2022 WL 1443240 (C.A.3) (Appellate Brief)
United States Court of Appeals, Third Circuit.

ADLIFE MARKETING & COMMUNICATIONS CO., INC., Appellant,
v.
KARNS PRIME AND FANCY FOOD LTD., Appellee.

No. 21-2074.
May 2, 2022.

Appeal from United States District Court, Middle District of Pennsylvania Case No. 1:19-cv-01638

Appellant's Initial Brief on Appeal

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***2 CORPORATE DISCLOSURE**

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Adlife Marketing & Communications Co., Inc.* (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Joel B. Rothman

(Signature of Counsel or Party)

Dated: *05.02.2022*

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*1 I. JURISDICTIONAL STATEMENT

Adlife Marketing & Communications, Inc. appeals the final order of the United States District Court for the Middle District of Pennsylvania entered February 23, 2021 dismissing Adlife's complaint with prejudice, *Adlife Mktg. & Communs. Co. v. Karns Prime & Fancy Food, Ltd.*, No. 1:19-cv-01638, 2021 U.S. Dist. LEXIS 33131, 2021 WL 694560 (M.D. Pa. Feb. 23, 2021), and the subsequent order denying Adlife's motion for reconsideration, *Adlife Mktg. & Communs. Co. v. Karns Prime & Fancy Food Ltd.*, No. 1:19-cv-01638, 2021 U.S. Dist. LEXIS 105880, 2021 WL 2272929 (M.D. Pa. May 11, 2021). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion when it dismissed Adlife's case for failure to prosecute pursuant to Fed. R. Civ. P. 41(b), without considering less severe sanctions or sanctioning Richard Liebowitz -- an attorney with a well-documented history of serious misconduct (J.A. [1] 10) -- and without providing Adlife with the procedural safeguards required by *Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126 (3d Cir. 1987) that would have permitted Adlife to demonstrate that it was not involved with, and had no knowledge of, Liebowitz's misconduct?

***2** 2. Whether the district court abused its discretion when it improperly balanced the *Poulis* factors in favor of dismissal, refused to consider the opposition to the motion to dismiss filed by new counsel for Adlife based on a local rules technicality (J.A. 6-7), found prejudice based on a delay of exactly sixty seconds and no harm to Karns, where the district court's stay protected not prejudiced Karns, where Karns itself gamed the discovery process, and where Liebowitz, not Adlife, was the focus of Karns' and the district court's litigation abuse complaints?

3. Whether the district court's denial of the motion for reconsideration (J.A. 17-23) was manifestly unjust because the district court was presented with the true facts showing Adlife had no knowledge of Liebowitz's malfeasance?

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case is related to *Adlife Mktg. & Communs. Co. v. Karns Prime & Fancy Food, Ltd.*, No. 1:21-cv-00741 (M.D. Pa. filed April 22, 2021) that is currently stayed pending the outcome of this appeal.

*3 IV. STATEMENT OF THE CASE

A. The Parties.

1. Adlife Marketing & Communications Co., Inc. (now known as Prepared Food Photos, Inc.)

Adlife is a full-service advertising agency. (J.A. 36). Adlife was founded by Joel Albrizio. (J.A. 1515). Albrizio's dual passions were food and photography. He focused his business on advertising and marketing for wholesale food sales and supermarket retail food sales and photographed food for the promotions and advertisements he created for his company's supermarket and wholesale food clients. (J.A. 1514-1516).

Adlife dominated the business for color advertising circulars in the late 1970s and 1980s when its massive food photography library was in high demand at the same time the costs of high-quality commercial color printing dropped and supermarket shopping exploded. (J.A. 1515-1517). Adlife's food stylists and photographers created hundreds of thousands of images of fresh and prepared foods, all of which were painstakingly color corrected for the cost-effective high-volume four-color printing process used for supermarket circulars. (J.A. 1514-1517).

Adlife's images are extremely valuable to anyone advertising food or groceries. Color circulars are still critical to these businesses. Images that are not color corrected are useless for color printing. (J.A. 1516-1517). Adlife's color corrected food image library is highly valuable to advertisers. (J.A. 1516).

***4** Adlife has suffered rampant infringement online. People steal Adlife images by scanning them or right clicking and downloading them without paying Adlife a penny. Every day Adlife discovers more and more infringement. (J.A. 1517-1518).

2. Adlife's Former Counsel, the Now Infamous Richard P. Liebowitz

Richard P. Liebowitz was suspended indefinitely from the practice of law by the state of New York in November of 2021 for engaging in a pattern and practice of failing to comply with court orders and making false statements to the court. *Matter of Liebowitz*, 2021 NY Slip Op 05967, ¶ 1, 200 A.D.3d 124, 125, 155 N.Y.S.3d 440, 440 (2d Dep't Nov. 3, 2021).

Judge Furman of the Southern District of New York described Liebowitz thusly:

Richard Liebowitz, who passed the bar in 2015, started filing copyright cases in this District in 2017. Since that time, he has filed more cases in this District than any other lawyer: at last count, about 1,280; he has filed approximately the same number in other districts. In that same period, he has earned another dubious distinction: He has become one of the most frequently sanctioned lawyers, if not the most frequently sanctioned lawyer, in the District. Judges in this District and elsewhere have spent untold hours addressing Mr. Liebowitz's misconduct, which includes repeated violations of court orders and outright dishonesty, sometimes under oath. He has been called "a copyright troll," "a clear and present danger to the fair and efficient administration of justice," a "legal lamprey[ ]," and an "example of the worst kind of lawyering." In scores of cases, he has been repeatedly chastised, warned, ordered to complete ethics courses, fined, and even referred to the Grievance Committee. And but for his penchant for voluntarily dismissing cases upon getting into hot water, the list of ***5** cases detailing his misconduct -- set forth in an Appendix here -- would undoubtedly be longer.

Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368 (JMF), 2020 WL 3483661, at *1 (S.D.N.Y. June 26, 2020) (citations omitted).

The sanctions imposed on Liebowitz in *Usherson* required him, *inter alia*, to "serve a copy of this Opinion and Order, either by email or by overnight courier, on every one of the firm's current clients and [] file a declaration attesting to such service on ECF" within thirty days. *Id.* at *22. On appeal, the Second Circuit affirmed both the non-monetary sanctions, *Liebowitz v. Bandshell Artist Mgmt.,* 858 F. App'x 457 (2d Cir. 2021), and the monetary sanctions. *Liebowitz v. Bandshell Artist Mgmt.,* 6 F.4th 267 (2d Cir. 2021).

3. Karns Prime and Fancy Food, Ltd.

Karns is a family owned grocery store business with nine locations in Pennsylvania. Karns also operated the internet website located at the URL www.karnsfoods.com (the "Website").

4. Fry Communications, Inc.

Fry is a printer and publisher located in Mechanicsburg, Pennsylvania. Fry created the advertisements that contained the infringing photographs for Karns. (J.A. 508).

Fry previously was a licensee of Adlife's images, but Fry's license expired and was terminated on March 1, 2017 before the infringements in this dispute were identified and documented. (J.A. 738, 765).

***6 B. The Progress of the Copyright Infringement Case Below**

1. Adlife Identified and Reported to Liebowitz Fifty-Nine (59) Adlife Copyrighted Images Infringed by Karns Three Hundred Times Prior to Filing the Case Below, but Liebowitz Filed a Much Smaller Case

Liebowitz filed Adlife's original complaint for copyright infringement in the Middle District of Pennsylvania on September 23, 2019. (J.A. 35-131). The Complaint asserted infringement of thirty-six of Adlife's copyrighted images by Karns. (*Id.)* Liebowitz never provided Jones or anyone else at Adlife with the complaint in the case below to review prior to filing. (J.A. 1674). Adlife trusted Liebowitz to accurately and completely allege Adlife's infringement claims. (J.A. 1674). Adlife discovered in November of 2020 that even though Adlife fully informed Liebowitz about the scope of Karns' infringement, image by image, the complaint Liebowitz filed was deficient because it failed to allege all the images infringed or all the infringements Adlife identified prior to filing the complaint. (J.A. 1674, 1720-1726).

