UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-175 Caption [use short title] Ransmeier v. UAL Corporation

Motion for: Order Overruling Notice of Defective Filing

Set forth below precise, complete statement of relief sought:

Motion for Order Overruling Notice of Defective Filing, Allowing Filing of Petition for En Banc Rehearing, and for Recall of Mandate if Needed (Emergency Motion)

MOVING PARTY: Ellen Mariani
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: John Ransmeier / UAL Corporation

MOVING ATTORNEY: Bruce Leichty
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Court-Judge/Agency appealed from: SDNY Hellerstein

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☑ No
Has this relief been previously sought in this Court? ☐ Yes ☒ No
Requested return date and explanation of emergency: 6/3/13
I am told that the Petition is subject to being struck unless "defects" cured by 6/3/13

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: This is a post-argument motion

Signature of Moving Attorney: /s/ Bruce Leichty Date: 5/31/2013 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER, Case No. 11-175

Plaintiff-Appellee,

v.

UNITED AIRLINES, INC.
et al.,

Defendant-Appellee,

v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation
_____/

MEMORANDUM OF APPELLANT ELLEN MARIANI IN SUPPORT OF EMERGENCY MOTION FOR ORDER OVERRULING NOTICE OF DEFECTIVE FILING, ALLOWING FILING OF PETITION FOR EN BANC REHEARING, AND FOR RECALL OF MANDATE IF NEEDED

Ellen Mariani, Appellant, together with undersigned counsel to the extent that the Court's prior orders affect him ("Appellant" or "Movant"), hereby submits the following points and authorities in support of her Motion, filed concurrently herewith, asking for the Court to overrule and override a "Notice of Defective Filing" issued 5/30/13 by the Clerk ("Notice") and for the Court

to direct the Clerk to accept the filing of Appellant's Petition for Rehearing En Banc. This request is made so that the timeliness and jurisdictional issues of the petition (addressed within the petition) can be determined by the Court, and not prejudged or pretermitted by the Clerk. If and only if other relief is necessary before the filing can be permitted, for reasons explained below, Movant is also asking that the Court recall the mandate either on its own motion or by way of this motion, although Movant prefers that relief regarding the mandate be considered coterminously with consideration of the Petition for Rehearing En Banc, since the Court has already filed its own document without recalling the mandate and that should not be made a threshold requirement for the filing of the Petition.

Movant is asking for relief on an emergency basis since the Clerk has stated in the Notice that the Petition is subject to being stricken unless the alleged "defects" in the Petition are cured by one or more actions being taken by 6/3/13 (a scant three business days after electronic transmission). For reasons explained below Movant believes the Clerk erred in deciding at a pre-filing state that there were defects in the Petition preventing its filing.

In brief, Movant has been placed in an untenable position because the Clerk exceeded her gatekeeping functions, contrary to the literal terms of Rules 35 and 40 of the Federal Rules of Appellate Procedure. Irrespective of her motivation, the Clerk's Notice is inaccurate, owing to the Court's issuance on 5/15/2013--long after issuance of the mandate herein on 2/21/13--of a sanctions order ("5/15 Order") having serious consequences as to Appellant, and relating back to its Summary Order of 6/26/12. Numerous false statements in the 5/15 Order have far-reaching consequences to the reputation and career of undersigned counsel. The anomalous timing of the 5/15 Order in relation to the

issuance of the mandate, and its status as a putative amendment to the Summary Order, are addressed in the Petition, and below. This Motion and this Memorandum are supported by the Affidavit of Bruce Leichty filed concurrently herewith,[1] and this motion will be referred to throughout as a "Motion to Overrule" or "MTO."

1. On 5/29/13, Movant electronically filed with the Clerk's office a Petition for Rehearing En Banc, believing that an opinion issued by a two-judge panel of this Court on 5/15/13 imposing sanctions on a long-suffering 9/11 widow and her attorney had to be reviewed en banc because it conflicted with other decisions of this Court and raised issues of exceptional importance. The Petition was filed within 14 days of the 5/15 Order, pursuant to F.R.A.P. 35(c), which provides that "a petition for rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing." Rule 40 provides that a petition for panel rehearing must be filed "within 14 days after entry of judgment" in cases not involving the United States as a party. Accordingly, Movant asserts that Movant complied with the literal terms of the applicable Federal Rules of Appellate Procedure and that there was no basis for the Clerk to refuse the filing or issue a defective notice based on untimeliness

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[1] The affidavit is lengthy. However much this Court might be tempted to say that it is full of impermissible "legal argument" pursuant to F.R.A.P. 27(a)(2)(B), Movant asks the court to recognize the merger between factual and legal when an affiant is controverting conclusions found in a judicial opinion. Movant also asserts that it was necessary for him to go to great lengths because this motion or the PFREB is subject to being discounted based on the "anti-Semitic" label that has now been attached to Movant, unless the Court understands the gravitas of the underlying issues and the extent of the false statements made by the two-judge panel discussed in that affidavit.

("untimeliness" is the most critical of several grounds given for labeling the notice "defective," all of which grounds are addressed herein).

2. Movant had pointed out in the Petition for Rehearing En Banc (hereinafter "PFREB") that the 5/15 Order of the two-judge panel had been issued without jurisdiction, without authority, without adequate notice or opportunity to respond, and without sufficient supporting grounds. Movant did not file a Petition for [Panel] Rehearing along with the request for en banc review,[2] because Movant believed that the two-judge panel had been without authority to begin with and remained without authority as to imposition of sanctions, pursuant to Local Operating Procedure (as noted in the PFREB which is attached to the accompanying Affidavit), but also that even if these two judges (Carney and Hall) had authority, in issuing the 5/15 Order they had demonstrated unusual animus toward Movant. See accompanying Affidavit of Bruce Leichty ("Leichty Aff."). For those reasons, and because an adverse ruling hereon would potentially constitute a final disposition of Movant's rights and remedies in this Court, Movant respectfully submits that this MTO must be decided by a panel of the Court that does not include either of the two judges on the panel, cf. F.R.A.P. 27(c), and definitely not by the same two-judge panel, since that panel's authority over anything but "deciding the appeal" is one of the issues that is a subject of the PFREB.

3. All that Movant seeks by way of this MTO is for her substantive

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[2] Movant had to file the PFREB electronically. Despite F.R.A.P. recognition of the right of a party to file a request for en banc rehearing without a request for panel rehearing, there was no "filing event" on the electronic filing website for the filing of only a "Petition for Rehearing En Banc;" so Movant had to select the filing event "Petition for Rehearing/Rehearing En Banc" in order to be able to file the Petition. However, the title of the Petition was clear.

arguments in the PFREB to be taken seriously. Movant is not asking for any determination put in issue by the PFREB to be made on the basis of this MTO, and indeed Movant believes that would be inappropriate. All Movant is seeking is for the PFREB to be recognized as timely filed, without a threat that it will be stricken 6/3 unless Movant cures what Movant believes are nonexistent defects (or complies with directives that are put in issue in the PFREB). Movant submits that the Clerk should have withdrawn the Notice without the need for the Court to be approached at all; however, the Clerk refused to withdraw the Notice even after being apprised that her directives conflicted with areas addressed in the PFREB. Since the Clerk told undersigned counsel that he would have to file a motion in order to get relief from the Notice, that is what Movant's counsel has resigned himself to doing. Leichty Aff.

4. The Notice of Defective Filing faults the PFREB for being "untimely." However, that is doubly wrong, or at least it is not within the province of a clerk to make the determination of untimeliness on the unique facts herein. Movant submits that, instead of following the literal dictates of Rules 35 and 40, the Clerk has taken it upon herself to resolve an anomaly that has occurred in this case, that can only be resolved by judges. This is particularly the case since the anomaly is created by the Circuit's two-judge panel itself, which issued a judgment after the Court had already issued the mandate.

5. Movant has pointed out in the PFREB that post-mandate orders are simply not supposed to occur, since jurisdiction of the appeals court terminates when the mandate issues, and since the appellate tribunal cannot exercise jurisdiction concurrently with the district court even if dicta in some cases might suggest exceptions in jurisdictional rules when it comes to issuing "collateral"

orders (which may sometimes include sanctions order). However, irrespective of whether this Court agrees on the merits of those points, the Court should recognize that it would be inappropriate for the Clerk to make that decision herself, and that the Clerk's only prerogative is to follow the literal strictures of Rules 35 and 40, and thus recognize the timely filing of an otherwise compliant petition for rehearing en banc. If the judges of the court decide that the PFREB is untimely, that is one thing; but for a clerk to decide that it is untimely on these unique facts--when the literal requirements of Rules 35 and 40 are met--is quite another.

6. The Clerk has also purported to be able to decide (independently) that the PFREB is untimely as to the "June 26, 2012 Summary Order" issued in this matter. However, that is also one of the issues addressed in the PFREB, and the Clerk should not be straying into legal determinations on matters briefed to the Court. Thus, Movant noted to the Court that there were ample grounds for ruling that the 5/15 Order of the court constituted an amendment to the 2012 Summary Order, which would of course extend the time for seeking petition for rehearing to a date 14 days after the amendment. Local Rule 35.1(d). The primary but not the only grounds for considering the 5/15 Order an amendment is that the OSC on which it was based was placed within the 2012 Summary Order, and that OSC has now necessarily been amended. (One can say that that is legal impossible because the mandate has issued in the meantime, but Movant submits that this position is no more legally impossible than the filing of a document by the court, e.g., the issuance of any order by the Court, after issuance of the mandate.)

7. Once again, Movant is not asking for the merits of her position to be adjudicated on this MTO, but only that the Court recognize the inherent problem

with a Clerk making a determination within a Notice of Defective Filing on a subject treated in the petition itself. The Court should overrule any prejudgment by the Clerk on whether the PFREB is or is not a timely petition for rehearing from the 2012 Summary Order; that will be a matter for those who determine whether en banc review should be granted.

8. The Clerk has also implied in the Notice that Movant is limited to "a motion to reconsider with respect to the May 15, 2013 non-dispositive motion." (The statement can be read permissively, but its effect along with the rest of the Clerk's comments appears to be one of limitation.) In other words, the Clerk appears to be saying that no PFREB can be filed as to an order of June 2012 because of untimeliness, and no PFREB can be filed as to an order of 5/15/13 because the order itself is not reviewable by PFREB. But Movant has already demonstrated by filing a PFREB that she does not agree that she is limited only to a motion for reconsideration, and that a PFREB can appropriately be filed from this unusual final judgment imposing sanctions against Movant (and making the extraordinary finding that Movant is "anti-Semitic"). Movant believes that en banc review will lie irrespective of whether or not the two-judge panel called its ruling a "non-dispositive opinion." As briefed in the PFREB, titles of orders are not dispositive, and the reviewability of an order notwithstanding nomenclature is an issue of law for a court to decide, not a Clerk. The 5/15 Opinion certainly has the full force and effect of a judgment as to Ellen Mariani and Bruce Leichty, and Movant is quite sure that Movant would be corrected--and perhaps subject to contempt--if Movant took some other position.

9. In summary, for the Clerk to have carte blanche to exercise the level of judgment necessary to label a PFREB "defective," even though contrary

arguments to the Court are made in the PFREB itself, is irregular and should not be permitted.

10. The other "defects" noted in the Notice of Defective Filing (those noted on the first page of the Notice) are not defects at all, unless the PFREB is not treated as a petition but is instead treated as a motion. Only a motion requires a Motion Information Sheet and supporting affidavit and memorandum, and Movant well knows how to comply with those rules in light of his previous law and motion practice in this Court (and Movant has followed them here with respect to the MTO). It follows from the preceding discussion that a Clerk cannot and should not make a pretermitting judgment when the petitioner has made out a prima facie case for recognition of the Petition for Rehearing En Banc, or even if the petitioner has only asserted arguments for its recognition and filing within the PFREB.

11. Movant notes that it is not just any "non-dispositive opinion" that is at issue here. Movant is unaware of any other federal appeals court decision in the history of U.S. jurisprudence which uses such strong language about an attorney (let alone about a victim of this country's most horrific terrorist incident). Undersigned counsel has been dealt a serious blow to his reputation and potentially to his career. Leichty Aff. Movant, like most of the rest of the citizens of this country, takes the opinions of federal courts very seriously. Feeling hugely wronged, Movant believes that there is no recourse other than for him to seek en banc rehearing, and no potential remedy except by way of an en banc hearing. He has no confidence in the ability of two judges to be fair when they have already made several prima facia false and unsupported statements in their ruling and demonstrated such unwarranted hostility toward him, as set forth in the accompanying Affidavit.

12. Although this Court would not be able to determine the falsity of some of the statements of the two-judge panel without better knowing the undersigned, at least two false statements can be readily determined from the pleadings alone. Those two statements are as follows: that Movant alleged in the subject motion of April 2012 that Judge Alvin Hellerstein was "unfairly biased" against them; and that Movant sought to "recuse" Judge Hellerstein. On the latter point, Movant specifically noted in Movant's papers that it was not seeking recusal, and pointed out why. Leichty Aff. Those false statements are reason enough to doubt the objectivity of the remainder of the 5/15 Order, which in turn relates to the importance of the en banc reviewability of a final judgment of this nature regardless of how it is labeled or usually regarded.

13. With respect, Movant also does not wish to be forced into having to make a motion for recall of the mandate, as if a recall is somehow Movant's idea or burden. As noted in the PFREB, Movant believes that the two-judge panel acted without jurisdiction, having already issued the mandate. Since the Court acted without recalling the mandate, Movant does not believe that it should be up to a party to move for recall of the mandate, simply in order to address that ruling of the Court. The Court, in the broad interests of justice and accountability to the public, has its own responsibility to make sure that its acts are not completely insulated from review. Moreover, if the mandate is recalled, Movant is concerned that the two-judge panel would then reissue what is otherwise an ultra vires order in order to try to make that order effective, saying that Movant opened the door for that result. Movant does not believe that should be an acceptable way to cure a jurisdictional defect, but Movant is concerned that Judges Hall and Carney might see it otherwise. By contrast, combining a sua sponte recall of the mandate (if indeed necessary) with an order

addressing the substance of Movant's grievances about the 5/15 Order relieves Movant of that dilemma, a dilemma not created by Movant.

14. In the final analysis Movant believes that as a matter of due process, there has to be some opportunity for a party to least seek en banc rehearing of a sanctions decision of this magnitude and consequences, made in the absence of a recall of the mandate and without the court having expressly retained jurisdiction, without the party being forced to seek such a recall. Movant would like to believe that a Court of Appeals would not put a party in a position where he effectively had no satisfactory remedy because of its own insulated act.

WHEREFORE, Appellant requests that the Court make the following order forthwith:

(1) That the Clerk's Notice of Defective Document is overruled and overridden;

(2) That Appellant's Petition for Rehearing En Banc shall be filed, and shall be accorded the same treatment as all other petitions for rehearing en banc;

(3) If and only if the Court believes mandate-related relief must precede the above two rulings, that the mandate be recalled; and that it be recalled on the Court's own motion, but alternatively if necessary on this motion; otherwise, that the filing of the PFREB is without prejudice to the right of the court to recall the mandate at a later date; and

(4) For such other and further relief as the Court may deem just and proper.

/s/ Bruce Leichty

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER,

Plaintiff-Appellee,

v.

UNITED AIRLINES, INC. et al.,

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v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation

_____/

Case No. 11-175

DECLARATION OF BRUCE LEICHTY IN SUPPORT OF MOTION FOR ORDER OVERRULING NOTICE OF DEFECTIVE FILING, ALLOWING FILING OF PETITION FOR EN BANC REVIEW, AND FOR RECALL OF MANDATE IF NEEDED

I, Bruce Leichty, declare as follows:

1. I am the attorney of record in this case for Appellant Ellen Mariani. I have represented Mrs. Mariani as attorney of record throughout this appeal. I was admitted to the Bar of the State of California in 1987, and I have had a private civil litigation practice in state and federal courts and before administrative tribunals for the last 25 years, the last 20 of which have been as the owner and sole proprietor of my own law practice. I am admitted to practice before the United States Supreme Court and three courts of appeal other than this court (for the 3rd, 6th and 9th circuits). I represent Mrs. Mariani in all matters pertaining to her rights and interests in connection with the Estate of deceased husband, Neil Louis Mariani, No. 318-2002-ET-00051 pending in

Rockingham County, New Hampshire. Mr. Mariani, a passenger on United Flight 175, was killed in the terrorist events of 9/11/2001.

2. I make this declaration without waiving any applicable privileges or rights of my client, including but not limited to the attorney-client privilege or the rule protecting attorney work product. Any statements made here containing or consisting of information that would otherwise be protected by the attorney-client privilege may not be deemed a waiver of that privilege as to the content of any other protected communications.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Notice of Defective Filing issued in this case that I received by electronic transmission the morning of May 30, 2013. I was very troubled after receiving this Notice, and I called the phone number shown on the Notice, and was told by the case manager that the content of the Notice had been determined directly by the Clerk, Catherine O'Hagan Wolfe. I asked to be transferred to Ms. Wolfe.

4. Ms. Wolfe and I had spoken before. I opened the conversation by telling her politely that I believed that the Notice was improper in that it prejudged legal issues that had been presented in the Petition for Rehearing En Banc, such as whether it was incumbent on the object of a sanctions motion to file a motion to recall the mandate when the court itself had issued its sanctions decision long after the mandate had been issued. I indicated that I believed that judges, not the Clerk, should be deciding whether the law allowed the Court to insulate a post-mandate ruling from review by issuing the ruling after issuance of the mandate, or whether the post-mandate ruling could be viewed as an amendment of the Court's summary order on the merits (in this case containing an Order to Show Cause within it).

5. Ms. Wolfe asked me if I was "asking" for relief, and I told her that

I was not asking her, but that instead I was simply notifying her of my belief that the Clerk needed to withdraw the Notice of Defective Filing and allow the filing of the Petition, and that I hoped that she would make that determination, since there were no defects in the filing absent her inaccurate determination that she was entitled to decide the legal issues arising from the issuance of a post-mandate judgment. I repeated that the legal issues had been raised in the Petition itself. When she told me I would have to file a motion in order to get relief, I told her that it should not be necessary for me to bear the burden and expense of so doing, when it was the Clerk's office that was acting outside of its authority and when the issues were already clearly addressed to the Court in the Petition itself, and I reiterated my belief that the Clerk should withdraw the Notice of Defective Filing. She told me that the conversation was over and hung up. Since the Clerk has not withdrawn the Notice of Defective Filing, and since the Notice threatens to strike the Petition unless the alleged defects are cured by 6/3/13, I am left with no recourse but to file the accompanying emergency motion.

6. I ascertained that I had complied strictly with the literal terms of Federal Rules of Appellate Procedure 35 and 40 when I filed my Petition for Rehearing En Banc. The Rules say nothing about having to file a motion to recall the mandate in certain circumstances before a Petition for Rehearing En Banc can be filed. F.R.A.P. 35 does not even refer to the mandate or use the term. All I have sought to date is filing, for recognition that my Petition has been filed, nothing more. I don't want resolution of any the issues raised in the Petition for Rehearing En Banc; indeed, I believe it would be improper for anyone to resolve those issues other than the Court sitting en banc, if and when the Petition is granted. It is hard for me to fathom that a respected federal

appeals court is taking the position that it can issue a sanctions decision after issuing the mandate, and even harder for me to fathom a requirement that the target of the (disputed) sanctions motion must file a motion to recall the mandate as a condition for seeking rehearing. If the Clerk is correct, the precondition would apply to any sort of a rehearing under these circumstances, and it is not clear why the Clerk believes that it would apparently not apply to a "motion for reconsideration" unless she believes no rehearing at all will lie from something labeled a "nondispositive opinion," although I have asserted in the Petition that that is a mislabeling of the 5/15/13 judgment for reasons set forth in more detail below.

7. Even if the Circuit would routinely require recall of the mandate for a rehearing on the merits of the underlying decision (here the Summary Order issued 6/26/12), that should not be true for a petition directed at rehearing a post-mandate sanctions decision alone. Since my petition sought rehearing for both an order issued prior to mandate and an order issued post-mandate, on 5/15/13, the petition was prima facie permissible for at least the 5/15/13 Order of this Court, and I believed that the Court could decide that it was also possible for the Court to rehear the underlying merits of the Summary Order as well--in which case the Court itself could on its own motion recall the mandate, if that were necessary. That is quintessentially a matter for the Court to decide, not the Clerk. That is what I briefed in the Petition. A true and correct copy of what I electronically filed is attached hereto as Exhibit 2.

8. This is an extremely important ruling for me, and for my client. To say I was shocked and stunned two weeks ago by the decision imposing sanctions on me -- and on my 9/11 widow client, Ellen Mariani -- would be a significant understatement. First, there was shock that the Court would wait

almost 11 months after first issuing an "Order to Show Cause" to impose sanctions. There was shock that the Court would sanction my client as well as me, particularly after I had asked that if sanctions were imposed, they be imposed on me. But there was even more shock at what the Court was imposing sanctions for--a motion I had filed in April 2012 asking the court to either supplement the record or take judicial notice of documents showing connections between the lawyer son of the trial judge in the case, Alvin Hellerstein, with certain defendants in the case. I felt totally blindsided, because I had specifically responded to the Court's June 2012 OSC by noting that it was not clear to me whether I was being threatened with sanctions for filing a motion regarding connections of Judge Hellerstein's son to defendants in his courtroom. Instead I had spent most of the space in my response limited to 10 pages--as did Mrs. Mariani in her own response capped at 10 pages (prepared by me)--on what was clearly threatened in the OSC: sanctions arising for the mere fact of a second intervention motion filed by Mrs. Mariani with Judge Hellerstein, and then for an appeal therefrom. Significantly, the two-judge panel reversed course and determined in its 5/15/13 Opinion that sanctions would not be appropriate for that litigation.

9. I also felt totally blindsided by the finding that I was "anti-Semitic" and that I had used the motion as a vehicle for "slurs" against Judge Hellerstein. Almost immediately after I received electronic notice of that ruling on 5/15/13, I got calls from three New York newspapers in quick succession, the New York Post, the New York Times, and the New York Law Journal, indicating that they planned to do a story based on the "unusually critical" language in the opinion. (Two of those newspapers actually did a story, the Times without providing any context at all regarding the motion, even though the Times reporter was fully

aware of the context.) In the days since that shock registered, I have realized just how much is at stake. My reputation and career are threatened by falsehoods. I am not anti-Semitic, I do not believe that I engaged in "slurs" of any kind, and I know that I was motivated only by legitimate concerns about the indifference of a judge to the appearance of partiality. Therefore the findings in the opinion are totally unsupported. Yet how can I possibly establish my counter-narrative when one of the most powerful courts in the country has said otherwise? And when newspapers have trumpeted the story--without providing context? The New York Times refused to publish corrections that I submitted (not even responding to me), and refused to publish a Letter to the Editor that I submitted (again not responding to me).

10. The 5/15/13 opinion is an immediate threat to both me and to Ellen Mariani. Based on her treatment in federal court, Mrs. Mariani is dependent for some modicum of salvaged justice on my ongoing representation of her in New Hampshire Probate Court, where I have been admitted "pro hac vice" since early 2008. Coincidentally or not--and it strikes me as a rather bizarre and unsettling coincidence--the 5/15/13 opinion was delivered while I was preparing a lengthy refutation of allegations that my admission in that court "pro hac vice" should be revoked, allegations made not by the court but by opposing counsel in that case (representing John Ransmeier). While I cannot say what effect the ruling will have on the New Hampshire probate court, I already know that my adversaries in that court will use it against me--they have already submitted it to that court.

11. Too, one of several professional hats that I wear is as a lawyer is as an immigration lawyer. My practice has always consisted of about 1/3 to 1/2 immigration matters. I have long been a member of the American Immigration

Lawyers Association, and I am part of a referral service of that association, which has long had active leadership from the Jewish community. I am also a part of a referral service of the San Diego County Bar Association ("SDCBA"), which I depend on for some of my ongoing business. I have already experienced since 5/15 that one client has discontinued my services, without citing any reason. The SDCBA has already for some months not sent me any referrals, and I had recently inquired as to that change, without yet receiving a satisfactory response. More than that, many of the referrals I get are from colleagues or former clients, among whom are some Jewish individuals. Religion has never been an issue with me or them. With use of the Internet more prominent than ever, I don't expect people to be referring cases to me any more when it comes to their attention that a court has found me to be "anti-Semitic." People talk. The legal community is still relatively small. This opinion is also unprecedented. Being "anti-Semitic" remains one of the worst things that can be said about a person during the last 50 years or so in the United States. I have checked federal court opinions in one of my legal databases covering all district courts and federal courts of appeal, and based on my review of these decisions I see no court of appeals decision in which an attorney has ever been found to be anti-Semitic. There is a District Court case imposing sanctions where (unlike me) the attorney admitted he was anti-Semitic and said he thought there was a religious war going on in America; he was then labeled a "security threat." The potential implications of this kind of a ruling are therefore far-reaching. I believe that the harshness of the 5/15/13 Opinion and the language used is completely without precedent. When the decision is also wrong, I have to resist my utmost, even though my attention is required in many different cases and other matters right now.

12. It was not possible within the short space (15 pages maximum) of a Petition for Rehearing En Banc to refute the 5/15/13 Opinion point by point, or even to point out several easily demonstrable falsehoods, nor is that the purpose of a Petition for Rehearing En Banc. But I believe that is may be important that I do so here, so that the Court understand what is at stake in deciding whether the cognizability of my Petition is an issue that should be left to a Clerk as opposed to judges. The 5/15/13 opinion is erroneous and deeply offensive in its unbelievably harsh criticism directed at me, in the following detail:

--I am not anti-Semitic, as the opinion charges. Nor do I have any reason to believe that Mrs. Mariani is anti-Semitic, and she denies anti-Semitism whenever the subject comes up (as I do). Would a true "anti-Semite" deny that attitude? It is not clear to me how judges Hall and Carney reached this conclusion about either of us, since at no time was the religion or "semitic" ethnicity of a judge made a factor in the motion faulted. Presumably Judges Hall and Carney were mistaking comments made in the motion about a judge's political interests and loyalties (to the nation of Israel) for comments made about religious or ethnic attachments. Nor do I believe that there were slurs expressed in the exhibit materials, and the two-judge panel did not say explicitly that there were, but if there were, any slurs in third party writings were incidental to the purposes for which the exhibits were tendered (and I was not notified that I could be sanctioned for using them).

--I did not regard my writing in the motion as an attack even on Judge Hellerstein, but simply a recitation of facts involving him; but certainly I did not at any time attack Judge Hellerstein's wife or son. Based on their harsh condemnation Judges Hall and Carney obviously thought I had done so. I made reference to Judge Hellerstein's wife only to put into context the fact that--where

the Judge's son was working for an Israeli law firm representing affiliates of defendants appearing in his courtroom--both he while father of that son and his wife while mother of that son had above-average involvement in Israeli causes. I believed that this involvement was relevant to show that, at the very least, Judge Hellerstein was not oblivious to his son's employment in the country to which he and his wife were thus attached, or to the nature of the clientele of this prominent Tel Aviv firm, and that the Judge would have been on inquiry notice of any links between his son's clients and the defendants appearing before him.

--What I was attempting to do in the motion about the connections of Hellerstein's lawyer son was not prove partiality of Judge Hellerstein but rather show that there was a reasonable doubt about his impartiality, and mainly, by so doing, to raise the question about the judge's willingness to ignore the appearance of partiality of Plaintiff John Ransmeier--which was directly relevant to what I believed was the alarming and unmistakable error on Judge Hellerstein's part in overlooking the divided loyalties of a fiduciary presenting a multi-million dollar settlement to him. These distinctions may be subtle to some, but they are real to me, and they are also important to the question of motive, and my motives have been grossly mischaracterized in the 5/15/13 opinion.

--I believe it should also go without saying that I did not at any time in the federal court of appeals engage in a "pattern of vexatious and duplicative filings, targeting opponents and judges with rude language, and asserting spurious legal positions," as the two-judge panel found in the 5/15/13 opinion (p. 7). While the 5/15/13 opinion disavows imposing sanctions on me for that reason, that is the opening line in the paragraph in which the Court finds that I "crossed the line" in filing a motion on 5/19/2012, and it is reasonable to

assume that the Court considered this allegedly "vexatious" conduct in its decision to impose sanctions for a discrete pleading else it would not have been mentioned. The fact that the Court originally ordered me to show cause why I should not be sanctioned for my litigation on behalf of Ellen Mariani, but then backtracked, shows internal inconsistency in the court's own reasoning.

--The 5/15/13 opinion is short on examples of my allegedly vexatious conduct--I believe there was none--but the Court appears preoccupied (in note 2 appearing on p. 7) with a single letter I wrote to the Clerk. I would hope that the Court is not taking a partisan position to defend the integrity of its employee, rather than dealing with the merits of the appeal--whether now or earlier. Even if I was originally wrong about the caption that the case should have been assigned, I believed that the Clerk then ventured into error later on, and it is still a mystery to me why the case was ever captioned "Ellen Mariani v. American West Airlines," as it was for oral argument on the first appeal. "American West Airlines" doesn't exist, and they were not subsequently listed as the first party in the caption, so I was asking why they were shown on the caption identified for oral argument. I was simply attempting to get the Clerk to act consistently with its own standards at that point. When communications occur between a party and a clerk, it is unreasonable to think that they will be limited to "legal argument," as the Court appeared to expect. Indeed, the Clerk should not be making legal determinations, as noted above. Communications with a clerk are necessarily full of the nitty-gritty of detail. Moreover, even if a letter can be said to be "disdainful" (I didn't believe mine was), I am taken aback to think that the "tone" of a letter to a Clerk can somehow justify imposition of imposition of sanctions.

--In the same vein, the idea that sanctions can relate to a single "cheap

shot" taken at a lawyer's spelling mistake, or that the court has no examples of supposedly "rude language" other than this (never quoted and never identified), is also outlandish. I disavow taking a "cheap shot" at anyone, and my understanding of a classic "cheap shot" is where someone is hit by a superior power while defenseless, or where the person who is hit has no opportunity to meaningfully defend, but in any event I have no idea even of how I would find the comment that I am being faulted for. Much less was I ever notified that I could be sanctioned for either that comment or my letter to the Clerk, so that I would be able to provide explanation and context to the Court before sanctions were imposed. Mere pettiness, even if it existed (and I deny that I was ever petty about anything in a case that had such enormous implications both to my client and the nation), should not be used as support for sanctions.

--Although the two-judge panel states that the motion is "procedurally defective," the memorandum filed in support of the motion dispenses with that allegation, by noting that F.R.A.P. 10 (only one of the rules cited for the motion) does not limit such a motion to materials presented to the trial court, and by citing a number of published appellate opinions for the same proposition. How could I be faulted for an act based on rule and precedent? In any case, the Court also failed to explain why the alternative ground for the motion was not justified, in that I had requested that the court simply take judicial notice of the information, as a court no doubt would do if there were newspaper headlines blaring, "Judge Accepted Bribe From Defendant." The court states that the "alleged new 'facts' are not remotely the type of uncontestable fact of which we may take judicial notice," but cites nothing besides the Federal Rule of Evidence on judicial notice itself, and in light of the fact that I was only requesting that the court take notice of contentions regarding connections to begin with (because

the main issue was not partiality itself but the appearance of partiality), it is difficult to understand why the court did not believe it was able to take notice of those contentions.

--Moreover, the Court suggests that the material could have been submitted to the District Court first, when the motion states explicitly that I had only recently discovered that there was documentation available through the Internet for the connections of Judge Hellerstein's son to affiliates of 9/11 defendants. That was true. The Court's comment constitutes a completely unjustified disregard for my unrebutted assertion contained in the motion, and effectively shows that the Court started out with a presumption that I was lying about the timing of the discovery of this documentation, which is reason enough to doubt the objectivity of Judges Hall and Carney.

--The Court states that I filed the motion to air "false...and insulting views," but does not explain what those "false" views are (in any case a "view" is ordinarily not false, but is by definition subjective). There are no examples given of false statements.

--The very first statement of the Court following the above conclusion is itself false: "Leichty asserts that he has obtained newly-discovered evidence demonstrating that Judge Hellerstein is unfairly biased against his client." I never said that. The Motion transparently does not say that. I did not use the word "bias" at all, much less that the judge was "unfairly biased" (a superfluous grammatical construction that I would have never used personally). I merely tendered evidence of facts which I suggested showed an insensitivity on the part of the judge to the appearance of partiality. There is a distinction, and I can only speculate about why these two appellate judges appear to have chosen the most loaded language possible to portray me.

--The two-judge panel states at one point in the 5/15/13 Opinion that my "main argument" is that "Judge Hellerstein...must recuse himself." The Court calls this argument "ludicrous," but the Court totally disregards the fact that this argument was never made. Indeed, I stated explicitly in the Memorandum in support of the motion that Mrs. Mariani and I were not seeking recusal of the judge, which I understood would have to be accomplished by other process, but that I was merely bringing apparent indifference to the appearance of partiality to the attention of the appeals court.

--The Court has also inaccurately summarized the argument that was made in the motion by characterizing it thusly: "Judge Hellerstein is partial to defendants...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." That erroneous formulation should be compared to the argument I actually made, which can be summarized as follows: that the court of appeals should be aware of the apparent insensitivity of Judge Hellerstein to the appearance of partiality created by the employment during his handling of the 9/11 litigation of his son Joseph by a prominent Tel Aviv law firm representing defense and security industry clients in a relatively small country (Israel) where prominent individuals mingle with each other at public events and often know each other personally, and where Joseph's clients numbered among those and included several that had more than an indirect connection to defendants in the 9/11 litigation; indeed they were affiliates (effectively owners of controlling companies) or joint venturers of defendants ICTS, Huntleigh and Boeing, all of whom were named in the Mariani Estate litigation.

--Contrary to the allegations by the Court, at no time did I ever say or

suggest that the judge's "religiously-oriented philanthropic activities" or that of his family "evince" or otherwise show "partiality." First, in my view the affiliations that I mentioned were not merely "religiously-oriented" activities but rather (primarily) politically-oriented since they all had to do with the nation of Israel, which for purposes of a court proceeding is first and foremost a political entity before it is a religious entity.

--However, even more important, I did not say that participation in these activities made Judge Hellerstein partial, I only said that these affiliations and activities tended to show that as a strong and connected supporter of the State of Israel he was at least on inquiry notice of the nature of the employment of his son, who was working as a lawyer in Israel, and likely aware of prominent persons in Israel with connections to defendants in his courtroom. Even if the court didn't agree with what was effectively a sub-argument, I fail to see how it can be regarded as either frivolous or ill-motivated or anti-Semitic, must less as deserving of a money sanction.

--When the Court says that I must have known that the motion did not have the "slightest chance of success," that is not only offensive but totally inaccurate. Indeed, I did not believe I was asking much at all to ask the appeals court to take notice of facts or supplement the record with facts that showed connections of a judge to defendants in a case before him, nor did I believe that the relationships that I documented were "attenuated." I had cited in my memorandum at least one case where a judge had been faulted for keeping cases in which his lawyer daughter was representing some of the defendants, and I believed that it was only a matter of degree if the offspring was representing not the defendant itself but the owner (or affiliate or partner) of the defendant. I had also been forced to ask myself the question on learning of these startling

connections of Judge Hellerstein's son: weren't the normal probabilities of these connections rather low? When I put that low probability together with the absolutely incomprehensible fact that this judge had chosen to ignore dual loyalties (of Plaintiff John Ransmeier) that were made manifest in my client's filing, I certainly did believe that the motion raised relevant facts that a court of appeals would and should be interested in.

--The Court ventures far into baseless speculation when it purports to conclude "why" I filed this motion. Contrary to its finding, I did not file the motion as a "vehicle for making personal slurs against Judge Hellerstein and his family," nor do I believe that any of the information I submitted by itself constituted a "slur"--and I was willing to let the court of appeals draw its own conclusions about insensitivity to appearance of partiality (on the part of the judge himself, not having anything to do with the character of his family members). The idea that I was essentially claiming that Judge Hellerstein "cannot be impartial because he is Jewish" is ludicrous and far-fetched, and I can scarcely believe that a respected court of appeals reached that astounding conclusion. The conclusion is absolutely repugnant. I never even used the term "Jew" or "Jewish" in my motion, and I never at any point alluded to religion other than perhaps in an incidental manner while pointing out the Israel advocacy of the temple in which the Hellersteins were apparently active, and I never attributed any of Judge Hellerstein's acts to his being Jewish. I treat all people including judges as individuals, based on their own actions, and even if one can sometimes generalize based on affiliations of individuals, I avoid stereotyping. Where is the support for the extravagant conclusion of the two-judge panel? The opinion provides none, and the motion is devoid of any. My motion was meticulously crafted in part to make it clear that an illicit motivation

was not my objective. I am left asking, how is an attorney supposed to raise concerns about connections of a judge to defendants in his courtroom, under the scenario here? The opinion has a chilling effect, and the court--at the very least--should still be acknowledging that appearance of impartiality and absence of connections remains extremely important in American jurisprudence. No such acknowledgement is made.

--Finally, the Court calls certain papers filed in support of the motion a "raw and ugly" form of anti-Semitism, but fails to identify these papers, and cites no example of any statements that were "raw" or "ugly." No names or epithets were used, as might be expected with a "raw" or "ugly" display. In any case, if the Court is referring to an exhibit to Ellen Mariani's declaration, it is preposterous that I should be faulted for the term or perceived motive of a writer of some exhibit, when the exhibit is used for a completely different purpose, and not to propagate anti-Semitism. Nor can I control the conclusions that others come to when they learn about judicial connections, even those that the court would characterize as "attenuated." Avoiding such speculation and "ugliness" is precisely one of the reasons why federal courts are supposed to be concerned about the appearance of partiality; and it is particularly unjust to sanction me for a "supporting paper" when I have never been put on notice that I could be sanctioned monetarily for having used a particular document as evidentiary support.

--In sum, the filing of this motion regarding judicial connections was not a litigation tactic, but arose out of genuine deep concern about Judge Hellerstein's actions, followed by the late discovery of ability to document some very unusual connections; the reality is that I could not have filed it sooner than I had, because I did not become aware until the Spring of 2012 that it was

possible to document all of the facts that I believed were necessary to show the connections of the Judge's son to 9/11 defendants ICTS, Huntleigh and Boeing; and it was filed for the reasons stated in the motion: to apprise the reviewing panel of facts which I believed were relevant to the colossal failure of Judge Hellerstein to have paid any attention at all to the conceded conflicts of interest of a litigant in his courtroom who had just gotten approval of a $3.75 million settlement with ostensibly adverse defendants who were in fact his clients--an approval which I still find mind-boggling in its implications and audacity, and utterly corrosive of confidence in the federal judiciary, every time I contemplate it.

Pursuant to 28 U.S.C. Section 1746 I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on May 30, 2014 at Clovis, California.

/s/ Bruce Leichty
Bruce Leichty

Respectfully submitted,

/s/ Bruce Leichty
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Attorney for Ellen Mariani, Appellant

Exhibit 1

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 30, 2013
Docket #: 11-175cv
Short Title: Ransmeier v. UAL Corporation, et. al.

DC Docket #: 03-cv-6940
DC Court: SDNY (NEW YORK CITY) DC Docket #: 03-cv-6940
DC Court: SDNY (NEW YORK CITY)
DC Judge: Hellerstein

NOTICE OF DEFECTIVE FILING

On May 29, 2013 the petition for rehearing/rehearing en banc was submitted in the above referenced case. The document does not comply with the FRAP or the Court's Local Rules for the following reason(s):

_____ Failure to submit acknowledgment and notice of appearance *(Local Rule 12.3)*
_____ Failure to file the Record on Appeal *(FRAP 10, FRAP 11)*
___X___ Missing motion information statement *(T-1080 - Local Rule 27.1)*
___X__ Missing supporting papers for motion (e.g, affidavit/affirmation/declaration) ***(FRAP 27)***
_____ Insufficient number of copies *(Local Rules: 21.1, 27.1, 30.1, 31.1)*
_____ Improper proof of service *(FRAP 25)*
    _____ Missing proof of service
    _____ Served to an incorrect address
    _____ Incomplete service *(Anders v. California 386 U.S. 738 (1967))*
_____ Failure to submit document in digital format *(Local Rule 25.1)*
_____ Not Text-Searchable *(Local Rule 25.1, Interim Local Rules 25.2)*, click here for instructions on how to make PDFs text searchable
_____ Failure to file appendix on CD-ROM *(Local Rule 25.1, Interim Local Rules 25.2)*
_____ Failure to file special appendix *(Local Rule 32.1)*
_____ Defective cover *(FRAP 32)*
    _____ Incorrect caption *(FRAP 32)*
    _____ Wrong color cover *(FRAP 32)*
    _____ Docket number font too small *(Local Rule 32.1)*
_____ Incorrect pagination, click here for instructions on how to paginate PDFs *(Local Rule 32.1)*
_____ Incorrect font *(FRAP 32)*
_____ Oversized filing *(FRAP 27 (motion), FRAP 32 (brief))*

_____ Missing Amicus Curiae filing or motion *(Local Rule 29.1)*
__X____ **Untimely filing**
__X____ **Incorrect Filing Event**
__X____ **Other: The mandate issued on February 21, 2013. A motion to recall the mandate must be submitted. A petition for rehearing with respect to the June 26, 2012 Summary Order is untimely, a motion to file late must be submitted. A motion to reconsider with respect to the May 15, 2013 non-dispositive opinion is appropriate.**

Please cure the defect(s) and resubmit the document, with the required copies if necessary, **no later than June 3, 2013.** The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

Failure to cure the defect(s) by the date set forth above will result in the document being stricken. An appellant's failure to cure a defective filing may result in the dismissal of the appeal.

Inquiries regarding this case may be directed to 212-857-8560.

Exhibit 2

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]

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PETITION FOR REHEARING EN BANC

Bruce Leichty
Law Offices of Bruce Leichty
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Clovis, CA 93612
(559) 298-5900
Attorney for Ellen Mariani,
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:

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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 &

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[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

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[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)

Bruce Leichty
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625-A 3rd St.
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Attorney for Ellen Mariani,
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.

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

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[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

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[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, 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,

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[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,

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[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.

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[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

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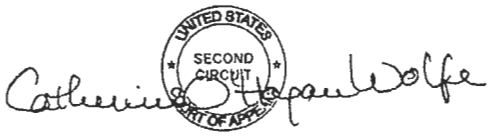
[5] Because Judge Hellerstein denied Leichty's application to appear *pro hac vice*, Mariani's briefing below was allegedly filed *pro se*. We agree with the district court's assessment that the briefs were obviously written by Leichty. In any event, Leichty's behavior has continued during this appeal,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



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)

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[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