

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of September, two thousand twenty-four.

PRESENT: REENA RAGGI,
RICHARD C. WESLEY,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

ABBOTT LABORATORIES, ABBOTT
DIABETES CARE INC., ABBOTT
DIABETES CARE SALES
CORPORATION,

*Plaintiffs - Counter Defendants -
Appellees,*

v.

H&H WHOLESALE SERVICES,
INC., HOWARD GOLDMAN, LORI
GOLDMAN,

Defendants - Counter Claimants -

No. 23-446-cv(L)
No. 23-449-cv(con)

Cross Defendants - Appellants,

ADELPHIA SUPPLY USA, YUDAH NEUMAN, AKA LENNY NEUMAN, REUVEN SOBEL, AKA CHAIM SOBEL, MOSES NEUMAN, SHMUEL LEZELL, SAVE RITE MEDICAL.COM LLC, MARC KAPLAN, MATRIX DISTRIBUTORS, INC., CHRISTOPHER BENEVENT, SETH GRUMET, PAPOUTSANIS USA, LLC, DBA VIP INTERNATIONAL-DROGARIS, GEORGE DROGARIS, OSD CAPITAL, INC., FKA FARNES ENTERPRISES CORPORATION, OVERSTOCKDRUGSTORE.COM LLC, DBA SIMPLEMED SUPPLY, RICK EVENSON, KEVIN PLUMB, BUDGET HEALTH CORPORATION, DBA BUDGET DRUGS PHARMACY, JOHN FANDETTI, ROBERT NEWMYER, MARIA FANDETTI, LORI BLUE, ANTHONY MEOLA, MARK D. HENKIN, DREAM CEREAL INC., DBA DIABETESSUPPLIES4LESS.COM, DOUGLAS HAUCK, BERKELEY DRUGS INC., MAJID HAMEED, EUGENE HA, CAREWAY PHARMACY INC., ANATOLIY FAIN, HARRICO-GALLER DRUG CORPORATION, JOHN GALLAGHER, HABER J&N INC., DBA THE MODERN CHEMIST, NAOMI HABER, JERRY HABER, NORSTRAND PHARMACY, LLC, DBA VANDERVEER PHARMACY, SARATHCHANDRA ADUSUMALLI, HEMAGIRI GAYAM, LEV RX CORP, DBA KIRAS PHARMACY, KIRA LEVKOUSKAYA, ELIYAHUS PHARMACY, INC., ILIAS MLABASATI, GLOBAL CARE PHARMACY, INC., D.K.Y. ENTERPRISES, INC., DBA 8TH AVENUE PHARMACY, KIM PING JIM, TGIS PHARMACY, INC., DBA SUNRISE FAMILY PHARMACY, SAJID JAVED, BAY PHARMACY INC., IRENE PIKER, B & T MARLBORO PHARMACY, INC., ANATOLY GOROKHOVSKY, LARKE DRUGS, INC., DBA 110 PHARMACY & SURGICAL, PRASAD VENIGALLA, LA RUCHE PHARMACY, INC., SUNIL B. PATEL, ESTATES PHARMACY, INC., MOHAMMED

NURUDDIN, JOHN DOE, 1-10, NOVEX AMERICA,
DENNIS CANTOR, TRI-STATE MEDICAL SUPPLIES
EQUIP. CORP., ERWIN GANZFRIED, MORDECHAI
KRITZLER, VALUE WHOLESALE, INC., DIANE
BROWN, MEDICAL DISCOUNT SERVICES, INC.,
BRIAN MESIKA, DARRYL SCHREIBER, XPRESS
MEDICAL SUPPLIES CORP., DBA PAYLESS
DISTRIBUTORS, MOHAMMED PATEL, ZUBEDA MOTI,
MUHAMMAD ARIF, SAPS DRUG WHOLESALE, INC.,
VILAS ASMIN, RAJESH AMIN, NIMESH AMIN, IXTHUS
MEDICAL SUPPLY, INC., KARL KUNSTMAN, COMPLY
USA INC., IRANY NIR, OFEK MESSIKA, KIMBERLY
PASZKIEWICZ, DRUGPLACE, INC., PAUL LEIGHT,
KEVIN SINGER, HMF DISTRIBUTING INC.,
WHOLESALE DIABETIC SUPPLIES INC., ROSS
TRAGER, MATTHEW FRANK, PRIMED
PHARMACEUTICALS LLC, VINCENT MONDENADO,
MATTHEW ZEIGLER, NE MEDICAL SUPPLY USA,
INC., DANIELLE WAYNE, NICK WAYNE, TAS
MEDICAL SUPPLY COMPANY, INC., TZVI SKLARZ,
PRODUCT PERFORMANCE COMPANY, INC.,
JERROLD HERMAN, STEPHEN HERMAN, MED-PLUS,
INC., ROGER MEZHIBOVSKY, DELRAY MARKETING,
LLC, STEVE MICHAELS, DIABETIC PHARMACY
SOLUTIONS, LLC, KARL BUCHOLZ, GLOBE WANTED,
MASSALAH TRADING U.S.A. LTD., SAAD HADDAD,
AKA SAM, HAVEMEYER PHARMACY INC., AKA
SOUTH SECOND PHARMACY, MICHAEL BASSANELL,
6122 PHARMACY, INC., 86TH STREET COMMUNITY
PHARMACY, ABLE WHOLESALERS OF TENNESSEE,
ABSOLUTE FREIGHT SERVICES, ADVANCED
PHARMACY LLC, ADVANCED SCRIPTS INC., ALBERT
KRITZLER, ALPESHKUMAR VASANI, AMEXPO
INTERNATIONAL, LLC, AMIN PHARMACY, INC., AN-
NOOR PHARMACY INC., ASHRAF AWAD, ASTUTE
HEALTHCARE LIMITED, DBA E-NET SOLUTION,

