to the Court. (*Id.*). The Court reiterated that it considered briefing on the pending motion for sanctions to be closed (*id.*), and accordingly Defendants' motion is now fully briefed and ripe for decision.

*Appendix D***DISCUSSION****A. Applicable Law****1. Sanctions Pursuant to Federal Rule of Civil Procedure 37**

Federal Rule of Civil Procedure 37 provides that when “a party ... fails to obey an order to provide or permit discovery ... the court where the action is pending may issue further just orders.” Fed. R. Civ. P. 37(b)(2)(A). Such just orders may include “striking pleadings in whole or in part; ... dismissing the action or proceeding in whole or in part; [or] rendering a default judgment against the disobedient party.” *Id.* Further, “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.” Fed. R. Civ. P. 37(b)(2)(C) (emphasis added). Several considerations inform the Court’s analysis of a motion for sanctions under Federal Rule of Civil Procedure 37, including: “[i] the willfulness of the [noncompliance] or the reason for noncompliance; [ii] the efficacy of lesser sanctions; [iii] the duration of the period of noncompliance[; and [iv] whether the noncompliant party had been warned of the consequences of noncompliance.” *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302-03 (2d Cir. 2009) (internal quotation marks and alteration omitted) (quoting *Nieves v. City of New York*, 208 F.R.D. 531, 535 (S.D.N.Y. 2002)); *accord Doe v. Delta Airlines Inc.*, 672 F. App’x 48, 50 (2d Cir. 2016) (summary order).

*Appendix D***2. Sanctions Pursuant to the Court’s Inherent Powers and 28 U.S.C. § 1927**

The Court has “inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct.” *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (“[A] court may assess attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons’” (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975))); *see generally Int’l Techs. Mktg., Inc. v. Verint Sys., Ltd.*, 991 F.3d 361, 367 (2d Cir. 2021). On top of this inherent power, 28 U.S.C. § 1927 authorizes a court to require an attorney “who so multiplies the proceedings in any case unreasonably and vexatiously ... to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927; *see also Madison 92nd St. Assocs., LLC v. Marriott Int’l, Inc.*, No. 13 Civ. 291 (CM), 2013 U.S. Dist. LEXIS 160290, 2013 WL 5913382, at \*12 (S.D.N.Y. Oct. 31, 2013) (“The purpose of § 1927 is to ensure that those who create unnecessary costs also bear them.”), *aff’d sub nom. Boies, Schiller & Flexner LLP v. Host Hotels & Resorts, Inc.*, 603 F. App’x 19 (2d Cir. 2015) (summary order).

To impose sanctions under either authority, the trial court must find “clear evidence that the conduct at issue is [i] entirely without color and [ii] motivated by improper purposes.” *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*,

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564 F.3d 110, 114 (2d Cir. 2009); *see generally Sorenson v. Wolfson*, 683 F. App'x 33, 37 (2d Cir. 2017) (summary order) (discussing sanctions imposed under the inherent powers doctrine and 28 U.S.C. § 1927). Regarding the first prong, “[c]onduct is entirely without color when it lacks any legal or factual basis; it is colorable when it has some legal and factual support, considered in light of the reasonable beliefs of the attorney whose conduct is at issue.” *Scivantage*, 564 F.3d at 114 (citing *Schlaifer Nance & Co. v. Est. of Warhol*, 194 F.3d 323, 338 (2d Cir. 1999)). The second prong requires the district court to find a clear showing of bad faith with a high degree of factual specificity in most cases. *See United States v. Seltzer*, 227 F.3d 36, 41-42 (2d Cir. 2000); *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986). Under this requirement, sanctions are appropriate only “when the attorney’s actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay.” *Oliveri*, 803 F.2d at 1273; *see also Int’l Techs. Mktg., Inc.*, 991 F.3d at 367-68.

**B. Analysis**

Broadly speaking, Defendants seek sanctions against the following parties for the following conduct:

- against Plaintiff, Mr. Cohen, and DSLG for intentionally or recklessly lying to the Court about the parties to, the damages sought in, and the nature of the claims in the Bronx Action;

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- against Mr. Cohen and DSLG for colluding with Dr. Siegel to perpetuate an improper scheme whereby DSLG hires Dr. Siegel to write favorable reports on behalf of its clients; and
- against Plaintiff, Mr. Cohen, and DSLG for obstructing discovery by willfully or recklessly failing to comply with discovery orders, including by concealing unfavorable facts throughout the course of litigation.

(*See generally* Def. Br.; Def. Reply; Def. Sur-Reply; *see also* Def. Br. 32-33). The Court addresses each of these three allegations — categorized for convenience as (i) misrepresentation, (ii) collusion, and (iii) obstruction — in turn, first addressing Defendants' motion for sanctions against Mr. Cohen and DSLG, and then resolving Defendants' motion for sanctions against Plaintiff.

**1. The Court Grants in Part Defendants' Motion for Sanctions Against Plaintiff's Former Counsel**

Before a district court may impose sanctions directly against an attorney, the Second Circuit has explained that, "under basic principles of due process":

[a]n attorney whom the court proposes to sanction must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed,

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and an opportunity to be heard on that matter, and must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges.

*Wilson v. Citigroup, N.A.*, 702 F.3d 720, 725 (2d Cir. 2012) (internal quotation marks omitted) (quoting *Sakon v. Andreo*, 119 F.3d 109, 114 (2d Cir. 1997)). Following the Second Circuit's directive, the Court explained that it was considering the imposition of sanctions pursuant to its inherent powers, Rule 11, Rule 37, and 28 U.S.C. § 1927, and discussed the legal and factual bases for Defendants' anticipated motion for sanctions at length with the parties on the record on February 28, 2020. (See Feb. 28, 2020 Hr'g Tr. 8:6-18:18). Defendants further explained the factual bases for their motion and the legal authority pursuant to which they sought sanctions in their opening brief (see generally Def. Br.), and Mr. Cohen and DSLG were provided ample opportunity to be heard on the matter in an opposition brief (see generally Pl. Opp.), on the record at several conferences with the Court (see generally Feb. 28, 2020 Hr'g Tr.; Mar. 12, 2021 Hr'g Tr.; Mar. 17, 2021 Hr'g Tr.; Apr. 21, 2021 Hr'g Tr.), and in several supplementary letters (see, e.g., Dkt. #121, 141, 144, 153, 158). For the reasons discussed herein, the Court sanctions Mr. Cohen and DSLG for misrepresentations to the Court, but declines to impose sanctions on Mr. Cohen or DSLG for obstruction or collusion.

