United States Court of Appeals

for the

First Circuit

Case No. 21-1069

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN; ARNOLD HENRIQUEZ; MICHAEL T. COHN; WILLIAM R. TAYLOR; RICHARD A. SUTHERLAND,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC; DOES 1-20,

Defendants,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Interested Party-Appellant,

v.

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP

Interested Parties-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN CASE NOS. 1:11-CV-10230-MLW; 1:11-CV-12049-MLW; AND 1:12-CV-11698-MLW
HON. MARK L. WOLF, U.S. DISTRICT JUDGE

INTERESTED PARTY-APPELLANT'S RESPONSE TO THE AMICUS BRIEF FILED BY HAMILTON LINCOLN LAW INSTITUTE

SAMUEL ISSACHAROFF
40 Washington Square South
New York, New York 10012
(212) 998-6580
si13@nyu.edu

Counsel for Interested Party-Appellant Lieff Cabraser Heimann & Bernstein, LLP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Introduction

The Hamilton Lincoln Law Institute's ("HLLI") *amicus* brief in support of the district court's judgment fails to acknowledge two core realities of this appeal: first, the district court found a Rule 11 violation by Lieff, and second, such a finding (even without accompanying monetary sanction) is appealable. HLLI thus begins with two fundamental errors concerning the nature of this appeal, and the conditions for challenging a Rule 11 finding.

First, and foremost, HLLI sees this case through the prism of its obsession with fees paid to plaintiffs' counsel in successful class actions. The *amicus* brief begins with the claim that this is "an *ex parte* appeal by one firm of a court's Rule 23(h) order awarding over $60 million of fees and costs[.]" Br.[1] at 1. This is repeated in HLLI's misstatement of the standard of review as being the abuse of discretion that attaches to a fee determination. Br. at 19.

Appellant could not have been more clear that there is no appeal taken from either the final resolution of the case or the total fees awarded. As Appellant's brief begins: "There is no appeal taken from the total award of fees except to the reduced fee award to Lieff as a form of punishment for claimed improprieties." App. Br. at 2. The only issue before this Court on appeal is the propriety of the district court's

[1] "Br." refers to the Brief of *Amicus Curiae* Hamilton Lincoln Law Institute Supporting Absent Appellees in Favor of Affirmance, Aug. 13, 2021, Case No. 21-1069 (1st Cir.).

invocation of Rule 11 and claimed ethical violations to both categorize Appellant's conduct and to lower its ultimate fee award. Neither the merits resolution of the case nor the award of 20 percent as the fee basis is being challenged. Other than the Rule 11 and ethical issues, the case in chief is over and resolved and needs only the final administration of the remedy.

Second, because HLLI sees this case only as a matter of attorneys' fees, it does not appreciate the important procedural and substantive protections that must apply to *sua sponte* invocation of Rule 11 by a district court. For HLLI, the absence of a formal "fee reduction or other monetary penalty" means Rule 11 does not apply and there is no appealable action by the court below. Br. at 23. Because the "district court imposed no monetary sanction on Lieff," the entirety of this appeal, per HLLI, is "based on a ruling that never happened." Br. at 20.

HLLI's claim that Rule 11 is reserved only for monetary penalties can only be asserted because it fails to cite, even once, the Court's leading opinion on this point, *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33 (1st Cir. 2005). In *Young*, this Court addressed the seriousness of Rule 11 consequences in the context of attorneys who were denied ongoing *pro hac vice* admission and received "a public censure" of one attorney, an admonition as to another, and as to a third, no action beside the Rule 11 finding itself; there were no monetary sanctions against

any of them. *Id.* at 38. Regardless of the form of the sanction, this Court had jurisdiction over the appeal and reversed as to all adverse findings. *Id.* at 41-42.

HLLI's omission is not simple oversight.[2] Lieff cited *Young* in its statement of jurisdiction and repeatedly throughout its brief. As stated in Lieff's opening brief, this appeal squarely concerns the district court's Rule 11 finding against Lieff (notwithstanding the district court's attempt to minimize or rewrite this portion of the case's history in a transparent attempt to avoid appellate scrutiny), and turns significantly on the importance of Rule 11's due process requirements when a district court acts as both inquisitor and adjudicator.

The district court's unequivocal failure to adhere to those requirements with respect to Lieff is the procedural core of this appeal and is, for the most part, unaddressed by HLLI. As set out in Appellant's brief, the procedural defects were then coupled with the district court's clear error in concluding that Lieff: (a) jointly "misrepresented" an academic study which the author himself said was correctly represented, which the district court was given but didn't look at, and which the district court didn't even rely on when making its initial fee award;[3] (b) "facilitated"

---

[2] There is a certain irony in HLLI filing a 53-page brief on the question of sanctions and a counsel's duty of candor to the court in which it does not cite the Court's leading opinion on the precise subject of this appeal – even more so since that opinion specifically distinguished the older authority on which HLLI *does* rely, for the same reasons that apply here.

[3] As discussed in Lieff's opening brief, the district court exclusively cited the law and case precedents within the First Circuit and beyond when determining, in its

co-counsel's violation of an ethical rule concerning payments to a lawyer who had not formally appeared in the case even though Lieff itself was misled as to the role of that lawyer in the case; and (c) falsely and misleadingly stated in its fee declaration that its billing rates were "regularly charged"[4] to paying clients, even though that phrase appears nowhere in Lieff's declaration. HLLI fails to adequately address any of these arguments, instead relying on misrenderings of the record and broad generalities about what 'should' have constituted rough notice under Rule 11.

In short, HLLI has submitted an *amicus* brief supporting a different judgment, concerning a different appeal, citing different law, and relating to a recasting of the facts already developed by the Special Master and even the court below. For the reasons discussed in Appellant's opening brief, further explained below, the district court's rulings should be reversed, and Lieff's requested relief granted.

Argument

I. A Rule 11 Finding, By Itself, Is Appealable Under This Court's Jurisprudence – No Accompanying Monetary Sanction is Necessary.

The controlling law in this Circuit is that a Rule 11 finding against counsel by a district court is appealable. "In our view," the Court wrote in *Young*, "Rule 11

initial fee award, that a 25 percent attorneys' fee was reasonable – the district court made no mention whatsoever of the Fitzpatrick study. *See* App. Br. at 45-46.

[4] *See* App. Br. at 26.

findings are appealable, being distinguishable from mere criticism[.]"[5] *Young*, 404 F.3d at 38. In so holding, the Court specifically distinguished *In re Williams*, 156 F.3d 86 (1st Cir. 1998), the principal authority on which HLLI relies, which held that a "jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a[n appealable] sanction." *Young*, 404 F.3d at 38 n.3 (citing *Williams*, 156 F.3d at 92). And while a court's "unflattering statements" alone may not constitute an appealable injury, particularly where they do not "bear . . . on the analytical foundations of the dispositive order or impact the result,"[6] those qualifications do not apply here: the court below did not simply engage in unflattering statements, it found a Rule 11 violation along with other "deficien[cies]"[7] by Lieff, and ordered that Lieff disgorge money as a consequence of those findings.

The district court's findings against Lieff are precisely the kind of "adverse" findings that can be "binding upon" Lieff in future litigation, making them distinguishable from mere "unflatter[y]." *Id.* at 30. Here, as in *United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000), which the Court cited favorably in

---

[5] As noted in Lieff's opening brief, the distinguishability of Rule 11 findings from mere judicial criticism is borne out in the daily practice of law firms such as Lieff who derive much of their business from representing public institutions, the latter of whom routinely inquire (as part of their hiring process) into law firms' Rule 11 histories. *See* App. Br. at 41.

[6] *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 29 (1st Cir. 2018).

[7] App. Br. at 7, 26, 30-31, 40-41.

Young,[8] the "district court . . . did more than use 'words alone' or render 'routine judicial commentary.' Rather, the district court made a finding and reached a legal conclusion that [counsel] . . . violated a specific rule of ethical conduct" and/or civil procedure. Here, as in *Talao*, "[i]f the court's formal finding is permitted to stand, it is likely to stigmatize [counsel] among [their] colleagues and potentially could have a serious detrimental effect on [their] career." 222 F.3d at 1138. "Such a finding, *per se*, constitutes a sanction"[9] – no monetary component is needed to make it appealable. *Precision Specialty Metals, Inc. v. U.S.*, 315 F.3d 1346, 1352-53 (Fed. Cir. 2003) ("A lawyer's reputation is one of his most important professional assets. Indeed. . . a [judicial] reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction.").[10]

HLLI's argument that the district court might have invoked its "inherent power to impose sanctions" rather than Rule 11 tries to make Rule 11's due process requirements a dead letter. This is wrong. Even under the court's "inherent powers," a "court must . . . exercise caution" and "comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees [if any]." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). "Furthermore," the Supreme

[8] *Young*, 404 F.3d at 38 n.3.
[9] *Id.*
[10] *Precision Specialty Metals* is also favorably cited by the Court in *Young*, 404 F.3d at 38 n.3.

Court continued, "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Id.* *Chambers* focused on inherent powers in a diversity action because the district court there specifically declined to find a violation of Rule 11. Here, by contrast, the district court expressly invoked Rule 11 to address the conduct of Lieff and to justify its final fee allocation in a case arising under federal law. Both the district court and HLLI now point to a court's "inherent power" as a trump card, after the fact, that dispenses with the need for the Rule and all of its procedural rigor. But as the Supreme Court explained, even the court's "inherent power" requires adequate due process – which, for the reasons Lieff argued at length in its opening brief, was not provided here. Even if there some laxer standard under a court's inherent powers to sanction – something that HLLI asserts without providing any authority – the fact is that the district court did invoke Rule 11 as the basis for one or more findings as to Lieff.[11]

For HLLI, none of the processes specified in Rule 11 matter "because neither of the two Rule 11 findings resulted in a fee reduction or other monetary penalty."

[11] Indeed, HLLI acknowledges as much, in an apparent effort to have its cake and eat it too. On the one hand, for purposes of arguing against Appellant's standing to appeal, HLLI denies that the district court's judgment included any appealable Rule 11 finding. Br. at 20-21. But on the other hand, for the apparent purpose of simply being able to say so in future challenges to fee awards, HLLI asserts that the district court *did* find that "Lieff failed to meet Rule 11 standards" – in "two ways," no less. Br. at 21.

Br. at 23. This claim cannot be reconciled with *Young*, and HLLI chooses to simply ignore binding Circuit law rather than even attempt to address it. Instead, HLLI argues that this Court should be satisfied that "the district court gave notice to Lieff of its misconduct years in advance." Br. at 21. As set out in Appellant's opening brief, the vague statements of concern by the district court, coupled with years of meandering hearings in front of the Special Master and the district court, would never satisfy the express language of Rule 11(c)(3) (court must direct at-risk party "to show cause why conduct specifically described in the order has not violated Rule 11(b)"), or the standards of other Circuits in district court-initiated sanctions proceedings. *See* App. Br. at 34-36. In response, HLLI offers a bob-and-weave account of the law of each Circuit to claim that Rule 11 was not operative in the context of criminal contempt, *U.S. v. Melot*, 768 F.3d 1082 (10th Cir. 2014), or that every element of offending conduct need not have been separately listed, *Jones v. United Parcel Services, Inc.*, 460 F.3d 1004 (8th Cir. 2006). *See* Br. at 39.

At the end of the day, the ruling below must fail based on the direct and unmistakable language of Rule 11(c)(3):

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

Neither the court below in its many rulings nor HLLI attempts to reconcile the proceedings below with the clear meaning of a "show cause" order. Given

the scrutiny that must attach to Rule 11 findings under *Young*, procedural error alone is grounds for reversal.

II. The District Court Abused Its Discretion In Finding that Lieff Violated Rule 11(b), Filed a False and Misleading Fee Declaration, and Facilitated Labaton's Violation of the Massachusetts Rules of Professional Conduct.

The remainder of the HLLI brief is a rehashing of the factual issues addressed extensively by the court below and addressed in Appellant's opening brief. As is its wont, HLLI casts everything in terms of its view that Appellant should have received less in attorneys' fees, a matter outside the boundaries of this Rule 11 appeal.[12] Accordingly, Lieff relies on its opening brief as to the facts underlying the Rule 11 determinations. Only a few points merit further consideration, as set forth below.

A. The fact that Lieff was not a signatory to the brief reinforces the need for the procedures of Rule 11(c).

Contrary to the representation by HLLI, at no point does Lieff suggest that as

[12] HLLI breathlessly refers, multiple times, to plaintiffs' counsel having had "secret" agreements about their fee allocation (Br. at 20, 23-24, 25, 26, 28), but there is nothing untoward or surprising about counsel allocating fee awards by and among themselves without court involvement unless the court orders otherwise. Fed. R. Civ. P. 54(d)(2)(iv) specifically contemplates this, requiring that a party making a motion for attorneys fees must "(iv) disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made." (emphasis supplied). Further, the district court here specifically ordered, in its initial fee award, that the internal fee allocation would be handled by counsel themselves, without court intervention, pursuant to the terms of the Settlement Agreement. Add. 207 (incorporating Settlement Agreement by reference, which set forth the planned fee allocation between Customer Class Counsel and ERISA Counsel); Dkt. No. 89, ¶ 21 (relevant Settlement Agreement provision).

a non-signatory to the briefs below it was beyond the reach of Rule 11. Lieff's brief to this Court carefully sets out the 1993 amendment to Rule 11 that allowed sanctions against a non-signatory, but imposed the requirements of notice and hearing before Rule 11 could be applied against a non-signatory. App. Br. at 52. Although some courts have adopted a near *per se* rule against sanctions for non-signatories, *see id.* at 53, the argument advanced is not one of prohibition but rather concerns the failure of process.

The district court asserted that Lieff was a signatory as per Rule 11(a) and then proceeded to find a violation of Rule 11. This is first of all a factual error, as Lieff was not and could not have been a signatory. *See, id.* at 50-54 (setting out procedural history on lead counsel authority in this case and explaining why Lieff was not a signatory to the brief). For HLLI, this is a distinction without a difference, because Lieff "presented" the fee memorandum to the court. But the fact of the matter is that the holding that Lieff violated Rule 11 is predicated on the plainly erroneous finding that Lieff was a Rule 11(a) signatory to the fee brief. "In any event, Lieff violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory to a misleading submission to the court." Add125. The district court emphasized the importance to its holding of this erroneous finding by repeating it, in various forms, at least seven times in the Order. Add20, 26, 41-42, 104, 125, 148. To address the possibility that Lieff violated the rule as a *non*-signatory, the district

court would have been obligated to give the notice mandated by Rule 11(c)(3) and an opportunity to address the charge, exactly as the notes regarding the 1993 amendments to the rule contemplated – notice that the district court manifestly did not provide. Moreover, had it done so, the district court would have had to confront the fact that, as a non-signatory, Lieff's role was no different than that of ERISA counsel on whose behalf the fee brief was also "presented," and who also reviewed and approved the fee brief before it was filed.[13]

Neither HLLI nor the district court argues that there was any such process afforded. Indeed, the finding that Lieff was a responsible "signatory" came seven months after the hearing on the objections to the Special Master's Report, meaning that there could not have been any process conforming to Rule 11(c)(1). *See* App. Br. at 23-24 (setting out timeline between conclusion of hearing where there was no notice to Lieff of any possible Rule 11 infraction and the imposition of the Rule 11 finding).

B. HLLI Presents Unsupported Arguments as 'Facts' Supporting the Finding that Lieff's Fee Declaration was False and Misleading.

Contrary to HLLI's representation, there was no fact-finding at all in the

[13] ERISA Counsel were also present for Plaintiffs at the November 2, 2016 fee hearing where the fee memorandum was presented. A250-251 (showing Carl Kravitz from Zuckerman Spaeder LLP, one of the ERISA Counsel, appearing on behalf of Plaintiffs and being present to answer questions); *see also* A286 (district court acknowledging "everybody on the plaintiffs' side," including ERISA Counsel, in attendance (without making an appearance) at the hearing).

proceedings below to support HLLI's contention that only a "handful" of Lieff's attorneys had previously billed time to paying clients. Br. at 16-17, 53. That fact was found and acknowledged to be true for Labaton, not Lieff. Add102. Subsequently, co-counsel raised additional arguments on the issue, after all fact investigation by the Special Master had concluded, in order to defend their own fee declarations. Dkt. 361 at 53-54; Dkt. 579 at 19.[14] Contrary to HLLI's contention, there was no fact investigation at all to support the assertion that "hardly any billers" at Lieff had "regular rates." HLLI's presentation of this completely speculative argument as fact, with respect to Lieff, is not only improper as not supported in the record, but is also plainly and simply wrong.

As discussed in Appellant's opening brief, apart from his belief as a matter of policy that contract attorneys in contingent matters should always be billed at cost (an idea almost universally rejected by courts and not accepted by the district court here), the Special Master found no basis on which to criticize Lieff's rate structure and its corrected hours, and specifically excluded Lieff from criticism over the language used by other counsel in their fee declarations concerning "regular rates." App. Br. at 15-16, 27.

[14] Even Labaton Sucharow and the Thornton Law Firm did not argue, however, as HLLI contends, that "hardly any biller" at Lieff "had 'regular' rates." Br. at 17. That greatly distorts what both of these firms *actually* argued concerning their fee declarations in the documents HLLI cites (which are also not at issue on this appeal).

Indeed, contrary to HLLI's assertions, the record developed below is uncontested that Lieff had paying clients who historically paid the firm at the rates requested for its attorneys and staff – including, no less, for attorneys such as Daniel Chiplock who was the principal attorney at Lieff on this matter – and that the former was the one and only question ever asked of Lieff on the subject by the district court. App. Br. at 27, 55-59. Additionally, the Special Master acknowledged that Lieff's rate-setting process for its attorneys and staff, on an annual basis, was entirely proper and consistent with accepted legal industry standards (with the exception of contract attorneys as mentioned above). A424-425; A428-A431; A784-785; *see also* A998–1010. The language used in Lieff's fee declaration was, accordingly, not false or misleading in any way, and, as set forth previously (App. Br. at 56), was materially the same as the declaration filed in the BNY Mellon litigation which the district court held up as perfectly adequate.

C. Lieff Did Not "Conceal" Evidence Concerning Chargois.

HLLI contends that Lieff "conceal[ed]" evidence from the Special Master concerning Chargois. Br. at 16. This is false, and the Special Master specifically stated he did not find that any discovery misconduct occurred over this issue. A477-78. Lieff produced the entire body of its communications regarding Chargois – which totaled a mere handful of emails – to the Special Master after his clarifying request, and these were fully part of the factual record leading to the Special Master's

conclusion, more than a year before the district court's subsequent fee order, that Lieff was blameless on the whole Chargois issue. App. Br. at 14-15, 22-23, 28-29, 40.

Conclusion

HLLI's arguments accordingly lack merit. For the reasons set forth above and in Lieff's opening brief, the findings by the district court that Lieff violated Rule 11 and facilitated co-counsel's violations of state ethics rules should be reversed; the finding that Chiplock Declaration misrepresented the firm's regular rates and billing history should be vacated; and Lieff should be permitted to recover up to $1,138,917 from unclaimed class funds, if any.

Dated: August 27, 2021

Respectfully submitted,

/s/ *Samuel Issacharoff*
Samuel Issacharoff
USCA Bar No. 1188614
40 Washington Square South
New York, NY 10012
Ph: (212) 998-6580
E-mail: si13@nyu.edu

Counsel for Interested Party-Appellant
Lieff Cabraser Heimann &Bernstein, LLP

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document listed in Fed. R. App. P. 32(f), this document contains 3,649 words.

2. This document complies with the typeface requirements of Fed. R. App. 32(a)(5), and the type-style requirements of Fed. R. App. 32(a)(6), because this document has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point.

Dated: August 27, 2021

Respectfully submitted,

/s/ *Samuel Issacharoff*
Samuel Issacharoff

CERTIFICATE OF SERVICE

I certify that I have on this day, August 27, 2021, served this document upon all parties by electronically filing to all ECF-registered parties in this action.

Dated: August 27, 2021 /s/ *Samuel Issacharoff*
Samuel Issacharoff