2. Adlife Remained in the Dark while Liebowitz filed the Complaint Without Special Admission to Practice or Local Counsel

Liebowitz was not admitted to practice law in Pennsylvania at the time he filed the complaint below, but filed the Adlife complaint under his own name anyway. (J.A. 39). No one at Adlife knew Liebowitz was practicing law in the district without regular or special admission until November 15, 2020.

The Middle District of Pennsylvania requires admission to the Pennsylvania ***7** bar as a prerequisite for regular admission to practice in the district. M.D. Pa. L.R. 83.8.1. Since Liebowitz was neither admitted to practice in Pennsylvania, nor regularly admitted to the district, upon filing the complaint the clerk advised Liebowitz "that the special admissions form can be found at http://www.pamd.uscourts.gov/forms/petition-admission-practice (mfa) (Entered: 09/23/2019). (J.A. 27). Liebowitz did not seek special admission or associate with local counsel; Liebowitz never informed Adlife. (J.A. 1454).

On January 27, 2020, the parties filed their joint case management plan. Liebowitz signed as counsel for Adlife. (J.A. 144-157). The plan omits any mention of Liebowitz's lack of admission to practice in the district. The plan notes the parties served written discovery on each other. (J.A. 149). The plan proposes August 1, 2020 for the conclusion of fact discovery, and November 1, 2020 for dispositive motions. (J.A. 153).

On February 3, 2020, the district court entered its case management order setting the close of fact discovery for August 4, 2020. (J.A. 175-176). The court also set a post-discovery status conference with the court for August 21, 2020 at 10:30 a.m., and ordered the parties to meet at least three business days before to submit a joint statement. (J.A. 175). The court did not adopt the parties' dispositive motion deadline, but instead indicated that the deadline for dispositive motions would be set at the post discovery status conference on August 21, 2020. (*Id*.)

***8 3. Adlife Remained in the Dark During Discovery while Liebowitz Failed to Timely Respond for Adlife and Failed to Move to Compel Karns when it Interposed Baseless Objections to Adlife's Discovery**

Liebowitz did not inform Adlife of the entry of the scheduling order. However, the same day the scheduling order was entered, Liebowitz asked Jones for "a spreadsheet of the 22 different copyright registrations and the effective date of each registration." Jones responded to Liebowitz that day and provided him with the spreadsheet he requested. (J.A. 1675).

On February 21, 2020, Liebowitz sent Jones an email attaching written discovery requests that had been served on Adlife by Karns back on December 23, 2019. (J.A. 1733). Responses to Karns' discovery requests were already overdue, but Liebowitz did not send them to Adlife until two months after they were served.

On February 25, 2020, Jones spoke to James Freeman, an attorney who worked for Liebowitz, and told him that all the documents responsive to the discovery requests were given to Liebowitz in a shared folder before the case was filed. (J.A. 1675). Jones followed the call with an email to Freeman and Liebowitz that attached Adlife's Terms of Use applicable to the images at issue, another item of discovery requested. (J.A. 1749-1756). Freeman acknowledged receipt. (J.A. 1675).

On April 13, 2020, Freeman sent Jones and Liebowitz a second set of discovery requests served by Karns. (J.A. 1676, 1757). The service date was March ***9** 13, 2020. (*Id*.) Freeman asked Jones for a telephone call to discuss the discovery. Jones agreed. Jones and Freeman spoke that afternoon. *(Id.)* Jones gave Freeman all the information he asked for to respond to the discovery requests from Karns. (J.A. 1676). The next day, April 14, 2020, Donna Halprin, a Liebowitz employee, sent Albrizio interrogatory answers for electronic signature, and Albrizio signed and returned them that day. (J.A. 1676, 1762-1783).

Meanwhile, unbeknownst to Adlife, Karns stonewalled Liebowitz. On December 24, 2019, Liebowitz served Adlife's written discovery requests on Karns. Karns did not respond timely. Six months later, Karns finally served its answers and responses. (J.A. 625-646). Karns' answers were pure gamesmanship. For example, Karns objected to producing revenues from sales tied to the advertisements containing the infringing images because "Plaintiff has not proffered evidence that it is truly the registered owner of the copyrights at issue, and until such time, the requested discovery is unduly burdensome and oppressive." (J.A. 630).

4. The Third-Party Complaint filed by Karns against Fry that was Never Resolved by the District Court When the Case was Dismissed

On February 28, 2020, Karns filed a third-party complaint against Fry in the district court. (J.A. 187-203). The third-party complaint sought Karns' expenses of defense, indemnity and contribution from Fry based upon Fry's alleged breach of ***10** warranty of non-infringement of Adlife's photographs Fry used in Karns' advertising. (J.A. 190).

Fry answered on April 29, 2020. (J.A. 311-340). Fry denied the third-party complaint's allegations, and also asserted a defense that claimed Karns knew that a third-party that purchased a publication from Fry called "Savings Guide" was running ads for Karns containing the infringing images. (J.A. 315-317).

Karns' third-party complaint against Fry was "lost in the shuffle" below. No mention of any disposition of that complaint is contained in the district court's final order, yet the case was closed. (J.A. 16).

5. Adlife Remained in the Dark when Liebowitz Filed the *Usherson* Decision Under Protest and Falsely Certified that he Served Adlife with the *Usherson* Decision in Violation of Judge Furman's Order

On July 27, 2020, Liebowitz filed the decision in *Usherson* in the docket without a caption entitled "Notice of Order". (J.A. 346). That same day, Liebowitz filed a declaration in *Usherson* swearing he served the *Usherson* order on every one of his clients *by email*. (J.A. 1531-1532).

As explained below, Liebowitz never served *Usherson* on Adlife.

6. Adlife Remained in the Dark when Karns and Fry Filed the Discovery Joint Statement without the Participation of Liebowitz or Adlife

The February 3, 2020 case management order required the parties to jointly file a discovery statement three days before the August 21, 2020 status conference. ***11** (J.A. 175-176). Liebowitz failed to respond to Karns' counsel's attempt to prepare and file the joint discovery statement, so Karns and Fry filed the joint statement without Adlife's participation. (J.A. 408-409). Liebowitz never told Adlife that he failed to participate in filing the joint statement.

The statement filed August 18, 2020 was one-sided and claimed that Adlife waited until "12:01 AM on August 5, 2020, after the discovery deadline passed" to produce "approximately 300 pages of discovery." (J.A. 409). The statement rails against Liebowitz based on the *Usherson* decision where Liebowitz "has been accused of engaging in dilatory and far more serious copyright litigation misconduct." (J.A. 410). The statement also complained about Liebowitz practicing without admission in the district. (J.A. 410-411).

The statement also requested a 90-day extension to "conduct discovery on matters related to Plaintiff's August 5, 2020 document production, and on matters relating to the claims and defenses of Karns and Fry with respect to the issues raised in the joinder complaint and answer thereto, with the close of all fact discovery on November 16, 2020." (J.A. 412).

The statement also notes that on February 26, 2020 Karns made an unaccepted offer of judgment in the amount of $35,000, but Adlife failed to respond "other than to inquire if Adlife was interested in mediation, which it was not." (J.A. 412). On August 19, 2020, the clerk again reminded Liebowitz on the ***12** docket to file for special admission. (J.A. 29).