*Appendix D***a. Misrepresentation**

The most serious allegation of misconduct currently before the Court is that Mr. Cohen and DSLG misrepresented the nature and the scope of the Bronx Action to the Court. (*See* Def. Br. 19-22; Def. Sur-Reply 4-6). A review of the complaint in the Bronx Action demonstrates a direct and irreconcilable conflict with Plaintiff's claims in this litigation. As noted above, Plaintiff filed his complaint in the Bronx Action on September 19, 2018, approximately three months before initiating this lawsuit. (*See generally* Bronx Action Compl.). There, Plaintiff alleged that at the time that Sewell and the other Bronx Action defendants purportedly defrauded him, in early 2018, he had already overcome any emotional distress caused by the conduct at issue in this case, and thus that any residual emotional distress was attributable solely to the Bronx Action defendants. (*See id.* at ¶¶ 72, 450, 457, 471-507, Ex. J, K).

At the moment Plaintiff filed the complaint in this case, he was already arguing in the Bronx Action that any emotional distress incurred as a result of Defendants' conduct had long abated. (*See* Bronx Action Compl. ¶¶ 471-507). Indeed, in support of his request for emotional distress damages in the Bronx Action, Plaintiff submitted as exhibits to his complaint the *very same* treatment notes from his Initial Providers that had been submitted as evidence of emotional distress in this case. (*Compare id.*, Ex. J, K, *with* Pl. Tr. Ex. 5). Put differently, Plaintiff simultaneously pursued two cases in which he sought to recover for *the same purported emotional distress*;

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however, there was, and there could be, no overlap between the two theories of recovery.<sup>13</sup> Nevertheless, in this action Plaintiff: (i) never disclosed the nature or even the existence of the emotional distress claims advanced in the Bronx Action; (ii) continued to seek emotional distress damages without any offset for the emotional distress purportedly attributable solely to the Bronx Action defendants; (iii) testified under oath that there were no other factors that contributed to his emotional distress; and (iv) testified that he did not suffer any emotional damage as a result of the conduct complained of in the Bronx Action. (See Pl. Dep. 324:15-325:15, 326:12-17 (disclaiming that Plaintiff suffered any emotional suffering or distress as a result of his other litigation); *see also* Siegel Dep. 58:6-59:20, 73:17-75:17, 105:6-106:18 (admitting that Plaintiff's damages expert did not know about the Bronx Action or any of Plaintiff's other litigations)). Disclosure of the Bronx Action and the nature of the claims asserted therein would have dramatically altered the instant litigation. On this point, the Court does not even need to hypothesize, since disclosure of this information on the eve of trial ultimately precipitated Plaintiff's voluntary dismissal of this case.

As noted previously, “[i]mposition of sanctions under a court’s inherent powers requires a specific finding that an attorney acted in bad faith,” and such sanctions “are

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13. To be clear, the Court is not stating that it is impossible for Plaintiff to have suffered harm due to the conduct both of Defendants in this case and of the Bronx Action defendants. Rather, it is Plaintiff’s characterization of — and sworn testimony and statements about — the emotional distress damages in each case that is incompatible.

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appropriate only if there is clear evidence that the conduct at issue is [i] entirely without color and [ii] motivated by improper purposes.” *Scivantage*, 564 F.3d 110, 114 (2d Cir. 2009); *see also Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000). Defendants frame the failure by Plaintiff and his counsel to disclose this information as part of a bad faith effort to disclose only favorable facts while concealing all unfavorable information throughout the course of this litigation. (See, e.g., Def. Br. 28-30). In opposition, DSLG argues that its failure to disclose this information was due to counsel’s excusable ignorance as to the scope and nature of the Bronx Action; that any misrepresentations made to the Court were made in good faith and to the best of counsel’s knowledge at the time; and that Plaintiff had instructed DSLG that his other litigation was not relevant and should not be disclosed. (Dkt. #141; *see also*, e.g., Cohen Decl. ¶¶ 3-5; DSLG Opp. 13, 25-26; Dkt. #158).<sup>14</sup>

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14. DSLG argues that it cannot be sanctioned pursuant to Fed. R. Civ. P. 37 for its failure to disclose information about the Bronx Action because Defendants never moved to compel a response to Interrogatory 10 or Request for Production 52. (DSLG Opp. 24-26). The Court need not address this argument because, as discussed herein, it is imposing sanctions for DSLG’s misconduct under its inherent power and 28 U.S.C. § 1927.

Relatedly, DSLG argues that Defendants should have investigated the Bronx Action sooner, and as such DSLG should not be sanctioned for defense counsel’s failure to fully investigate this issue. (See, e.g., Dkt. #141). This argument is without merit for myriad reasons. *First*, as the Court has already explained, Defendants cannot be faulted for relying on Plaintiff’s misrepresentations when Plaintiff’s counsel failed to correct them. (See, e.g., Feb. 27, 2020 Hr’g Tr. 25:12-26:3; Feb. 28, 2020 Hr’g Tr. 5:11-18). *Second*, as noted

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While the Court is sympathetic to Defendants' framing of this issue, especially given DSLG's and Mr. Cohen's other failings in this litigation, it cannot conclude that counsel withheld this information in bad faith and for improper purpose *ab initio*. It appears from the record before the Court that Mr. Cohen and DSLG failed to conduct even basic due diligence in investigating the Bronx Action, which was already underway when this case was filed. And this dereliction was not the product of any concealment on Plaintiff's part; to the contrary, by May 2019, Plaintiff had disclosed the existence of the action to DSLG, noted that he intended to pursue intentional infliction of emotional distress damages against Sewell, and given DSLG enough information to have discovered the true nature and scope of his claims in the Bronx Action. (See Pl. Decl., Ex. P, R). Had only DSLG bothered to read the Bronx Action Complaint, counsel would have seen the obvious conflict between the damages claimed in this case and Plaintiff's sworn statements in the Bronx Action. This review would have afforded them several options: (i) they could have corrected or prevented Plaintiff's false and perjurious statements as to the nature of the Bronx Action and its relationship to this case; (ii) they could have attempted to circumscribe the emotional distress damages Plaintiff sought here; or (iii) they could have convinced Plaintiff not to pursue either or both of the two actions. Instead, the most charitable reading of the record for Plaintiff's counsel suggests that Mr. Cohen and DSLG did not review the Bronx Action Complaint or

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on the record, information about the Bronx Action was not readily available, and as such, even a diligent search would not have revealed this misrepresentation. (See Feb. 27, 2020 Hr'g Tr. 14:7-15:19).

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any other filings in the Bronx Action until the Thursday evening before trial. (See Feb. 27, 2020 Hr'g Tr. 4:3-6:17, 7:13-25; *see also* Dkt. #141).

While not accepting it as a complete justification, the Court largely credits Mr. Cohen's representation that "[a]t all times material, [he] was only generally aware of a fee dispute between Plaintiff and his prior attorney, and nothing further," which impression was reinforced, or at least not refuted, by Plaintiff throughout the litigation. (Dkt. #141; *see also* Pl. Decl., Ex. R (referring to the Bronx Action as one "against [Plaintiff's] previous attorney for fees"); Pl. Decl., Ex. P (disclosing an intent to pursue intentional infliction of emotional distress claims, but only against Sewell)). The Court also accepts Mr. Cohen's representation that he took his client's word that the Bronx Action was not relevant to this case (*see, e.g.*, Pl. Decl., Ex. B (instructing DSLG to object to DSLG's disclosure of Plaintiff's other litigation on relevance grounds)), even if it may have been incautious for Mr. Cohen to accept that representation without doing any due diligence. As such, although Mr. Cohen's initial failure to investigate this issue bespeaks deficiencies of professional responsibility — and although any legal or factual argument DSLG may offer in support of any decision to conceal this litigation is "meritless" — the Court cannot find that this initial failure was made in bad faith or for "improper purposes." *Reveson*, 221 F.3d at 79.

The Court's generosity of spirit is not boundless, however. Later in the litigation, Mr. Cohen and DSLG made what turned out to be material misrepresentations

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to the Court in their filings and then doubled down on these misrepresentations. From this point forward, DSLG’s “good faith” argument is no longer viable, and sanctions are appropriate both under the Court’s inherent powers and 28 U.S.C. § 1927.

In Plaintiff’s tenth motion *in limine* seeking to exclude evidence of his “unrelated litigation,” filed on January 13, 2020, Mr. Cohen wrote:

Plaintiff anticipates Defendants will seek to ask Plaintiff questions about a fee dispute between Plaintiff and his attorney in another case [*i.e.*, the Bronx Action], prior claims Plaintiff raised against a past employer in Russia, and Plaintiff’s workers[‘] compensation claims against Trader Joes. Defendants should be prohibited from discussing, asking questions relating to, or presenting evidence having to do with any unrelated litigation.

Simply put, any other litigation concerns different defendants, different allegations, and entirely unrelated incidents. Evidence of other litigation is irrelevant to any issue in this case and therefore, is inadmissible pursuant to FRE 401 and 402.

In the alternative, and should the evidence at issue be deemed relevant, it should still be excluded under Rule 403. The allegation central to other litigation would only serve to confuse

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the issues, mislead the jury, unfairly prejudice Plaintiff and would serve no legitimate purpose.

(Dkt. #86 at 7). By this point, Mr. Cohen and DSLG could no longer willfully blind themselves to the nature of their client's other litigations. After all, Federal Rule of Civil Procedure 11(b) was now implicated, which provides, in relevant part, that:

[b]y presenting to the court a pleading, written motion, or other paper ... an attorney ... 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

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- (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.

Fed. R. Civ. P. 11(b). The rule imposes on attorneys “an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing.” *Bus. Guides, Inc v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 551, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991).

Contrary to counsel’s representations in the tenth motion *in limine* that the Bronx Action concerned only “a fee dispute between Plaintiff and his attorney in another case,” was “irrelevant,” and that its disclosure “would serve no legitimate purpose,” the Bronx Action was directly relevant to — if not dispositive of — the emotional distress damages sought in this case. Mr. Cohen proactively made material misrepresentations in this motion *in limine* to gain a strategic advantage, as he sought to keep evidence of the Bronx Action and Plaintiff’s other litigation from the jury at trial. While the Court is foreclosed for procedural reasons from imposing sanctions under Rule 11 for this specific misrepresentation,<sup>15</sup> the

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15. For avoidance of doubt, the Court believes DSLG’s January 13, 2020 motion *in limine* seeking to exclude evidence of Plaintiff’s other litigation violated Rule 11 of the Federal Rules of Civil Procedure. However, the procedural prerequisites to impose sanctions under Rule 11 for this filing are not satisfied here, and therefore the Court is forced to rely on its inherent power and 28 U.S.C. § 1927. Ironically, it is only because of the misconduct of Plaintiff and his counsel in concealing and/or failing to disclose this

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fact remains that in signing the moving papers, Mr. Cohen attested that he had made the necessary inquiry into the factual allegations substantiating the claims. As such, any misrepresentations about the nature of, parties to, or scope of the Bronx Action from this filing forward could not have been made in good faith and could only have been made with improper purpose — for example, as here, to gain a strategic advantage at trial, with reckless disregard for the truth.

Therefore, sanctions are rightfully imposed to allow Defendants to recover those attorneys' fees and costs that were incurred after the filing of Plaintiff's tenth motion *in limine* on January 13, 2020, on account of Mr. Cohen's and DSLG's affirmative misrepresentations to the Court regarding the Bronx Action. After filing a motion *in limine* that sought to capitalize on Plaintiff's failures to disclose, Plaintiff's counsel then strove to exacerbate the problems faced by the Court and defense counsel because of that nondisclosure. Among other things, after the Court explicitly asked Plaintiff's counsel about the nature of the Bronx Action and whether Plaintiff was engaged in litigation against Fordham or against any parties other than Sewell, Plaintiff's counsel responded that he was not. (Feb. 21, 2020 Hr'g Tr. 20:1-22). In so doing, Mr. Cohen made another affirmative — and false — representation to the Court, and one that he made no effort to clarify or correct in the days and pretrial conferences that followed. Here, as with the motion *in limine*, the

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evidence that the Court and Defendants lacked information sufficient to cause them to invoke the procedures of Rule 11.

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Court can only conclude that Mr. Cohen engaged in this conduct with the improper purpose of gaining a strategic advantage at the expense of the truth: minimizing the Bronx Action to preclude it from coming in at trial. Nor can Mr. Cohen’s explanation — which amounts to willful inattention to the underlying facts — excuse his false statements, since he had previously certified to the Court that he had made the necessary inquiry into the factual allegations substantiating these claims. *See Fed. R. Civ. P. 11(b); see also Egerique v. Chowaiki*, No. 19 Civ. 3110 (KPF), 2020 U.S. Dist. LEXIS 73060, 2020 WL 1974228, at \*32 (S.D.N.Y. Apr. 24, 2020) (finding that counsel was “responsible for the inaccurate factual allegations” because “counsel signed the [filing], indicating that he made the necessary inquiry into the factual allegations substantiating the claims”).

Whether careless or strategic, Mr. Cohen’s failure to investigate resulted in unnecessary expenditures as the parties and the Court geared up for trial. Instead, it was *defense counsel* who finally notified the Court as to the truth — more than a month later and less than a week before trial was to begin. (*See* Dkt. #96).<sup>16</sup> But even after receiving and reviewing Defendants’ letter highlighting the misrepresentation and its obvious materiality to the instant litigation and impending trial, DSLG still did not investigate the Bronx Action. (Feb. 27, 2020 Hr’g Tr. 4:3-

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16. As explained above, uncovering the truth about the Bronx Action required defense counsel to physically go to the courthouse to view the records, and required the Court to reach out to the presiding judge to obtain records because the records were unavailable online. (*See* Feb. 27, 2020 Hr’g Tr. 14:7-15:19; Feb. 28, 2020 Hr’g Tr. 2:18-21).

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17). That was made clear in Mr. Cohen's colloquy with the Court at the conference held the next day:

THE COURT: I see. But, sir, I asked you on Friday a specific question about Fordham University and you spoke falsely to me. Why did you do that? And why is it that I have to, in order to keep this case honest, why am I out there digging up dockets from other cases? Why can't I trust that when I ask you a question about a litigation that you will answer me correctly and honestly about it.

MR. COHEN: Absolutely, your Honor. And when I spoke to you on Friday I really had no idea that Fordham was a named party in this suit. I just thought, you know, from speaking to my client, that there was a litigation between him and his former attorney. I had no idea that Fordham was named, that Fordham was involved.

(*Id.* at 7:13-25). Inasmuch as this is another instance in which Mr. Cohen made affirmative misrepresentations to the Court without undertaking the necessary inquiry into his client's claims — the Court can discern no colorable basis for this argument, nor good faith explanation for counsel's factual misrepresentation.

DSLG's misrepresentations did not end there, as the Court later learned that Plaintiff had two appeals pending before the First Department, rather than the

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one that Plaintiff's counsel had led the Court to believe. (See Dkt. #93; Feb. 21 Hr'g Tr. 18:13-15). When pressed on this misrepresentation, Mr. Cohen continued to plead ignorance, despite being on notice that he had already made several misrepresentations to the Court with respect to this very issue. (Feb. 28, 2020 Hr'g Tr. 3:3-25). At the same conference, on DSLG's advice, Plaintiff voluntary dismissed all his claims. (*Id.* at 6:2-18).

In sum, DSLG's misrepresentations to the Court — starting with the tenth motion *in limine*, continuing with an affirmative misrepresentation to the Court on February 21, 2020, and concluding with repeated failures to correct or investigate the very misrepresentations the Court had already brought to DSLG's attention — demonstrates a complete disregard for the judicial process. As a result of Plaintiff's counsel's conduct, the Court and the parties expended significant resources preparing for trial, investigating Plaintiff's other litigation, preparing letters about and repeatedly conferring about this litigation, and separating DSLG's misrepresentations from the truth. Because Mr. Cohen and DSLG "acted in bad faith, vexatiously, wantonly, [and] for oppressive reasons," *Chambers*, 501 U.S. at 45-46, the Court finds that sanctions should be imposed in order "that those who create unnecessary costs also bear them[,]" *Madison 92nd St. Assocs., LLC*, 2013 U.S. Dist. LEXIS 160290, 2013 WL 5913382, at \*12.

Therefore, the Court sanctions Mr. Cohen and DSLG pursuant to 28 U.S.C. § 1927 and its inherent powers to permit Defendants to recover attorneys' fees and costs

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incurred following the submission of tenth motion *in limine* filed on January 13, 2020, up through the voluntary dismissal of this case on February 28, 2020, as well as for the costs associated with seeking leave to file and filing the instant motion for sanctions.

**b. Collusion**

Turning now to Defendants' allegations of collusion between DSLG and Dr. Siegel, the Court finds that Defendants have not established the existence of a pattern or practice of misconduct. The record establishes that DSLG was reckless in working with Dr. Siegel in this case, that the latter's methodology is suspect, and that his professional opinion perhaps ought to be afforded little weight, but not that sanctions are warranted.

To support their argument, Defendants: (i) point to defense counsel's experience with DSLG and Mr. Siegel in a similar employment discrimination case (the "*Cooper* Matter"); (ii) cite to a handful of other cases where Dr. Siegel reviewed no medical records; (iii) note that Dr. Siegel has been retained by DSLG in more than 170 cases; and (iv) highlight that Dr. Siegel is purportedly related to a high-ranking partner at DSLG. (See, e.g., Def. Br. 14-18, 31-32). After carefully reviewing this evidence, the Court cannot conclusively determine that DSLG and Dr. Siegel have engaged in a fraudulent scheme spanning multiple litigations. For starters, the Court hesitates to find that the events surrounding Dr. Siegel's report and testimony in this case are identical to those in the *Cooper* matter, as

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Mr. Cohen was not involved in the *Cooper* Matter.<sup>17</sup> Nor can the Court confidently conclude that Dr. Siegel *never* reviews medical records from the smattering of cases Defendants cite. The Court believes this evidence may be considerable ammunition for cross-examination or a *Daubert* motion, but is not — without more — sufficient proof of a fraudulent conspiracy warranting sanctions.

While the Court cannot on this record find that DSLG and Dr. Siegel operated a fraudulent scheme, it pauses briefly to note that DSLG recklessly or willfully failed to disclose relevant information to Dr. Siegel, and then failed to correct those omissions even after the Court ordered the same information to be disclosed to Defendants. (See Siegel Dep. 28:21-23, 43:8-19; *see also id.* at 72:12-81:10 (denying that Dr. Siegel reviewed records from each mental health and medical care provider disclosed to Defendants at the time of his deposition)).<sup>18</sup> That is, Plaintiff and DSLG disclosed only favorable facts to Dr. Siegel and concealed all other relevant evidence, even after the Court compelled Plaintiff to disclose information regarding other medical providers to Defendants, and

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17. Furthermore, Judge Stein declined to sanction DSLG for conduct arising out of the purportedly identical misconduct in the *Cooper* Matter. *See Cooper v. Upstairs, Downstairs of New York, Inc.*, No. 18 Civ. 6426 (SHS), 2021 U.S. Dist. LEXIS 59679, 2021 WL 1172477, at \*8 (S.D.N.Y. Mar. 29, 2021).

18. As noted above, prior to Dr. Siegel's deposition, on October 29, 2019, he issued an addendum to the Siegel Report stating that his "office requested [Plaintiff's] medical records from the Derek Smith Law Group but received none." (Shanahan Reply Decl., Ex. AA). Dr. Siegel did not issue any further addenda to his report.

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even after it explicitly found their relevance to Plaintiff's emotional distress claims. Still and all, Dr. Siegel's failure to obtain relevant information, his "troubling" business model, and his suspect methodology are all suitable fodder for cross-examination, but not sufficiently "improper," individually or in the aggregate, to warrant sanctions. (Nov. 26, 2019 Hr'g Tr. 11:8-16, 29:24-30:11).

**c. Obstruction**

The Court next addresses Defendants' argument that Mr. Cohen's and DSLG's conduct throughout the course of this litigation served to obstruct discovery for improper purposes and in bad faith. (*See* Def. Br. 4-14, 32-33; Def. Reply 8-10). In this regard, Defendants allege that Plaintiff and his counsel obstructed discovery by withholding relevant and responsive information about Plaintiff's: (i) asylum application; (ii) workers' compensation claim; (iii) medical service providers other than the Initial Providers; and (iv) medical records. (*See id.*).<sup>19</sup> In opposition, DSLG argues that it did not advance meritless claims in discovery, did not act with improper purpose in objecting to Defendants' discovery requests, and complied with the Court's orders compelling the production of discovery. (*See* DSLG Opp. 23-24, 28-30; *see also, e.g.*, Dkt. #158). Relatedly, DSLG observes that the

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19. Defendants also allege obstruction in the concealment of the Bronx Action, which issue is discussed *supra*. The Court declines to hold Plaintiff's counsel responsible for failing to disclose information about the workers' compensation claim because the record is not clear as to whether Plaintiff disclosed this information to counsel before disclosing it for the first time at his deposition.

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Court has already declined to sanction Plaintiff or DSLG for some of the same conduct at issue here. (See DSLG Opp. 20; *see also*, e.g., Dkt. #121).

As an initial matter, the Court rejects DSLG's argument that Defendants are improperly seeking reconsideration of the Court's prior denials of sanctions motions for Plaintiff's failures to produce various HIPAA releases, medical care providers, and his asylum application. (See DSLG Opp. 20 & n.43). The Court denied each of those motions based on the record before the Court at that time. After reviewing the parties' submissions in connection with the instant motion, the Court understands Defendants to be aggregating Plaintiff's and DSLG's repeated failures to disclose relevant information and asking the Court to consider this misconduct in its totality. The Court will do so; to do otherwise would only serve to incentivize accretive misconduct.<sup>20</sup>

Reviewing the record in full, the Court finds that DSLG's obstructionist conduct was "entirely without color." *Scivantage*, 564 F.3d at 114. Specifically, the record establishes a pattern of reckless obstruction in discovery, as Defendants were forced to file multiple motions to obtain basic information about this litigation that should have been disclosed: (i) in Plaintiff's Rule 26(a) initial disclosures, (ii) in Plaintiff's initial responses to Defendants' first requests for production and interrogatories, and (iii) in compliance

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20. As it happens, the sanctions the Court imposes in this Opinion are designed to compensate Defendants, not for the various discovery disputes in the matter, but rather for the protraction and subversion of the litigation process in the runup to the trial.

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with Court orders granting Defendants' motions to compel. As but one example, despite interrogatories, requests for productions, and at least one Court order compelling production, Plaintiff's counsel did not disclose several medical care providers until Plaintiff's deposition in September 2019. (See, e.g., Oct. 15, 2019 Hr'g Tr. 8:12-16). Yet the record demonstrates that Plaintiff supplied DSLG with information about these providers as early as May 2019. (Pl. Decl., Ex. T). Had Mr. Cohen or DSLG simply looked at the records for any of these undisclosed providers, it would have been immediately apparent that the information was relevant to Plaintiff's claims and responsive to Defendants' discovery requests. (See, e.g., Oct. 15, 2019 Hr'g Tr. 9:19-10:12 (overruling DSLG's objections to production of previously undisclosed medical records and workers' compensation claims)).

Similarly, a review of Plaintiff's asylum application demonstrates that DSLG's arguments in opposition to its disclosure and in opposition to the production of HIPAA releases for medical care providers referenced in the application either were frivolous or deliberately misrepresented the contents of the asylum application, as the application clearly implicated Plaintiff's emotional distress claims. (*Compare* Dkt. #39 (Plaintiff's objections to the production of the asylum application), *and* Dkt. #47 (Plaintiff's objections to the production of HIPAA releases), *with* Dkt. #48-1 (excerpt from Plaintiff's asylum application making extensive claims regarding Plaintiff's physical and mental health); *see also* Aug. 6, 2019 Hr'g Tr. 18:23-19:14). Thus, it is clear to this Court that DSLG "acted 'without a colorable basis,'" *Boies*,

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*Schiller & Flexner LLP*, 603 F. App'x at 20 (quoting *Enmon v. Prospect Cap. Corp.*, 675 F.3d 138, 143 (2d Cir. 2012)), in consistently failing to disclose obviously relevant information and documents in its possession.<sup>21</sup>

However, it is less clear that DSLG acted with “improper motive” or for “improper purposes,” as is typically required for a showing of bad faith in this context. *See Scivantage*, 564 F.3d at 114; *Revson*, 221 F.3d at 79. While Defendants see DSLG’s obstruction as part of an overarching fraudulent scheme to disclose only favorable facts (see, e.g., Def. Br. 25), the Court perceives more incompetence than malevolence in DSLG’s conduct. That is, rather than affirmatively concealing unfavorable documents, it appears instead that Mr. Cohen and DSLG: (i) failed to conduct any due diligence; (ii) failed to review the contents of documents and as such had no knowledge as to whether documents were in fact relevant; and (iii) deferred to Plaintiff’s characterization of evidence and relevant documents without independently reviewing or verifying such claims. Stated colloquially, Mr. Cohen

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21. The Court categorically rejects DSLG’s argument that it cannot be sanctioned because it eventually produced HIPAA releases and Plaintiff’s asylum application in compliance with Court orders. (DSLG Opp. 23-24, 26-31). Obstruction with respect to some documents is not obviated by the production of other documents, especially when those documents were only produced over the objections of the sanctioned party and pursuant to a Court order to compel production. *See Nittolo v. Brand*, 96 F.R.D. 672, 677 (S.D.N.Y. 1983) (“Plaintiff may not properly escape the consequences of his own wrongful conduct because the defendants were diligent and persistent enough to overcome the obstacles which he placed in their path.”).

