
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

UNITED STATES OF AMERICA <i>ex rel.</i>)	
RHONDA SALMERON,)	Appeal from the
)	United States District Court
Relator-Appellant,)	Northern District of Illinois
)	Eastern Division
v.)	
)	No. 05 C 4453
ENTERPRISE RECOVERY)	
SYSTEMS, INC., <i>et al.</i> ,)	Hon. Milton I. Shadur
)	
Defendants-Appellees.)	

**BRIEF OF DEFENDANTS-APPELLEES SALLIE MAE, INC.,
USA GROUP GUARANTEE SERVICES, INC., USA SERVICING CORP.,
AND SALLIE MAE SERVICING, L.P.**

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[Disclosure Statements]

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
JURISDICTIONAL STATEMENT	1
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS.....	2
A. The Parties	2
B. Salmeron’s False Claims Act Lawsuit.....	3
C. The Confidentiality Agreement	4
D. The Dismissal For Want Of Prosecution.....	6
E. Public Disclosure Of The Agreement	7
F. Sanchez’s First Response: “I Didn’t Leak The Agreement.”	8
G. Sanchez’s Second Response: “I Did It And I’m Sorry.”	9
H. Sanchez’s Third Response: “I Didn’t Know They Would Give It To Others.”	10
I. The District Court’s Sanction Order.....	12
SUMMARY OF THE ARGUMENT	15
ARGUMENT	18
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING DISMISSAL AS A SANCTION FOR SANCHEZ’S MISCONDUCT	18
A. Courts have inherent authority to order dismissal as a sanction for bad-faith or other abusive conduct.....	19
B. Sanchez’s egregious misconduct warranted dismissal	19
II. SALMERON’S ARGUMENTS FOR REVERSAL LACK MERIT	24
A. Salmeron’s First Amendment argument is waived and in any event meritless	24
B. The absence of a protective order did not justify Sanchez’s dissemination of the Agreement	28
C. The district court was not required to provide further warnings to Sanchez before ordering dismissal	32
D. The sanction was not unduly harsh.....	33

TABLE OF CONTENTS
(continued)

	Page
III. THE DISTRICT COURT’S FACTUAL FINDINGS ARE NOT CLEARLY ERRONEOUS	39
CONCLUSION	42

TABLE OF AUTHORITIES

Cases

<i>Anheuser-Busch, Inc. v. Natural Beverage Distribs.</i> , 69 F.3d 337 (9th Cir. 1995)	23
<i>Ball v. City of Chicago</i> , 2 F.3d 752 (7th Cir. 1993)	20, 24, 33, 35, 37
<i>Banco Del Atlantico, S.A. v. Woods Indus. Inc.</i> , 519 F.3d 350 (7th Cir. 2008)	33
<i>Barnhill v. United States</i> , 11 F.3d 1360 (7th Cir. 1993).....	37
<i>In re Bluestein & Co.</i> , 68 F.3d 1022 (7th Cir. 1995)	32
<i>C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.</i> , 726 F.2d 1202 (7th Cir. 1984)	35
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991)	19, 30, 36
<i>Chicago Tribune Co. v. Bridgestone/Firestone, Inc.</i> , 263 F.3d 1304 (11th Cir. 2001).....	29
<i>Citizens First Nat'l Bank v. Cincinnati Ins. Co.</i> , 178 F.3d 943 (7th Cir. 1999)	25
<i>Cohen v. Cowles Media Co.</i> , 501 U.S. 663 (1991)	26
<i>Dal Pozzo v. Basic Mach. Co.</i> , 463 F.3d 609 (7th Cir. 2006)	41
<i>Dotson v. Bravo</i> , 321 F.3d 663 (7th Cir. 2003)	19, 34
<i>Enterprise Recovery Sys., Inc. v. Salmeron</i> , No. 06 L 7643, Order (Circuit Court of Cook County, June 3, 2008).....	3
<i>Greviskes v. Univ. Research Ass'n</i> , 417 F.3d 752 (7th Cir. 2005)	18, 20, 23, 29, 31
<i>Grove Fresh Distribs., Inc. v. Everfresh Juice Co.</i> , 24 F.3d 893 (7th Cir. 1994)	25
<i>Hal Commodity Cycles Mgmt. Co. v. Kirsh</i> , 825 F.2d 1136 (7th Cir. 1987).....	32
<i>Hobley v. Burge</i> , 2005 WL 256481 (N.D. Ill. Jan. 21, 2005).....	30
<i>Jepson, Inc. v. Makita Electric Works, Ltd.</i> , 30 F.3d 854 (7th Cir. 1994)	29

<i>Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec</i> , 529 F.3d 371 (7th Cir. 2008)	31
<i>Kovilic Constr. Co. v. Missbrenner</i> , 106 F.3d 768 (7th Cir. 1997).....	31
<i>Link v. Wabash R.R.</i> , 370 U.S. 626, 630 (1962).....	19, 37
<i>Loctite Corp. v. Fel-Pro, Inc.</i> , 667 F.2d 577 (7th Cir. 1981)	30
<i>Mañez v. Bridgestone Firestone N. Am. Tire, LLC</i> , 533 F.3d 578 (7th Cir. 2008)	30
<i>Marrocco v. General Motors Corp.</i> , 966 F.2d 220 (7th Cir. 1992)	18, 26, 40
<i>Martinez v. City of Chicago</i> , 499 F.3d 721 (7th Cir. 2007).....	23, 37
<i>Metropolitan Life Ins. Co. v. Estate of Cammon</i> , 929 F.2d 1220 (7th Cir. 1991).....	35
<i>Metzger v. Illinois State Police</i> , 519 F.3d 677 (7th Cir. 2008).....	24
<i>Minotti v. Lensink</i> , 895 F.2d 100 (2d Cir. 1990)	38
<i>National Hockey League v. Metropolitan Hockey Club</i> , 427 U.S. 639 (1976).....	19, 20, 24, 41
<i>Negrete v. National R.R. Passenger Corp.</i> , 547 F.3d 721 (7th Cir. 2008).....	42
<i>NutraSweet Co. v. X-L Eng'g Co.</i> , 227 F.3d 776 (7th Cir. 2000).....	39
<i>Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Am., LLC</i> , 516 F.3d 623 (7th Cir.), cert denied, 129 S. Ct. 160 (2008).....	18, 22, 34, 38, 42
<i>Roadway Express, Inc. v. U.S. Dep't of Labor</i> , 495 F.3d 477 (7th Cir. 2007)	35
<i>Roland v. Salem Contract Carriers, Inc.</i> , 811 F.2d 1175 (7th Cir. 1987)	19, 37
<i>Safeco Ins. Co. v. Burr</i> , 127 S. Ct. 2201 (2007)	41
<i>Seattle Times Co. v. Rhinehart</i> , 467 U.S. 20 (1984).....	25
<i>Stive v. United States</i> , 366 F.3d 520 (7th Cir. 2004).....	42
<i>Thomas v. General Motors Acceptance Corp.</i> , 288 F.3d 305 (7th Cir. 2002).....	21
<i>Toon v. Wackenhut Corr. Corp.</i> , 250 F.3d 950 (5th Cir. 2001).....	22

<i>Union Oil Co. v. Leavell</i> , 220 F.3d 562 (7th Cir. 2000)	25
<i>United States ex rel. Drake v. Norden Sys., Inc.</i> , 375 F.3d 248 (2d Cir. 2004)...	38
<i>United States ex rel. Shaver v. Lucas Western Corp.</i> , 237 F.3d 932 (8th Cir. 2001)	38
<i>Wade v. Soo Line R.R.</i> , 500 F.3d 559 (7th Cir. 2007).....	31, 34, 37, 42
<i>Williams v. Chicago Bd. of Educ.</i> , 155 F.3d 853 (7th Cir. 1998).....	32
<i>Young v. Gordon</i> , 330 F.3d 76 (1st Cir. 2003)	28
<i>Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.</i> , 313 F.3d 385 (7th Cir. 2002)	31

Statute and Rule

31 U.S.C. §§ 3729-3733.....	3
34 C.F.R. § 682.404.....	40

Other Authorities

Christopher Carmichael, <i>The Misunderstood Protective Order</i> , Circuit Rider 27 (June 2008)	26
<i>Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, Lawyers’ Duties to Other Counsel</i> , http://www.ca7.uscourts.gov/Rules/rules.htm#standardsothercounsel	21

JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

ISSUE PRESENTED FOR REVIEW

Whether the district court abused its discretion by imposing a dismissal sanction for an attorney's disclosure to the media of a commercially sensitive document obtained in discovery that he had agreed to keep confidential.

STATEMENT OF THE CASE

In August 2005, Relator-Appellant Rhonda Salmeron sued her former employer, Enterprise Recovery Systems, Inc. ("ERS"), under the False Claims Act, alleging that ERS had engaged in fraud in its efforts to collect overdue federally backed student loans. R. 1.¹ The United States declined to participate, leaving Salmeron to prosecute the case. R. 9; R. 31. Salmeron later amended her complaint several times to add as defendants Scott Nicholson, an ERS officer; USA Funds, Inc. ("USA Funds"); Sallie Mae, Inc. ("Sallie Mae"); and three defunct Sallie Mae entities: USA Group Guarantee Services, Inc., USA Servicing Corp., and Sallie Mae Servicing, L.P. R. 82; R. 160; R. 172; R. 185.² On August 15,

¹ Salmeron's Appendix is cited as "A_"; