

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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5 August Term, 2011
6

7 (Argued: November 9, 2011 Final Submission: December 2, 2011 Decided: April 6, 2012)
8

9 Docket No. 10-2811-cv
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13 MICHAEL ENMON,
14

15 Respondent-Appellant,
16

17 ARNOLD & ITKIN LLP,
18

19 Miscellaneous-Appellant,
20

21 v.
22

23 PROSPECT CAPITAL CORPORATION, PROSPECT
24 CAPITAL MANAGEMENT LLC, JOHN F. BARRY,
25 M. GRIER ELIASEK, WALTER PARKER, and BART
26 DE BIE,
27

28 Petitioners-Appellees.
29

30 ----- X
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32 Before: POOLER, B.D. PARKER and LOHIER, Circuit Judges.
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34 On appeal, law firm Arnold & Itkin LLP challenges the District Court's imposition of
35 sanctions, as well as the form and monetary amount of sanctions. We largely affirm the
36 judgment of the District Court because we find that it did not abuse its discretion in imposing
37 sanctions or determining the monetary amount of the sanctions. However, we remand the order
38 insofar as it required all Arnold & Itkin attorneys to attach the sanctions order to all future pro
39 hac vice applications in the Southern District of New York, so that the District Court may
40 consider whether a temporal limit should apply to that part of the order and whether to exclude
41 from the order any attorneys who joined the firm after June 23, 2010.
42

1 ALEXANDRA A.E. SHAPIRO, Elizabeth C. Kennedy,
2 James Darrow (on the brief), Macht, Shapiro, Arato
3 & Isserles LLP, New York, NY, for Miscellaneous-
4 Appellant.

5
6 MAURA BARRY GRINALDS, Jonathan J. Lerner,
7 Timothy G. Nelson, Daniel M. Sussner (on the
8 brief), Skadden, Arps, Slate, Meagher & Flom LLP,
9 New York, NY, for Petitioners-Appellees.

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12 LOHIER, Circuit Judge:

13 Arnold & Itkin LLP, a Texas-based law firm, appeals from a judgment of the United
14 District Court for the Southern District of New York (Sand, J.) sanctioning Arnold & Itkin for its
15 conduct in opposing the arbitration of a dispute between its client, Michael Enmon, and appellee
16 Prospect Capital Corporation (“Prospect”).¹ Arnold & Itkin challenges the determination that its
17 conduct was sanctionable and the amount and form of the sanctions imposed. For the reasons
18 that follow, we largely affirm the judgment of the District Court, except that we remand in part
19 to permit the District Court to consider whether it should impose certain limits on its requirement
20 that Arnold & Itkin’s attorneys attach the sanctions order to all future applications for admission
21 pro hac vice in the Southern District of New York.

22 **BACKGROUND**

23 The sanctions imposed on Arnold & Itkin arose out of Michael Enmon’s attempts to
24 obtain a subordinated loan from Prospect to complete his acquisition of Caprock Pipe & Supply
25 LP (“Caprock LP”), a company in the business of purchasing, refurbishing and selling pipes for

¹ In addition to Prospect Capital Corporation, Prospect Capital Management, John F. Barry, M. Grier Eliasek, Walter Parker and Bart de Bie were also Appellees and were Defendants in the District Court. Most of the relevant facts involve Prospect Capital Corporation and, in any event, the individual identity of the Appellees does not affect our analysis of the issues presented in this appeal. For convenience, unless otherwise noted, we refer to the Appellees collectively as “Prospect.”

1 use in connection with oil and natural gas wells. In April 2006, Enmon formed a company called
2 Caprock Pipe & Supply, Inc. (“Caprock Inc.”), solely as a vehicle for borrowing the funds to
3 purchase Caprock LP. That same month, Enmon, with the help of his then-attorney Robert Fiser,
4 Esq., signed a letter agreement and term sheet (collectively, the “Letter Agreement”) with
5 Prospect to obtain financing for the acquisition in the form of a subordinated loan for \$10
6 million. The Letter Agreement contained an arbitration provision that committed the parties to
7 resolving all disputes arising thereunder through “binding arbitration in New York City.” The
8 Letter Agreement also provided that Prospect’s financing proposal was subject to actual delivery
9 of the final deal documents.

10 In anticipation of the deal closing in May 2006, Prospect prepared several draft
11 documents and went so far as to forward to its corporate counsel on the deal, Vinson & Elkins
12 LLP, “provisionally signed” signature pages of a credit agreement (the “Credit Agreement”)
13 identifying Enmon’s company, Caprock Inc., as the counterparty. The signature pages were
14 undated and unattached to a draft of the Credit Agreement. They were forwarded by email to
15 place Vinson & Elkins in a position to circulate an executed Credit Agreement as soon as one
16 was finalized. Indeed, the accompanying email message to Vinson & Elkins stated: “Attached
17 are our signature pages. Please check form. DO NOT SEND OUT UNTIL YOU TALK TO
18 ME. For V&E only.”

19 In May 2006, based on the results of its due diligence and Enmon’s belated request for an
20 additional \$2 million in financing, Prospect decided not to finance Enmon’s purchase of Caprock
21 LP.

1 1. The Texas TRO

2 In September 2006, Fiser sued Enmon in Texas state court for unpaid legal fees in
3 connection with Fiser’s work on the failed Prospect financing transaction. In contesting the
4 lawsuit, Enmon, at this point represented by Jason Itkin, Esq., a named partner of Arnold &
5 Itkin, filed third-party claims against Prospect, alleging common law fraud, statutory fraud under
6 Texas state law, and tortious interference with a contract between Enmon and Caprock LP. The
7 third-party claims were based on Prospect’s decision not to consummate the financing proposed
8 in the Letter Agreement and contemplated by the draft Credit Agreement.

9 Relying on the arbitration clause contained in the Letter Agreement, Prospect responded
10 by initiating an arbitration proceeding in New York and filing a petition to compel arbitration in
11 the United States District Court for the Southern District of New York (the “SDNY Action”).
12 On January 10, 2007, Jason Itkin told Prospect that he intended to ask the Texas state court for a
13 temporary restraining order (the “Texas TRO”) staying the New York arbitration proceeding. In
14 an email response the following day, Prospect’s counsel advised Itkin that she would seek a
15 temporary restraining order in the Southern District of New York (the “SDNY TRO”) that same
16 day to enjoin the Texas state court action. Itkin ignored the email and applied for the Texas
17 TRO.

18 Arnold & Itkin’s application for the Texas TRO was signed by Itkin under the name
19 “Arnold & Itkin LLP.” It requested not only that the Texas state court stay the arbitration
20 proceeding, but that it issue “a temporary restraining order and temporary injunction prohibiting
21 Prospect . . . from taking any further action in New York state or federal courts” until the Texas
22 court had ruled on the applicability of the arbitration provision. Although the proposed order
23 attached to the application disclosed that the “Prospect Defendants are seeking a temporary

1 restraining order in New York,” the application failed to disclose that Prospect had already filed
2 a complaint in New York federal court.

3 Both the District Court and the Texas state court granted their respective TROs on
4 January 11, 2007.² The following day, instead of offering to withdraw the Texas action, Arnold
5 & Itkin wrote a letter to both courts advising them of the dueling TROs and suggesting that the
6 courts “dissolve both TROs and allow the proceedings in both courts to continue.” At a hearing
7 several days later, Prospect advised the Texas state court that the competing New York case was
8 in federal court and that the Texas TRO was unconstitutional under General Atomic Co. v.
9 Felter, 434 U.S. 12, 12-13 (1977), because it sought to enjoin a federal court action. So
10 informed, the Texas state court promptly adjourned the hearing, effectively suspending its TRO.

11 In February 2007, the District Court granted Prospect’s petition to compel arbitration
12 after concluding that Enmon’s objections to arbitrability “either strain[ed] the language of the
13 [Letter Agreement] or [were] precluded by clear and controlling precedent in the Second
14 Circuit.” Enmon timely appealed the District Court’s judgment, but, in the meantime, arbitration
15 was scheduled to start on July 23, 2007.³

16 2. The Rule 60(b) Motion

17 Less than two weeks before the arbitration, Arnold & Itkin filed a motion in the District
18 Court under Rule 60(b) of the Federal Rules of Civil Procedure, on behalf of Enmon and
19 Caprock Inc. (as an intervenor), for relief from the order granting Prospect’s motion to compel
20 arbitration. The firm sought an order permitting Caprock Inc. to pursue litigation in New York

² Another District Judge, sitting in Part I, issued the SDNY TRO. All subsequent relevant matters were handled by Judge Sand.

