

11-175

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN C. RANSMEIER, administrator of
the Estate of Louis Neil Mariani, deceased,

Plaintiff-Appellee,

and

COLGAN AIR INC., a Virginia
corporation, US AIRWAYS INC.,
a Delaware Corporation,
[continued]

PETITION FOR REHEARING EN BANC

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Appellant

L 3 COMMUNICATIONS CORPORATION
SECURITY AND DETECTION SYSTEMS,
a Delaware corporation, L 3 COMMUNICATIONS
CORPORATION, a Delaware corporation,
L 3 COMMUNICATIONS HOLDINGS, INC.,
a Delaware corporation, INVISION
TECHNOLOGIES, INC., state of incorporation
unknown, AIR FRANCE, a French corporation,
DELTA AIRLINES, a corporation, SWISS, a
Swiss corporation, AIR JAMAICA, a Jamaican
corporation, CAPE AIR, Air Transportation
Association, a trade organization,

Defendants.

UAL CORPORATION, an Illinois Corporation,
UNITED AIRLINES, INC., and Illinois
corporation, HUNTLEIGH USA CORPORATION,
a Missouri corporation, ICTS INTERNATIONAL
NV, a Netherlands business entity of unknown form,
GLOBAL AVIATION SERVICES, a Delaware
corporation, BURNS INTERNATIONAL
SECURITY SERVICES CORP., Delaware Corporation,
SECURITAS AB, a Swedish business entity of
unknown form, MASSACHUSETTS PORT
AUTHORITY, a government entity, THE BOEING
COMPANY, and Illinois corporation,
MIDWEST EXPRESS AIRLINES, INC. A Wisconsin
Corporation, CONTINENTAL AIRLINES, INC., a
corporation, Does 1 through 100, inclusive,
MIDWEST AIRLINES, INC.,

Defendants-Appellees,

v.

ELLEN MARIANI, Proposed Intervenor,

Appellant.

I. PRELIMINARY STATEMENT SUPPORTING PETITION [F.R.A.P. 35(b)(1)]

ELLEN MARIANI, Appellant ("Mariani"), widow of 9/11 victim Louis Neil Mariani, hereby petitions for rehearing en banc from the order of the 2nd Circuit dated 5/15/2013 ("5/15/13 Order"); and from the order denying motion of 6/26/12 ("Motion Order") and from the Summary Order dated 6/26/12 ("Summary Order"), both as finalized or amended by the 5/15/13 Order; under both the conflicts and exceptional importance provisions of F.R.A.P. 35(b)(1), based on the unusual act of two (2) jurists in sanctioning the undersigned attorney and his client for having truthfully disclosed connections of a federal judge's son to affiliates of 9/11 aviation security defendants appearing before him. Although not the central issue in the underlying appeal, Mariani and her counsel were excoriated despite having submitted to this Court a memorandum detailing the connections and explaining their relevance in the context of one of the main issues on appeal, namely the failure of the same judge to act on the dual loyalties of a plaintiff appearing before him. For the latter reason Mariani is also petitioning for en banc review of the Summary Order as well, especially if the 5/15/13 order was within the jurisdiction of the Court (disputed below), since the Summary Order would be deemed to have become final only now or to have been amended (Local Rule 35.1).¹

¹ Mariani believes that the failure of the panel to label the 5/15/13 order as an amendment to the 2012 Summary Order is not dispositive as to its nature, and

The above-referenced panel decisions conflict with decisions of both this Court and the U.S. Supreme Court as follows: Ostrer v. United States, 584 F.2d 594 (2nd Cir. 1978) (5/15/13 Order re: jurisdiction); Johnson v. Holder, 564 F.3d 95 (2nd Cir. 2009) (Summary Order--application of law of the case doctrine); Marino v. Ortiz, 484 U.S. 30 (1988) (Summary Order--intervention); and Marshall v. Marshall, 547 U.S. 293 (2006) and Lefkowitz v. The Bank of New York, 528 F.3d 102 (2nd Cir. 2007) (Summary Order--limits of the probate exception). En banc consideration is necessary to secure uniformity of the court's decisions.

The proceeding involves multiple questions of exceptional importance including one of first impression: may a federal court of appeals exercise jurisdiction concurrently with a district court after issuance of its mandate, sufficient to impose sanctions? In addition to those noted above, other questions of exceptional importance are raised by (1) the chilling effect of this type of discipline arising out of even the most disparaged disclosure of judicial connections, implicating the even-handed administration of justice in the federal courts (notably in a prominent terrorism-related case), and (2) the fact that a 9/11 widow has been denied the right to protect her property interests rendered vulnerable by fiduciary conflict of interest, and in sub-part as follows:

the Summary Order has in fact been amended to confirm that no sanctions are justified based on Mariani's second bid for intervention.

II. THERE ARE MULTIPLE GROUNDS FOR EN BANC REHEARING

At least six issues are raised upon the exceptional import of a 5/15/13 decision of a two-judge panel of the Second Circuit to impose sanctions on an attorney and his client and to make unprecedented findings branding them "anti-Semitic" for disclosing late-discovered Israeli-related connections of the settlement judge, relating back to an OSC in a 6/26/12 Summary Order denying Petitioner's appeal, and a separate order issued that same day denying the connections motion:

1. Did the panel without expressly retaining jurisdiction still have jurisdiction to impose sanctions, almost 11 months after issuing an Order to Show Cause, where it is clear under 2nd Circuit authority that the jurisdiction of a court of appeals terminates upon issuance of the mandate and where this Court had issued the mandate to the lower court already three months earlier?

2. In the absence of express authorization to do anything other than decide an appeal pending before them, did a reduced panel consisting of only two (2) appellate jurists even have authority to impose sanctions?

3. If the Court of Appeals did retain jurisdiction to impose sanctions after the issuance of its mandate, did the piecemeal rendering of judgment deprive the Petitioner of a clear remedy to petition for writ of a certiorari because of the absence of finality in a single indivisible order, unless that remedy still exists?

4. Even if the motion of Mariani regarding judicial connections to defendants' affiliates was misguided, was the sanction and "public reprimand" and its obvious chilling effect on dissenting speech disproportionate to the offense?

5. Were sanctions for filing the connections motion proper and had proper notice been given to the at-risk parties where there was no finding made of frivolousness in the Motion Order and where the panel OSC--and the ensuing rebuttal of Mariani and counsel--was devoted mostly to other allegedly frivolous acts, namely trying to intervene in the district court a second time, which attempt the panel then ultimately found was not sanctionable in its 5/15/13 Order?

6. Since the panel found in its 5/15/13 Order that there was no indisputable law of the case precluding a second intervention motion by Mariani, or even irrespective of that finding based on the absence of finality until 5/15/13, is rehearing not necessary because the panel incorrectly found in its Summary Order that the appeal had to be denied not on its merits but because of law of the case?