7. Adlife Remained in the Dark when Karns Moved Early for Partial Summary Judgment

On August 19, 2020, Karns filed a motion for partial summary judgment on Adlife's claims for actual damages and profits. (J.A. 424-653). Karns argued Adlife failed to produce evidence of its damages or Karns' profits from the infringement and so Karns was entitled to judgment as a matter of law. (J.A. 434-440). The motion relied upon Adlife's failure to "attach to the complaint copies of the relevant copyright registrations," and that the "only documents plaintiff has produced in discovery were produced at 12:01 AM on August 5, 2020, one minute after the discovery deadline passed." (J.A. 425, 538). Karns argued the one minute late filing meant Adlife's certificates of registration must be excluded from the evidence and therefore Karns was entitled to judgment as a matter of law. (J.A. 548).

The motion concluded in a contradictory fashion by requesting the court grant an additional 90 days for discovery. (J.A. 440). Liebowitz did not provide a copy of the motion to Adlife. Adlife did not find out about the motion until November 15, 2020. (J.A. 735).

8. Adlife Remained in the Dark when the District Court Stayed the Action on August 24, 2020 Pending Appearance of Qualified Counsel for Adlife

The district court held the post-discovery conference on August 24, 2020 by ***13** telephone. (J.A. 29). Liebowitz appeared. (Id.) The district court noted that Liebowitz was not admitted to practice in the district, stayed the action "pending the entry of an appearance of counsel for Plaintiff who is qualified to appear on behalf of Plaintiff," and instructed the clerk to schedule a telephonic status conference upon the entry of appearance of qualified counsel. (Id.) Liebowitz mentioned nothing about the August 24th conference to Adlife.

Liebowitz did nothing. Months passed. The case remained stayed from August 24, 202 to October 30, 2020. No activity occurred on the docket. (J.A. 29).

9. Adlife Remained in the Dark when Karns Moved to Dismiss for Failure to Prosecute While the Case was Stayed

On October 30, 2020 Karns filed its motion to dismiss for failure to prosecute. (J.A. 656-703). The motion argued Liebowitz's failure to obtain special admission to practice in the district and lack of activity during the preceding two months while the case was stayed, combined with Liebowitz's history of bad litigation conduct in other cases, entitled Karns to a dismissal. (J.A. 656-661). According to Karns, Adlife should "be charged with knowledge of, and responsibility for its litigation conduct while under the stewardship of Mr. Liebowitz," and "should be held personally responsible for the conduct of its chosen counsel, whom it knew had an 'extraordinary record of misconduct.' " (J.A. 665).

Liebowitz did not inform Adlife of the filing of the Motion to Dismiss for ***14** Failure to Prosecute. Adlife only found out about the motion after terminating Liebowitz. (J.A. 735).

10. Adlife Remained in the Dark when Freeman and Local Counsel Appeared and Opposed the Motion to Dismiss for Lack of Prosecution

On November 12, 2020, James Freeman, Liebowitz's associate, filed a petition for special admission. (J.A. 29). The next day, November 13, 2020, attorney Mark Wendaur, IV, of Lancaster appeared for Adlife. (J.A. 30). Freeman's application was approved on November 17, 2020. (Id.)

On November 13, 2020, Freeman and Wendaur filed a brief in opposition on behalf of Adlife. (J.A. 704-712). The opposition was short. It argued that Adlife should not be punished for the misdeeds of Liebowitz, that Karns suffered no prejudice from the three months delay, that Adlife was not dilatory, that Adlife's claim was meritorious, and that alternative sanctions to dismissal should be considered. (J.A. 707-710). The opposition also echoed Karns' requests in its statement and motion for summary judgment for a 90-day discovery extension. (J.A. 710). Adlife did not participate in the preparation of the opposition brief or even know the motion was pending at that point.

11. Liebowitz Finally Confessed to Adlife on November 15, 2020, about Three Months into the Stay

On November 15, 2020, Liebowitz sent an email to Albrizio, Fleurant and Jones that said:

***15** Hi Joel,

On the case against Karns, months ago they did a SJ on the issue that we did not provide proof of actual damages, but we are going for statutory damages, so you do not need to prove actual damages for a statutory damages case. So their motion will likely not succeed and even if it does you still have the $750-$150,000 for statutory for willful infringement. Our response was put on pause, as I needed to get a local lawyer in Harrisburg which took some time to get. The judge did not set a time limit on when to get a local lawyer in Harrisburg. I thought the parties would do a meditation before having to get a local lawyer in Harrisburg, PA. Instead of trying to in good faith do a mediation they did a motion for lack of prosecution, which has almost no shot of winning as the court never set a time limit to get a local lawyer. In any event, I got a local lawyer late last week to come in and we responded to them and told the judge to require the other side to participate in a mediation. The judge is likely going to set a status conference in the upcoming few weeks to talk about mediation and to talk about new discovery deadlines. Karns never produced any documents in the case so we have a strong argument that they have not engaged in good faith. The case is taking its course. Let me know if you want to jump on the phone to discuss more.

Thank you.

Best,

Richard Liebowitz

(J.A. 1525-1526).

Liebowitz's November 15th email was Adlife's first notice that there were problems with the case below. (J.A. 1526).

12. New Counsel Appeared, Liebowitz Withdrew, and Adlife Finally Learned the Truth About the Progress of the Case Prompting it to File a Motion for Leave to Supplement the Response to the Motion to Dismiss for Failure to Prosecute Without Opposition from Karns

New counsel regularly admitted to practice in the district was engaged and ***16** appeared for Adlife on November 24, 2020. (J.A. 30). The next day, Liebowitz, Freeman and Wendaur moved to withdraw. (*Id*.)

New counsel quickly assessed the situation. On November 25, 2020, while the case was still stayed, Adlife filed a motion for leave to file a supplemental response brief supported by a declaration of Albrizio. (J.A. 730-735). Albrizio advised the district court that he relied on Liebowitz for updates on cases, including upcoming deadlines, pending motions, and requests for discovery, but that Leibowitz failed to inform Adlife of the pending motions to dismiss or for summary judgment. (J.A. 734-735).

Albrizio advised the court that Liebowitz never sought Adlife's approval or input on any of the pending motions, that Adlife was always prepared to move forward with the case, and that "dismissal would result in substantial prejudice and harm to Adlife, through no fault of its own." (J.A. 735). Albrizio affirmed that he was not aware of any of the "deficiencies in Mr. Liebowitz's and his firm's participation in this matter," and that Adlife only became aware of the issues in this case in the past few weeks when it searched court records, discovered what had transpired, and demanded an explanation from Liebowitz. (*Id*.) When Liebowitz's explanation proved insufficient, Adlife terminated Liebowitz and his firm. (J.A. 735).

The motion that accompanied Albrizio's declaration contained, in a single ***17** document, a request for leave to file supplemental response briefs in opposition to the motions to dismiss for failure to prosecute and for summary judgment, and legal argument and authorities in support of the relief requested. (J.A. 730-732). In other words, instead of separating the facts from the legal arguments into two separate documents, the facts and legal argument were combined into a single unit. (*Id*.)

Karns did not oppose the motion in any way, and the record is devoid of any objection by Karns to the district court's consideration of Adlife's proposed supplemental brief or the declaration of Albrizio.

13. The District Court Lifted the Stay on December 4, 2020

On December 4, 2020, the district court noted on the docket that it had "observed that there has been the entry of an appearance of counsel for Plaintiff who is qualified to appear" and therefore lifted the stay. (J.A. 30). Thereafter, several unopposed motions for extension of time to respond to Karns' motion for summary judgment were filed and granted. (J.A. 30-31).

14. Adlife Moved for Leave to Amend to Plead All the Infringements by Karns of All of Adlife's Photographs

New counsel for Adlife further reviewed the progress of the case and discovered that Liebowitz failed to allege in the complaint all the infringements of all of Adlife's works that Adlife disclosed to Liebowitz prior to and during the pendency of the case. So, on January 26, 2021, Adlife moved for leave to amend. ***18** (J.A. 737-1105). The motion attached a proposed amended complaint with hundreds of pages of exhibits including all the copyright registrations applicable to Adlife's images. (Id.)