³ By summary order dated August 20, 2008, this Court affirmed the District Court’s judgment compelling arbitration and enjoining the Texas action. Prospect Energy Corp. v. Enmon, 290 F. App’x 400, 401 (2d Cir. 2008).

1 state court for breach of the draft Credit Agreement. It argued that the signature pages for that
2 agreement constituted “new[ly]” uncovered evidence establishing that the draft Credit
3 Agreement had been executed and that the arbitration provision in the Letter Agreement had
4 been superseded. Without revealing that Caprock Inc. had recently changed its corporate name
5 to “Enmon Capital Inc.,” Arnold & Itkin insisted that, regardless of Enmon’s obligations to
6 arbitrate the dispute under the Letter Agreement, Caprock Inc. was not similarly bound under the
7 Credit Agreement, which contained no arbitration provision.⁴

8 The District Court concluded that Enmon’s pending appeal divested it of jurisdiction to
9 resolve the Rule 60(b) motion, which it dismissed by order dated July 24, 2007, with the warning
10 that “it would not be inclined to grant the motion if the Second Circuit were to remand the case.”
11 In August 2007, Arnold & Itkin filed an appeal of the District Court’s order denying Enmon’s
12 Rule 60(b) motion, but it voluntarily withdrew the appeal in October 2007.

13 3. The Petition to Confirm the Arbitration Award

14 In April 2008, the arbitrator designated to preside over the arbitration between Prospect
15 and Enmon issued a preliminary decision in favor of Prospect. Among other things, the
16 arbitrator found that the draft Credit Agreement was never consummated and that the Letter
17 Agreement permitted Prospect to refuse to finance Enmon’s project. Prospect immediately filed
18 a petition to confirm arbitration with the District Court. Arnold & Itkin opposed the petition,
19 urging that confirmation was premature because the arbitrability of the dispute was “ripe for
20 decision in the Second Circuit Court of Appeals.” It also claimed that the arbitration had gone

⁴ For example, the brief asserted that “Caprock [Inc.] was not a party to the alleged contract or arbitration agreement between Enmon and Prospect” and that “[t]he arbitration provision in the purported agreement between Enmon and Prospect, signed before Caprock even existed, obviously cannot apply to Caprock’s claims arising from a breach of a separate contract between it and Prospect.”

1 “forward in a disjointed manner that prevented a fair presentation of the evidence,” and that this
2 “disjointed manner included[] calling witness[es] out of order, not cross-examining witnesses
3 immediately after their direct testimony, and not allowing depositions.” Arnold & Itkin also
4 rehashed several other arguments it had previously advanced to challenge arbitrability.

5 In a final award on August 23, 2008, the arbitrator directed Enmon to pay Prospect
6 \$2,287,687.32 in attorneys’ fees, costs, and expenses. Prospect then filed a renewed petition to
7 confirm the arbitration award, which the District Court granted in October 2008. In November
8 2008, Arnold & Itkin appealed the confirmation of the award. Because the appeal was defective,
9 Arnold & Itkin refiled a notice of appeal in January 2009, but voluntarily withdrew that appeal in
10 April 2009.

11 In May 2009, Prospect moved pursuant to 28 U.S.C. § 1927 and the District Court’s
12 inherent power to recover attorneys’ fees and expenses associated with its litigation of the
13 motion to compel arbitration, the Texas TRO, the Rule 60(b) motion, confirmation of the arbitral
14 awards both before the District Court and on appeal, and the sanctions motion itself. After
15 briefing and oral argument, the District Court granted the motion for sanctions in part. It found
16 that Arnold & Itkin had acted in bad faith and engaged in frivolous and vexatious litigation in
17 seeking the Texas TRO, bringing the Rule 60(b) motion and subsequent appeal, and opposing
18 Prospect’s petition to confirm the arbitral award.