III. THE PANEL ACTED IN EXCESS OF ITS JURISDICTION

Initially, en banc review is proper because the Court of Appeals had already lost jurisdiction by the time it imposed sanctions on the undersigned counsel and his client, having issued the mandate without retaining jurisdiction.

The standard authority cited by the 2nd Circuit itself on the effect of issuance of the mandate is Ostrer v. United States, 584 F.2d 594 (2nd Cir. 1978). In that case the Court stated, "The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum from whence it came." Neither the Ostrer court or any other has used less than categorical language or stated exceptions, and it is clear from this court's utterance that the issue is jurisdictional.

An extensive discussion of issuance of the mandate including in other jurisdictions is also found in United States v. Rivera, 844 F.2d 916 (2nd Cir. 1988). That court summarizes by quoting Ostrer and stating, "Simply put, jurisdiction follows the mandate." Accord United States v. Dilapi, 651 F.2d 140 (2nd Cir. 1981) ("The issuance of the mandate from this Court terminated this Court's jurisdiction").²

Although there is Second Circuit authority stating that federal courts can rule on collateral matters even in the absence of jurisdiction, see Schlaifer Nance &

² Dilapi goes on to state that filing of a petition for rehearing "did not revest jurisdiction in this Court;" however, the case also suggests that this court can recall the mandate if a petition for rehearing is presented. Mariani would be in the kafkaesque position of having no satisfactory legal remedy as to an ultra vires order of this court if the court then refused to consider a claim of absence of jurisdiction because it lacked jurisdiction. Accordingly, Mariani asks that the Court recall the mandate sua sponte if necessary to rule on this petition.

Company v. Estate of Warhol, 194 F.3d 323 (2nd Cir. 1999), that case pertained to the exercise of jurisdiction by a district court over a sanctions motion after the appellate issuance of the mandate, and Mariani has discovered no cases approving of a similar exercise of jurisdiction by a court of appeals which--after all--would be inconsistent with jurisdiction having been returned to the district court, since a district court and a court of appeals cannot simultaneously have jurisdiction in a case. See U.S. v. Jacobson, 15 F.3d 19 (2nd Cir. 1994) (recognizing need for overt act to restore appellate jurisdiction after mandate has been issued).

Thus this petition raises a question of first impression. Moreover, an issue not just of error but of exceptional importance is raised when a panel acts contrary to the precedent of its own Circuit -- and does so in the manner done here.

III. A TWO-JUDGE PANEL LACKED AUTHORITY TO SANCTION

Mariani counsel pointed out to the two-judge panel in responding to its OSC, Docket No. 407, note 4, and it remains true, that under the literal terms of their express authority two judges could not impose sanctions in the absence of a third jurist because a two-judge panel can act at all only because found in 2nd Circuit Operating Procedure E(2), which allows a two-judge panel to "decide the matter." Issuing an OSC and imposing sanctions thereon nostra sponte are not part of

"deciding the matter." In the context of an even more unusual situation such as this where only two judges are deciding on the reputation and indeed the career of a lawyer appearing before them,³ restraint should already be called for, but Mariani believes that because it was necessary for an operating procedure to be adopted to confer any authority at all on a two-judge panel, that authority should be construed narrowly, consistent with a maxim generally applicable to public authorities, namely, "that which is not permitted is forbidden." Such a rule would not tie the hands of two judges left in the lurch by the last-minute recusal of a colleague in a case involving genuine grounds for sanction, since a hobbled panel also has a ready mechanism for bringing in a third panel member to hear a tape of oral argument or even reschedule oral argument, and to review the briefs.

IV. THE PANEL ERRED IN ITS PIECEMEAL DECISION-MAKING

This Court should also provide a remedy based on the inordinate delay that occurred between the OSC issued in the Summary Order (the OSC was combined

³ Judges Hall and Carney obviously intended that their reprimand be "public," and their decision along with multiple quotes was duly reported by the New York Times (where Judge Carney's husband Lincoln Caplan is an editorial page editor). Irrespective of that curious connection, an unprecedented appellate opinion calling a lawyer is "anti-Semitic" is presumptively ruinous to a career in the United States, where anti-Semitism has for many decades now been one of the worst things one can be accused of.

with a ruling on the merits in a single document) and the ultimate rendition of judgment imposing sanctions 5/15/13, especially if the Court does not strike the latter judgment as ultra vires.

Under one proposition, what that delay caused was a premature submission of a petition for writ of certiorari to the Supreme Court, because Mariani was concerned that if she waited for a clear signal of finality to the Summary Order she might be faulted for an untimely petition and thereby deprived of meaningful review (see Docket No. 424); and only now is she finally made aware that her petition was premature, forcing her to file a new petition (unless this Court provides a complete remedy). No explanation was provided for the denial of Mariani's initial certiorari petition, nor is an explanation commonly given; therefore it is just as likely that the denial was based on a procedural flaw as anything else. The denial of a petition for certiorari does not constitute law of the case. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n. 1 (1973).

Under the alternative proposition, the Court's delay created the need for two different post-judgment proceedings, namely not just proceedings on the merits which petitioner had already initiated, but now proceedings on the imposition of sanctions. Piecemeal review is inimical to the Supreme Court, and presumably the Court of Appeals also, and steps should ensue so that parties are not prejudiced.

V. NOTICE OF GROUNDS FOR SANCTIONS WAS INADEQUATE

There is one more serious procedural flaw which should prompt the Court to vacate the 5/15/13 order of the two judges imposing sanctions if the Court does not agree that sufficient grounds are already stated: the two judges did not give adequate notice to the undersigned counsel or his client of the prospect that they could be sanctioned for a single motion directed to connections of Judge Hellerstein (or for elements of that motion), and/or they were not given proper opportunity to respond, by allotment of only 10 pages each to address the OSC.

Mariani counsel notes that he explicitly addressed the ambiguity of the OSC in his rebuttal, Docket No. 407. Mariani quotes from that pleading:

"....Moreover, counsel should not be at risk of sanctions for statements made during briefing or argument without those statements being clearly identified in the OSC, which--with one possible exception--they are not.

....Counsel sees one act of misconduct alleged with specificity: that he filed a "series" of "vexatious motions" despite the "clear res judicata effect" of this court's prior decision []....Counsel also notes that there are references in the OSC to "ad hominem attacks" and "bombastic challenges" in the papers filed below (and on appeal); but no examples have been cited and counsel cannot possibly speculate in such short space about all instances throughout [] briefing three motions and various oppositions [] where [] this Court might have taken issue with what counsel believed was permissible comment within the bounds of zealous advocacy....

This Court has also suggested that Appellant's frivolousness might be located in her motion regarding the connections of Judge Hellerstein ("Motion to Supplement Record" or "MSR") (the OSC states that "this all" culminated in the filing of that motion); however, this Court did not make a finding in its order on that motion, Docket No. 400, that the MSR was frivolous or filed in bad faith, and counsel submits that such a finding in that order would have been necessary for the Court to now say that Respondents' frivolousness occurred in or ripened with that motion. As a general principle, counsel cannot be expected to respond regarding an act that might have supported sanctions. Nuwesra v. Merrill Lynch et al., 174 F.3d 87, 92 (2d Cir. 1999) (per curiam).

In any case counsel notes that here again, he has not been given adequate space to brief the merits of the MSR; counsel can only note that he denies making "personal slurs" against Judge Hellerstein. The MSR was, after all, about connections of a judge's family member to parties suggesting absence of impartiality, not an inherently impermissible subject for a lawyer to raise in a tribunal, and particularly so where [] the issue of "connections" was one of the central issues on appeal; and the use of the word "slurs" is a loaded term suggestive of pretext that counsel completely disclaims. The careful documentation in the MSR of Judge Hellerstein's connections to defendants Boeing and Huntleigh through his son's law firm--regardless of what one might conclude about them in the context of the appeal--are a far cry, for instance, from the allegations about judge and trustee made by the sanctioned attorney in In re 60 East 80th Street Equities, supra.

As noted, Mariani counsel could not have shown in the space of 20 pages

that he proceeded in good faith in both the "Hellerstein motion" and in the litigation as a whole, and thus he devoted his space to the only ground for sanction that appeared to be unequivocally stated--the intervention litigation as a whole--believing that there was no possible basis for sanctioning him or his client for "slurs" against Judge Hellerstein because neither he nor his client had not used any slurs (which he did point out, but in a necessarily cursory fashion). Mariani counsel submits that it is self-evident that he and his client made optimum use of their 10 pages each (Docket No. 407). Indeed, Mariani counsel apparently caused the two judges to change their mind about sanctioning him (and his client) for litigating Mariani's second bid to intervene, through a showing that "there was no indisputable 'law of the case' preventing Ellen Mariani from bringing a second intervention motion...." (5/15/13 Order, p. 6).

Mariani counsel believes he would have been able to do the same thing as to the connections motion, had he been properly notified and had he been given sufficient space to rebut the suggestion that he had improperly disparaged a judge with anti-Semitic slurs, or that he was motivated by the judge's "Jewish" religion. Mariani counsel was blindsided by those findings since neither "anti-Semitic" or "Jewish" were terms used in the OSC or his moving papers, and moreover he was sanctioned for papers filed in support of the motion that allegedly contained "raw

and ugly" anti-Semitic speech, but those papers were likewise not identified in either the OSC or the 5/15/13 Order. Counsel simply was not warned that either those papers or specific arguments or speech in the motion appeared sanctionable.

VI. THERE IS NO BASIS FOR FINDING "ANTI-SEMITISM" OR FOR SANCTIONS IRRESPECTIVE OF ITS ABSENCE

One of the numerous anomalous features of an opinion which finds attorney "anti-Semitism" in a "raw and ugly form" is the absence of any quotation in the opinion from what the targeted attorney actually wrote or appended. In the absence of raw quotes, therefore, there are only two premises possible for the conclusions reached by Judges Hill and Carney in imposing sanctions on the undersigned and his client: Either there could be no explanation other than anti-Semitism for seeking judicial notice of late-discovered connections of a judge's son to Israeli affiliates of 9/11 defendants appearing before him, or there could be no explanation other than anti-Semitism for certain unidentified comments about the judge's Israeli ties made in the course of an otherwise permissible attempt to attract notice to the connections. Although the panel suggests that it has adopted both premises, neither stand up to examination when given objective scrutiny--in the same way that the panel's original OSC charging frivolous litigation could not stand (as confirmed in the 5/15/13 Order) when the panel gave it closer scrutiny.

It is fallacious, to begin with, to suggest that critique of a judge's Israeli loyalties amounts to anti-Semitism. But the cruel irony here is that the undersigned counsel was not even critiquing support for Israel on the part of Judge Hellerstein (or any of his family members). Rather, Mariani counsel was describing; he was anticipating doubt over whether Judge Hellerstein was aware of connections of his Tel Aviv-based lawyer son, and Mariani counsel believed--whether rightly or wrongly, he genuinely believed--that a showing of the degree to which Judge Hellerstein and his wife were actively involved in Israeli causes would tend to show that the judge was at least on inquiry notice of his son's Israeli clients (some prominent in the defense and security industries) and their connections to 9/11 defendants. Most litigants would be concerned to know that a judge's son represented another litigant, and Mariani genuinely believed that the representation by the judge's son of persons that were effectively the owners of these companies was relevant to the appearance of partiality, and to the judge's seeming lack of concern with the even more egregious demonstration of dual loyalties of Mariani's fiduciary, John Ransmeier, whose law firm was representing other defendants (airlines and insurance companies) at the same time he was litigating against and settling with them.

No references to Judge Hellerstein or his son or wife were disparaging--

certainly there were no slurs--but they were necessarily personalized to make the legal point. Revson v. Cinque & Cinque, 221 F.3d 71 (2nd Cir. 2000). This is a distinction that federal appeals court judges should be able to and must make. Contrary to the 5/15/13 Order, recusal was not sought and counsel never used the term "bias" or "biased." This is not the first time that judges have faced scrutiny for their children's links. See In re Aetna Surety & Casualty, Inc., 919 F.2d 1136 (6th Cir. 1990). Moreover, even if Mariani counsel engaged in illogical thinking (he believes he did not), the branding and reprimanding are disproportionate, considering the chilling effect on those who genuinely believe that there has been a miscarriage of justice influenced by a judge's connections.

Much more could be said about the vituperative statements directed toward the undersigned, but counsel simply note that even the fact of an "Israel" link was incidental to the motion: Mariani and her counsel would have filed the same motion if the connections of the judge's son had been Saudi or Dutch instead.

VII. THE COURT SHOULD ORDER REHEARING OF THE WHOLE APPEAL

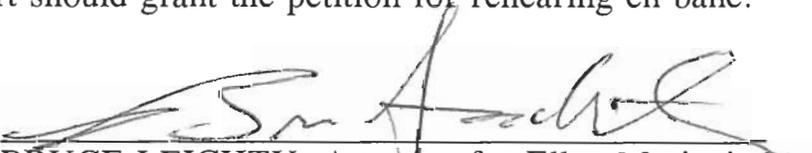
Finally, although there is not space to fully make the argument because of the operative 15-page limit, the Court should order rehearing of the entire appeal and ultimately reverse and remand, either because only now (5/15/13) has an

indivisible order become final or amended, or because of the implications of the 5/15/13 Order suggesting the error in the Summary Order. If the 5/15/13 errors are not enough to rehear a case arising from the biggest domestic terror incident in U.S. history, then the Court should at least take due note of the implications of a settlement judge acting with willful ignorance regarding a lawyer plaintiff entering into a multi-million dollar settlement with his own client defendants.