ATTILA KEKESI, AVI FRANKMAN, BELL
APOTHECARY, INC., BENJAMIN WALVOORD, JANI
BHAGVAT, BHANUMATI PATEL, BISHAM SINGH
GHOTRA, BOB-BILA DISTRIBUTORS, INC., BRIAN
BOESHART, BRIAN MCCLELLAND, BRIDESBURG
PHARMACY, CAREPOINTE HEALTH CARE
CORPORATION, CARL TELANDER, CASHARIM
TRADING, AKA CASHRIM, CHAIM GREENFIELD,
CHAOYING XUAN, CHAYA BRAISH, CHILDRENS
CLINIC PHARMACY, CHRISTOPHER AARONS,
CLINTON HERMAN, COOLRELIC, INC., DANJAL
HANSEN, DANNY KATZ, DAVID JOHN TIPP,
DEALS2000 LLC, DBA JUSTDIABETICTESTSTRIPS.COM,
DEDAC NGUYEN, DEEPAK MUNSHI, DELWAR
KAHN, DENNIS CHARLES PAY, DESAI'S PHARMACY
INC., DIPTIBAHEN PATELDEFE, DISCOVERY
PHARMACY INC., DOUGLAS PARKER RUDDERHAM,
DWAYNE PORTER, EAST TREMONT PHARMACY
INC., EDUARDO GIL, EDWARD CONNELL, ERIK
BERG, EXPRESS CHEMIST, FCL HEALTH SOLUTIONS
LTD., FIFTY50 MEDICAL, LLC, G&P SUPPLIES, INC.,
GABECARE DIRECT RX, INC., GARY KAGAN, GEORGE
LYNCH, AKA RICK, GLENDALE PRESCRIPTION
CENTER, INC., GLOBALMED LIMITED, AKA
GLOBALMED PHARMACEUTICAL WHOLESALER,
GOODLIFE PHARMACY INC., GOOLAM SHEIKH,
GREGORY PETER SANTULLI, GREGORY S. DIXON,
GREGORY SARGENT, GURPREET SINGH, GUY SAVIA,
HANNA NGUYEN, HARMANPREET BAL,
HETASVEEBEN MAHENDRABHAI VANAPARIYA,
HIRONORI MITSUISHI, HSIU SARGENT, INSIGHT
DESIGNS, INC., ISSA KASHOU, JACQUELINE
HERRERA, JAMES H. REDECOPP, JASON GRAMA,
JASVIR SINGH SOHI, JENNIFER HERMAN, JENNY
NGUYEN, JIRI SVEC, JOEL SILBERSTEIN, JOHN SEAL,
JOHNNY K. CHAN, JONATHAN NIKOLAS WOODS,