19 Prospect then filed a proposed judgment for \$354,559 in fees incurred in connection with
20 all of these matters. In June 2010, the District Court entered the proposed judgment against
21 Arnold & Itkin and further directed the firm to “submit this Court’s Sanctions Order with any
22 future applications for admission pro hac vice in the Southern District of New York.” We

1 interpret this directive to apply to every Arnold & Itkin lawyer who seeks to be admitted pro hac
2 vice in the Southern District of New York.

3 This appeal followed.

4 DISCUSSION

5 The District Court imposed sanctions against Arnold & Itkin pursuant to both its inherent
6 powers and 28 U.S.C. § 1927. In either case, we review the sanctions order for abuse of
7 discretion, Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 333 (2d Cir. 1999), to
8 “ensure that the district court’s sanctions are not based on ‘an erroneous view of the law or on a
9 clearly erroneous assessment of the evidence,’” Wolters Kluwer Fin. Servs., Inc. v. Scivantage,
10 564 F.3d 110, 113 (2d Cir. 2009) (quoting Schlaifer Nance, 194 F.3d at 333). Because “‘the trial
11 court [imposing sanctions] may act as accuser, fact finder and sentencing judge’” all in one,
12 Schlaifer Nance, 194 F.3d at 334 (quoting Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 128 (2d
13 Cir. 1998)), our review of such an order is “‘more exacting than under the ordinary abuse-of-
14 discretion standard.’” Wolters Kluwer, 564 F.3d at 113-14 (quoting Perez v. Danbury Hosp.,
15 347 F.3d 419, 423 (2d Cir. 2003)).

16 “In order to impose sanctions pursuant to its inherent power, a district court must find
17 that: (1) the challenged claim was without a colorable basis and (2) the claim was brought in bad
18 faith, i.e., motivated by improper purposes such as harassment or delay.” Schlaifer Nance, 194
19 F.3d at 336; see also id. at 337 (holding that a claim is “entirely without color when it lacks any
20 legal or factual basis. Conversely, a claim is colorable when it has some legal and factual
21 support, considered in light of the reasonable beliefs of the individual making the claim.”)
22 (internal citations omitted). Although both findings “must be supported by a high degree of
23 specificity in the factual findings,” Wolters Kluwer, 564 F.3d at 114, “bad faith may be inferred

1 ‘only if actions are so completely without merit as to require the conclusion that they must have
2 been undertaken for some improper purpose such as delay,’” Schlaifer Nance, 194 F.3d at 336
3 (citation omitted).

4 The showing of bad faith required to support sanctions under 28 U.S.C. § 1927 is
5 “similar to that necessary to invoke the court’s inherent power.” Oliveri v. Thompson, 803 F.2d
6 1265, 1273 (2d Cir. 1986). In practice, “the only meaningful difference between an award made
7 under § 1927 and one made pursuant to the court’s inherent power is . . . that awards under §
8 1927 are made only against attorneys or other persons authorized to practice before the courts
9 while an award made under the court’s inherent power may be made against an attorney, a party,
10 or both.” Id.

11 1. The Texas TRO

12 With these principles in mind, we conclude that the District Court acted within its
13 discretion when it sanctioned Arnold & Itkin based on its particularized findings that Arnold &
14 Itkin acted without a colorable basis (a finding that Arnold & Itkin does not dispute) and in bad
15 faith in procuring the Texas TRO. The District Court’s bad faith determination rested on the
16 finding that Arnold & Itkin’s failure to disclose that its Texas TRO application sought to enjoin a
17 federal court action (as opposed to a state court action) constituted a “misrepresentation[] by
18 omission.”

19 In support of these conclusions, the District Court pointed to the face of the Texas TRO
20 application, which specified “it will do nothing but ensure the status quo is maintained,” when in
21 fact the TRO sought to change the status quo by enjoining the SDNY Action. Furthermore, the
22 District Court correctly noted that “[t]he body of the TRO request . . . [was] noticeably silent as
23 to the action already pending in federal court.”

1 Arnold & Itkin disputes the District Court’s finding that it concealed the existence or
2 nature of the SDNY Action from the Texas state court. It notes that it attached an email from
3 Prospect’s counsel that referenced a pending proceeding in “United States District Court” as an
4 exhibit to its Texas TRO application, and that it alerted both courts to the existence of dueling
5 TROs in its letter dated January 12, 2007.

6 We are not persuaded that either of these documents demonstrates an absence of bad faith
7 on Arnold & Itkin’s part. The email was not cited in the text of the application itself, and the
8 District Court could properly have concluded that a vague, passing reference to “United States
9 District Court” in an email from opposing counsel attached as an exhibit was insufficient to
10 disclose the critical fact that the application sought to enjoin a federal proceeding. Indeed, the
11 email also references Arnold & Itkin’s pursuit of a “stay of the New York AAA Arbitration,”
12 suggesting that the purpose of the Texas TRO application was to stay an arbitration proceeding,
13 not a federal district court case. Nor are we persuaded that Itkin’s January 2007 letter evidenced
14 a lack of bad faith. The letter was not delivered until after the Texas state court had already
15 granted the Texas TRO and was, therefore, too little, too late.

16 Arnold & Itkin also suggests that sanctions were unwarranted because the Texas TRO
17 had no effect on the SDNY Action. We disagree that such an effect was required. In Chambers
18 v. NASCO, Inc., 501 U.S. 32 (1991), for example, the Supreme Court upheld sanctions even
19 though the sanctioned conduct had not disrupted the relevant litigation. The district court in
20 Chambers had enjoined the defendants from altering the status quo of a television station the
21 plaintiffs sought to purchase pending final determination of the plaintiff’s suit to prevent a sale
22 of the station to third parties. See NASCO, Inc. v. Calcasieu Television and Radio, Inc., 124
23 F.R.D. 120, 127 (W.D. La. 1989). After a bench trial on the merits and “during the delay for

1 submission of authorities,” the defendants nevertheless “petitioned the FCC for permission to
2 [change aspects of the television station] site,” in violation of the district court’s order. Id. at
3 128-29. Soon after the defendants made that application, “the informal intervention of [the
4 district court], and [the plaintiff’s] threat of further contempt sanctions, persuaded [the
5 defendants] to withdraw the application.” Id. at 129. The FCC application in Chambers caused
6 no disruption in the federal court action, and yet the Supreme Court affirmed the sanctions based
7 on the defendants’ bad-faith conduct before the FCC. Chambers, 501 U.S. at 58.

8 We read Chambers to mean that sanctions may be warranted even where bad-faith
9 conduct does not disrupt the litigation before the sanctioning court. This accords with our
10 sanctions jurisprudence, which counsels district courts to focus on the purpose rather than the
11 effect of the sanctioned attorney’s activities. See Schlaifer Nance, 194 F.3d at 336 (sanctions are
12 appropriate if “(1) the challenged claim was without a colorable basis and (2) the claim was
13 brought in bad faith, i.e., motivated by improper purposes such as harassment or delay”)
14 (emphasis added).

15 Here, the Texas TRO’s intended effect on the SDNY Action was greater than the
16 intended effect of the FCC application on the litigation in Chambers: Arnold & Itkin sought to
17 enjoin the SDNY Action entirely. That Arnold & Itkin’s attempt to derail the District Court
18 proceeding was quickly thwarted by vigilant opposing counsel does not make the firm’s purpose
19 any less improper.

20 Even if we were to focus on the effect of the conduct as opposed to its purpose, we are
21 not persuaded that the Texas TRO’s actual effect on the SDNY Action was as minimal as Arnold
22 & Itkin now suggests. First, Arnold & Itkin’s conduct “multiplie[d] the proceedings” before the
23 District Court by forcing Prospect to seek its own, federal TRO to preempt the illegal Texas

1 TRO. See 28 U.S.C. § 1927. Second, the firm forced the District Court to consider its frivolous
2 claim that the competing SDNY TRO should be dissolved in light of the Texas TRO.

3 2. The Petition to Confirm the Arbitration Award

4 The District Court also sanctioned Arnold & Itkin for its opposition to Prospect’s petition
5 to confirm the arbitration award. The court found that the law firm made “frivolous arguments
6 that misrepresented the record” and gave as a specific example that “Arnold & Itkin objected to
7 the arbitrator’s calling witnesses out of order, even though Arnold & Itkin had requested that it
8 be able to call witnesses out of order.”

9 The record supports the District Court’s finding that the opposition to Prospect’s petition
10 lacked a colorable basis and was brought in bad faith. In its opposition papers, Arnold & Itkin
11 claimed that “Prospect, with the tribunal’s permission, called witnesses out of order and did not
12 subject them to cross-examination immediately.” That claim, however, was undermined by an
13 email dated July 21, 2007, from the arbitrator, which demonstrated that Arnold & Itkin – not
14 Prospect’s counsel – requested calling witnesses out of order during the arbitration. In that
15 email, the arbitrator warned Itkin to “pare down his ‘out of order’ witnesses,” to “have very good
16 reason why it is really necessary to take such witnesses out of order,” and to be mindful of “[t]he
17 contemplated length of [such witnesses’] testimony.” Contrary to appellant’s contention, the
18 District Court’s findings of bad faith are detailed and particularized. We see no abuse of
19 discretion in the District Court’s decision to sanction Arnold & Itkin for its gross
20 mischaracterization of the arbitral proceedings.

21 3. The 60(b) Motion

22 We also conclude that the District Court acted within its discretion when it sanctioned
23 Arnold & Itkin for filing the Rule 60(b) motion for relief from the order to compel arbitration.

1 There was ample evidence that the motion as a whole contained “persistent misrepresentations”
2 and was made in bad faith. Prospect Capital Corp. v. Enmon, No. 08 Civ. 3721 (LBS), 2010 WL
3 907956, at *5 (S.D.N.Y. Mar. 9, 2010).

4 First, Arnold & Itkin falsely stated that the evidence relating to the alleged consummation
5 of the Credit Agreement was “new” or “newly discovered,” even though the record demonstrates
6 that Arnold & Itkin had known about the evidence for over a year. In the January 12, 2007 letter
7 to the Texas and New York courts alerting them to the dueling TROs, Itkin stated that “[t]he deal
8 was supposed to close on May 12, 2006. In fact, final deal documents were prepared and signed
9 by all the parties on that date” (emphasis added). Similarly, in connection with Prospect’s
10 petition to compel arbitration the following month, Arnold & Itkin informed the District Court
11 that Prospect Capital Corporation’s chief executive officer had “apparently signed [those
12 documents], although they were never delivered back.” Second, the Rule 60(b) motion omitted
13 the critical fact that, when Prospect delivered the signature pages to its counsel, it did so with
14 express instructions that they not be forwarded to Enmon or to anyone else. Third, Arnold &
15 Itkin strategically filed the motion on behalf of both Enmon as a party and Caprock Inc. as an
16 independent intervenor in the action, without disclosing that the latter’s official name had been
17 changed to “Enmon Capital Inc.” Doing so permitted the firm to argue that Caprock Inc. should
18 not be bound by the arbitration clause in the Letter Agreement. In the motion, moreover, Arnold
19 & Itkin described Enmon as “part owner of Caprock” and otherwise strained to suggest that
20 Enmon and Caprock Inc. were two independent entities, even though Caprock Inc. was a shell
21 company controlled entirely by Enmon.

1 4. Voluntarily Withdrawn Appeals

2 Beginning with Cheng v. GAF Corp., we have expressed a preference that district courts
3 not sanction parties for filing frivolous appeals in this Court. 713 F.2d 886, 892 (2d Cir. 1983),
4 vacated and remanded on other grounds, 472 U.S. 1023 (1985). Our reluctance has been due in
5 part to a concern that “[a] rule permitting a district court to sanction an attorney for appealing an
6 adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court
7 opinion.” Id. at 892. By the same token, “we . . . do not want to discourage voluntary
8 dismissals, which save the time not only of appellees but also of this court, by a readiness to
9 grant sanctions.” Overseas Cosmos, Inc. v. NR Vessel Corp., 148 F.3d 51, 52 (2d Cir. 1998)
10 (internal quotation marks omitted).

11 Even with these policy concerns in mind, however, we have never established a bright-
12 line rule prohibiting district courts from ever sanctioning a party for a voluntarily withdrawn,
13 frivolous appeal. We decline to do so now, and we affirm the District Court’s decision to
14 sanction Arnold & Itkin for its voluntarily dismissed appeals of the court’s rulings on the Rule
15 60(b) motion and Prospect’s petition to confirm the arbitral award.

16 Having concluded that the Rule 60(b) motion and Arnold & Itkin’s opposition to
17 Prospect’s petition were themselves sanctionable, we are hard put to describe the District Court’s
18 decision to sanction Arnold & Itkin’s appeal of those matters as an abuse of discretion. In any
19 event, the record supports the court’s finding that Arnold & Itkin’s voluntarily withdrawn
20 appeals were taken purely for dilatory and resource-draining reasons relating to the district court
21 litigation. When opposing the petition to confirm the arbitral award, for example, Arnold &
22 Itkin argued that confirmation was premature because its appeal of the District Court’s decision
23 compelling arbitration (which was ultimately unsuccessful) was still pending. This strongly

1 suggests that Arnold & Itkin’s purpose in appealing various rulings was partly to prolong the
2 district court litigation, and that it withdrew those appeals when it became clear that they would
3 not serve that purpose.

4 Two reasons persuade us that permitting rather than categorically foreclosing district
5 court sanctions for voluntarily withdrawn frivolous appeals will have a salutary effect overall.
6 First, appellees contesting frivolous appeals may be deterred from consenting to voluntary
7 dismissal if it means surrendering the chance to recover attorneys’ fees before the district court.
8 Second, we have no jurisdiction once an appeal has been voluntarily dismissed, and it is then
9 entirely in the hands of the district court to monitor a party’s conduct. Prohibiting district courts
10 from imposing sanctions in these unique circumstances might encourage the malicious law firm
11 to manipulate the appeals process like a yo-yo. That said, we caution that the sanction power for
12 voluntarily dismissed appeals is to be used sparingly, so as not to discourage parties who wish to
13 preserve their appellate rights, only to later decide an appeal is not worth pursuing.

14 5. Additional Arguments

15 Arnold & Itkin also challenges the form and amount of the District Court’s sanctions on
16 the grounds that it improperly (1) sanctioned the law firm as a whole, rather than sanctioning
17 Jason Itkin and the other individual attorneys who participated directly in the litigation, (2)
18 required all Arnold & Itkin lawyers to attach the sanctions order to any future pro hac vice
19 applications in the Southern District of New York, and (3) imposed costs associated with
20 litigating the sanctions motion itself. The firm also complains that it was deprived of procedural
21 due process because it was not given an opportunity to contest every basis for the sanctions
22 award. We address each argument in turn.

1 We disagree with Arnold & Itkin’s assertion that the District Court was without authority
2 under 28 U.S.C. § 1927 to award sanctions against the “firm as a whole” for the “actions of
3 various lawyers.” As an initial matter, the District Court imposed sanctions pursuant to both its
4 inherent powers and § 1927. There is no serious dispute that a court may sanction a law firm
5 pursuant to its inherent power. We see no reason that a different rule should apply to § 1927
6 sanctions, and, in any event, we have previously upheld the award of § 1927 sanctions against a
7 law firm. See Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1019-20 (2d Cir. 1988). In addition,
8 we would upset a relatively long-standing practice among district courts in our Circuit if we
9 were to hold that law firms may not be sanctioned under § 1927 for the acts of certain attorneys.
10 See Reichmann v. Neumann, 553 F. Supp. 2d 307, 327-28 (S.D.N.Y. 2008) (imposing sanctions
11 on a law firm pursuant to 28 U.S.C. § 1927); Saratoga Inv. Co. v. O’Conner, No. 97 Civ. 729
12 (FJS), 1997 WL 473066, at *2 (N.D.N.Y. Aug. 7, 1997) (same); ACLI Gov’t Secs., Inc. v.
13 Rhoades, 907 F. Supp. 66, 71-72 (S.D.N.Y. 1995) (same).⁵ The practice of imposing § 1927
14 sanctions on law firms has also been approved by our sister circuits. See LaPrade v. Kidder
15 Peabody & Co., 146 F.3d 899, 900 (D.C. Cir. 1998); Avirgan v. Hull, 932 F.2d 1572, 1582 (11th
16 Cir. 1991); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 206 (3d Cir. 1985).

17 The District Court also properly attributed the actions of Jason Itkin to the entire firm.
18 Itkin was a founding, named partner of a firm that, according to counsel at oral argument, had
19 ten or fifteen lawyers during the relevant time period. Tr. of Oral Arg. at 25. Throughout the
20 litigation, Itkin’s actions were indistinguishable from those of Arnold & Itkin as a firm.

⁵ Even when they have refrained from imposing sanctions, district courts in our Circuit have assumed that § 1927 sanctions are available against law firms. See Lynch v. United Servs. Auto Ass’n, 491 F. Supp. 2d 357, 365-66 (S.D.N.Y. 2007); Weaver v. Chrysler Corp., No. 96 Civ. 2245 (DAB), 1998 WL 477725, at *2-3 (S.D.N.Y. Aug. 14, 1998), vacated and remanded on other grounds, 14 F. App’x 136 (2d Cir. 2001); In re Sheldon & Co., No. 93 Civ. 4209 (RO), 1997 WL 728415, at *5 (S.D.N.Y. Nov. 21, 1997).

1 Likewise, in opposing Prospect’s sanctions motion, the firm consistently accepted responsibility
2 for conducting the underlying litigation.

3 In sum, nothing in the language of 28 U.S.C. § 1927, in our case law regarding that
4 statute or a district court’s inherent powers, or in counsel’s actions in this case leads us to think
5 that the District Court was without authority to impose sanctions on Arnold & Itkin as a whole.

6 We also substantially affirm the District Court’s sanctions order insofar as it directed that
7 lawyers from Arnold & Itkin submit the order itself with any future pro hac vice applications in
8 the Southern District of New York. Although we have affirmed similar sanctions against
9 individual attorneys without any apparent temporal limits, see MacDraw, Inc. v. CIT Group
10 Equip. Fin., Inc., 138 F.3d 33, 37-38 (2d Cir. 1998), this sanctions order involves an entire law
11 firm, including lawyers who joined the firm after this litigation had already concluded and
12 therefore could not have had any role in it. Accordingly, we remand to the District Court to
13 consider, with or without a hearing, only whether to impose a temporal limit on this component
14 of its order, and whether to exclude from the scope of the order all attorneys who joined the firm
15 after June 23, 2010, when the sanctions order was entered. We note, for example, that in Gallop
16 v. Cheney, 667 F.3d 226, 230 (2d Cir. 2012), we recently required an attorney to provide notice
17 of his sanction to any federal court before which he sought to appear “for a period of one year.”

18 Under these circumstances, we also see no error in the District Court’s order requiring
19 Arnold & Itkin to pay for the costs associated with defending the sanctions motion itself. The
20 fact that it denied the sanctions motion in part did not prevent the District Court from imposing
21 the full cost of litigating the motion, which, if not completely successful on all the grounds urged
22 by Prospect, was nevertheless well founded. In challenging the fee amount, Arnold & Itkin
23 observes that a very large portion of the fees related to litigating the sanctions motion itself

1 (roughly \$260,000 of the \$354,559 awarded). But the high cost of preparing the sanctions
2 motion is attributable largely to Arnold & Itkin’s extraordinary pattern of misrepresentations and
3 unreasonable litigation in this case. Cf. In re 60 E. 80th St. Equities, Inc., 218 F.3d 109, 120 (2d
4 Cir. 2000) (“relevant to our [sanctions] inquiry is the fact that [appellant’s] behavior is
5 repetitive.”).

6 Lastly, Arnold & Itkin asserts that it was deprived of due process because it “had no
7 opportunity to respond to Prospect’s allegation” that Arnold & Itkin “concealed the substance of
8 the email transmitting Prospect’s signature pages” to Vinson & Elkins. It states that the
9 allegation was first “lodged” in Prospect’s final brief in support of its sanctions motion. This
10 argument is meritless because Prospect’s initial brief requesting sanctions contained this
11 allegation.

12 CONCLUSION

13 Arnold & Itkin’s remaining arguments are without merit. For the foregoing reasons, we
14 AFFIRM the judgment of the District Court in part, but we REMAND the order insofar as it
15 required all Arnold & Itkin attorneys to attach the sanctions order to all future pro hac vice
16 applications in the Southern District of New York, so that the District Court may consider
17 whether a temporal limit should apply to that part of the order and whether to exclude from the
18 order any attorneys who joined the firm after June 23, 2010.