The document below is hereby signed.

Signed: August 09, 2010.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLUMBIA

S Martin Teel Jr

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
GREATER SOUTHEAST COMMUNITY	)	Case No. 02-02250
HOSPITAL CORP., I, *et al.*,	)	(Chapter 11)
	)	(Jointly Administered)
Debtors.	)	
	)	
	)	
SAM J. ALBERTS, TRUSTEE FOR	)	
THE DCHC LIQUIDATING TRUST,	)	
	)	
Plaintiff,	)	
	)	Adversary Proceeding No.
v.	)	04-10459
	)	
PAUL TUFT, *et al.*,	)	**Not for Publication in**
	)	**West's Bankruptcy Reporter**
Defendants.	)	

MEMORANDUM DECISION AND ORDER REGARDING MOTION OF EPSTEIN
BECKER & GREEN P.C. FOR EXCESS EXPENSES AND ATTORNEYS' FEES

The claims against it having been dismissed, one of the defendants in this adversary proceeding, Epstein Becker & Green P.C., has moved for an award of attorneys' fees and expenses against the attorneys and law firm that represented the plaintiff, Sam J. Alberts, Trustee for the DCHC Liquidating Trust in this adversary proceeding.[1] For the reasons that follow, I will grant Epstein Becker's motion in part, imposing sanctions against Sam J. Alberts as counsel for the plaintiff with respect to litigation pursued after the court granted Epstein Becker's motion for summary judgment.[2]

I

In seeking attorney's fees and expenses, Epstein Becker relies on 28 U.S.C. § 1927 and the inherent authority of this court.

A.

Under 28 U.S.C. § 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[1] Epstein Becker's motion seeks sanctions against Sam J. Alberts, Esq.; Lucius B. Lau, Esq.; Francis A. Vasquez, Esq.; and the law firm in which those attorneys practiced, White & Case LLP. For reasons discussed later, sanctions are appropriate only against Alberts. Because I conclude that none of the conduct prior to the dismissal of the adversary proceeding warrants sanctions, I will review the plaintiff's conduct in the proceeding prior to dismissal without specifying which attorneys were carrying out that conduct on the plaintiff's behalf.

[2] This Memorandum Decision constitutes the court's findings of fact and conclusions of law regarding the motion. At the hearing of November 27, 2007, the court reserved for a later hearing the resolution of the amount of fees to be awarded if the court determined after the initial hearing that there was misconduct warranting an award of costs, expenses, and attorneys' fees.

The purpose of § 1927 is to allow the court "to assess attorneys' fees against an attorney who frustrates the progress of judicial proceedings." *United States v. Wallace*, 964 F.2d 1214, 1217 (D.C. Cir. 1992). As observed in *Wallace*, 964 F.2d at 1220-21 (footnote omitted):

> Where courts have employed section 1927, the attorney's behavior has been repeated or singularly egregious. For example, in *Fritz v. Honda Motor Co.*, 818 F.2d 924 (D.C. Cir. 1987), this court upheld section 1927 sanctions where the attorney "repeatedly took actions which required [the defendant] to expend unnecessary time and money, even though he had no intention of pursuing this litigation." *Id.* at 925; *see also Julien v. Zeringue*, 864 F.2d 1572, 1575-76 (Fed. Cir. 1989) (sanctioning attorney who "continually missed deadlines, requested at least 10 extensions of time to file his briefs, and submitted a joint appendix 11 months after he was given extensive and explicit instructions"); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) (en banc) ("section 1927 imposes a continuing obligation on attorneys by prohibiting the persistent prosecution of a meritless claim"); *Toombs v. Leone*, 777 F.2d 465, 471-72 (9th Cir. 1985) (counsel sanctioned for deliberately failing to meet pretrial brief deadline and then filing, on morning of trial, 148-page trial brief and 34-page exhibit list).

Before imposing sanctions on an attorney under § 1927, the court must evaluate whether the attorney's conduct has been *"at least* reckless[.]" *Wallace*, 964 F.2d at 1217 (emphasis in original). Accordingly, "inadvertent, and negligent acts will not support an imposition of sanctions under section 1927." *Wallace*, 964 F.2d at 1219 (*quoting Cruz v. Savage*, 896 F.2d 626, 631 (1st Cir. 1990)); *see also Healey v. Labgold*, 231 F. Supp. 2d

64, 68 (D.D.C. 2002) ("A showing that counsel's behavior has been unreasonable and vexatious requires more than a showing of negligence. Instead, it requires a showing of deliberate action in the face of a known risk, the likelihood or impact of which the actor inexcusably underestimates or ignores.") (citations and internal quotations omitted).

Such conduct that recklessly multiplies the proceedings in an unreasonable fashion is adequate to warrant a finding of vexatiousness under § 1927. *Reliance Ins. Co. v. Sweeney Corp., Md.*, 792 F.2d 1137 (D.C. Cir. 1986). In *Reliance Ins.*, the Court of Appeals stated:

> While the language of § 1927 suggests deliberate misbehavior, subjective bad faith is not necessary; attorneys have been held accountable for decisions that reflect a reckless indifference to the merits of a claim. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985). We adopt these standards in the case at bar.

792 F.2d at 1138. That holding makes sense. The court already has authority pursuant to its inherent authority to sanction bad faith conduct, and § 1927 would add nothing if it requires a showing of bad faith. *See Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986).

The Court of Appeals later expressed the view that the law in the D.C. Circuit is unsettled as to whether a court must find subjective bad faith or merely recklessness to impose sanctions under § 1927. *See Wallace*, 964 F.2d at 1218-19.[3] However, the only D.C. Circuit decision cited in *Wallace* as suggesting that § 1927 requires subjective bad faith was *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 45 n.9 (D.C. Cir. 1990). Rule 11 sanctions, not § 1927 sanctions, were at issue in *Hilton Hotels*. The suggestion in *Hilton Hotels* (relegated to a footnote) was thus mere dictum, and is not enough to overturn the holding of *Reliance Ins. Co*.[4] I view myself as bound to follow the holding of *Reliance Ins. Co.*

If only a showing of recklessness is needed for § 1927 sanctions, a party must demonstrate the opposition made a "conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." *Wallace*, 964 F.2d at 1220 (quoting *Restatement (Second) of Torts*, § 500 cmt. G (1964)). This standard is a higher bar than negligence, which "consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future

[3] *See also LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 905 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999) (citing *Wallace* for this proposition).

[4] The holding in *Reliance Ins. Co.* was viewed as being a holding, not dictum, by at least one commentator. *See* Josselyn, *The Song of the Sirens-Sanctioning Lawyers under 28 U.S.C. § 1927*, 31 B.C. L. Rev. 477, 489 (1990).

emergency." *Id.*

The standards of bad faith and recklessness are similar and distinguishable; although both involve a general, deliberate action in the face of a risk, a bad faith actor intends the "bad" consequence to come about, such as the needless delay of proceedings, whereas a reckless actor knows of but is indifferent to the risk of the "bad" consequence. *See id.* at 1219-20.

B.

Epstein Becker also seeks an award of attorneys' fees and expenses pursuant to the court's inherent authority to impose sanctions on attorneys for misconduct. Epstein Becker never moved for sanctions under Fed. R. Bankr. P. 9011. I underscore that point because Epstein Becker's motion advances arguments that would have been pertinent to a motion under Rule 9011, the analog of Fed. R. Civ. P. 11, but that for the most part fall short of establishing conduct supporting a finding of abuse under § 1927 or under the court's inherent authority

Rule 9011(c) permits an award of attorney's fees when a filed paper fails to comply with the standards of Rule 9011(b), and the party who filed the paper neglects to withdraw the paper within the safe harbor time period of Rule 9011(c)(1)(A). In contrast to § 1927 and the court's inherent authority, Rule 9011 does not require a showing of recklessness or bad faith in order for sanctions to be awarded. Although the plaintiff's attorneys' conduct may have violated Rule 9011, the claims against Epstein Becker have already been dismissed by a final judgment that is no longer appealable. If that dismissal of the claims against Epstein Becker did not bar pursuit of a Rule 9011 motion, the plaintiff could readily defeat a Rule 9011 motion by filing a motion (within the safe harbor time period of Rule 9011(c)(1)(A)) to withdraw any paper that violated Rule 9011.

Epstein Becker's failure to avail itself of Rule 9011 does not preclude awarding sanctions under § 1927 (or pursuant to the court's inherent power) if the plaintiff's attorneys had engaged in unreasonable and reckless or bad faith conduct warranting such sanctions. *See Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567, 1575 (11th Cir. 1995). However, the plaintiff's attorneys' filing of papers in violation of Rule 9011 with a good faith, non-reckless pursuit of litigation of the claims cannot form a basis for such sanctions.

Although a court's "inherent powers must be exercised with restraint and discretion," a court has the inherent authority and duty to police conduct in proceedings before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46 (U.S. 1991) (citations omitted). Assessing attorneys' fees is appropriate where a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," or otherwise "act[s] in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*, 501

U.S. at 45-46. Such a sanction both “vindicates judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy.” *Hutto v. Finney*, 437 U.S. 678, 690 n.14 (1978) (citation omitted). Bad faith is required for the court to impose such sanctions under its inherent authority. *Wallace*, 964 F.2d at 1219 (noting that in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), the Court indicated that sanctions under a court’s inherent powers requires a finding “as to whether counsel’s conduct in [the] case constituted or was tantamount to bad faith”).

Unlike 28 U.S.C. § 1927, an award of sanctions pursuant to the court’s inherent authority does not require that a party’s bad faith conduct have caused a multiplication of proceedings.

C.

To make a showing of bad faith, whether for purposes of imposing sanctions pursuant to § 1927 or the court’s inherent authority, a party must demonstrate that the opposition engaged in deliberate conduct for an improper motive, such as harassment, needless delay, or disruption of the litigation. Even in those circuits that hold that § 1927 requires a showing of bad faith, such bad faith can be proven directly through evidence of subjective intent, or indirectly through evidence of objective actions that lead to an inference of subjective intent--such as filing a document with the court that is plainly frivolous, lacking even a colorable basis in law or fact. *See, e.g., United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Service Workers Intern. Union, AFL-CIO, CLC v. Shell Oil Co.*, 549 F.3d 1204, 1209 (9th Cir. 2008) ("Imposing sanctions under the Court's inherent powers requires a finding of bad faith, which may be demonstrated by actions delaying or disrupting the litigation."); *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (A party may demonstrate bad faith by "delaying or disrupting the litigation or hampering enforcement of a court order.") (citation omitted); *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) ("Like an award made pursuant to the court's inherent power, an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay.").

II

The court must determine whether fees and expenses are appropriately awarded here and, if so, whether they should be awarded for the entirety of the litigation or only a portion of it. I address in this part II the conduct preceding the granting of the motion for summary judgment, and conclude that it is not sanctionable. It is first necessary to review the history of the proceeding preceding the granting of summary judgment.

A.

Epstein Becker's allegations of the plaintiff's attorneys' bad faith refer to various periods during the litigation. Many of Epstein Becker's arguments boil down to a contention that the attorneys advanced claims and arguments lacking legal merit. Section 1927, however, does not amount to a repeal of the traditional American Rule that each party bears its own legal costs. Indeed, § 1927 "does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980).

The history of this adversary proceeding buttresses Epstein Becker's position that it viewed the proceeding as unwarranted and that it pressed throughout for a prompt resolution, and that the court entered orders that made clear that there was to be a firm deadline for resolving Epstein Becker's motion for summary judgment. But the following review of that history demonstrates that until the motion for summary judgment was granted in Epstein Becker's favor, none of the plaintiff's attorneys had engaged in misconduct sanctionable under § 1927 or the court's inherent power. The basic thrust of Epstein Becker's motion for sanctions is that the plaintiff’s attorneys muddied Epstein Becker’s reputation by continually accusing it of malpractice and of affirmatively aiding and abetting breaches of fiduciary duty relating to the debtors’ deepening insolvency, did so without any factual basis and with specious legal theories, and failed to ever avail themselves of the opportunity to take discovery to demonstrate that the facts justified the complaint.

In 2002, Doctors Community Healthcare Corporation (“DCHC”) and its affiliates as debtors commenced the cases (under chapter 11 of the Bankruptcy Code (11 U.S.C.)) within which this adversary proceeding was pursued. A chapter 11 plan was confirmed, which created the DCHC Liquidating Trust, vested with certain claims that had been property of the estate under 11 U.S.C. § 541 and certain avoidance and recovery powers under chapter 5 of the Bankruptcy Code that the debtors, as debtors in possession, had enjoyed pursuant to 11 U.S.C. § 1107(a). Sam J. Alberts was appointed trustee of that trust, and in that capacity he is the plaintiff in this adversary proceeding. Epstein Becker does not seek sanctions against Alberts in that capacity, and seeks sanctions only against the attorneys (including Alberts) and the law firm that represented him in the adversary proceeding.

In November 2004, the plaintiff filed his original complaint seeking monetary damages against Epstein Becker, Kutak Rock LLP (another law firm), and certain of the debtors’ directors and officers. The adversary proceeding was based upon each defendant’s participation in a financing scheme that permitted the debtors to improperly receive hundreds of millions of dollars from National Century Financial Enterprises and its affiliates (individually and collectively referred to as NCFE or National Century), beyond the debtors’ ability to repay such amounts.

As to Epstein Becker and Kutak Rock, the Trustee sought damages based primarily upon theories of deepening insolvency and legal malpractice. Epstein Becker had a long-standing, close relationship with DCHC and its subsidiaries, which eventually included Greater Southeast Community Hospital Corporation I (an entity created as a DCHC subsidiary to acquire a hospital in Washington, D.C.). As part of that relationship, Epstein Becker executed opinion letters in December 1999 used in connection with Greater Southeast’s fully leveraged acquisition of its hospital. That acquisition required Greater Southeast to assume (as non-recourse obligations against its assets that were being pledged) all liabilities of all of the debtors owed to National Century, which at that time totaled approximately $205 million.

Two of the opinion letters executed by Epstein Becker allegedly contained language that Epstein Becker (1) “assumed” neither DCHC nor Greater Southeast was “insolvent” at the time of the transaction; or (2) “assumed” the accuracy of certain debtor representations that DCHC and Greater Southeast were solvent at the time of the transaction and would not become insolvent by reason of the transaction. As discussed later, the claims relating to those opinion letters were eventually dismissed on the basis that no reasonable reliance can be placed on the parts of an opinion letter that merely hypothesize that certain facts are true. Had those claims survived that hurdle, the factual premise of those claims--that the assumptions were inaccurate and Epstein Becker had reason to know that--was not bad faith for the reasons discussed next with respect to the one remaining opinion letter.

In the remaining opinion letter Epstein Becker went a step further beyond only making assumptions: it represented that it found nothing in its representation of Greater Southeast that led it to believe that the representations of solvency of Greater Southeast made in one document that Epstein Becker reviewed were “inaccurate or incomplete in any material respect.” One of the certificates Epstein Becker reviewed stated that Greater Southeast was solvent and stated that Greater Southeast "will not become insolvent . . . and . . . will have an adequate amount of capital to conduct its business and anticipates no difficulty in continuing to do so for the foreseeable future." Epstein Becker allegedly knew or should have known that this representation was false. To support that allegation, the plaintiff noted that when

Epstein Becker executed the opinion letter in December 1999, an Epstein Becker partner had attended a meeting of the DCHC board of directors on March 9, 1998. At that meeting, it was noted that the consolidated balance sheet for DCHC and its subsidiaries reflected “a negative net worth of ($10,459,539) and that “the . . . consolidated income statement for January [1998] shows a net loss of $(353,215) compared to a budgeted net loss of $(367,157).” (Docket Entry (“DE”) No. 399 Ex. 8). Prior to the purchase by Greater Southeast of the hospital, an e-mail of November 30, 1999, revealed that an Epstein Becker partner involved in advising DCHC regarding the forthcoming purchase was of the view that DCHC “will have its hands full trying to turn the hospital around quickly post-acquisition, and staunch the negative cash flow . . . .” (DE No. 399 Ex. 9).

Epstein Becker has demonstrated via evidence presented in a later motion for summary judgment that Epstein Becker had no reason to believe that any of the representations of solvency made in the documents Epstein Becker reviewed were "inaccurate or incomplete in any material respect." Epstein Becker has also demonstrated that the evidence that the plaintiff relied upon as suggesting to the contrary was at best extremely weak. There was a 20-month gap between the meeting that the Epstein Becker partner attended in March 2008, and the opinion letter of December 2009. The minutes of the March 2008 meeting referred to

DCHC attempting to raise $50,000,000 in equity capital investments in DCHC (which would have increased the debtor's assets without increasing its debts, and have resulted in substantial solvency) in conjunction with a forthcoming acquisition of a hospital in Chicago. In the 20-month period since March 2008, DCHC had engaged in the acquisition of several hospitals the value of which would affect the solvency issue.

Finally, the March 2008 board meeting addressed the solvency of DCHC, not Greater Southeast. As to that latter point, however, the plaintiff’s attorneys note that Greater Southeast had signed a security agreement (Pl. Attorneys' Ex. 29A) that posted the collateral to secure not only Greater Southeast’s obligations to NCFE but also the obligations owed to National Century by DCHC and other DCHC affiliates. That security agreement pledged not only Greater Southeast's real property described in an attachment to the security agreement but also "all . . . machinery, fixtures, furniture and articles of property now owned or hereafter acquired by the Borrower located on the Premises, and used or acquired for use in the business of the Borrower . . . ." Epstein Becker contends that Greater Southeast pledged only some of its assets to secure debts of DCHC and other affiliates, but the plaintiff's attorneys could reasonably argue that Greater Southeast had pledged at least the majority of its assets. The term "Premises" was defined as meaning the real property described in an attachment to the security agreement, but Exhibit 29A did not include the attachment. The term "Premises" presumably included at a minimum the hospital facility, Greater Southeast's principal asset, and the plaintiff's attorneys could view Greater Southeast as having pledged so much of its assets that any significant insolvency of DCHC and its affiliates would result in Greater Southeast being insolvent as well because the acquisition was essentially fully leveraged.[5]

The plaintiff’s attorneys, in other words, relied on information, albeit slim, that constituted a good faith basis to justify their belief that as of December 1999 Epstein Becker had reason to believe that the representations *were* inaccurate, essentially contending that the dire circumstances of DCHC in March 1998 warranted Epstein Becker’s being hesitant in certifying that it had no reason to believe that the representations in December 1999 were inaccurate. It was a close call whether they could legitimately assert that claim, but not bad faith. Moreover, prior to the entry of summary judgment in Epstein Becker’s favor, the plaintiff’s attorneys did not multiply proceedings regarding that claim. Even if the assertion of the claim could be viewed as done in reckless disregard of its

[5] The burden of proof was on Epstein Becker to demonstrate bad faith or recklessness, and the missing attachment must thus be viewed in a light unfavorable to Epstein Becker.

infirmities, the plaintiff’s attorneys allowed the adjudication of the claim to progress to summary judgment without unreasonably multiplying the proceedings to get to that point.

The plaintiff filed his first amended complaint on April 15, 2005, renumbering the counts and adding additional claims against Epstein Becker relating to certain opinion letters and allegedly unreasonable compensation paid to Epstein Becker. The amended complaint cannot be viewed as unreasonably multiplying the proceedings as it merely added new claims that had not been asserted previously.

In a decision of October 31, 2005, addressing the first amended complaint, the court dismissed “all counts [against the law firm defendants] except for Count XIV insofar as it alleges malpractice based on the Law Firm Defendants’ negligent preparation of opinion letters used by the NCFE Entities to overfund the Debtors and Counts XVI-XXI, which state claims for fraudulent conveyances under federal and Arizona state law.” *Alberts v. Tuft (In re Greater Southeast Community Hosp. Corp. I)*, 333 B.R. 506, 539 (Bankr. D.D.C. 2005).

The court dismissed claims (in Counts XI and XII) against Epstein Becker based on causing deepening insolvency and aiding and abetting deepening insolvency, rejecting the view of some decisions that deepening insolvency could be an independent tort. 333 B.R. at 516-17. The court also dismissed the trustee’s claims (in Count XV) based on 11 U.S.C. § 544(a), 333 B.R. at 517-22, rejecting the reasoning of decisions that supported the trustee’s attempted invocation of § 544(a), 333 B.R. at 517, and rejecting what the court characterized as a clever alternative argument by the plaintiff. 333 B.R. at 521. These dismissed claims cannot be said to have been pursued recklessly or in bad faith.

As to Count XIII (Aiding And Abetting Breach Of Fiduciary Duties), the amended complaint alleged in paragraph 306 that Epstein Becker “knowingly participated in the D&O Defendants' breach of their fiduciary duties by (1) failing to inform the Debtors of the consequences associated with the Debtors' deepening insolvency; and (2) negligently preparing opinion letters that allowed NCFE to perpetuate a Ponzi scheme and overfund the Debtors.” The court ruled that the amended complaint failed to allege a breach of fiduciary duty by the directors and with respect to funding from National Century, 333 B.R. at 529, and that, alternatively, to the extent the allegation was that Epstein Becker gave bad business advice, a law firm, hired to give legal advice, cannot be sued for giving bad business as opposed to legal advice. 333 B.R. at 529 n.28.

Count XIV (Legal Malpractice - Negligence) alleged in paragraph 312 that Epstein Becker breached its professional duties of care to the debtors “by (1) failing to inform the

Debtors of the consequences associated with the Debtors' deepening insolvency; and (2) negligently preparing opinion letters that allowed NCFE to perpetuate a Ponzi scheme and overfund the Debtors.” The court ruled that the first ground failed to establish legal malpractice because a law firm is not hired to give business advice, and, in any event, the plaintiff had failed to plead any *legal* harm arising with respect to the National Century funding. 333 B.R. at 529-30. The dismissed claims that were based on Epstein Becker having given erroneous business advice may have been without merit, but they were not pursued recklessly, in bad faith, or to multiply the proceedings.

As to the second alleged ground for finding legal malpractice, the court noted:

> The Complaint states in pertinent part:
>
> > Over the years of representation, Epstein Becker provided a number of legal opinions to NCFE on behalf of the Debtors. The legal opinions were drafted in accordance with NCFE's requests and, in some cases, were initially drafted by NCFE. The legal opinions allowed NCFE to perpetuate a Ponzi scheme. (Compl. [¶ 129]).
>
> . . . .
>
> Other paragraphs allege that Epstein Becker authored an opinion letter to NPF X, Inc. (Greater Southeast's primary lender and an NCFE subsidiary) containing assumptions which the author knew to be false. (Compl.¶ 133). Another letter was sent that same day to NPF XII, Inc. and NPFS, Inc. (Compl. ¶ 134). These NCFE spin-offs overfunded Greater Southeast, thereby deepening its insolvency. (Compl. ¶ 112).

Although criticizing the lack of definiteness as to which debtors Epstein Becker was representing (333 B.R. at 530 n.30 and 531 n.31), the court concluded that this part of Count XIV sufficed to state a claim for legal malpractice. 333 B.R. at 530-31.

Epstein Becker has appropriately taken umbrage at the plaintiff having argued in opposition to the motion to dismiss the first amended complaint that “[b]ecause at minimum the Law Firm Defendants turned a blind eye to the Debtors’ substantial problems and rubber-stamped opinion letters, the Debtors’ insolvency was steadily increased with no recovery in sight.” Oppos. (DE No. 203) at 22. The term “Law Firm Defendants” included both Epstein Becker and Kutak Rock, and the assertion inappropriately tarred Epstein Becker by including it with the other Law Firm Defendant in a list of alleged misdeeds by the Law Firm Defendants that included rubber stamping that had been pled, if at all, only with respect to Kutak Rock. The argument must be read in the context of the first amended complaint which alleged at ¶ 130 that NCFE had initially drafted some of the opinion letters that Epstein Becker issued, and which alleged at ¶ 145 that Kutak Rock prepared opinion letters that were largely drafted by NCFE. Read in that context, the argument regarding rubber stamping can be viewed as relating to Kutak Rock, not Epstein Becker. Lumping Epstein Becker and Kutak Rock together in the same argument that included the reference to rubber stamping was inappropriate conduct because it left the impression that it was being asserted that both Law Firm Defendants engaged in such misconduct. Nevertheless, with respect to the claims prosecuted against Epstein Becker, there never was a claim based on rubber stamping, and thus no occasion for sanctions in that regard.

As to what *was* pled as part of any claim against Epstein Becker, namely, that National Century prepared initial drafts of some opinion letters, National Century *did* prepare the initial draft (Respondents' Ex. 15(a)) of the one opinion letter later issued by Epstein Becker that remained at issue prior to the grant of summary judgment. That draft included some language (but not much) that eventually was contained in the opinion letter that Epstein Becker issued, and in no way can Epstein Becker be viewed as having rubber stamped National Century's draft. But ¶ 130 of the first amended complaint did not assert rubber stamping by Epstein Becker and was not a factually unfounded claim in regard to National Century having prepared initial drafts in some instances. Accordingly, that paragraph is not a basis for sanctions.

In Counts XVI-XXI, the plaintiff also sought to recover payments made to Epstein Becker as fraudulent conveyances because the debtors made the transfer of legal fees to Epstein Becker without receiving reasonably equivalent value. Because the complaint had sufficed to state a claim for legal malpractice, the court concluded that the fraudulent conveyance claims survived. 333 B.R. at 531-32.

The court recognized that the plaintiff had not had an opportunity to again amend the complaint in response to the specific objections raised by the defendant directors and officers, and, accordingly, the court gave the plaintiff leave to file a second amended complaint to cure any of the defects identified as to certain of the claims against those defendants. 333 B.R. at 539. In turn, the court granted leave to amend the complaint as to Epstein Becker regarding the first prong of its malpractice count (the prong addressing advice regarding deepening insolvency) and regarding aiding and abetting breach of fiduciary duty if new allegations were made against the defendant officers and directors that would support amended claims against Epstein Becker. 333 B.R. at 539 n.40. The court indicated that Epstein Becker might be entitled to a more definite statement as to the allegations regarding negligent preparation of opinion letters, 333 B.R. at 539-40 and 540 n.41, and regarding identifying, as to each opinion letter, the debtors for which the law firms had been hired to prepare the letters, 333 B.R. at 531 n.31.

When the law firm defendants sought a more definite statement as to the first amended complaint, the plaintiff opposed their motions by indicating that the forthcoming second amended complaint would provide a more definite statement. (DE No. 158). The court granted the motions for a more definite statement, directing that when the plaintiff filed his second amended complaint he was required to provide certain definite information regarding the opinion letters. (DE No. 168).

The plaintiff filed his second amended complaint on December 23, 2005. (DE No. 171). The filing of memoranda addressing motions to dismiss the second amended complaint was not completed until May 4, 2006, and oral argument was held on May 16, 2006. The court addressed Epstein Becker's motion to dismiss the second amended complaint in a decision of September 26, 2006. *Alberts v. Tuft (In re Greater Southeast Community Hosp. Corp. I)*, 353 B.R. 324 (Bankr. D.D.C. 2006).

With respect to the claims of malpractice, the second amended complaint included two sets of allegations the court dismissed out of hand as not having asserted wrongdoing:

> Alberts alleges that Epstein Becker "sponsored" the "misleading and false" testimony of NCFE CEO Lance Poulsen at a hearing before this court on November 11, 1999, and that Epstein Becker "assist[ed]" the D & O Defendants in their pursuit of a contract with the District of Columbia for millions of dollars that inured to the benefit of the D & O Defendants through their self-serving use of those funds (Compl.¶¶ 175-80, 182-83). There are no allegations that Epstein Becker knew that Poulsen's testimony was false or that it knew that the D & O Defendants were wasting their fiduciary's money, and therefore no allegations of wrongdoing.

353 B.R. at 359. The count asserting malpractice claims, although incorporating these allegations, addressed the opinion letters as having constituted malpractice, and did not seek relief regarding these allegations, and added nothing to the claims asserted. Accordingly, this was an inappropriate cheap shot, alleging an irrelevant fact whose only purpose was to besmirch Epstein Becker by innuendo via guilt by association, and put forward to advance the claims for relief that *were* asserted. Nevertheless, these allegations did not multiply the proceedings, and, not having asserted claims for relief, cannot be viewed as bad faith prosecution of invalid claims.

The second amended complaint, for the first time, sufficed to plead claims for breach of fiduciary duty against some of the defendant directors and officers with respect to the debtors' deepening insolvency. 353 B.R. at 338-43. Taking up the court's invitation in its earlier decision, 333 B.R. at 539 n.40, the second amended complaint pled anew, in that context of breaches of fiduciary duty by certain directors and officers, that Epstein Becker had committed malpractice with respect to its advice regarding deepening insolvency, and had aided and abetted the breaches of fiduciary duty. The second amended complaint, however, did not plead that Epstein Becker knew or should have known of those breaches of fiduciary duty when they approved the allegedly harmful financial transactions with National Century entities, and instead only pled that Epstein Becker knew or should have known of the effects of the debtors’ deepening insolvency. Without more, the court ruled, this did not amount to an allegation that Epstein Becker should have known that the directors and officers were breaching fiduciary duties, because, as the court had explained in its previous decision, a company’s acquisition of additional debt, by itself, is not a legal wrong. *Alberts v. Tuft*, 353 B.R. at 357-58. Accordingly, the court dismissed the claims asserted in the second amended complaint for malpractice in giving legal advice regarding deepening insolvency, *id.*, and the claims for aiding and abetting the breach of fiduciary duty, 353 B.R. at 359-60.[6] I address in part B, below, whether sanctions are appropriate with respect to these dismissed claims.

Shorn of those dismissed claims, the case against Epstein

[6] More fully, the court stated:

> As the court explained in its prior opinion, “a company’s acquisition of additional debt, by itself, is not a legal wrong . . . .” *In re Greater Southeast Cmty. Hosp. Corp. I*, 333 B.R. at 530. Deepening insolvency is not a tort, and a law firm’s knowledge that a corporate transaction is going to deepen the corporation’s insolvency does not mean that the law firm knows that the corporation’s fiduciaries are breaching their duties of care or loyalty in approving such transactions. *Ergo*, the failure to advise the debtors of the consequences of acquiring excess debt is not malpractice.

353 B.R. at 357-58.

Becker boiled down to the alleged inaccuracies in opinion letters. The second amended complaint dropped the prior allegation that some of the opinion letters were initially drafted by National Century. By dropping that allegation, the plaintiffs' attorneys could not be said to have multiplied the proceedings in that regard.

Turning to what the second amended complaint *did* allege, two of the opinion letters it addressed contained assumptions of fact that Epstein Becker allegedly knew or should have known were erroneous. The court dismissed those allegations on the basis that "[w]hen a lawyer prepares legal opinions on the basis of assumed or hypothesized facts, she puts her client and anyone else reading the opinion on notice that she is not vouching for the veracity or accuracy of those facts." 353 B.R. at 358.

That left only one opinion letter, and Epstein Becker had represented in that letter that nothing had come to its attention in the course of its representation of the debtors which had led it to believe that any representations set forth in any of the certificates relating to a National Century loan were inaccurate or incomplete in any material respect. Second Amended Compl. ¶ 174. One of the certificates stated that Greater Southeast was solvent and stated that Greater Southeast "will not become insolvent . . . and . . . will have an adequate amount of capital to conduct its business and anticipates no difficulty in continuing to do so for the foreseeable future." Epstein Becker allegedly knew or should have known that this representation was false. *Id.* This sufficed to state a claim of legal malpractice unless barred by an affirmative defense.

Based on an *in pari dilecto* defense, the *direct* claims for malpractice as to even the one opinion letter were dismissed. 353 B.R. at 361-369. The plaintiff's arguments against the *in pari dilecto* defense were based on reasoning, supported by at least one decision, that had not been rejected in this circuit. The assertion of the direct claims for malpractice in the face of the *in pari dilecto* defense is accordingly not a proper basis for imposing sanctions even under Fed. R. Bankr. P. 9011, s*ee Burns v. George Basilikas Trust*, 599 F.3d 673, 677 (D.C. Cir. 2010), and thus certainly not under § 1927 or the court's inherent authority.

All that survived as to Epstein Becker were claims to avoid and recover payments of attorney's fees to Epstein Becker as fraudulent conveyances, which turned on the allegedly negligent preparation of the one opinion letter, and claims (based on such avoidability) for disallowance or subordination of Epstein Becker's claims against the debtors. 353 B.R. at 369-70.

After the issuance of the decision regarding the motions to dismiss the second amended complaint, the court set deadlines for completing discovery and for responding to Epstein Becker's motion for summary judgment. The plaintiff's attorneys never conducted the depositions they had noticed up, and failed to oppose Epstein Becker's motion for summary judgment, which led to the court's granting that motion as unopposed.

B.

Sanctions are not warranted based on Epstein Becker's contention that the plaintiff's initial complaint and later amended complaints rested on erroneous views of the law. "Something more than a lack of merit is required for § 1927 sanctions or they would be due in every case." *McMahan v. Toto*, 256 F.3d 1120, 1129 (11th Cir. 2001), *amended on reh'g with respect to other parts of decision*, 311 F.3d 1077 (11th Cir. 2002), *cert. denied*, 539 U.S. (2003) (an erroneous argument regarding the collateral estoppel effect of a state court decision did not warrant § 1927 sanctions). The "advancement of meritless positions . . . unless it is utterly without colorable basis, will not support" a § 1927 sanction. *Kassatly v. Dynaco Acquisition Corp.*, 1997 WL 31104, at *3 (D.D.C. Jan. 22, 1997) (meritless arguments regarding the interpretation of an arbitration statute did not justify § 1927 sanctions).

To the extent that this court, in addressing the motions to dismiss, determined some of the plaintiff's claims were not in accordance with the law, their shortcomings did not extend to the point that they were without a colorable basis, unpersuasive though they may have been. These shortcomings do not support a finding of bad faith or recklessness, and thus recovery under § 1927 and the court's inherent authority is unwarranted for the plaintiff's erroneous views.

The closest Epstein Becker has come to showing sanctionable conduct with respect to erroneous assertions of law was the plaintiff's attorneys renewal of the claims for malpractice based on advice regarding deepening insolvency (and regarding aiding and abetting breaches of fiduciary duty regarding deepening insolvency). The court's decision addressing the first amended complaint invited assertion anew of such claims if, for the first time, the second amended complaint were adequately to plead breaches of fiduciary duty by directors and officers regarding deepening insolvency. 333 B.R. at 539 n.40. What the court said elsewhere in that decision may have been a clear indicator (as discussed in n.6, *supra*) of what would happen to the second amended complaint's claims regarding malpractice with respect to deepening insolvency and with respect to aiding and abetting breaches of fiduciary duty even if breaches of fiduciary duty by the directors and officers were pled in the second amended complaint. But that issue had not yet been definitively resolved, as the court had expressly contemplated that the plaintiff could renew those claims if breaches of fiduciary duty by directors and officers were adequately pled. In any event, the pleading of those claims anew cannot be said to have multiplied the proceedings unreasonably. Instead, it pled the claims anew shed of the defect of failing to relate to any misconduct of the directors and officers regarding deepening insolvency, thus presenting a cleaner set of allegations for determining whether attorneys have a duty to advise a client regarding the dangers of deepening insolvency. The claims were readily disposed of (*see* n.6, *supra*), and the conduct thus did not unreasonably multiply the proceedings. To the extent the plaintiff's attorneys reasoned that pleading the claims anew in the context of the allegations of breaches of fiduciary duty by the directors and officers would alone suffice to state valid claims against Epstein Becker, that was erroneous reasoning, but not bad faith. Accordingly, sanctions are not warranted either under § 1927 or pursuant to the court's inherent power.

C.

Epstein Becker also argues that the plaintiff had no factual basis for his claims in the initial complaint. In relation to the initial complaint, the act of filing a meritless complaint (at least one never asserted by the attorney in other proceedings) is insufficient to warrant imposition of § 1927 sanctions. *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1225 (10th Cir. 2006) ("[I]t is not possible to multiply proceedings until *after* those proceedings have begun.") (emphasis in original); *DeBauche v. Trani*, 191 F.3d 499, 511 (4th Cir. 1999) ("as a matter of law . . . the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably and vexatiously"), *cert. denied*, 529 U.S. 1033 (2000); *Zuk v. Eastern Pa. Psychiatric Inst.*, 103 F.3d 294 (3d Cir. 1996); *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996).[7]

Neither are sanctions under the court's inherent authority appropriate based upon the lack of a factual basis for the complaint. The initial complaint's claims were legally unsound, but the allegations of fact appear to have had a colorable basis. There is no evidence of a subjective, bad faith motive for filing the complaint, nor does the objective evidence permit an inference of bad faith.

D.

In relation to the amended complaints and the responses in opposition to Epstein Becker's motions to dismiss, Epstein Becker similarly seeks sanctions due to a lack of a factual basis. In opposing the motions to dismiss, the plaintiff was entitled to attempt to show that he had pled valid claims against Epstein

[7] To the extent *In re TCI, Ltd.*, 769 F.2d 441, 448 (7th Cir. 1985), suggests that § 1927 can be a basis to sanction the filing of an initial complaint, the Seventh Circuit rejected that suggestion in *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1201 n.6 (7th Cir. 1990), stating that "[s]ince the basis of Judge Shabaz's imposition of sanctions seems to have been Dahnke's failure to investigate the legal foundation for his claim before filing it in federal court . . . section 1927 is not implicated here."

Becker, and did not add facts beyond those pled in the complaints. The claims in the amended complaints against Epstein Becker regarding deepening insolvency and aiding and abetting were dismissed as a matter of law, and Epstein Becker has not pointed to those claims as factually unsound. What was left were the opinion letters.[8]

With respect to factual allegations regarding the opinion letters, as discussed in the court's review of the proceedings preceding the granting of summary judgment, Epstein Becker has not shown that the factual allegations were ones for which the attorneys had no colorable basis for making the allegations, and thus there was no bad faith. The inferences the plaintiff's attorneys drew to reach their factual assertions may have been extremely weak, but they were not made in bad faith. Nor did the assertion of the claims unreasonably multiply the proceedings. The claims were adjudicated in due course pursuant to Epstein Becker's motion for summary judgment. Accordingly, despite the thin factual basis for the claims relating to the opinion letters, Epstein Becker has not shown that sanctions are

[8] As noted previously, the claims relating to two of the opinion letters (those that set forth assumptions of fact that were not true facts) were dismissed as legally insufficient, but depended on the same thin factual foundation as the third opinion letter. The allegations regarding the third opinion letter survived as a matter of law with respect to the fraudulent conveyance claims to recover compensation paid for that opinion letter, and as a basis for seeking disallowance or subordination of Epstein Becker's claims against the debtors.

warranted under § 1927 or the court’s inherent authority.[9]

E.

Epstein Becker also contends that the plaintiff’s failure promptly to attempt to gather evidence to support his claims unreasonably multiplied the proceedings, but Epstein Becker has not shown that such conduct was the result of bad faith or recklessness. The Court of Appeals has emphasized that bad faith and recklessness are to be distinguished from acts that are unintended, inadvertent, or negligent. *See Wallace*, 964 F.2d at 1219 (citation omitted). These latter acts will not support sanctions under § 1927 or the court’s inherent power.

Epstein Becker’s evidence, taken at its strongest, indicates that the plaintiff’s attorneys did not exhibit the due diligence expected of attorneys in promptly and thoroughly pursuing discovery and development of the factual basis for a plaintiff’s claims. The evidence does not demonstrate any improper motivation. Instead, the decision not to pursue discovery was likely prompted by the difficulties that the plaintiff would face

[9] There having been no bad faith or an unreasonable multiplication of proceedings, Epstein Becker’s contention that the complaints lacked a factual basis seems more properly suited for a motion for sanctions under Fed. R. Bankr. P. 9011(b)(3), a provision not raised by Epstein Becker.

once such discovery was completed,[10] and the relatively small amount of the claim still left in play after the court’s decision of September 21, 2006 (absent a successful appeal of the court’s prior rulings). This is what likely prompted the plaintiff as early as December 4, 2006, to focus on attempting to settle the remaining claims against Epstein Becker. Discovery efforts were terminated only once the plaintiff’s attorneys thought they had a settlement in principle that would be acceptable to the DCHC Liquidating Trust committee (which had to approve any settlement by the plaintiff).

Although lax pursuit of a claim is in no way commendable, it does not demonstrate a deliberate attempt to continue the proceedings for an improper purpose or to obstruct the resolution

[10] The court had noted in its decision addressing the second amended complaint that to the extent that the malpractice claims survived (which they did only as an element of the fraudulent conveyance claims, and of the claims for disallowance or subordination of Epstein Becker’s claims against the debtors), the plaintiff “would have a tough row to hoe.” *Alberts v. Tuft,* 353 B.R. at 359 n.52. Specifically:

> He would need to show that the Law Firm Defendants did not exercise a reasonable standard of care in reviewing the documents described in the supposedly erroneous opinion letters, that the debtors relied on this specific guarantee to close their deals with NCFE and its subsidiaries (*i.e.*, that the deals could not have closed had these certifications not been there), and that these transactions actually impaired the business operations of the debtors to some degree. This task might or might not prove to be possible in the long run . . . .

Id.

of the proceeding. Nor does it demonstrate recklessness that leads to unreasonably multiplying proceedings. The Federal Rules of Civil Procedure and a court's local rules and orders set the parameters for pursuing the factual development of a case, and a plaintiff's failure to develop the case through discovery within those parameters may result in that plaintiff's being unable to prove its case, but that failure does not demonstrate a multiplication of proceedings. Nor, on the facts of this case, does it demonstrate bad faith.

Although sanction determinations are very fact-specific, *see Wallace*, 964 F.2d at 1219, other sanction cases provide some insight here. In *Wallace*, a defense attorney, with only six days remaining before trial, had not yet subpoenaed witnesses. *Id.* at 1215. The next day, the attorney contacted an investigator to serve the subpoenas; however, they were not served, and the attorney informed the court only one day before trial of his failure to serve the subpoenas. *Id.* On the day of the trial, the witnesses did not show up at 9:30 am for the trial. *Id.* at 1216. However, sanctions under § 1927 and the court's inherent authority were not warranted because such sanctions should "flow only from an intentional departure from proper conduct, or, at a minimum, from a reckless disregard of the duty owed by counsel to the court." *Id.* at 1120. Just as the attorney in *Wallace* demonstrated a lax approach to making necessary preparations for trial, so too--according to Epstein Becker’s evidence--the plaintiff’s attorneys were lax in the development and pursuit of litigation.

This laxness is in stark contrast to cases that have warranted sanctions:

- In *Fritz v. Honda Motor Co., Ltd.*, the plaintiff’s attorney unilaterally advised his client not to attend a scheduled deposition; took a deposition despite knowing that he was no longer going to pursue the case in that forum; and informed the parties at that deposition that he was *considering* pursuing the claim in state court, despite having already filed a complaint in state court. 818 F.2d 924, 924-25 (D.C. Cir. 1987).
- In *Healey v. Labgold*, the plaintiff filed a complaint with five claims that had already been deemed part of his bankruptcy estate, and thus claims only the trustee could bring. 231 F. Supp. 2d 64, 68 (D.D.C. 2002). There, the court viewed his actions as “the kind of purposeful, intentional action that rises well above negligence, to at least the level of recklessness.” *Id.*
- In *Morrison v. Int’l Programs Consortium, Inc.*, counsel’s failure to attend a trial date was a

> “conscious, intentional decision” because he knew the date of the trial and had no valid excuse why he neglected to act in conformity with the dates scheduled by the court. 240 F. Supp. 2d 53, 58 (D.D.C. 2003).

The common denominators of these latter cases are the deliberateness of the sanctioned parties’ actions and the bad faith and vexatiousness inherent in pursuing those actions which it was clear (or should have been clear) would lead to disrupting court proceedings. The evidence here does not establish that level of deliberateness and bad faith in failing to pursue discovery, and although the failure may have recklessly cost the plaintiff his case, it did not recklessly multiply the proceedings. Rather, it cost the plaintiff the ability to oppose the motion for summary judgment, and thus resulted in his losing the case, and flowed from the belief that a settlement was imminent.

F.

Epstein Becker further argues that the plaintiff’s attorneys acted in bad faith in their continuing failure to dismiss the plaintiff’s claims when they determined those claims were no longer viable. (*See, e.g.,* DE No. 382, Attachment 2, pp. 14-15.) There is a conflict among the circuits as to whether 28 U.S.C. § 1927 imposes such a duty on counsel to seek to have its client’s claims dismissed when counsel determines those claims are no longer viable,[11] and no opinion in this circuit appears to resolve the matter.[12]

However, regardless of whether 28 U.S.C. § 1927 encompasses inaction which multiplies proceedings, such inaction is sanctionable under the court's inherent authority. "[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *See Chambers*, 501 U.S. at 50. A court has the inherent authority to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive

[11] As examples, the Seventh Circuit has held that § 1927 imposes a continuing duty, *see Jolly Group, Ltd. v. Medline Indus., Inc.,* 435 F.3d 717, 720 (7th Cir. 2006) (citing *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1201 n.6 (7th Cir. 1990)). In discussing Rule 11 in conjunction with § 1927, the First Circuit has held that a continuing duty exists, *see Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. 1988), while the Fifth Circuit has held that no such duty exists, *see Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 872 n.9 (5th Cir. 1988).

[12] The United States District Court for the District of Columbia, in an unpublished opinion, while rejecting the imposition of a duty to dismiss under Fed. R. Civ. P. 11, noted that "[f]or any continuing abuse of court processes, the court may resort to section 1927 or to its inherent power." *Norris v. American Nat. Red Cross*, 1988 WL 90396, at *3 (D.D.C. 1988). *Norris* does not parse whether a continuing duty to withdraw unsupported claims constitutes an "abuse of court processes" or, if it does, whether the conduct is sanctionable under both § 1927 and the court's inherent authority.

reasons,” *id.* at 45-46, because it has a duty to police its own proceedings and the counsel and parties before it. Thus, where counsel or a party endeavors to delay or disrupt litigation in bad faith, whether by action or inaction, that course of conduct is sanctionable under the court’s inherent authority. *See Hutto v. Finney*, 437 U.S. 678, 690 (U.S. 1978) (“An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.”) (citations omitted).

Epstein Becker argues that the plaintiff’s attorneys had a duty to withdraw the plaintiff’s claims throughout the litigation because they never had any grounds upon which to base those claims against Epstein Becker. (*See* DE No. 383, Memo. at 6.) However, as discussed above, Epstein Becker has failed to demonstrate that the plaintiff’s attorneys filed and amended the complaint in bad faith and without any colorable basis. Therefore, Epstein Becker has failed to prove that the plaintiff’s attorneys had any duty to withdraw the claims during that time. At the point that the plaintiff’s opportunity to conduct discovery and to oppose the motion for summary judgment had expired, the plaintiff’s attorneys were operating under the good faith belief that the claims that the plaintiff was pursuing would be mooted by what they expected would be a settlement of the matter. Moreover, by then, the work had already been done in seeking summary judgment, and hence the plaintiff’s attorneys’ inaction cannot be said to have multiplied the proceedings.

F.

Epstein Becker takes specific issue with the plaintiff’s attorneys’ request for discovery to address the summary judgment motion, because this request prolonged the litigation and the plaintiff’s attorneys ultimately did not pursue such discovery in any significant way. (DE No. 383, Attachment 2, pp. 14-15, 17.) The evidence does not demonstrate that this was done in bad faith or with reckless disregard for the delay it would engender. Rather, after requesting an additional discovery period from the court, the plaintiff’s attorneys decided instead to pursue settlement. This evidence does not show that the plaintiff’s attorneys determined the plaintiff’s claims were without any factual basis; rather, the evidence is more likely indicative of a much more common realization in litigation--that litigating the matter was unlikely to produce an outcome that warranted the expense of litigation.

III

Alberts’ conduct in one aspect of this litigation does rise to the level of bad faith, sufficient to sustain an award of fees and expenses under both 28 U.S.C. § 1927 and the inherent authority of the court. The plaintiff’s motion to vacate the summary judgment order and establish a new briefing and discovery schedule was baseless, unreasonable, unnecessarily prolonged the proceedings, and was filed in bad faith.

A.

After the court had ruled on the motion to dismiss the second amended complaint on September 21, 2006, Epstein Becker filed a motion for summary judgment and made clear that it was ready to provide discovery expeditiously in order to permit a prompt disposition of its motion for summary judgment. Epstein Becker filed its motion for summary judgment on November 2, 2006. At a scheduling conference on that date, Epstein Becker made clear that it wanted the deadline for any discovery that was needed to oppose its motion for summary judgment to be set so that it was completed on an expedited basis, and sooner than the deadline for other discovery in the adversary proceeding. Epstein Becker’s counsel stated, "All the documents have been produced informally, but we'll do it formally if they'd like. And if they want to take the depositions of the five people whose affidavits we filed, they're ready at any time." Tr. (Ex. 1 to DE No. 281) at 6. He further stated, “If the Trustee wants to also have expert discovery or whatever they want to do, we're game for that. So my only point is, is we don’t want to be kept hostage in this case for another year under the schedule [set for completing other discovery in the adversary proceeding]." *Id.* at 6-7.

On November 16, 2006, the plaintiff objected to the motion for summary judgment under Fed. R. Civ. P. 56(f) on the basis that he needed time for discovery. (DE No. 281.) Epstein Becker filed a reply on November 27, 2006, requesting that the court approve an expedited schedule for discovery, briefing, and hearing with respect to the motion. (DE No. 287.) On November 30, 2006, the court held a hearing to address the plaintiff's objection. Epstein Becker's counsel told the court that he wanted an expedited schedule for discovery related to the motion for summary judgment instead of being held hostage for more than a year to the deadline otherwise being set for discovery and disposition of motions for summary judgment so that there would be "a [sic] opportunity for the Court to rule earlier and to, in the words of Moses, 'Let my people go.'" Tr. (DE No. 294, Ex. A) at 6. The court resolved the matter by setting the following deadlines and dates with respect to the disposition of Epstein Becker's motion for summary judgment:

> March 31, 2007, was the last day for completing discovery, including the taking of depositions;
>
> April 16, 2007, was the deadline for the plaintiff to file a response to Epstein Becker's motion for summary judgment;
>
> April 30, 2007 was Epstein Becker's deadline to file a reply; and
>
> May 16, 2007, was the date for hearing the motion for

summary judgment.[13]

It should go without saying that, when a court establishes deadlines, those deadlines are binding on the parties. Even if a court routinely grants consensual modifications of such deadlines, a party is not entitled unilaterally to assume that if promising settlement negotiations are ongoing, the other party will consent to an alteration of the deadlines. Yet, as discussed below, the plaintiff made no effort to adhere to or seek modification of the court-ordered deadlines.

Here, throughout the litigation, Epstein Becker was adamant in securing discovery and briefing deadlines that would provide for an expeditious disposition of its motion for summary judgment. When the plaintiff filed motions (DE Nos. 295 and 304) on December 29, 2006, and on March 16, 2007, to delay deadlines as to the Kutak Rock, based on ongoing settlement efforts, Epstein Becker filed responses (DE Nos. 297 and 307) on January 9, 2007, and on March 27, 2007, stating that it had no objection, provided that the relief did not alter, and was not a basis for modification or reconsideration of, the schedule for disposition

[13] On December 4, 2006, the court entered the general scheduling order (DE No. 292), and noted on that order that "[a] separate order will issue regarding the special deadlines (announced in an oral decision of November 30, 2006) designed to place Epstein Becker's motion for summary judgment in a posture to be ripe for disposition." The parties submitted a proposed order setting forth the deadlines that had been announced on November 30, 2006, and the order was signed on March 15, 2007, and entered on March 16, 2007. (DE No. 305.)

of Epstein Becker’s motion for summary judgment. The court’s orders (DE Nos. 302 and 308) addressing the plaintiff’s motions made clear that they did not alter, or provide a basis for modification or reconsideration of the schedule for disposition of Epstein Becker’s motion for summary judgment.

Commencing December 4, 2006, and continuing until May 8, 2007, the parties exchanged settlement proposals, but the parties never reached a settlement. The plaintiff scheduled depositions for the week of March 25, 2007, with the first depositions to occur on March 27, 2007. On the afternoon of March 26, 2007, Alberts and Daniel J. Carrigan, counsel for Epstein Becker, engaged in telephone conferences discussing settlement. Carrigan then e-mailed Alberts a letter offering to settle the adversary proceeding, with one of the terms of the settlement to be that the terms were to be kept confidential only until July 15, 2007. At 5:53 p.m. on that day, Alberts e-mailed Carrigan, stating:

> Dan, I think we have enough of a deal in principal [sic] to nix tomorrow’s depositions. Could you please send me a form, short, settlement agreement.

The plaintiff (through Alberts or other counsel) never wrote to accept the terms of Epstein Becker’s March 26, 2007 offer. Despite the existence of no actual settlement, Alberts did not request Carrigan to re-set the March 27, 2007 depositions so that they could be held before the March 31, 2007 deadline for completing discovery. Nor did he request Carrigan to agree to seek a modification of the March 31, 2007 deadline so that he could take discovery later if a deal was not finalized with all details ironed out. Nor did he request Carrigan to agree to seek an extension of the April 16, 2007 deadline for the plaintiff to oppose the motion for summary judgment pending execution of a final settlement agreement. Alberts was sufficiently confident that a deal would be finalized that he abandoned deposition discovery by permitting the deadline to pass. He later failed to file an opposition to the motion for summary judgment by the April 16, 2007 deadline.

Alberts assumed that Epstein Becker would agree to push the deadlines, as occurred with other settlements in the adversary proceeding, and believed that Epstein Becker would not act to pursue the motion for summary judgment (which it later did by filing a reply on April 30, 2007, noting the lack of opposition to the motion). Tr. of Hearing of May 25, 2007 (DE No. 373) at 19. Alberts further explained his being surprised by Epstein Becker’s April 30, 2007 reply (which noted the lack of an opposition to the motion for summary judgment) by stating:

> frankly, I lost track of the date that there was even a motion for summary judgment dismissal. From my point of view I looked, you know, when I was looking at the situation I thought we had a deal, we were trying to get the final paperwork done, I was busy on a lot of different things, and frankly it was nice to have this piece taken care of. I could focus on something else.

Id. at 19-20.

But Epstein Becker did not lose sight of the scheduling order, and had communicated that to Alberts. As already noted, on March 14, 2007, the plaintiff had filed a motion to alter deadlines as to Kutak Rock based on ongoing settlement negotiations. That motion had noted that Epstein Becker objected to the motion "to the extent that this proposed schedule would interfere with the schedule for its motion for summary judgment." On March 27, 2007, the day after Alberts canceled the depositions, Epstein Becker filed a response to the plaintiff's motion stating that it had no objection, provided that the relief did not alter, and was not a basis for modification or reconsideration of, the schedule for disposition of Epstein Becker's motion for summary judgment. On April 2, 2007, the court entered an order addressing the motion relating to Kutak Rock, and the order (prepared by Epstein Becker) included the proviso requested by Epstein Becker. Accordingly, Epstein Becker made it abundantly clear to Alberts that the scheduling order regarding its motion for summary judgment was to remain in place and not be altered by any ongoing efforts at settlement.

In nixing the depositions on March 26, 2007, Alberts had asked Carrigan to send a settlement agreement. On March 28 and 29, 2007, Carrigan sent Alberts a draft Settlement Agreement and the exhibits thereto.[14] On March 30, 2007, he sent Alberts a revised version of the proposed Settlement Agreement executed on behalf of Epstein Becker by the chairman of Epstein Becker’s board of directors. On April 13, 2007, Alberts sent Carrigan a revised draft settlement agreement. On April 18, 2007, Carrigan sent Alberts a further revised draft settlement agreement, and it was that proposed settlement agreement that was Epstein Becker’s last offer of relevance to its sanctions motion. As will be seen, that offer was rejected. Between April 18th and 30th, there was no communication between the parties. As of April 30, 2007, Alberts was still in the process of soliciting final comments on that draft. (DE No. 313, Exhibit A, p. 2.)

April 30, 2007, was also the deadline for Epstein Becker to file a reply for its summary judgment motion, and Epstein Becker filed such a reply bringing to the court’s attention that the motion had not been opposed. (*See* DE No. 310.) On May 2, 2007, Alberts sent an e-mail to Epstein Becker’s counsel, stating:

> [T]he Trust Committee went ballistic when it saw the Epstein Becker reply, and this has undercut their confidence that Epstein Becker will soft-play the deal. At bottom, I think I can get them to calm down, but **I believe it will require one small concession. Basically, the Committee does not want the deal itself or terms to go public.** This is mostly out of respect to Kutak. This does not mean Epstein cannot discuss the deal with suitors or internally.

[14] Carrigan noted that the drafts remained “subject to further review and comment by our client.”

(Emphasis added.) Alberts made no effort to contact the court regarding the reply or the pursuit of settlement, and the court granted the summary judgment motion on May 3, 2007. (*See* DE No. 311.) On May 3, 2007, Epstein Becker's counsel wrote to Alberts, stating that it was regrettable that Epstein Becker's April 18 proposal had been rejected, and stating that the Trust committee's counter-proposal described in Alberts' May 2, 2007 e-mail "which was not acceptable when first broached in February, remains unacceptable to our client."

At no time during this period did Alberts sign any draft of a settlement offer, or communicate to Epstein Becker that he accepted one. (*See* DE No. 373, pp. 15–18.) On May 7, 2007, Alberts presented Epstein Becker with a revised proposed settlement agreement that was the same as what Epstein Becker had previously proposed except that it (1) changed a reference to "a date certain" to the "July 15, 2007" mentioned elsewhere in the agreement, and (2) required Epstein Becker to prepare a motion for withdrawal of the summary judgment order. He informed Epstein Becker that it had until that same day at 5:00 p.m. to accept those settlement terms. (*Id.*, pp. 17-18.) Epstein Becker did not sign the settlement agreement or otherwise accept the terms, and on the next day, May 8, 2007, Carrigan wrote to Alberts that the proposed agreement was not acceptable, and proposed an alternative settlement.[15]

At that point on May 8, 2007, Epstein Becker was entitled (absent an appeal of the summary judgment) to view the litigation as at an end pursuant to the fruits of its vigorous insistence that there be a clear day of reckoning for the plaintiff to oppose its motion for summary judgment. But two days later, on May 10, 2007, the plaintiff filed his motion to vacate the summary judgment that had been entered a week prior. (*See* DE No. 313.) That motion was signed by Alberts and litigated by him as an attorney for the plaintiff, and, for ease of discussion, will be referred to as Alberts' motion.

B.

Alberts' motion to vacate was based upon two subsections of Fed. R. Civ. P. 60(b), as adopted by Fed. R. Bankr. P. 9024. (DE No. 313, pp. 3-4.) Alberts asserted that vacating the order was appropriate due to "excusable neglect," pursuant to Rule 60(b)(1), and "any other reason that justifies relief," pursuant to Rule 60(b)(6). (*Id.*, pp. 4-5.) Although Alberts' motion could be treated as a motion under Fed. R. Civ. P. 59 (because it was made within the deadline for a Rule 59 motion), the grounds for relief, and the propriety or impropriety of asserting those

[15] No settlement was reached until *after* Alberts had unsuccessfully pursued a motion to vacate the summary judgment order.

grounds, would have been the same whether the motion was pursued under Rule 59 or Rule 60.

Alberts' grounds were predicated on Alberts' alleged "good faith belief that the parties reached agreement in March 2007." (*See* DE No. 313, p. 4.) Under Rule 60(b)(1), Alberts argued it was "excusable neglect" not to file a response to the motion for summary judgment or not to conduct and answer discovery as a result of this belief. *Id.* at pp. 4-5. Under Rule 60(b)(6), Alberts argued that relief was necessary to "accomplish justice" because Epstein Becker did not inform the court of its agreement with Alberts to settle when Epstein Becker filed its reply to its summary judgment motion. *Id.* However, Alberts presented no good-faith basis for his asserted belief that he had settled the case with Epstein Becker. In fact, the evidence presented was clear in demonstrating that no settlement agreement existed.

First, in viewing the evidence and based upon the matters discussed at the hearing, at most, Alberts alleged he had agreed with Epstein Becker that the case ought to be settled. A mere agreement-to-agree does not create a valid contract. *See, e.g., Maloney v. E. I. Du Pont de Nemours & Co.,* 352 F.2d 936, 938 (D.C. Cir. 1965)*; Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti*, 15 F. Supp. 2d 47, 53 (D.D.C. 1998). Alberts provides no legal or factual reason why, in this case, Alberts' belief that the parties were in agreement that the case ought to be settled could excuse the plaintiff’s deliberate failure to adhere to the court-ordered discovery deadlines and deadline to file a response to the summary judgment motion.

Second, Epstein Becker and the plaintiff did not agree upon any set of terms with which to form a binding agreement. On April 18, 2007, Epstein Becker circulated a revised proposed settlement agreement. The plaintiff never accepted those terms, and Alberts was still soliciting comments on them as late as April 30, 2007. (DE No. 313, Exhibit A, p. 2.) Because there was never an agreement to terms, there was no good-faith basis for Alberts to believe or assert reliance upon a settlement agreement.

Third, Alberts himself recognized that there was no binding agreement when on May 2, 2007, he told Epstein Becker’s counsel that the committee had gone ballistic when it saw Epstein Becker’s reply regarding the pending summary judgment motion and he communicated to Epstein Becker’s counsel an additional concession from Epstein Becker that would be necessary to finalize a deal, a concession that was contrary to the terms regarding confidentiality contained in the pending proposed agreement that Epstein Becker had circulated on April 18, 2007. Alberts’ communication can only be viewed as a rejection of the pending proposed agreement that Epstein Becker had circulated on

April 18, 2007.[16] Alberts definitively demonstrated on May 7, 2007, that he did not believe that any agreement had been reached when he transmitted a proposed agreement that materially altered the terms of the proposed agreement that Epstein Becker had circulated on April 18, 2007.

Fourth, all of these negotiations--from April 18, 2007, to May 7, 2007--occurred *after* the plaintiff's court-set deadlines to conduct discovery (March 31, 2007) and to file a response to the summary judgment motion (April 16, 2007).[17] (See DE No. 305.) Alberts provided no excusable explanation for not having

[16] Alberts' assertion--that this concession language merely conveyed that people were upset, and did not constitute a rejection--is not credible. Tr. (DE No. 373) at p. 15. Alberts represented to the court that the language was meant to convey "just my belief on what I think would be needed . . . ." *Id.* Although he did not specify for what it was needed, the only clear answer is to effectuate a finalized agreement--and Alberts presented no evidence to demonstrate a reasonable explanation otherwise. Even if I were to credit Alberts' statement, Alberts was clearly communicating that the Trust had *not* accepted Epstein Becker's proposed agreement.

[17] The evidence indicates that Epstein Becker was pursuing settlement, and even preferred settlement to prevailing on its summary judgment motion. For instance, Epstein Becker circulated settlement terms on April 18, 2007--two days after the deadline for the plaintiff to file a response to its summary judgment motion, and well after the termination of the discovery deadline.

There are numerous reasons why Epstein Becker might have preferred settlement over summary judgment; as examples, a settlement might have offered better terms, or avoided an appeal. Regardless of Epstein Becker's motives for pursuing settlement even after it realized its motion for summary judgment was unopposed, the relevant issue here is that there was no actual settlement agreement between the parties at any time during the litigation.

adhered to those deadlines, or for not having sought to have them modified because he believed a settlement could be reached. Had he asked Epstein Becker's counsel to agree to extend the discovery deadline, Epstein Becker had twice made clear that it would not agree to such an extension.

Based upon the evidence submitted to the court and the representations made by counsel, there was no good faith basis for Alberts to assert that a settlement agreement existed, and thus no valid ground upon which to move to have summary judgment vacated and discovery reopened. Alberts' motion was frivolous, unreasonable, and in bad faith, having been based upon facts he knew to be false. His conduct was based on an obstinate refusal to acknowledge that the entry of the summary judgment order had brought the claims against Epstein Becker to an end with a finality that Epstein Becker had repeatedly made clear it desired.

Epstein Becker is entitled to be made whole for the attorney's fees and expenses arising from Alberts' obstinacy. *Chambers*, 501 U.S. at 46, citing *Hutto*, 437 U.S. at 689 n.14. Furthermore, the motion unnecessarily prolonged the litigation and increased litigation costs. *See Walter v. Fiorenzo*, 840 F.2d 427, 435 (7th Cir. 1988) (imposing sanctions for multiplying proceedings by not raising ground for opposing motion for summary judgment in the initial opposition to the motion).

Pursuant to both 28 U.S.C. § 1927 and the inherent authority of the court, sanctions against Alberts are appropriate in an amount to compensate Epstein Becker for costs, expenses, and attorneys’ fees incurred in addressing Alberts’ motion to vacate summary judgment and reopen discovery. (*See* DE No. 313.) This amount may also include the portion of the costs, expenses, and attorneys’ fees that Epstein Becker reasonably incurred in seeking sanctions for Alberts’ motion to vacate summary judgment and reopen discovery, and for filing a reply to Alberts’ response concerning that motion. (*See* DE Nos. 383, 413.) Such fees were “reasonably incurred because of [the sanctioned] conduct.” *See* 28 U.S.C. § 1927; *Baldwin Hardware Corp. v. FrankSu Enterprise Corp.*, 78 F.3d 550, 561 (9th Cir. 1996) (“fees for fees” are available under § 1927); *cf. Brandt v. Schal Assocs., Inc.*, 960 F.2d 640, 649-50 (7th Cir. 1992) (Rule 11 sanctions include attorney’s fees incurred at trial level in recovering such sanctions).

The motion for sanctions sought sanctions as well for the period preceding the granting of summary judgment. As noted previously, the motion’s discussion of the conduct preceding the granting of summary judgment buttresses Epstein Becker’s point that it viewed the plaintiff’s claims as baseless and persistently pressed for a prompt resolution of the claims, and its point that, in light of the history of the proceeding, it was plain as could be that Epstein Becker intended the deadline for opposing its motion for summary judgment to remain firm despite ongoing settlement negotiations. Nevertheless, the discussion in Epstein Becker's sanctions motion of the conduct preceding the granting of summary judgment was longer than it reasonably would have been had Epstein Becker limited its request to Alberts' conduct after the entry of the summary judgment order. Accordingly, only a portion of the time spent regarding that discussion ought to be compensable.[18]

Additionally, the plaintiff's motion to seal certain documents to be filed in response to Epstein Becker's motion for sanctions resulted in additional filings. (*See* DE No. 402.) Epstein Becker's costs, expenses, and attorneys' fees regarding the plaintiff's motion to seal will also be recoverable as necessarily flowing from Alberts' improperly pursuing his motion to vacate. Similarly, Epstein Becker filed a motion to unseal exhibits that were received in evidence at the hearing on the plaintiff's motion to vacate the summary judgment order, to permit their use at the hearing on the motion for sanctions, and that time as well ought to be compensable.

[18] At the hearing on the motion for sanctions, the arguments were focused on the conduct preceding the entry of summary judgment, and very little of that time may reasonably be compensated.

IV

Sanctions under § 1927 are only appropriate against Alberts. Under 28 U.S.C. § 1927, the court has the authority to sanction “any attorney or other person admitted to conduct cases in any court of the United States or any Territory” that committed the offending conduct. *Claiborne v. Wisdom*, 414 F.3d 715, 722-24 (7th Cir. 2005), holds that sanctions under § 1927 may not be imposed against a law firm, and I adopt the reasoning of that decision on that point. Although the Court of Appeals for this circuit upheld an award of sanctions against a law firm under § 1927 in *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 905 (D.C. Cir. 1998), the law firm failed to raise the issue of whether a law firm, and not only those attorneys of the law firm who conducted the litigation, could be sanctioned under § 1927, and the decision in *LaPrade* thus did not decide the issue. Limiting the award of § 1927 sanctions to one against only Alberts, however, does not address his law firm’s vicarious liability for the award if Alberts fails to pay the award. *Claiborne v. Wisdom*, 414 F.3d at 724.

V

Under its inherent authority, the court may sanction a party’s law firm. *In re Mroz*, 65 F.3d at 1574; *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1228 (3d Cir. 1995) (upholding sanctions--beyond Rule 9011

sanctions imposed against one attorney, who had signed the offending paper--against law firm pursuant to the court’s inherent power because the trial court concluded that other attorneys at the law firm were primarily responsible for the sanctionable conduct). *See Wallace*, 964 F.2d at 1218. Here, the sanctionable conduct was committed in the filing of the motion to vacate the order and reopen discovery. (*See* DE No. 313, p. 6.) Alberts signed and litigated that motion, and sanctions against him under the court’s inherent authority are appropriate as to him. There is no evidence that anyone else in his law firm bore any responsibility for that course of conduct. In the exercise of my discretion, I do not believe it appropriate to impose sanctions for bad faith litigation against the White & Case law firm as a whole. *See Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110 (2d Cir. 2009), *cert. denied*, ___ U.S. ___ (Nov. 16, 2009). In *Scivantage*, an attorney, Peters, engaged in bad faith conduct, and the district court imposed sanctions against her law firm. The court of appeals declined to uphold such sanctions against the law firm, finding that the district court imputed Peters's bad faith to the law firm because the law firm failed to prevent what she did. The court of appeals explained:

> we have held that “[b]ad faith is personal” and “may not automatically be visited” on others. *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir.1977). Accordingly, absent other specific

> evidence of [the law firm's] bad faith, a sanction under the court's inherent power is unjustified.

In this court, the local rules provide for an attorney to enter his or her appearance on behalf of a client, although the attorney's law firm is also understood to be representing the client. To impose sanctions against the law firm personally appears unwarranted when the law firm, as an institution, has not engaged in any conduct leading to the bad faith conduct. *See Claiborne*, 414 F.3d at 724 (contemplating sanctions on a law firm where previous litigation and events had put the law firm on notice that the attorney's litigation practices were questionable and warranted monitoring). Nevertheless, this does not address the issue of whether White & Case LLP can be held vicariously liable for the sanctions award if Alberts does not satisfy the award.

Because Alberts, in his capacity as counsel, signed and litigated the motion to vacate the summary judgment order, the sanctions, the amount of which will be determined at a later hearing, are imposed upon Alberts in his capacity as counsel for the plaintiff.[19] This will require him "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably

[19] This is to clarify that Alberts is not sanctioned in his capacity as Trustee for The DCHC Liquidating Trust.

incurred because of such conduct." *See* 28 U.S.C. § 1927.[20]

VI

In light of the foregoing analysis, the court grants in part and denies in part Epstein Becker's motion to recover costs, expenses, and attorneys' fees. (*See* DE No. 383.) It is

ORDERED that Epstein Becker's motion to recover costs, expenses, and attorneys' fees with regard to and incurred as a result of Alberts' filing of a motion to vacate summary judgment and reopen discovery (*see* DE NO. 313) is **GRANTED** against Alberts, but Epstein Becker's motion in all other respects is **DENIED** (but does not bar Epstein Becker's pursuit against White & Case LLP, on the basis of vicarious liability, of amounts awarded against Alberts). It is further

ORDERED that:

(1) within 28 days after entry of this Memorandum Decision and Order, Epstein Becker shall file a memorandum that includes a statement of the costs, expenses, and attorney's fees it asserts are recoverable pursuant to this Memorandum Decision and Order that flowed from and occurred

[20] The motion to file certain documents under seal was signed by Dana E. Foster, and not by Alberts, although Alberts' name is listed as an attorney submitting the motion. (*See* DE No. 402.) The motion to seal was not itself vexatious, but it was necessitated by Alberts' filing of the motion to vacate the summary judgment order. Because the motion to seal flows from his sanctionable conduct in his previous filing, costs, expenses, and attorney's fees flowing from the motion to file under seal are appropriately imposed upon Alberts.

as a result of Alberts’ groundless motion seeking to vacate summary judgment and reopen discovery;

(2) within 21 days after the filing of that memorandum and statement, Alberts shall file an opposition to whatever amounts, if any, he asserts are not recoverable pursuant to this Memorandum Decision and Order;

(3) within 14 days after the filing of that opposition, Epstein Becker may file a reply;

(4) once Epstein Becker has a satisfactory idea as to the date by which the foregoing submissions will be concluded, Epstein Becker may contact the clerk to arrange a date and time for it to notice up a hearing to address the amounts recoverable;

(5) at least 7 days prior to the hearing, the parties shall file lists of their exhibits and witnesses, and exchange copies of their exhibits and prepare two copies of the exhibits (one for the judge to mark up, and one for his law clerk) for the court’s use at the hearing which will be a trial of the matter;

(6) at least 7 days prior to the hearing, the parties shall confer in good faith to attempt to reach agreement regarding the amount of fees recoverable pursuant to this Memorandum Decision and Order, and, because attorneys sometimes hesitate to be the party that first makes an offer

lest it be taken as a sign of weakness, Alberts is designated as the party to make the first offer.

[Signed and dated above.]

Copies to: All counsel of record.