Good cause for the amendment was provided by a declaration of Albrizio in which he explained that Adlife told Liebowitz before the case was filed that Karns infringed fifty-nine Adlife images three hundred times. (J.A. 749-751). Furthermore, Albrizio

swore that after the suit was filed, Adlife identified forty-four additional infringements, and that the final tally could show as many as 350 infringements of Adlife's images by Karns. (J.A. 751).

Albrizio also explained to the court, as he had done in his declaration supporting the motion for leave to file a supplemental brief, that Adlife relied on Liebowitz for updates on cases, including upcoming deadlines, pending motions, and requests for discovery, but that Leibowitz failed to inform Adlife of the pending motions to dismiss or for summary judgment; that Adlife was not aware of the deficiencies in Liebowitz's legal representation and it had only become aware after November 15, 2020 when it searched court records; that Liebowitz never sought Adlife's approval or input on any of the pending motions; that Adlife was always prepared to move forward with the case; and that unless Adlife was permitted to amend Adlife would be prejudiced through no fault of its own. (J.A. 751-752).

***19 C. The District Court's Dismissal for Lack of Prosecution**

On February 23, 2021, in a memorandum decision, the district court granted Karn's motion to dismiss for failure to prosecute. (J.A. 3-16). The court "deemed" Adlife's motion for leave to file a supplemental response "withdrawn" pursuant to local rule 7.5. (J.A. 6-7). The district court denied the motion for summary judgment, motion for leave to amend, and the motions to withdraw as counsel filed by Liebowitz, Freeman and Wendaur as moot. (J.A. 3, 16). The court ordered the clerk to close the case. (J.A. 16).

1. The District Court Deemed the Motion for Leave to File a Supplemental Response to the Motion to Dismiss for Failure to Prosecute "Withdrawn" Under the Local Rules

The district court decision dispatched the supplemental response request because it was unsupported by a brief in violation of the local rules. (J.A. 6-7). The district court explained that Local Rule 7.5 requires the filing of a brief in support of every motion except in limited exceptions. (Id.) The district court indicated that "Defendant did not concur in Plaintiff's request to file a supplemental response" (J.A. 7) even though the record is devoid of any opposition by Karns to the motion for a supplemental brief. Nonetheless, because "Plaintiff never filed a brief in support of its motion as required by the rule" (id.), the district court determined that that "Plaintiff's motion and exhibits are not properly before it and will deem the motion (Doc. No. 49) withdrawn in accordance with Local Rule 7.5." (J.A. 7).

As a result, the district court did not consider either the Albrizio declaration ***20** or the argument of new counsel for Adlife in opposition to the motion to dismiss.

2. The District Court's Grant of the Motion to Dismiss for Failure to Prosecute

The district court next determined that in view of the "totality of Plaintiff's conduct in prosecuting this case" as framed by Karns in the motion, and considering the "limited" arguments made by former counsel affiliated with Liebowitz in opposition, dismissal was justified pursuant to Rule 41(b). (J.A. 7-15).

The district court analyzed the case according to the factors in *Poulis v. State Farm Fire and Casualty Co*., 747 F.2d 863 (3d Cir. 1984). The district court focused most of its attention on the first factor, Adlife's personal responsibility. (J.A. 10-12). The court quoted extensively from the decision of the Northern District of New York in *Adlife Mktg. & Communs. Co. v. Buckingham Bros., LLC*, No. 5:19-CV-0796, 2020 WL 4795287, 2020 U.S. Dist. LEXIS 148755 (N.D.N.Y. Aug. 18, 2020) that denied Adlife's motion for default judgment and dismissed the case as a sanction for Liebowitz's "misleading citations and frivolous assertions in an attempt to recover an unjustifiably high amount of statutory damages and attorney's fees." *Id*., 2020 U.S. Dist. LEXIS 148755, at *5-6. The district court then concluded that holding Adlife responsible was warranted under the first *Poulis* factor because Adlife "must have become aware of its counsel's egregious history of misconduct after being served with the sanction Opinion and Order of June 26, ***21** 2020 from the Southern District of New York [in *Usherson*]," (J.A. 11), and because Adlife "deliberately engaged the services of an attorney and law firm with a well-documented history of serious misconduct." (J.A. 12).

On the second factor, the district court determined that Karns was prejudiced by Liebowitz's conduct and the delays in the case. (Id.)

Defendant has been attempting for over a year to defend an action in which Plaintiff was noncompliant with court orders and nonresponsive throughout months of discovery, only producing substantive documents after the discovery deadline, and in which the allegations at issue have not even been clarified. Neither Plaintiff nor Plaintiff's counsel has ever provided an explanation for this conduct.

(Id.) The district court, quoting from *Ware v. Rodale Press, Inc.,* 322 F.3d 218 (3d Cir. 2003), and citing *Woods v. Malanoski*, No. CV 17-17, 2018 WL 3999660 (W.D. Pa. July 18, 2018), interpreted "prejudice" to mean not just " 'irredeemable harm" but also to mean "the burden imposed by impeding a party's ability to prepare effectively a full and complete [defense] is sufficiently prejudicial." (J.A. 12). The district court found prejudice in Adlife's "noncompliance with discovery obligations and lack of clarity surrounding the allegations in this case, which have impeded Defendant's ability to mount a defense, as well as by the delays in briefing of its still-pending motion for summary judgment." (J.A. 13).

Examining the third and fourth factors, the district court again faulted Adlife.

***22** Plaintiff not only filed the instant action through counsel who was not qualified to practice before this Court, but was noncompliant with discovery obligations and the Court's case management Order, and failed to secure qualified counsel to enter an appearance in this action for three months after Mr. Liebowitz stated that he would file for special admission within days of the Court's August 24, 2020 status conference. Plaintiff has not provided an explanation for this conduct, and, viewed in light of the fact that Mr. Liebowitz and Plaintiff have a well-documented history of similar actions before other courts--and indeed, that Mr. Liebowitz has been specifically sanctioned for this conduct--the Court can only conclude that these actions were undertaken willfully and in bad faith.

(J.A. 13).

On the fifth factor, the court found that alternative sanctions would not be effective because Liebowitz was sanctioned so many times by other courts, one more sanction short of dismissing Adlife's case, "especially the imposition of fines or costs, would be ineffective" to deter both Liebowitz and Adlife who "continued to utilize Mr. Liebowitz's legal services until late November 2020." (J.A. 14).

Finally, on the meritoriousness factor, the district court noted that Adlife's "complaint and associated submissions include no information regarding loss to Plaintiff or when its allegedly infringed images were registered," and therefore it judged the factor as neutral. (Id.)

D. Adlife's Motion for Reconsideration

On March 15, 2021, Adlife timely moved for reconsideration. (J.A. 1491-1513). The motion was supported by declarations of Albrizio, Fleurant, and Jones, and each declaration attached extensive evidence showing Adlife's ***23** communications, and lack of communications, with Liebowitz during the pendency of the case below. (Albrizio, J.A. 1514-1625; Fleurant, J.A. 1626-1668; Jones, J.A. 1669-1793). The motion was also supported by a declaration of counsel for Adlife attesting to the search of Adlife's emails by an ESI vendor that revealed that, contrary to Liebowitz's sworn declaration in the *Usherson* case, Adlife was never served with the *Usherson* decision by Liebowitz. (J.A. 1909).

1. Declaration of Joel Albrizio in Support of Reconsideration

Albrizio explained to the district court that Adlife was not a professional litigant, but rather a victim of rampant infringement that decimated Adlife's traditional advertising business and required the filing of lawsuits to protect its investment in its copyrighted photography. (J.A. 1517). Albrizio explained that while [p]rior to 2016, 95% of Adlife's total revenue was generated by the creation and distribution of printed circulars and in-store signage" and Adlife kept fifty employees busy creating "weekly circulars and in-store signage," recently Adlife's business has dropped precipitously, and now only fifteen employees work on print and digital advertisements for Adlife's remaining forty clients. (Id.) Meanwhile, Adlife caught numerous former clients and Adlife's competitors infringing on Adlife's images because the internet permits "almost anyone to steal Adlife images by simply right clicking and copying or scanning our images and pasting them wherever they liked, including in promotions, without paying Adlife a penny." ***24** (Id.)