In issuing the Summary Order, the panel failed to follow Johnson v. Holder, 564 F.3d 95 (2nd Cir. 2009), which provides for manifest injustice exceptions to law of the case (which did not even operate preclusively to begin with, as can be implied from the 5/15/13 panel concessions); and Marino v. Ortiz, 484 U.S. 30 (1988), which expressly states that the (only) remedy of a non-party affected by a settlement is to intervene; and Marshall v. Marshall, 547 U.S. 293 (2006), which expressly provides that the so-called "probate exception" does not always require a litigant to resort to a state probate court, and should have not have done so here.

WHEREFORE, the Court should grant the petition for rehearing en banc.

Date: 5/28/13


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11-175

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN C. RANSMEIER, administrator of
the Estate of Louis Neil Mariani, deceased,

Plaintiff-Appellee,

and

COLGAN AIR INC., a Virginia
corporation, US AIRWAYS INC.,
a Delaware Corporation,
[continued]

ADDENDUM TO PETITION FOR REHEARING EN BANC
(TO INCLUDE SUMMARY ORDER, ORDER AND
NONDISPOSITIVE OPINION ONLY)

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a Delaware corporation, L 3 COMMUNICATIONS
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GLOBAL AVIATION SERVICES, a Delaware
corporation, BURNS INTERNATIONAL
SECURITY SERVICES CORP., Delaware Corporation,
SECURITAS AB, a Swedish business entity of
unknown form, MASSACHUSETTS PORT
AUTHORITY, a government entity, THE BOEING
COMPANY, and Illinois corporation,
MIDWEST EXPRESS AIRLINES, INC. A Wisconsin
Corporation, CONTINENTAL AIRLINES, INC., a
corporation, Does 1 through 100, inclusive,
MIDWEST AIRLINES, INC.,

Defendants-Appellees,

v.

ELLEN MARIANI, Proposed Intervenor,

Appellant.

11-175-cv(L)
Ransmeier v. UAL Corporation, et al.

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

August Term, 2011

(Argued: May 23, 2012

Decided: May 15, 2013)

Docket Nos. 11-175-cv & 11-640-cv

JOHN C. RANSMEIER, ADMINISTRATOR OF THE ESTATE OF LOUIS NEIL MARIANI, DECEASED,

Plaintiff-Appellee,

and

COLGAN AIR INC., A VIRGINIA CORPORATION, US AIRWAYS, INC., A DELAWARE CORPORATION, L
3 COMMUNICATIONS CORPORATION SECURITY AND DETECTION SYSTEMS, A DELAWARE
CORPORATION, L 3 COMMUNICATIONS CORPORATION, A DELAWARE CORPORATION, L 3
COMMUNICATIONS HOLDINGS, INC., A DELAWARE CORPORATION, INVISION TECHNOLOGIES, INC.,
STATE OF INCORPORATION UNKNOWN, QUANTUM MAGNETICS, INC., STATE OF INCORPORATION
UNKNOWN, HEIMANN SYSTEMS CORP., STATE OF INCORPORATION UNKNOWN, AIR FRANCE, A
FRENCH CORPORATION, DELTA AIRLINES, A CORPORATION, SWISS, A SWISS CORPORATION, AIR
JAMAICA, A JAMAICAN CORPORATION, CAPE AIR, AIR TRANSPORT ASSOCIATION, A TRADE
ORGANIZATION,

Defendants,

UAL CORPORATION, AN ILLINOIS CORPORATION, UNITED AIRLINES, INC., AN ILLINOIS
CORPORATION, HUNTLEIGH USA CORPORATION, A MISSOURI CORPORATION, ICTS
INTERNATIONAL NV, A NETHERLANDS BUSINESS ENTITY OF UNKNOWN FORM, GLOBAL AVIATION
SERVICES, A DELAWARE CORPORATION, BURNS INTERNATIONAL SECURITY SERVICES CORP., A
DELAWARE CORPORATION, SECURITAS AB, A SWEDISH BUSINESS ENTITY OF UNKNOWN FORM,
MASSACHUSETTS PORT AUTHORITY, A GOVERNMENT ENTITY, THE BOEING COMPANY, AN ILLINOIS
CORPORATION, MIDWEST EXPRESS AIRLINES, INC., A WISCONSIN CORPORATION, CONTINENTAL
AIRLINES, INC., A CORPORATION, DOES, 1 THROUGH 100, INCLUSIVE, MIDWEST AIRLINES, INC.,

Defendants-Appellees,

-v.-

ELLEN MARIANI, Proposed Intervenor,

Appellant.

Before:

HALL, CARNEY, *Circuit Judges*.¹

After an appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*), this court AFFIRMED the district court's judgment denying Appellant's motion to intervene, and ordered the Appellant and her attorney to show cause why they should not be sanctioned for their conduct on appeal. We conclude that Appellant and her attorney's conduct in prosecuting this appeal was frivolous and offensive, and therefore warrants the imposition of sanctions.

Bruce Leichty, Clovis, California, *for Appellant*.

Peter G. Beeson, Devine Millimet & Branch, Professional Association, Concord, New Hampshire, *and* Charles R. Capace, Zimble & Brettler, Boston, Massachusetts, *for Plaintiff-Appellee*.

Jeffrey J. Ellis, Quirk and Bakalor, P.C., New York, New York, *and* Michael R. Feagley, Mayer Brown, LLP, Chicago, Illinois, *for Defendants-Appellees*.

HALL AND CARNEY, *Circuit Judges*:

On June 26, 2012, this panel issued a summary order (1) affirming the judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*) denying Appellant's renewed motion to intervene, and (2) ordering Appellant and her attorney to show cause why they should not be sanctioned for their conduct before this Court. *See Ransmeier v. Mariani*, 486 F. App'x 890, 893-94 (2d Cir. 2012) (summary order). We have now reviewed their submissions, as well as the totality of their behavior in this case, in particular with respect to their Motion to Supplement the Record (the "Motion"). For the reasons set forth below, we

¹ Hon. Barrington D. Parker, Jr., originally assigned to this panel, recused himself from consideration of this appeal. Pursuant to Internal Operating Procedure E(b), formerly § 0.14(b) of the Local Rules of the United States Court of Appeals for the Second Circuit, the appeal – including this sanctions matter – was decided by the panel's remaining two judges, who are in agreement as to the disposition.

invoke the inherent power of this Court and impose sanctions in the form of double costs jointly and severally on Appellant Ellen Mariani and her counsel, Bruce Leichty.

I. Procedural History

This case's lengthy procedural history is set out in detail in two prior decisions of this Court. *See generally Ransmeier v. Mariani*, 486 F. App'x 890; *N.S. Windows, LLC v. Minoru Yamasaki Assocs., Inc.*, 351 F. App'x 461 (2d Cir. 2009) (summary order) ("*N.S. Windows*").

Briefly, Ellen Mariani is the widow of Louis Mariani, who died in one of the planes involved in the tragic September 11, 2001 terrorist attacks. *See N.S. Windows*, 351 F. App'x at 465. Mariani and her step-daughter, Lauren Peters, both filed related wrongful death suits against various airlines and other parties in the Southern District of New York. *Id.* In 2004, Mariani and Peters entered into an agreement in New Hampshire probate court, pursuant to which Mariani resigned as administrator of her late husband's estate, and a neutral administrator was appointed to replace Mariani. The administrator was "to act to dismiss with prejudice" Mariani's suit and pursue only the step-daughter's suit ("the Peters suit"). *Id.*

After entering into that agreement, Mariani apparently had second thoughts. Starting in 2005, she has repeatedly attempted to intervene in the Peters suit, arguing primarily that her probate court agreement did not divest her of what she calls her "independent loss of consortium claim." Mariani Br. at 4. In each of these proceedings, our Court and the district court concluded that "Mariani's probate court agreement with Peters demonstrated [Mariani's] clear intention and commitment to abandon *all* her claims, including her loss of consortium claims." *Ransmeier*, 486 F. App'x at 892 (emphasis added).

In deciding Mariani's second appeal, we became deeply concerned by two aspects of the case as framed by Mariani's counsel Bruce Leichty. First was its apparent frivolousness. In *N.S.*

Windows we had affirmed the district court's holding that, by virtue of her agreement with Peters, Mariani had no legal status in the federal action and that any arguments she cared to make regarding her individual loss of consortium claim were properly addressed only to the New Hampshire probate court. *N.S. Windows*, 351 F. Appx at 466-67. In appealing once again to this Court, Mariani persisted in making arguments that we had clearly rejected, and others that were irrelevant.

Our other concern with Mariani's second appeal was the disturbing manner in which she and her counsel prosecuted it. We noted, in particular, the "discreditable tone" of her filings. *Ransmeier*, 486 F. App'x at 893. We also wrote that her briefs featured "an escalating series of *ad hominem* attacks on opposing counsel and bombastic challenges to the integrity of the district court," *id.*, which culminated with the particularly offensive Motion to Supplement the Record to introduce "newly-discovered evidence" of the district court's alleged partiality. *Id.* This purported "evidence" consisted of little more than a series of offensive insinuations, unmistakably anti-Semitic, about Judge Hellerstein, his family members, their professional work and some of their personal charitable activities.

We therefore ordered Mariani and her counsel to show cause why they should not be sanctioned in the amount of double costs.

II. Analysis

Our authority to impose sanctions is grounded, first and foremost, in our inherent power to control the proceedings that take place before this Court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). "These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* (quotation marks omitted). Thus a federal court – any

federal court – may exercise its inherent power to sanction a party or an attorney who has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers*, 501 U.S. at 45-46. We may impose sanctions *nostra sponte*. *Id.* at 42 n.8; *see also Gallop v. Cheney (Gallop I)*, 642 F.3d 364, 370 (2d Cir. 2011).

Beyond our inherent power, two additional sources provide authority to impose sanctions. Pursuant to 28 U.S.C. § 1927, “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” Further, Federal Rule of Appellate Procedure 38 provides that, after providing notice and a reasonable opportunity to respond, a court of appeals may “award just damages and single or double costs” if it determines that an appeal is frivolous. Both of these rules, however, are supplementary. Neither “displaces the inherent power to impose sanctions for [litigants’] bad-faith conduct.” *Chambers*, 501 U.S. at 47.

Although perhaps the most common reason for a sanctions award may be the “patently frivolous” nature of an appeal, *see, e.g., Gallop I*, 642 F.3d at 370, we also impose sanctions where the conduct of the sanctioned litigant or attorney evinces bad faith or an egregious disrespect for the Court or judicial process. We recently sanctioned attorneys who “repeatedly and in bad faith accused the Court of bias, malice, and general impropriety.” *Gallop v. Cheney (Gallop III)*, 660 F.3d 580, 584 (2d Cir. 2011) (*per curiam*), *vacated in part on other grounds, Gallop v. Cheney (Gallop IV)*, 667 F.3d 226, 231 (2d Cir. 2011). In *Gallop III*, we imposed sanctions on an attorney who had demanded the recusal of the panel and “any other members of [our Court] who share their feelings,” noting in *Gallop II* that the attorney’s actions appeared “malicious” and “intended, in bad faith, to use his position as an attorney of record to harass and

disparage the Court.” *Gallop v. Cheney (Gallop II)*, 645 F.3d 519, 521 (2d Cir. 2011) (ordering attorney to show cause why sanctions should not be imposed); *see also Gallop III*, 660 F.3d at 586 (imposing sanctions).

These two justifications for imposing sanctions – patently frivolous legal argument and egregious conduct – may emerge in the same case. We are especially likely to impose sanctions on an attorney for offensive conduct where such conduct suggests that the attorney allowed antagonism toward the Court to “undermine his legal judgment and interfere with his duty to provide thoughtful and reasoned advice to his client.” *Gallop III*, 660 F.3d at 585. Indeed, an appeal or motion is more likely frivolous where it is motivated by bad faith or an attorney’s desire to “air personal grievances against the Court” as opposed to a sincere belief that the particular motion or appeal will be successful. *Id.* Frivolous appeals and motions of this sort waste judicial resources and undermine the integrity of the judicial process.

A. Attorney Leichty

It is well settled that an attorney’s conduct on appeal as well as the arguments he makes may expose him to sanctions both under our inherent power and under the proscriptions of 28 U.S.C. § 1927 and Federal Rule of Appellate Procedure 38. *See Gallop I*, 642 F.3d at 370. We therefore begin with Attorney Leichty, who has represented Mariani during the entire course of this appeal and has put his name on each of the filings that has caused serious concern.

As to frivolousness, Attorney Leichty asserts that he reasonably believed that his client’s second appeal had merit. At the very least, he says, he should not be faulted for misapprehending the preclusive effect of *N.S. Windows* under the law-of-the-case doctrine. *See Leichty Resp. to Order to Show Cause* at 9 (“[T]here was no *indisputable* ‘law of the case’ preventing Ellen Mariani from bringing a second intervention motion . . . on what she believed

were different and compelling facts.”). For present purposes, we will accept that argument.

Although a competent attorney should have realized that *N.S. Windows* necessarily foreclosed the motion to intervene, the appeal, while not meritorious in and of itself, is not so frivolous as to warrant sanctions.

But of course, sanctions are not limited only to frivolous *appeals*. Frivolous arguments with regard to a motion – particularly where that frivolousness is coupled with inappropriate conduct that suggests the attorney was motivated by bad faith – may also merit the imposition of sanctions by this Court. *See* 28 U.S.C. § 1927; *Chambers*, 501 U.S. at 45-46; *Gallop III*, 660 F.3d at 584. We conclude that Mariani’s related Motion to Supplement the Record, filed by Leichty in connection with the second appeal, is such a motion.

In this litigation, Leichty has engaged in a pattern of vexatious and duplicative filings, targeting opponents and judges with rude language, and asserting spurious legal positions.² He has nonetheless managed to avoid sanctions up to this point. On April 19, 2012, however, he crossed the line by filing the wholly inappropriate Motion. We conclude that the Motion was

² For example, during the pendency of the *N.S. Windows* appeal, Leichty requested, by letter dated September 9, 2009, that the caption be changed to “Mariani v. Ransmeier.” This request was devoid of legal merit. Federal Rule of Appellate Procedure 12(a) required the Clerk to docket the appeal under the caption used by the district court, dispelling Leichty’s baseless suggestion that the clerk had chosen the caption with the design of debasing his client. But it was not so much its patent disregard of Rule 12, as the tone of the letter that was especially disdainful. Instead of sticking to legal argument, Leichty’s letter devolved into personal attacks, accusing the Clerk of Court of intentionally making Mariani “look foolish,” of “‘thumbing its nose’ at the appellant,” and of “sending a message about the arbitrary and capricious intent of the Court.” Letter from Attorney Leichty to Clerk’s Office, *N.S. Windows, LLC v. Minoru Yamasaki Assocs.*, No. 07-5442-cv (2d Cir. Sept. 10, 2009).

We note, further, that in Leichty’s appellate briefing, he permitted himself to indulge in similarly unprofessional language regarding opposing counsel. For example, in one brief he ridicules Ransmeier’s counsel for a minor misspelling and suggests to us that the error is a reason to ignore Ransmeier’s arguments. This is not good lawyering. It is just a cheap shot.

frivolous, and even more significantly, that it was filed to air false and egregiously insulting views about the district court without any good-faith belief that the Motion would be successful.

Leichty asserts in the Motion that he has obtained “newly-discovered evidence” demonstrating that Judge Hellerstein is unfairly biased against his client. This is a baseless and repugnant assertion from multiple vantages. As a threshold matter, the Motion is procedurally defective. Although Leichty claims to rely on Federal Rule of Appellate Procedure 10 in seeking to supplement the record, that rule specifically limits the record on appeal to materials presented to the trial court. The record contains no indication that Leichty attempted to submit the materials at issue to the district court. Alternatively, he invokes judicial notice as a basis for our consideration of materials attached to the Motion, but the allegedly new “facts” are not remotely the type of uncontestable facts of which we may take judicial notice. *See* Fed. R. Evid. 201.

These technical deficiencies, however, pale alongside the ludicrous arguments Leichty makes in support of the Motion. Leichty’s main argument is, in sum, that Judge Hellerstein is partial to defendants and must recuse himself because his adult son, an attorney, at one point was employed by a law firm in Israel that at some time represented two companies that might have an indirect connection to some of this case’s defendants. He also makes reference to certain religiously-oriented philanthropic activities of the family, which he says evince partiality. Section 455(a) of Title 28 of the United States Code provides in pertinent part that a federal judge “shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned.” 28 U.S.C. §455(a) (emphasis added); *see also Liteky v. United States*, 510 U.S. 540, 548 (1994). Leichty’s argument that such an attenuated chain of relationships calls Judge Hellerstein’s impartiality into question is patently frivolous. In filing this motion, Leichty had to know that he was proceeding “without the slightest chance of success.” *Gallop I*, 642 F.3d at

370 (internal quotation marks omitted).

This leads us to the question of why the Motion *was* brought. Leichty's behavior belies the possibility that he was motivated by a belief that the Motion would be successful. Rather than making good-faith legal arguments, his Motion seems to us to be nothing more than a vehicle for making personal slurs against Judge Hellerstein and his family. In fact, on closer observation, Leichty's real argument is that Judge Hellerstein cannot be impartial because he is Jewish. The papers filed in support of the Motion reflect anti-Semitism in a raw and ugly form. For a private citizen to make such spurious and offensive suggestions is bad enough. For an attorney admitted to this Court to make them in court pleadings is unpardonable.

We note, of course, that no law or court may prevent Leichty from believing what he chooses to believe. In most contexts, he may also say the things he says. What he is not allowed to do, however, is to let his misguided views cloud his judgment regarding what arguments may properly be made to this Court. In other words, we do not sanction him here for harboring anti-Semitic views. Rather, we impose sanctions against him because he allowed those views to prompt him to submit frivolous and grossly insulting arguments to this Court. *See Gallop III*, 660 F.3d at 585-86 (sanctioning an attorney who allowed "his emotional reaction . . . to further undermine his legal judgment and interfere with his duty to provide thoughtful and reasoned advice to his client").

To deter Leichty from acting similarly in the future, and to warn other lawyers about the consequences of similarly egregious behavior, we impose sanctions on Attorney Leichty in the form of double the costs incurred by Ransmeier in responding to the Motion.

B. Appellant Mariani

For purposes of determining whether to impose sanctions, we analyze the conduct of parties and their attorneys separately. “The rule that the sins of the lawyer are visited on the client does not apply in the context of sanctions,” and we therefore must “specify conduct of the client herself that is bad enough to subject her to sanctions.” *Gallop III*, 660 F.3d at 584 (alterations and quotation marks omitted). Non-attorney clients do not share the same ethical obligations that their attorneys owe this Court. *Id.* at 583. Furthermore, although clients are responsible for dictating the ultimate goals of a lawsuit, *see* ABA Model R. of Professional Conduct, R. 1.2, we recognize that attorneys often have considerable latitude in the exercise of their professional judgment to design litigation strategies to achieve those goals. A client should not be punished when an attorney, without the client’s approval, exercises that responsibility unwisely. *See, e.g., Gallop III*, 660 F.3d at 583-84 (declining to impose sanctions against client where she “did not spearhead her litigation strategy”).

Mariani, however, is a veteran of federal court litigation, and she affirmatively admits that she “worked closely” with Attorney Leichty in preparing the Motion to Supplement the Record. Decl. of Ellen Mariani in Support of Motion at 1. Indeed, it is the declaration filed under her name, and signed with her signature, that includes some of the most offensive allegations against Judge Hellerstein. Mariani, too, is therefore jointly responsible with her attorney for the double costs imposed by this Order.

III. Conclusion

For the foregoing reasons, it is hereby **ORDERED** that Appellant Ellen Mariani and her attorney Bruce Leichty are **SANCTIONED** in the amount of double the costs incurred by

Ransmeier in responding to the Motion. They shall be jointly and severally liable for the amount, which shall be paid within sixty days of entry of this order.

Although we have authority to impose additional sanctions in the form of fines or attorney's fees on Mariani and Attorney Leichty, *see Gallop III*, 660 F.3d at 586, we decline to do so at this time. We trust that this relatively public reprimand will suffice to prevent similar transgressions in the future.

11-175-cv(L)
Ransmeier v. UAL Corporation, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of June, two thousand twelve.

PRESENT:

PETER W. HALL,
SUSAN L. CARNEY,¹

Circuit Judges.