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and DSLG were asleep at the wheel at various points in this case, allowing Plaintiff to intentionally withhold and conceal relevant information, including his medical history, employment history, and litigation history. While the Court finds counsel's insouciance to tack extremely close to bad faith, “[t]he power to assess the fees against an attorney should be exercised with restraint.” *Colucci v. N.Y. Times Co.*, 533 F. Supp. 1011, 1014 (S.D.N.Y. 1982). For that reason, the Court declines to impose sanctions for this conduct pursuant to its inherent powers and 28 U.S.C. § 1927.<sup>22</sup>

Nevertheless, the record in this case reveals a concerning disregard for the judicial process, as DSLG repeatedly failed to disclose highly relevant material throughout discovery. There must be a line at which counsel's inattention to basic requirements of litigation — for example, failing to conduct due diligence before initiating an action or recklessly advancing factually unfounded arguments — becomes sanctionable, even if such misconduct is more akin to willful blindness than to

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22. For the same reason, the Court does not believe sanctions are warranted pursuant to Fed. R. Civ. P. 37 for this obstruction. *See Arrowhead Capital Fin., Ltd. v. Seven Arts Entm't, Inc.*, No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545, 2016 WL 4991623, at \*19-20 (S.D.N.Y. Sept. 16, 2016) (stressing the importance of willfulness in determining whether Rule 37 sanctions are justified), *opinion withdrawn in part on reconsideration*, No. 14 Civ. 6512 (KPF), 2017 U.S. Dist. LEXIS 66551, 2017 WL 1653568 (S.D.N.Y. May 2, 2017), *and aff'd*, 739 F. App'x 701 (2d Cir. 2018) (summary order). Additionally, Rule 11 was amended in 1993 to exclude sanctions arising from discovery disputes, and thus Rule 11 sanctions are not proper here. *See* Fed. R. Civ. P. 11(d).

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deliberate fraud. The Court believes the record does not adequately establish that Mr. Cohen and DSLG have been apprised of this line, because, to the Court's knowledge, neither Mr. Cohen nor DSLG has been warned that future misconduct of this nature will result in sanctions. This Court now does.

This Opinion serves as a formal warning that the conduct in this case exists in the gray area between incompetence and bad faith. *See Penthouse International, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371, 388 (2d Cir. 1981) ("[I]t is questionable whether [counsel] intentionally ... misrepresented to the court material facts with respect to the existence of the relevant ... records. It is conceivable that he was misled by his client. However, the record does support ... [the] finding that [counsel] ... was grossly negligent in not pursuing the matter more diligently to ascertain the facts from his client[.]"); *cf. Jimenez v. City of New York*, 166 F. Supp. 3d 426, 431-32 (S.D.N.Y. 2016) (finding that attorney acted in bad faith where he demonstrated "willful blindness" to "absolutely fanciful" statements by his client). Therefore, although the Court does not now sanction Mr. Cohen or DSLG for obstructive conduct that it believes is sanctionable, it warns them that future misconduct of this kind will be considered sanctionable by this Court and sister courts in this District.

## **2. The Court Sanctions Plaintiff**

While the misconduct of Plaintiff's former counsel may be attributable to a combination of recklessness

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and indifference, the record reveals a much more willful pattern of obstruction and deception carried out by Plaintiff. Plaintiff consistently and systematically concealed relevant and unfavorable facts and documents: first from his former counsel, and later from Dr. Siegel, Defendants, and the Court. For the reasons that follow, the Court sanctions Plaintiff pursuant to Rule 37 of the Federal Rules of Civil Procedure and the Court's inherent powers for misconduct related to obstruction in discovery, including misrepresentations regarding the Bronx Action.

Defendants argue that Plaintiff and his former counsel waged a systematic campaign of obstruction by repeatedly failing to disclose relevant information throughout the course of litigation, including: (i) Plaintiff's medical care providers (beyond the Initial Providers); (ii) Plaintiff's asylum application; (iii) Plaintiff's workers' compensation claim; and (iv) information about Plaintiff's other litigation, including the Bronx Action. (See Def. Br. 23-24; Def. Sur-Reply 2-6, 8). Defendants also argue that Plaintiff's failure to disclose this same information to Dr. Siegel is further evidence of Plaintiff's obstructive scheme. (Def. Sur-Reply 9, 13-14). This obstruction led to serious and completely unnecessary expenditures of time and resources, both in Defendants' repeated motions to compel and, more importantly, in Plaintiff's unreasonable maintenance of factually and legally unsupportable claims.

Evidence of Plaintiff's efforts to cherry-pick favorable facts for disclosure is clear from the very beginning of this case. For example, Plaintiff's April 2019 disclosures to his counsel in response to Defendants' initial discovery

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requests demonstrate that he only disclosed to DSLG the Initial Providers — providers he only saw after leaving employment with the Club and with whom he largely discussed the claims asserted in this case — while proffering formalistic legal objections to the disclosure of any other providers in responding to DSLG's inquiries. (See Pl. Decl., Ex. B). DSLG's incomplete response to Interrogatory 4 and the motion practice that followed is the direct result of Plaintiff's failure to produce a full list of his medical care providers to his attorneys for them to determine which were relevant.<sup>23</sup>

Once the compelled documents were actually produced — including the asylum application, the names of Plaintiff's undisclosed medical care providers, and the medical records from those providers — their obvious relevance to Plaintiff's emotional distress damages became apparent. *Cf. Arrowhead Capital Fin., Ltd. v. Seven Arts Entm't, Inc.*, No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545, 2016 WL 4991623, at \*19-20 (S.D.N.Y. Sept. 16, 2016) (sanctioning litigant where litigant repeatedly obstructed discovery by baselessly claiming information sought was irrelevant), *opinion*

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23. As noted above, Plaintiff did disclose additional care providers in May 2019 after initial discovery responses were served and after the Court compelled production of Plaintiff's asylum application. (See Pl. Decl., Ex. T). The asylum application revealed several medical providers that Plaintiff failed to disclose to DSLG, highlighting that Plaintiff saw fit to disclose additional providers to his lawyers only after he had already been caught concealing information from them. DSLG's failure to supplement Plaintiff's initial responses with this additional information is discussed *supra*.