Albrizio explained Adlife's intellectual property enforcement program to the district court at length, including the participation of Liebowitz and other firms as outside counsel. (J.A. 1518). Albrizio told the court that Adlife exercised control over outside counsel by dedicating an experienced paralegal, Rebecca Jones, to oversee Adlife's litigation. (Id.) Albrizio explained that Adlife relied on outside counsel for "updates on cases, including filing status, upcoming deadlines, pending motions and decisions, and requests for discovery," but did not monitor PACER or services that rely on PACER. (Id.) Instead, "Adlife relied upon its attorneys' professional responsibility and duty of candor to keep Adlife truthfully informed of the progress of its cases on an ongoing basis." (Id.)

Albrizio advised the court that in November of 2020 when Liebowitz contacted Adlife was the first time he had knowledge of Liebowitz's failure to comply with his professional responsibilities to candidly and honestly keep Adlife informed of the progress of Adlife's cases. Albrizio swore that

I was never aware that Mr. Liebowitz and LLF failed to produce documents or discovery in this case. LLF had access to all relevant documents regarding the images and copyrights in the lawsuit. LLF had access to our subscription fees and terms of use. Adlife had no knowledge or reason to suspect that these documents had not been produced.

(J.A. 1519). Regarding the decision in *Usherson*, Albrizio swore that

***25** I have carefully and diligently reviewed and searched my email for the period from June 26, 2020 to the present. I never received an email from Mr. Liebowitz on July 27, 2020 or any other date serving me with the decision in *Usherson*.

(J.A. 1520). After reading the decision in *Buckingham Brothers*, Albrizio swore that he:

immediately wrote to Mr. Liebowitz demanding a meeting to discuss the decision . . . In our email exchange Mr. Liebowitz starts off by writing "Yes, this was the case we discussed about. Terrible judge that didn't agree with the $30k in default. We often get $30k on default but this judge is just devaluing copyright laws. Think we ask the Court for $10k?" Mr. Liebowitz's response suggests we previously discussed this case, but I have no memory of any prior discussion with him about the Buckingham Bros. case. I have searched my email and found no communications about the decision in Buckingham Bros. before the August 21st emails attached.

I then ask Mr. Liebowitz about the court's "statements in which he names cases of Adlife. Page 22 par#10 ..... I would like to better understand why we dismissed these cases. I believe the dismissals were based on settlements and not incorrect filings. We just need to go over all of this and totally understand everything . . . Joel." At that time, for the reasons I indicate below, I knew that all but one of the five Adlife cases referred to by the Court in footnote 10 of the *Buckingham Bros.* decision had been dismissed because those matters settled, not because the filings in those cases were incorrect as the court in Buckingham Bros. concluded. The fact that I knew that all but one of the cases listed in footnote 10 were voluntarily dismissed based on settlements, and not because LLF was in "hot water" as the *Buckingham Bros.* court suggested, provided a basis for me to credit Mr. Liebowitz's explanation for the decision and his assertion in his email that the decision was an aberration.

Mr. Liebowitz concluded our email exchange by stating "Yes, might be a corrupt judge. We can go over on Monday. Everything will be okay." I do not know why Mr. Liebowitz suggested that the judge in the *Buckingham Bros.* case might be corrupt, but it was a remark he made often to me. I am not a lawyer. Mr. Liebowitz was ***26** my company's lawyer. I trusted him to be knowledgeable in litigation matters. I now realize that I was mistaken to do so.

(J.A. 1521-1522).

Albrizio, the CEO of Adlife, went on to explain, point by point, to the district court why it misapprehended the true facts concerning Adlife's knowledge of Liebowitz's misconduct, and that the true facts showed that Liebowitz kept Adlife in the dark about the progress of the case and Liebowitz's malfeasance. Albrizio explained Adlife's innocence of every act or omission for which the district court found Adlife culpable. Albrizio also apologized to the district court and Karns for Liebowitz's conduct. (J.A. 1523-1529).

2. Declaration of Rebecca Jones in Support of Reconsideration

Adlife's in-house paralegal Rebecca Jones told the district court in her declaration that her job was to solicit and obtain reports from Liebowitz on Adlife's cases, and that Adlife relied on Leibowitz for updates, rather than following the cases directly on PACER. Her written testimony was consistent with Albrizio's. Like Albrizio, Jones swore she "never had any reason to believe that any of Adlife's counsel, including Mr. Liebowitz, had failed to comply with their professional responsibilities to candidly and honestly keep Adlife informed of the progress of Adlife's cases." (J.A. 1670).

Jones attached her extensive weekly report emails with Liebowitz and others at his firm so the district court could see for itself that she was telling the truth that ***27** Adlife knew nothing about Liebowitz's malfeasance in the case until November of 2020. (J.A. 1670, 1680-1708). Jones attached her dated spreadsheet with her notes of her calls and emails with Liebowitz in this case and the *Buckingham Brothers* case so that the district court could verify that Jones, the person in charge of monitoring Adlife's litigation, was never informed what was going on in either the case below or *Buckingham Brothers* until November of 2020. (J.A. 1671-1672, 1709-1710).

Jones, like Albrizio, swore that in November of 2020 when Liebowitz contacted Adlife that was the first time she learned of Liebowitz's failure to comply with his professional responsibilities to candidly and honestly keep Adlife informed of the progress of Adlife's cases.

Until the events discussed below in November 2020 that led to his termination as counsel for Adlife, I had no knowledge whatsoever that Mr. Liebowitz and LLF had ever been sanctioned or disciplined by this court or other courts. During the nearly three (3) years we worked with LLF, LLF never notified me directly of any procedural or substantive problems that would call into question LLF's or Mr. Liebowitz's handling of Adlife's cases.

(J.A. 1672). Regarding *Usherson*, Jones, like Albrizio, swore that she "never received an email from Mr. Liebowitz on July 27, 2020 or any other date serving [her] with the decision in *Usherson*," and that she "did not find out about the decision in *Usherson* until November of 2020 ...[as] a result of [her] own research." (J.A. 1673). Jones also provided the district court ***28** with reasonable explanations for what occurred in other Adlife cases demonstrating why the district court's belief that Adlife must have known about Liebowitz's malfeasance and was culpable for it was a manifest factual error. (J.A. 1673-1679).

3. Declaration of Douglas Fleurant in Support of Reconsideration

Douglas Fleurant, the EVP and CFO of Adlife who was responsible for all financial activities, including all settlements of Adlife litigation, swore out the third Adlife declaration in support of reconsideration. (J.A. 1626-1627). Fleurant confirmed much of Albrizio's and Jones' written testimony discussed above. (J.A. 1628-1635). In particular, Fleurant, like Jones, testified that he

did not read the *Buckingham Brothers* decision until November 16, 2020. (J.A. 1630). Attached to Jones' declaration was the email she sent to Fleurant that day with the Buckingham Brothers decision attached. (J.A. 1715-1716). Fleurant explained,

[m]y immediate reaction in response to Ms. Jones in my reply to her at 3:45 pm that day is "OMG. Has Joel [Albrizio, CEO of Adlife] read this?" To which Ms. Jones answers "I don't think so. I was afraid to send it Friday. I finally read the whole thing through. I had to keep taking breaks on Friday because I knew it was bad, but I wanted to find out about all of the other cases also. It's just awful. Did you read the footnotes also? The Judge lumps Adlife in with Liebowitz. We need to distance ourselves from him." In response I agreed to share it with Mr. Albrizio immediately.

(J.A. 1630-1631).

***29** Regarding *Usherson*, Fleurant, like Jones and Albrizio, swore that he "never received an email from Mr. Liebowitz on July 27, 2020 or any other date serving [him] with the decision in *Usherson.*" (J.A. 1630). Fleurant provided the district court with even more explanation why the district court's belief that Adlife must have known about Liebowitz's malfeasance and was culpable for it was a manifest factual error. (J.A. 1630-1635).

4. Adlife's Counsel Employed an ESI Vendor to Preserve and Search Adlife's Email and Confirmed No Record Existed of Service by Email of the *Usherson* Decision on Adlife as Sworn to the Southern District of New York by Liebowitz

To eliminate any doubt that the district court wrongly concluded that Adlife "must have become aware of its counsel's egregious history of misconduct after being served with the sanction Opinion and Order of June 26, 2020 from the Southern District of New York [in *Usherson*]," (J.A. 11), counsel for Adlife employed Precision Legal Services, an experienced and reputable ESI vendor, to independently confirm that Albrizio, Jones and Fleurant certified truthfully in their declarations that Liebowitz's July 27, 2020 declaration filed in *Usherson,* where he swore he "served by email a copy of the Order on every one of LLF's clients [including Adlife]" was false. (J.A. 1794-1795).

Counsel swore that he caused Precision to collect all of Albrizio's, Jones' and Fleurant's emails, and then searched those emails for ones from senders using the email suffix "@liebowitzlawfirm.com" and "rl@liebowitzlawfirm.com," ***30** Liebowitz's email address. Counsel received the results of the search and reviewed all the emails, but did not find any email from Liebowitz or anyone else at his law firm informing Adlife of the decision in *Usherson*. (J.A. 1795).

E. The District Court's Denial of the Motion for Reconsideration

Karns opposed the motion, (J.A. 1796-1825), Adlife replied, (J.A. 1848-1857), and on May 11, 2021, the district court denied reconsideration. (J.A. 17).

The district court determined that Adlife blew its opportunity to submit the declarations of Albrizio, Fleurant and Jones on the motion to dismiss that "could have been raised prior to the entry of judgment," but filing that material on reconsideration was too little too late. (J.A. 22).

As to Adlife's demonstrated lack of notice of the *Usherson* decision which was one of the bases for the district court's dismissal, the district court said the following in a footnote:

The Court notes that although Plaintiff alleges generally that it was not served with the sanction Opinion and Order, it specifically states that none of Plaintiff's relevant contacts "ever *received an email* from Mr. Liebowitz on July 27, 2020 or any other date serving them with the decision . . ." (Doc. No. 65 at 6) (emphasis added). The Court further notes that, as Plaintiff acknowledges, email was not the only potential method of service available to Mr. Liebowitz. (Id.)

(J.A. 21). Meanwhile, email was the only method of service used by Liebowitz in *Usherson*. (J.A. 1531-1532).

Concerning the *Buckingham Brothers* decision, the district court disregarded ***31** Adlife's explanation that it trusted Liebowitz when he blamed it on a "corrupt judge" and downplayed the significance of the decision to Albrizio, and faulted Adlife because "by [its] own admission, its CEO reviewed a decision of another court that detailed this extensive history and dismissed Plaintiff's own case at least three days prior to the case management conference in this action that resulted in a stay of proceedings."[2] The district court cited this court's decision in *Adams v. Trustees of the N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994) as authority holding that "[w]here a client had or should have had independent knowledge of the delinquency that was the grounds for dismissal, we have held notice and hearing are not required." (J.A. 22).

The court also determined that all of Adlife's arguments in its motion went to the first *Poulis* factor - Plaintiff's personal responsibility - but even so the remaining factors favored dismissal anyway "regardless of [the court's] determination as to Plaintiff's personal responsibility." (J.A. 21-22).

***32 F. The District Court's Denial of Karns' Motion for Attorney's Fees**

On March 9, 2021, Karns filed its motion for attorneys' fees and costs pursuant to 17 U.S.C. § 505. (J.A. 1459-1490). Adlife opposed the motion. (J.A. 1826-1847). Karns replied. (J.A. 1858-1870).

On May 11, 2021, the district court denied the motion for attorneys' fees. The court noted that "a determination that an award of fees is necessary to compensate Defendant and deter Plaintiff from future conduct would undercut the Court's prior finding" that dismissal was necessary. (J.A. 1880-1881). The court determined that Adlife "has already been sanctioned for the misconduct in this case--the case was dismissed," therefore "[a]n award of attorneys' fees [] strikes the Court as overly punitive." (J.A. 1881). Therefore, exercising its discretion, the district court declined to award attorneys' fees.

V. STANDARD OF REVIEW

A district court's dismissal with prejudice for failure to prosecute is reviewed for abuse of discretion. *Hildebrand v. Allegheny Cty.,* 923 F.3d 128, 132 (3d Cir. 2019) (a district court "abuses its discretion where it fails to properly consider and balance" the factors set forth in *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984)). The record must support the district court's findings on the six *Poulis* factors. *Hildebrand,* 923 F. 3d at 132. While this court defers to the district court's discretion, dismissal with prejudice is only appropriate in limited circumstances and doubts should be resolved in favor of reaching a ***33** decision on the merits. *Emerson v. Thiel Coll.,* 296 F.3d 184, 190 (3d Cir. 2002)

VI. SUMMARY OF THE ARGUMENT

Adlife did not have full knowledge of Liebowitz's misdeeds until it was too late. Liebowitz falsely certified he served Adlife with the decision in *Usherson.* Liebowitz lied and dissembled when confronted with the decision in *Buckingham Bros.* Liebowitz kept Adlife in the dark. It was not until November 15, 2020 that Adlife learned the full truth about the harm Liebowitz caused Adlife. Yet by then Liebowitz had already filed Adlife's opposition to the motion to dismiss.

Adlife was entitled to *Dunbar*'s special procedural protections below. Had the district court notified Adlife and held a hearing Adlife would have appeared and dispelled the notion that Adlife "deliberately engaged the services of an attorney and law firm with a well-documented history of serious misconduct," (J.A. 10) or that Adlife knew about Liebowitz's misconduct. The district court was required to notify Adlife specifically and hold a hearing. Instead, the district court improperly turned a blind eye to the conflict of interest inherent in Liebowitz's violation of the district court's directives and struck new counsel for Adlife's

opposition based on a local rules technicality. The district court's failure to provide Adlife with the protections required by *Dunbar* was a clear abuse of discretion requiring reversal.

The district court's refusal to grant reconsideration when presented with the ***34** true facts showing it had manifestly misunderstood the facts and that Adlife had no knowledge of Liebowitz's misconduct, was also an abuse of discretion. Why the district court believed that Liebowitz truthfully certified service of the *Usherson* decision on Adlife, when Liebowitz lied so often to courts, defies reason. The declarations of Albrizio, Fleurant, Jones and Adlife's counsel showed the district court its patent error. Liebowitz's characterization of the *Buckingham Brothers* decision as that of a "corrupt judge" was consistent with Liebowitz's contempt for the judiciary.

The district court's disbelief of Adlife and its determination that Adlife was blameworthy in the face of Liebowitz's track record of lying was an abuse of discretion. The district court's flat-out refusal to consider the facts shown by Adlife on reconsideration demonstrating that it was blameless and ignorant of Liebowitz's malfeasance was an abuse of discretion. The district court's conclusion that Adlife knew what was going on without listening to Adlife's reasonable explanations was an abuse of discretion. The district court's dismissal in reliance on other, unrelated cases including one where Adlife was not represented by Liebowitz, was an abuse of discretion.

Putting Liebowitz's bad behavior aside, Adlife never failed to prosecute its claims against Karns. Even while represented by Liebowitz, Adlife pursued its claims, and the only delay chargeable to Adlife was sixty seconds: the 12:01 a.m. ***35** production of Adlife's discovery documents on August 5, 2020. Producing documents one minute late with no prejudice shown, and when viewed in light of Karns' own discovery games, demonstrates that the sanction of dismissal was way out of proportion to the crime. And since the case was stayed from August 24, 2020 until December 4, 2020, Karns suffered no prejudice during that time anyway.

For the reasons below, the decisions of the district court should be reversed and remanded for further proceedings.

VII. ARGUMENT

A. The District Court's Dismissal with Prejudice Instead of Sanctioning Liebowitz or Imposing a Lesser Sanction was an Abuse of Discretion

A dismissal with prejudice is an "extreme" sanction. *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976). Dismissals with prejudice "must be a sanction of last, not first, resort." *Poulis*, 747 F.2d at 867, 869. If the case is close, "doubts should be resolved in favor of reaching a decision on the merits." *Adams v. Trs. of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994) (quoting *Scarborough v. Eubanks*, 747 F.2d 871, 878 (3d Cir. 1984)).

"Without a doubt, cases should be decided on the merits barring substantial circumstances in support of the contrary outcome." *Hildebrand v. Allegheny Cty.*, 923 F.3d 128, 132 (3d Cir. 2019). Dismissal is a "drastic sanction" which should ***36** be reserved for cases "where there is a clear record of delay or contumacious conduct by the plaintiff." *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339, 342 (3d Cir. 1982).

Even if punishment of some kind was justified, going directly to dismissal without considering less severe sanctions was an abuse of discretion.
Obviously, a pattern of wrongdoing may require a stiffer sanction than an isolated incident; a grave wrongdoing may compel a more severe sanction than might a minor infraction; and wrongdoing that actually prejudices the wrongdoer's opponent or hinders the administration of justice may demand a stronger response than wrongdoing that, through good fortune or diligence of court or counsel, fails to achieve its untoward object. Furthermore, there may be mitigating factors that must be accounted for in shaping the court's response.

Second, having evaluated the conduct at issue, the district court must specifically consider the range of permissible sanctions and explain why less severe alternatives to the sanction imposed are inadequate or inappropriate. Although the court need not exhaust all other sanctioning mechanisms prior to resorting to its inherent power the court must explain why it has chosen any particular sanction from the range of alternatives it has identified.

Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 (3d Cir. 1994) (citations omitted). Here the sanction of outright dismissal was not justified and an abuse of discretion.

Sanctioning Adlife, instead of Liebowitz, was also an abuse of discretion because if an attorney, rather than a client, is at fault, the sanction should ordinarily target the culpable attorney. *Carter v. Albert Einstein Med. Center*, 804 F.2d 805, 807 (3d Cir. 1986). Here the district court abused its discretion by going directly to ***37** dismissal instead of imposing a lesser sanction, and by sanctioning Adlife instead of Liebowitz.

B. The District Court's Dismissal with Prejudice Without Giving Adlife Notice and a Hearing was an Abuse of Discretion

In cases where the attorney's conduct is at issue, "*Dunbar* specifically establishes special procedural protection for parties with outside counsel in order to benefit the client that had no part in, and no knowledge of, its attorney's delinquent behavior." *Adams,* 29 F.3d at 872.

> [D]ismissals based on the apparent default of counsel require the court not just to balance the *Poulis* factors but also to provide the litigant notice and a hearing. Even where the attorney's actions are "flagrant," a litigant's potentially meritorious claim is not to be dismissed in the absence of evidence that the litigant bears any personal responsibility.

Difrancesco v. Aramark Corp., 169 F. App'x 127, 130 (3d Cir. 2006)(district court's failure to provide the party's attorney with the opportunity to respond to the threat of dismissal was an abuse of discretion requiring reversal).

The requirement for notice to the client in *Dunbar* stemmed from an "increasing trend toward the dismissal of legal actions based on dereliction of duty by members of the bar." *Dunbar*, 816 F.2d at 129. Faced with this trend, and to protect clients "dependent on their attorneys to protect their interests," because of the "conflict of interest [] almost inherent in such a situation," this court held that notice to the client and a hearing prior to entry of an involuntary dismissal for lack of prosecution was required.

***38** We conclude that any motion, whether by court or counsel, seeking an effective dismissal or default judgment based on an apparent default on the part of a litigant's counsel be pleaded with particularity and with supporting material and that where the papers demonstrate reasonable grounds for dismissal on that basis the court shall direct the clerk of the court to mail notice directly to the litigant of the time and place of a hearing on any such motion, reasonably in advance of the hearing date. We are confident the district judges have the necessary remedies to prevent any abuse of this procedure.

We think such a procedure will put the client on notice of possible jeopardy to his or her legal interests by counsel's conduct at a time when the client can take appropriate action and when the *Poulis* balance has not been irretrievably struck in favor of the moving party.

Dunbar, 816 F.2d at 129.

Here, the district court abused its discretion when it failed to comply with the requirements of *Dunbar.* The district court assumed, incorrectly, that Adlife knew what was going on, but Adlife did not, and, at the very least, *Dunbar* entitled Adlife to notice and a hearing before dismissal.

On reconsideration, relying on this court's decision in *Adams*, the district court determined that Albrizio's receipt of the *Buckingham Brothers* decision "three days before the case management conference in this action that resulted in a stay of proceedings" disqualified Adlife from seeking the procedural protections of *Dunbar* because this notice gave Adlife "independent knowledge of the delinquency." (J.A. 22 quoting *Adams,* 29 F.3d at 872).

The dismissed litigant's delay in *Adams* was not three days, but *four and* ***39** *one-half years. Id.* at 869 ("From October, 1988 to March, 1993 there was no contact among the parties and the court...") Moreover, when confronted with the motion to dismiss in *Adams*, the tardy party gave the district court no explanation for its dilatory conduct. *Id.* That is a different case than this one.

In this case, instead of following the requirements of *Dunbar*, the district court turned a blind eye to Adlife. To make matters worse, when Adlife tried to alert the district court to its plight, the district court refused to listen and used a local rules technicality [3] to silence Adlife. *Dunbar*'s requirement for notice to the ***40** litigant and a hearing exists to avoid a situation like the one below where the party's lawyer, conflicted by his own malfeasance, causes further prejudice to the parties or the court. Had a hearing been held with notice to Adlife, Adlife would have learned what was happening in the Karns case and ameliorated any prejudice Liebowitz caused.

C. The District Court Abused its Discretion by Misapplying the *Poulis* Factors

This court requires district courts to evaluate motions to dismiss for failure to prosecute under the six factors in *Poulis:*

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. at 868. This court's determination whether the district court abused its discretion is based on its evaluation of the *Poulis* factors. *Harrison v. Coker*, 587 F. App'x 736, 739 (3d Cir. 2014).

For the reasons discussed above, on the first factor the district court ***41** mistakenly assumed Adlife's responsibility and abused its discretion by not providing Adlife the procedural protections *Dunbar* requires that would have permitted Adlife to show the court it was not responsible for Liebowitz's conduct.

On the second factor, the district court improperly concluded Karns was prejudiced, even though the only delay before the case was stayed totaled all of one minute. Karns never moved to compel, and the record does not contain any discovery orders directed to Adlife. Furthermore, once the case was stayed, the status quo was maintained until the stay was lifted. "[A] stay is not a vague, legally meaningless pause in a judicial proceeding," rather "the stay 'operates upon the judicial proceeding itself' and prevents 'judicial alteration of the status quo.' " *Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 454 (3d Cir. 2020) quoting *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). Consequently, nothing that occurred during the period the case was stayed could cause any prejudice to Karns or the Court.

The district court found prejudice by interpreting prejudice to mean not just " 'irredeemable harm" but also to mean "the burden imposed by impeding a party's ability to prepare effectively a full and complete [defense] is sufficiently prejudicial." (J.A. 12).

Once again, the delay charged to Adlife that Karns claimed impeded its ability to prepare lasted only one minute. Furthermore, Karns, Fry and Adlife all asked the district court for ninety additional days of discovery to permit them to prepare their cases. There is nothing in the record to support the ***42** proposition that an additional ninety days was insufficient to permit Karns to prepare effectively, or that Karns was permanently impeded from defending itself. In fact, Karns' request for the additional time belies the district court's finding to the contrary.

The district court justified its prejudice finding based on *Ware v. Rodale Press, Inc.,* 322 F.3d 218 (3d Cir. 2003), and *Woods v. Malanoski*, No. CV 17-17, 2018 U.S. Dist. Lexis 120952, 2018 WL 3999660 (W.D. Pa. July 18, 2018). (J.A. 12). The district court's reliance on these cases was misplaced.

Ware involved a lesser sanction than dismissal. The sanction was levied under Rule 37(b)(2)(B) because the sanctioned party defied a court order requiring production of the party's damages calculation. This court found the opposing party's need to file two motions (one to compel, and one to preclude the use of the evidence at trial), and the sanctioned party's production of the damages calculation one week before trial without supporting documentation, prejudiced the opposing party's ability to prepare a full and complete defense at trial. *Ware*, 322 F.3d at 223-4.

Woods was *pro se* case filed by an incarcerated plaintiff. In response to an order to show cause why plaintiff did not respond to the defendants' motion to dismiss, plaintiff explained he mailed his response but it must have been destroyed. Despite being released from jail, plaintiff never filed anything further in opposition ***43** to the motion to dismiss. The decision cited by the district court in this case was the magistrate judge's report and recommendation recommending partial dismissal. The plaintiff failed to object to the report and recommendation, and the district court dismissed the whole case based on plaintiff's dilatory conduct. *Woods v. Malanoski*, No. 2:17-cv-17, 2018 U.S. Dist. LEXIS 141777, 2018 WL 3997344 (W.D. Pa. Aug. 21, 2018). Basically, after filing the complaint, plaintiff did nothing.

Neither *Ware* nor *Woods* come close to the facts here. The delay and prejudice in *Ware* and *Woods* were obvious. Here it is absent. Neither case supports the district court's reasoning that Karns was prejudiced by Adlife's "lack of clarity surrounding the allegations in this case, which have impeded Defendant's ability to mount a defense, as well as by the delays in briefing of its still-pending motion for summary judgment." (J.A. 13). Nor does the district court's reasoning make sense in light of the stay it imposed on the entire case for three months.

The district court's analysis of factor three - history of dilatoriness - was also faulty. Adlife was not dilatory except by perhaps one minute. Any other delays were either caused by and chargeable to Liebowitz, or excused by Karns' failure to act.

The district court's analysis of the fourth factor was corrupted because it wrongly attributed Liebowitz's malfeasance to Adlife, and because it refused to ***44** listen to Adlife's request for a supplemental brief. The district court's determination that a form-over-substance technicality in the local rules disqualified consideration of Adlife's reasonable explanations violated the policy underlying *Poulis* and *Dunbar* which is plainly to avoid punishing a blameless litigant for the sins of its lawyer.

The district court's analysis of the fifth factor was again based on its mistaken belief that Adlife was behind the games Liebowitz played. It was not. Had the district court looked at the facts, instead of discarding them wholesale, it would have seen the truth.

On the last factor, Adlife's case was plainly meritorious as its proposed amended complaint and opposition to summary judgment demonstrated.

D. The District Court's Refusal to Consider the Motion for Reconsideration was an Abuse of Discretion

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). A motion for reconsideration may be granted if the moving party

shows the need to correct a clear error of law or fact or to prevent manifest injustice. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

The manifest injustice of dismissal of Adlife's case is obvious. The *Poulis* six factor analysis would not exist had this court not determined safeguards against ***45** unjust dismissals were required. The district court's deemed withdrawal of Adlife's supplemental submission on the motion to dismiss for failure to prosecute, and its refusal to consider Adlife's submissions on the motion for reconsideration, prevented it from discovering the manifest injustice it was committing. If ever there was a case that presented the possibility of such an injustice, this is that case.

Before he was suspended, Liebowitz left a trail of destruction in his wake. Adlife, through no fault of its own, was strewn battered and beaten along that trail. No other young lawyer has been so famously defiled in the legal press than Liebowitz. No other young lawyer operated so obviously outside his depth than Liebowitz. No other young lawyer disrespected so many federal district judges as Liebowitz. A closer look at Adlife's situation was called for. The district court's refusal to undertake that closer look, and its outright refusal to even consider Adlife's plea through its new lawyers after Liebowitz was terminated, was manifest injustice that requires correction.

VIII. CONCLUSION

The district court abused its discretion when it dismissed Adlife's case for failure to prosecute. The district court abused its discretion when it failed to provide Adlife with specific notice and a hearing as required by *Dunbar*. The district court abused its discretion when it refused to consider the opposition to the motion to dismiss filed by new counsel for Adlife based on a local rules ***46** technicality. The district court abused its discretion when it denied the motion for reconsideration that presented the true facts to the district court showing Adlife was unaware of Liebowitz's history of misconduct in the case below and had no knowledge of Liebowitz's malfeasance in other unrelated cases in other courts. The district court abused its discretion when it dismissed for failure to prosecute because Adlife never failed to prosecute its claims, violated no court orders, complied with all the rules of civil procedure, and caused no prejudice to Karns.

The orders below dismissing Adlife's case and denying reconsideration should be vacated and the case remanded for further proceedings in accordance therewith.

DATED: May 2, 2022

Respectfully submitted,

/s/ Joel B. Rothman

JOEL B. ROTHMAN

-and-

JOSEPH A. DUNNE

Footnotes

1 Refers to pages of the Joint Appendix.

2 The district court saw Albrizio's admission that he was aware of the *Buckingham Brothers* decision as evidence that Adlife was not "unaware of Mr. Liebowitz's history of misconduct or any issues with his representation." (J.A. 22). But the district court must have missed Albrizio's testimony that after reading *Buckingham Brothers*, Albrizio wrote to Liebowitz and demanded a meeting, to which Liebowitz responded "Yes, this was the case we discussed about. Terrible judge that didn't agree with the $30k in default. We often get $30k on default but this judge is just devaluing copyright laws. Think we ask the Court for $10k?" and then railed against "corrupt judges." (J.A. 1522-1523, 1534).

3 The district court's application of M.D. Pa. L.R. 7.5 in this case appears to run afoul of Fed. R. Civ. P. Rule 7(b) which sets forth the basic requirements for motions, and contains no penalty of "deemed withdrawal" where a brief separate from the motion is not filed within a given time period. Of course, local rules must be consistent with acts of Congress and the federal rules, and may not interfere with their application. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 569 (3d Cir. 1985). A local rule that, in its application, is incompatible with the federal rules is invalid. *Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1186 (11th Cir. 2013).

In *Cohen v. Bd. of Trs. of the Univ. of the D.C.*, the D.C. Circuit, confronted with a local rule that deemed an unopposed motion to dismiss granted, invalidated the rule as inconsistent with the federal rules. 819 F.3d 476, 481 (2016).

Local Rule 7(b) works against that weighty preference in favor of deciding cases on their merits when applied to a case-dispositive motion under Federal Rule 12(b)(6). Not only does Local Rule 7(b) effectively shift the burden of persuasion to the non-moving party, allowing the district court to dispose of cases without examining their merits, but it also provides none of the procedural protections that attach when the court dismisses a case under Federal Rules 41(b) or 55 instead.

Id. Here, as in *Cohen*, the merits of Adlife's opposition to the motion to dismiss filed by new counsel -- unconstrained by the conflicts of interest inherent in Liebowitz's continued representation -- were never reached and the procedural protections of Rule 41(b) and *Dunbar* were improperly discarded. L.R. 7.5 should not have been applied to Adlife here, and its application was a further abuse of discretion.

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