JOHN C. RANSMEIER, ADMINISTRATOR OF THE ESTATE OF LOUIS NEIL MARIANI, DECEASED,

Plaintiff-Appellee,

and

COLGAN AIR INC., A VIRGINIA CORPORATION, US AIRWAYS, INC., A DELAWARE CORPORATION, L 3 COMMUNICATIONS CORPORATION SECURITY AND DETECTION SYSTEMS, A DELAWARE CORPORATION, L 3 COMMUNICATIONS CORPORATION, A DELAWARE CORPORATION, L 3 COMMUNICATIONS HOLDINGS, INC., A DELAWARE CORPORATION, INVISON TECHNOLOGIES, INC., STATE OF INCORPORATION UNKNOWN, QUANTUM MAGNETICS, INC., STATE OF INCORPORATION UNKNOWN, HEIMANN SYSTEMS CORP., STATE OF INCORPORATION UNKNOWN, AIR FRANCE, A FRENCH CORPORATION, DELTA AIRLINES, A CORPORATION, SWISS, A SWISS CORPORATION, AIR JAMAICA, A JAMAICAN CORPORATION, CAPE AIR, AIR TRANSPORT ASSOCIATION, A TRADE ORGANIZATION,

Defendants,

¹ Hon. Barrington D. Parker, Jr., originally assigned to this panel, recused himself from consideration of this appeal. The appeal was decided by the panel's remaining two judges, who are in agreement as to the disposition, pursuant to Internal Operating Procedure E(b), formerly § 0.14(b) of the Local Rules of the United States Court of Appeals for the Second Circuit.

UAL CORPORATION, AN ILLINOIS CORPORATION, UNITED AIRLINES, INC., AN ILLINOIS CORPORATION, HUNTLEIGH USA CORPORATION, A MISSOURI CORPORATION, ICTS INTERNATIONAL NV, A NETHERLANDS BUSINESS ENTITY OF UNKNOWN FORM, GLOBAL AVIATION SERVICES, A DELAWARE CORPORATION, BURNS INTERNATIONAL SECURITY SERVICES CORP., A DELAWARE CORPORATION, SECURITAS AB, A SWEDISH BUSINESS ENTITY OF UNKNOWN FORM, MASSACHUSETTS PORT AUTHORITY, A GOVERNMENT ENTITY, THE BOEING COMPANY, AN ILLINOIS CORPORATION, MIDWEST EXPRESS AIRLINES, INC., A WISCONSIN CORPORATION, CONTINENTAL AIRLINES, INC., A CORPORATION, DOES, 1 THROUGH 100, INCLUSIVE, MIDWEST AIRLINES, INC.,

Defendants-Appellees,

v. Nos. 11-175-cv(L); 11-640-cv(Con)

ELLEN MARIANI, Proposed Intervenor,

*Appellant.*²

FOR APPELLANT:

BRUCE LEICHTY, Clovis, California.

FOR PLAINTIFF-APPELLEE:

PETER G. BEESON (Charles R. Capace, Zimble & Brettler, Boston, Massachusetts, *on the brief*), Devine Millimet & Branch, Professional Association, Concord, New Hampshire.

FOR DEFENDANTS-APPELLEES:

JEFFREY J. ELLIS (Michael R. Feagley, Mayer Brown, LLP, Chicago, Illinois, *on the brief*), Quirk and Bakalor, P.C., New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, J.). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Appellant Ellen Mariani appeals from the district court's November 15, 2010, order denying her motion to intervene and the March 1, 2010, order denying (once again) her attorney's motion for admission *pro hac vice*.³ We assume the parties' familiarity with the facts,

² The Clerk of the Court is requested to amend the caption as set forth above.

³ Mariani also purports to appeal from the district court's January 26, 2011, compromise order authorizing the final distribution of the settlement, and from the district court's February 8,

procedural history, and issues on appeal.

A thorough examination of the record demonstrates that Mariani has only one true argument on appeal—that she was entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2), of course, was the very basis for Mariani’s first motion to intervene. The district court denied that motion, and we affirmed that decision on appeal. *See N.S. Windows, LLC v. Minoru Yamasaki Associates, Inc.*, 351 F. App’x 461, 467 (2d Cir. 2009) (summary order). Mariani’s renewed attempt to intervene is foreclosed by the doctrine of the law of the case.

This doctrine, in reality, consists of two closely-related rules. The first, the so-called mandate rule, “requires a trial court to follow an appellate court’s previous ruling on an issue in the same case.” *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (emphasis added). Under the second rule, which is somewhat more flexible, a court—be it a district court or an appeals court—will generally follow its own earlier ruling on an issue in later stages of a litigation unless “cogent and compelling reasons militate otherwise.” *Id.* (internal quotation marks omitted).

Mariani argues that her second motion to intervene does not implicate the law of the case doctrine because it presented a brand-new reason for intervening, to wit, her alleged discovery that Ransmeier was operating under a conflict of interest. The flaw in that assertion, however, is that the district court did not rely on this new argument when it determined to deny Mariani’s second motion to intervene. Rather, the court denied the motion for the same reason as the first time around—that Mariani did not have an interest in the litigation.

2011, order denying her motion to reconsider the January order. Because we affirm the district court’s order denying Mariani leave to intervene, she has no standing as a non-party to challenge the settlement.

The first time Mariani tried to intervene, her chief argument was that a so-called “individual loss of consortium” claim constituted a sufficient “interest” to give her the absolute right, under Rule 24(a)(2), to intervene in the proceedings below.⁴ The district court definitively rejected that argument in its November 5, 2007, order denying intervention, holding that, by virtue of her agreement with Peters, Mariani had “no legal status” in the federal action and that any arguments she had regarding her individual loss of consortium claim needed to be made in New Hampshire probate court. As the district court explained, federal courts “do[] not sit to review decisions of the probate court.”

On appeal, this court expanded on Judge Hellerstein’s analysis. Between the time the district court denied Mariani’s motion and the time we decided her first appeal, the New Hampshire Supreme Court had raised some doubt regarding whether Mariani even had an individual loss of consortium claim, and, if so, whether Ransmeier had the authority to settle that claim. *See N.S. Windows*, 351 F. App’x at 466-67. We held, however, that Mariani’s probate court agreement with Peters demonstrated her clear intention and commitment to abandon all her claims, including her loss of consortium claims, and to let Ransmeier pursue them on her behalf in the Peters litigation. *Id.* Like Judge Hellerstein, we explained that for the purposes of the federal litigation Mariani was bound by her agreement in New Hampshire probate court. *Id.* at 467. If she wanted to challenge that agreement, she had to do so in the probate court. *Id.*

The necessary implication of our decision in *N.S. Windows* is that, by handing over her claims to Ransmeier, Mariani no longer possessed a sufficient interest to justify intervention as of right under Fed. R. Civ. P. 24(a)(2). To gain such an interest, she had somehow to dissolve the agreement she had reached in the probate court, which is why we pointed her back there.

⁴ Mariani also asserted at one time that she was a “real party in interest” as defined by Fed. R. Civ. P. 17(a), but she abandoned that position long ago.