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*withdrawn in part on reconsideration on other grounds*, No. 14 Civ. 6512 (KPF), 2017 U.S. Dist. LEXIS 66551, 2017 WL 1653568 (S.D.N.Y. May 2, 2017), and *aff'd*, 739 F. App'x 701 (2d Cir. 2018) (summary order). Furthermore, the Court's review of Plaintiff's disclosures to his former counsel — submitted by Plaintiff in opposition to the instant motion — show him directing counsel to object to the production of information and documents that he knew or should have known were relevant (especially given his legal training), offering flimsy legal arguments in support of his instructions to object, and misleading his counsel as to the contents of certain of the documents he sought to shield from disclosure. (See Pl. Decl., Ex. B, C, F).

Further evidence of Plaintiff's concerted effort to shield relevant facts and documents from disclosure is contained in his selective disclosures to Dr. Siegel. Plaintiff failed to disclose information about his employment history, medical history, mental health history, and litigation history in his interview with Dr. Siegel in early 2019. (See, e.g., Siegel Dep. 61:2-62:12, 72:12-81:20, 91:22-92:3, 96:8-97:8, 98:8-101:9).<sup>24</sup> Similarly, Plaintiff failed to disclose his workers' compensation claim

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24. In fact, Dr. Siegel testified that Plaintiff lied to him about his litigation history (see Siegel Dep. 58:6-59:20, 73:17-75:17, 105:6-106:18), and conceded that he would need to consider reevaluating his expert opinion after learning of the all of the information concealed from him by Plaintiff (*id.* at 142:18-143:3). While Plaintiff's lies to his own expert are not themselves sanctionable, the Court agrees with Defendants that they are strong evidence of Plaintiff's scheme from the outset of this litigation to shape the record favorably by concealing unfavorable information.

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to Dr. Siegel and to Defendants, wherein Plaintiff claimed carpal tunnel syndrome that rendered him unable to work (or able to work only limited jobs). This information was directly responsive to discovery requests regarding mitigation and was clearly relevant to Plaintiff's economic damages claim, as witnessed by the fact that the claim was abandoned shortly after the revelation of the spurious workers' compensation claim. (*See* Def. Trial Ex. S; Dkt. #69, 73-12; *see also* Nov. 26, 2019 Hr'g Tr. 22:21-24:17).

Plaintiff's misconduct also included efforts to conceal the true nature of his claims in the Bronx Action. Plaintiff submitted evidence in opposition to the instant motion demonstrating that he *did* disclose basic information about the Bronx Action to DSLG by mid-2019. (*See* Pl. Decl., Ex. R; *see also* Pl. Opp. 15-18). However, Plaintiff's submissions also show him perpetuating the false narrative that the Bronx Action was solely against former counsel and had no relevance to the instant litigation. For example, Plaintiff emailed DSLG to note that he intended to pursue intentional infliction of emotional distress damages — but he also specified that the case was to be brought against Sewell over a fee dispute, thereby concealing the involvement of other litigants (such as Fordham) and failing to disclose that the emotional distress claims would explicitly conflict with those asserted here. (*See* Pl. Decl., Ex. P, R). Similarly, Plaintiff never corrected statements made by Mr. Cohen to the Court and Defendants to clarify that the Bronx Action included two appeals, litigants beyond Sewell, and emotional distress claims that conflicted with his claims in this case. (*See generally* Pl. Dep.; *see also* Pl. Decl., Ex. R).

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Finally, Plaintiff's misconduct is evident from his deceptive and perjurious deposition testimony. Specifically, Plaintiff gave misleading testimony about the Bronx Action, volunteering that he had initiated the lawsuit against Sewell alleging fraud arising out of a dispute over attorneys' fees, and that he was in the process of appealing the dismissal of his suit against Sewell to the First Department. (Pl. Dep. 131:18-136:13; *see also id.* at 175:8-15, 272:7-17). Plaintiff conspicuously neglected to mention that: (i) he was also suing Fordham and other defendants; (ii) he was seeking to recover for intentional infliction of emotional distress; (iii) he was also actively pursuing an appeal as to the Fordham defendants; and (iv) his theory of the case in the Bronx Action (particularly on the issue of emotional distress damages) directly conflicted with his claims in this litigation.

In his opposition to the instant motion, Plaintiff states that "at the trial" he "was never going to say that in 2018, ... Sewell's acts did not contribute to [his] health damages initially caused by Defendants[.]" (Pl. Decl. ¶ 15). However, this statement is directly contradicted by Plaintiff's deposition testimony, wherein he testified that the Bronx Action had no impact on the damages sought in this case:

Q. Is it still your testimony that your dispute with your former attorney has had no impact — has no impact on the emotional damage you claim to have suffered in this case? ...

A. It is unpleasant, but I believe it did not cause emotional damage.

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Q. Did it cause you emotional suffering? ...

A. Not to the level of suffering. But we don't like lawsuits, sure.

(Pl. Dep. 325:3-15). In that same proceeding, Plaintiff affirmatively stated that there were no other factors that contributed to his emotional distress:

Q. So my question to you is, are there other factors contributing to the alleged emotional distress that you claim to be suffering from? ...

A. The answer is no.

(*Id.* at 326:12-17). Rather than suggesting that Plaintiff would come clean at trial, and suddenly disclose that his emotional distress damages were circumscribed by those attributable to the Bronx Action defendants, the record instead suggests that Plaintiff would have persisted in seeking damages for the same purported emotional distress in both cases and that he perjured himself at his deposition to conceal that fact. *See Burrell v. AT&T Corp.*, 282 F. App'x 66, 67 (2d Cir. 2008) (summary order) (affirming court's sanctioning of litigant for, *inter alia*, "fail[ing] to disclose his involvement in a number of other lawsuits in response to questions at his depositions" and "testif[ying] to certain facts] ... at his deposition that [were] contradicted by sworn statements he made in connection with another lawsuit").

The efforts just described easily rise to the level of "willful noncompliance" in the context of Rule 37

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sanctions, *Agiwal*, 555 F.3d at 302, as the record demonstrates that, among other misconduct, Plaintiff: (i) initially withheld unfavorable facts from his attorney; (ii) disclosed some of that information only after the Court compelled the production of his asylum application, revealing his deception; (iii) repeatedly advanced baseless legal arguments that the information he sought to conceal was irrelevant; (iv) misled the Court and his counsel as to the nature and scope of the Bronx Action; (v) lied to his own expert witness to ensure he received a favorable expert report; and (vi) perjured himself at his deposition. It is equally obvious that Plaintiff's extensive campaign of obstruction and misinformation was waged for the improper purpose of precluding the introduction of any fact that could harm his case, no matter how relevant.

This misconduct persisted throughout the course of this case, and Plaintiff's subsequent compliance with certain of the Court's orders compelling production does not obviate the fact that Defendants were forced to file multiple motions to compel. *Accord Nittolo v. Brand*, 96 F.R.D. 672, 676-77 (S.D.N.Y. 1983) ("Nor is it of any moment that, notwithstanding plaintiff's obstructive efforts, the defendants were still able to obtain some of the true facts. The sanctions imposed by Rule 37 for obstructing or failing to comply with discovery procedures would be hollow indeed if they could be imposed only on those whose efforts at concealment proved to be successful."). With respect to the efficacy of lesser sanctions and whether Plaintiff had been warned that further obstruction would lead to sanctions, the Court believes that the years-long record of intentional obstruction, coupled with the Court's previous decisions to give Plaintiff and his counsel the benefit of

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the doubt in denying without prejudice past motions for sanctions (*see, e.g.*, Dkt. #65; Nov. 26, 2019 Hr’g Tr. 29:22-30:25), afforded Plaintiff sufficient notice and opportunity to comply with his discovery obligations.<sup>25</sup>

Turning to the imposition of sanctions under its inherent power, the Court finds that, considered as a whole, Plaintiff’s conduct was entirely without color — as each motion to compel revealed that Plaintiff’s legal arguments against disclosure were completely unsupported by the facts. Plaintiff’s misconduct led to extensive and unnecessary litigation in this case: after the disclosure of the workers’ compensation claim, Plaintiff ceased to pursue economic damages (*see* Dkt. #69, 73:12; *see also* Nov. 26, 2019 Hr’g Tr. 22:21-24:17); after the revelation that Plaintiff lied to Dr. Siegel (which revelation, notably, emerged only after motion practice over Dr. Siegel’s consulting fees), Plaintiff’s counsel declined to call Dr. Siegel as a trial witness (*see* Feb. 25, 2020 Hr’g Tr. 12:5-13); and after a series of last-minute disclosures regarding the Bronx Action, Plaintiff dropped his emotional distress claims (Dkt. #99) and then voluntarily dismissed the case in its entirety (Feb. 28, 2020 Hr’g Tr. 6:4-18). Had Plaintiff disclosed relevant information in response to discovery

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25. Indeed, Plaintiff to this very day continues to assert that he has done no wrong in obstructing discovery throughout the course of this litigation, maintaining that evidence of his medical history, mental health history, employment history, and litigation history has no relevance to his case (*see generally* Pl. Opp.; Pl. Decl.), despite multiple Court orders to the contrary. The Court declines to reconsider its many decisions already addressing the relevance of the information and documents that Plaintiff attempted to shield from disclosure and that he continues to claim are not relevant.

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demands at the outset, including the truth about the Bronx Action, it is certain that this litigation would have concluded years ago and at significantly less expense. *Cf. Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 40 (2d Cir. 1993) (“Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.”).

In sum, the Court believes sanctions are warranted to compensate Defendants for Plaintiff’s “abuse [of] the judicial process.” *Chambers*, 501 U.S. at 45; *see also Goodyear Tire & Rubber Co v. Haeger*, U.S. , 137 S. Ct. 1178, 1186, 197 L. Ed. 2d 585 (2017). The sanctions period for Plaintiff begins on May 2, 2019, the date Plaintiff responded to Defendants’ initial discovery requests, wherein Plaintiff’s first intentional act of misconduct — concealing relevant information from his attorney — was initially communicated to Defendants. The sanctions period continues through the voluntary dismissal of this case, on February 28, 2020, and it also includes the cost of Defendants’ response to Plaintiff’s *pro se* opposition to the instant motion.<sup>26</sup>

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26. Because DSLG did not oppose Defendants’ motion for sanctions on Plaintiff’s behalf (*see* DSLG Opp. 1 n.1) and because Plaintiff was not involved in litigating the instant motion until the March 17, 2021 conference where Plaintiff asserted his intent to oppose Defendants’ motion *pro se*, the Court declines to sanction Plaintiff for the period between the voluntary dismissal of the case on February 28, 2020, and Plaintiff’s appearance at the March 17, 2021 conference. For clarity, the Court specifies that the sanctions period for Plaintiff is from May 2, 2019, to February 28, 2020, and from March 17, 2021, to the present.

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Because the Court sanctions Plaintiff and DSLG for the period of January 13, 2020, through the voluntary dismissal of Plaintiff's claims on February 28, 2020, and from March 17, 2021, to the present, Plaintiff and DSLG are jointly and severally liable for fees and costs covering those periods.

**CONCLUSION**

For the foregoing reasons, Defendants' motion is GRANTED. Defendants may submit to the Court, within 30 days of the date of this Opinion, contemporaneous billing records, other documented expenses, and supporting papers in support of an award of fees and costs. Plaintiff and DSLG may each file an opposition, if any, within 30 days of Defendants' submission. Defendants may file a single response within 14 days of receiving the later of Plaintiff's or DSLG's opposition. The Clerk of Court is directed to terminate the motions pending at docket entries 116 and 125. The Clerk of Court is further directed to lift the stay previously imposed on March 17, 2021 (see Minute Entry for March 17, 2021), and to restore this case to the active docket.

SO ORDERED.

Dated: July 1, 2021  
New York, New York

/s/ Katherine Polk Failla  
KATHERINE POLK  
FAILLA  
United States District  
Judge

**APPENDIX E — ORDER DENYING REHEARING  
OF THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT, FILED MAY 28, 2024**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of May, two thousand twenty-four.

Docket No: 23-1015

DEREK SMITH LAW GROUP, PLLC,  
JOHNMACK COHEN,

*Appellants,*

JOHN DOE 1,

*Plaintiff-Counter-Defendant,*

v.

EAST SIDE CLUB, LLC,  
JOHN DOE 2, JOHN DOE 3,

*Defendants-Counter-Claimants-Appellees.*

**ORDER**

Appellants, Johnmack Cohen and Derek Smith Law Group, PLLC, filed a petition for panel rehearing, or, in

*Appendix E*

the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe  
Catherine O'Hagan Wolfe, Clerk