JOSEPH KARAS, JOYCE MOGIL, KENNETH RUIZ,
KEYUR SHAH, KIRI PATEL, KONIE MINGA,
KONSTANTINOS POLYCHRONOPOULOS, KRUNAL
VASANI, KULBIR SINGH SOHI, LAFAYETTE DRUGS,
LARRY E. SMITH, LAURYNAS LEMESOVAS, LEONID
BEIGELMAN, LESLIE BOESHART, LESLIE STEWART
JONES, LIGHTBOX MEDICAL LLC, LUBNA ARSHAD,
LUIS SANTIAGO, LUIS SOTO, M & L BROTHERS
PHARMACY, INC., MAGCHOP, LLC, MANIFEST
PHARMACY LLC, MANISH MITTAL, MARK MOGIL,
MARLENY CANETE, MAULIK SHAH, MEDEX SUPPLY
DISTRIBUTORS INC., MEDICAL CARE SUPPLIES INC.,
MEDICAL DISCOUNT SERVICES, LLC, DBA MEDICAL
WHOLE SALE SUPPLIES, MEDWORLD SUPPLY INC.,
FKA SP DIST. INC., MISAR LLC, MOHAMMAD
ARSHAD, MONSUR CHOWDHURY, MOSHE BRAISH,
MUJJAHD UL HUQ, N A & S DRUGS, INC., DBA
FALCON HEALTHMART DRUGS, N HOSKING & S
DUFFELL, DBA TOWERS PHARMACY, NABILA
CHAUDHRY, NACHMAN NEIL FEIG, NADER
PARSIAN, NATIONAL MEDICAL MANAGEMENT,
NEIL J. HOSKING, NESSIN USSEIN, NIGEL HUW
BUSH, NOEMI RUIZ, NOURI FITHA, NPR
BIOMEDICAL INC., NWHOLESALEDEAL, INC.,
OLIVER SUESS, OXFORD PHARMACY, INC.,
PARITOSH MAZUMDER, PAT KEKESI, PATRICIA
HERMAN, PAUL MICHAEL CAPPER, PERFECTO H.
HALLON, PETER E. SUTULOV, PHARMA SUPPLY,
INC., PHARMACY WHOLESALE SERVICES INC., AKA
PROFESSIONAL PHARMACY WHOLESALE SERVICES
INC., PHYSICIAN CHOICE PHARMACY LLC, POWER
DISTRIBUTION ENTERPRISES LLC, PRANAM
HEALTHCARE LLC, DBA SAN PEDRO PHARMA INC.,
PREMIER EQUIPMENT SOLUTIONS, INC., PRODUCT
LTD., PRIORITY CARE PHARMACY LLC, AKA
PRIORITY HEALTHCARE CORP., PRODUCT TRADE

SERVICES LTD., QAISER CHAUDHRY, QRX
PHARMACY AND HEALTHCARE SUPPLIES, INC.,
DBA QRX2 PHARMACY & MEDICAL SUPPLIES INC.,
RAANAN COHEN, RALEIGH PAOLELLA-
TITSCHINGER, RALPH AMATO, RAN LEV, RANDY
TAMMARA, ROSEMARY ELIZABETH ANN PAY, SAM
ZIGHELBOIM, SANTA ZAWAIDEH, SAVOY MEDICAL
PRODUCTS, LLC, SHARINE XUAN, SHENAY USSEIN,
SHERWOOD PRIME, INC., DBA SHERWOOD MEDICAL
SUPPLIES, SHIE GREENFIELD, SHRINATHJI RX INC.,
DBA LANSDALE RX PHARMACY, SIMON R. DUFFELL,
SMARTWAY PHARMACEUTICALS LTD, SMARTWAY
PW HOLDINGS LTD., SPYRIDON PSONIS, DBA
PARAPHARMACY STORE, STAMPMATIC, STEPHANIE
HUQ, STEPHEN M. KRAUSE, STEVEN TAMMARA,
STEVEN THUSS, STEVEN W. LABA, TADAS
LEMESOVAS, TDC PHARMACEUTICAL
CORPORATION, INC., DBA VITAL HEALTH
PHARMACY, TDP TRADING, INC., TERRIFIC CARE
LLC, DBA DEANWOOD NURSING, THOMAS GULIK,
THUY PHAM, AKA DENIS PHAM, AKA HUY PHAM,
TIFFANY RIGGS, ANTHONY KVENVOLD, WYNNE
TREANOR-KVENVOLD, TORI GOLDSTEN, TOTAL
PHARMACY INC., DBA EZ PHARMACY, TRUSTED
MEDICAL SUPPLY LLC, VALLEY LIQUIDATION
SERVICES LLC, DBA VLS, LLC, VICKIE MARTINO,
VINH HUYNH, WILLIAM SEMAAN, YS MARKETING
INC., FKA NUMED PHARMA INC., YUSUF MUSE, AKA
YUSUF MOHAMED, YUXIN XUIE, YX ENTERPRICES
CORP, Z WORLDWIDE, INC., 86 STREET PHARMACY,
AL GRAY, DBA S D'FROG, DAVID STRATHY, DBA
BARGIN PAWN, ELLA SELA, DBA ELLA'S VISION,
JIGAL PATEL, AKA JIGNAL PATEL, KIMBERLY
STEVENS, DBA STRIPS2CASH, KONG CHEUNG, AKA
KONG CARL CHENG TUNG, LEHIGH PHARMACY &
SUPPLIES, INC., SAYED RAZA, AKA SYED HASAN,

MIR DARWICHZADA, WHOLESALER DEFENDANTS,
REPRESENTED BY GOODMAN & SAPERSTEIN,
GOTTLIEB & JANEY, and STERN & SCHURIN,

Defendants,

v.

JASON YERT, KERR RUSSELL AND WEBER PLC,

Intervenors.

FOR APPELLANTS H&H
WHOLESALE SERVICES, INC.
and HOWARD GOLDMAN:

PETER MICHAEL LEVINE, New
York, NY

FOR APPELLANT LORI GOLDMAN:

JOSHUA H. EPSTEIN (David S.
Greenberg, *on the brief*),
Davis+Gilbert LLP, New York,
NY

FOR APPELLEES:

TIMOTHY A. WATERS (Geoffrey
Potter, Natalie G. Noble,
Nicole Scully, *on the brief*),
Patterson Belknap Webb &
Tyler LLP, New York, NY

Appeal from a judgment of the United States District Court for the Eastern
District of New York (Carol Bagley Amon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED that the judgment of the District Court is AFFIRMED.

Defendants-Appellants H&H Wholesale Services, Inc., Howard Goldman, and Lori Goldman (collectively, the “H&H Defendants”) appeal from a March 29, 2023 judgment of the United States District Court for the Eastern District of New York (*Amon, J.*) imposing, after entry of a default judgment, \$33,471,224 in damages for trademark infringement. Specifically, the H&H Defendants all challenge the District Court’s award of damages without a jury trial. Lori Goldman alone also separately challenges the entry of default judgment against her. We assume the parties’ familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

In 2015 Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corporation (collectively, “Abbott”) sued hundreds of defendants for, among other things, trademark infringement under the Lanham Act, 15 U.S.C. § 1125(c). Five years into the litigation, the District Court granted Abbott’s motion for case-ending sanctions against the H&H Defendants for repeatedly withholding responsive documents and providing misleading and inconsistent testimony in depositions and court filings. The District Court then held an inquest on damages, awarding \$33,471,224 plus post-judgment interest

to Abbott. Abbott's lawsuit against many of the remaining defendants is ongoing.¹

I. Right to a Jury Trial on Damages

On appeal, the H&H Defendants argue that they were entitled to a jury trial on the issue of damages even after the District Court entered default judgment. Abbott argues that we need not reach the merits of this argument because the H&H Defendants waived their right to a jury trial. We agree with Abbott.

"[T]he right of jury trial is fundamental," *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972) (quotation marks omitted), but it "may be waived by conduct of the parties," *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989). A party waives its right to a jury trial if, with "notice that the trial court [i]s planning to adjudicate the dispositive issues of fact," it "participate[s] in a [nonjury proceeding] without objection." *Id.* at 1018 (quotation marks

¹ We have appellate jurisdiction pursuant to 28 U.S.C. § 1291, which permits us to hear appeals from partial final judgments. *See Petrello v. White*, 533 F.3d 110, 113 (2d Cir. 2008); Fed. R. Civ. P. 54(b). The District Court's judgment against the H&H Defendants is a partial final judgment because: there are multiple defendants in Abbott's lawsuit; the judgment "finally determine[s]" the rights and liabilities of the H&H Defendants; and the District Court expressly determined that "there [wa]s no just reason for delay of entry of final judgment" against them. *Linde v. Arab Bank, PLC*, 882 F.3d 314, 322–23 (2d Cir. 2018) (quotation marks omitted).

omitted); *accord Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 117–18 (2d Cir. 2021) (holding that participation “in a bench trial without objection” is enough to “constitute[] waiver of the jury trial right”).

Initially, in the complaint and answer, both Abbott and the H&H Defendants demanded a jury trial. Once the District Court began considering Abbott’s motion for case-ending sanctions, however, the H&H Defendants acquiesced to a damages inquest instead. Before the District Court imposed case-ending sanctions, counsel for the H&H Defendants stated that any trial on damages for the other defendants should *not* include the H&H Defendants. After the District Court granted the motion for case-ending sanctions, it requested that the parties address “the sequencing of a damages inquest against the H&H Defendants and a trial against the remaining defendants,” Joint App’x 274, thereby putting the H&H Defendants on notice that it intended to hold an inquest on damages rather than a jury trial. But the H&H Defendants did not once argue that they had the right to a jury trial on damages. Instead, they argued that the damages inquest should follow any jury trial for the remaining defendants. They proposed as an alternative that the damages inquest be consolidated with a jury trial for the remaining defendants. Even as to this

alternative scenario, however, the H&H Defendants suggested that the District Court, rather than a jury, could determine the amount of damages. The H&H Defendants thereafter participated in the damages inquest without objecting that they were entitled to a jury trial.

On appeal, the H&H Defendants describe their proposal to consolidate the inquest with a jury trial but to have Judge Amon decide their damages as a compromise, maintaining that their true request was to have a jury hear and decide their damages. The record is to the contrary. The H&H Defendants' primary request was for the damages inquest to *follow* a jury trial for the non-defaulting defendants, and in making that request, the H&H Defendants clearly acquiesced to a nonjury proceeding for determination of the damages they owed.

Based on this record, we conclude that the H&H Defendants waived their right to a jury trial on damages.

II. Case-Ending Sanctions

Individually, Ms. Goldman appeals the merits of the District Court's decision to impose case-ending sanctions against her. We review the District Court's imposition of sanctions for abuse of discretion, *Rosbach v. Montefiore Med. Ctr.*, 81 F.4th 124, 141 (2d Cir. 2023), though our review is "more exacting

than under the ordinary abuse-of-discretion standard” because the District Court “is accuser, fact finder and sentencing judge all in one,” *Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 113–14 (2d Cir. 2009) (quotation marks omitted). Here, the District Court imposed sanctions under its inherent powers, requiring it to find “clear and convincing evidence of bad faith.” *Yukos Cap. S.A.R.L. v. Feldman*, 977 F.3d 216, 235 (2d Cir. 2020).

Ms. Goldman argues that the District Court abused its discretion because it imposed sanctions without first finding that she personally committed a fraud on the court and did so in bad faith. *See Wolters Kluwer*, 564 F.3d at 114 (explaining that, in the context of sanctions, “[b]ad faith is personal” (quotation marks omitted)). We disagree.

In the Report and Recommendation adopted by the District Court, Magistrate Judge Bloom identified multiple instances in which Ms. Goldman misled Abbott and the court by falsely claiming that she had no role at H&H and no responsive documents to produce. Indeed, the record establishes that Ms. Goldman continued to assert throughout the litigation that she had no meaningful involvement with the business activities at H&H, even though emails that she was eventually required to produce revealed that she maintained

an office at H&H, attended management meetings, and handled various aspects of the business. She used these misrepresentations to gain a litigation advantage: In response to Abbott's motion for a preliminary injunction, she argued that its claims against her were frivolous and sanctionable because she had no role at H&H. Abbott thereafter withdrew its motion for a preliminary injunction against her. Finally, as the District Court noted, Ms. Goldman was individually responsible for meeting her discovery obligations and for attempting to cover up the discovery violations. The District Court therefore did not abuse its discretion when it concluded that Ms. Goldman had personally acted in bad faith. *See Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 387–88 (2d Cir. 1981).

Ms. Goldman's arguments to the contrary are unavailing. First, she attempts to blame the discovery failures on her former lawyers and other H&H employees. Her effort fails not only because a client can be held to account for the "acts and omissions" of her counsel in connection with her discovery violations, *see Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 & n.10 (2d Cir. 1979), but also because Ms. Goldman is responsible for her false testimony to the District Court and at her deposition. In any event, there is no evidence in the record that her lawyers or other H&H

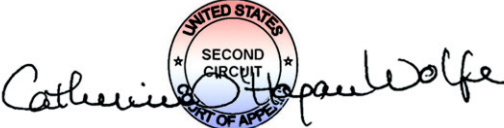
employees prevented her from producing responsive documents. *See id.* Second, she argues that the District Court abused its discretion by declining to hold an evidentiary hearing on Abbott's motion for sanctions. But the District Court need not conduct an evidentiary hearing when, as here, "sanctions are based entirely on an established record." *Schlaifer Nance & Co. v. Est. of Warhol*, 194 F.3d 323, 335 (2d Cir. 1999). Finally, she contends that the District Court failed to satisfy its obligation to consider lesser sanctions before dismissal. *See Shepherd v. Annucci*, 921 F.3d 89, 97 (2d Cir. 2019). But the District Court acted within its discretion in concluding that lesser sanctions would be ineffective given the record of repeated discovery abuses, misrepresentations to the court, and the prejudice to Abbott. *See S. New Eng. Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 148 (2d Cir. 2010) (holding that the district court is not "required to exhaust possible lesser sanctions before imposing dismissal or default if such a sanction is appropriate on the overall record").

We have considered the Defendants' remaining arguments and conclude

that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in the center, flanked by two small stars on either side.