Consequently, in deciding Mariani's second motion to intervene, Judge Hellerstein was not just *permitted*, he was *required* to follow our prior ruling. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994) (law of the case doctrine applies to issues previously decided by necessary implication). And that is exactly what he did, denying the motion on the basis of his own prior ruling and our decision in *N.S. Windows*. Crucially, although Mariani had briefed her new argument regarding Ransmeier's alleged conflict in great detail, Judge Hellerstein did not at all rely on this new argument, which arguably goes to the "adequate representation" prong of Rule 24(a)(2). Instead, he explained that he had "already ruled that Ms. Mariani has *no interest to justify intervention* because her complaints belong before the New Hampshire Probate Court," and that, despite Mariani's new arguments, there was "no basis to reconsider" his prior decision. (Emphasis added.)

Mariani may have a right to have a court hear her concerns regarding Ransmeier's representation. For example, to the extent Ransmeier's alleged conflict of interest compromised his obligations to her as administrator of her husband's estate, she may be able to pursue those claims in New Hampshire probate court. We express no view in that regard. We are firm in our holding, however, that such claims simply do not give rise to an "interest" sufficient to give her the right to intervene in these proceedings.

The district court's decision to apply correctly the law of the case doctrine and to deny Mariani's second motion to intervene was not an abuse of discretion. *See United States v. City of New York*, 198 F.3d 360, 364 (2d Cir. 1999). Having properly determined for the second time that Mariani was not permitted to intervene, the district court again did not abuse its discretion in denying Mariani's attorney's application for admission *pro hac vice* on the grounds that Mariani was a non-party.

We have considered the remainder of Mariani's arguments and find them to be without merit, and therefore **AFFIRM** the judgment of the district court.

Further, "we cannot help but register our concern with appellant[']s] frivolous conduct in pursuing this appeal." *Smith v. Silverman (In re Smith)*, 645 F.3d 186, 190 (2d Cir. 2011).

Despite the clear *res judicata* effect of *N.S. Windows*, Mariani and her attorney, Bruce Leichty,⁵ chose to return to the district court and file a series of vexatious motions whose lack of legal merit is matched only by their discreditable tone. Beyond specious arguments, including that *N.S. Windows* had actually *given* Mariani standing, *contra* 351 F. App'x at 464, their briefs feature an escalating series of *ad hominem* attacks on opposing counsel and bombastic challenges to the integrity of the district court. All this has continued on appeal, culminating with Mariani's and Leichty's defiant motion to supplement the record, which supposedly identifies "newly discovered" evidence of the district court's partiality, but is in fact nothing more than a vehicle for asserting deeply troubling personal slurs against Judge Hellerstein and his family.⁶

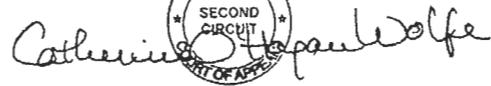
Under Federal Rule of Appellate Procedure 38, 28 U.S.C. § 1927, and our own inherent authority "to consider sanctions on parties who pursue patently frivolous appeals" and force us to consider and the appellees to defend vexatious litigation, "we may, with adequate notice and opportunity to be heard, impose sanctions *nostra sponte*." *Gallop v. Cheney*, 642 F.3d 364, 370 (2d Cir. 2011) (alterations and punctuation omitted). Appellant Mariani and her counsel Leichty are therefore each ordered to show cause, no later than fourteen days following entry of this

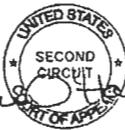
⁵ Because Judge Hellerstein denied Leichty's application to appear *pro hac vice*, Mariani's briefing below was allegedly filed *pro se*. We agree with the district court's assessment that the briefs were obviously written by Leichty. In any event, Leichty's behavior has continued during this appeal, now that he officially represents Mariani.

⁶ This motion will be denied by separate order.

order, why they should not be sanctioned in the form of double costs, for which Mariani and Leichty would be jointly and severally liable. Their responses shall each be no more than ten pages, double-spaced. Any appellee wishing to respond may file a supplemental letter brief, not longer than fifteen pages, double-spaced, within fourteen days of the date by which the responses of appellant Mariani and her counsel Leichty are due.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of June, two thousand twelve.

Present:

Peter W. Hall,
Susan L. Carney,¹
Circuit Judges.

John C. Ransmeier, administrator of the Estate of Louis
Neil Mariani, deceased,

Plaintiff-Appellee,

and

Colgan Air Inc., a Virginia corporation, US Airways,
Inc., a Delaware corporation, L 3 Communications
Corporation Security and Detection Systems, a
Delaware corporation, L 3 Communications
Corporation, a Delaware corporation, L 3
Communications Holdings, Inc., a Delaware
corporation, Invision Technologies, Inc., state of
incorporation unknown, Quantum Magnetics, Inc., state
of incorporation unknown, Heimann Systems Corp.,
state of incorporation unknown, Air France, a French
corporation, Delta Airlines, a corporation, Swiss, a
Swiss corporation, Air Jamaica, a Jamaican
corporation, Cape Air, Air Transport Association, a
trade organization,

Defendants.

ORDER

Docket Numbers: 11-175(L)
11-640(Con)

¹ Hon. Barrington D. Parker, Jr., originally assigned to this panel, recused himself from consideration of this appeal. This motion was decided by the panel's remaining two judges, who are in agreement as to the disposition, pursuant to Internal Operating Procedure E(b), formerly § 0.14(b) of the Local Rules of the United States Court of Appeals for the Second Circuit.

UAL Corporation, an Illinois corporation, United Airlines, Inc., an Illinois corporation, Huntleigh USA Corporation, a Missouri corporation, ICTS International NV, a Netherlands business entity of unknown form, Global Aviation Services, a Delaware corporation, Burns International Security Services Corp., a Delaware corporation, Securitas AB, a Swedish business entity of unknown form, Massachusetts Port Authority, a government entity, The Boeing Company, an Illinois corporation, Midwest Express Airlines, Inc., a Wisconsin corporation, Continental Airlines, Inc., a corporation, Does, 1 through 100, inclusive, MidWest Airlines, Inc.,

Defendants-Appellees,

v.

Ellen Mariani, Proposed Intervenor,

Appellant.

Appellant's motion to supplement the record is DENIED. Appellant seeks to introduce materials not part of the record on appeal. *See* Fed. R. App. P. 10(e). "Absent extraordinary circumstances, this Court will not enlarge the record on appeal to include evidentiary material not presented to the district court." *Okoi v. El Al Isr. Airlines*, 378 F. App'x 9, 11 n.1 (2d Cir. 2010) (summary order) (citing *IBM Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975)). To the extent that Appellant requests that this Court take judicial notice of documents not presented to the district court, we decline to do so. *See Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 196-97 (2d Cir. 2010). In any event, the documents Appellant seeks to introduce do not reasonably call the district judge's impartiality into question.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe
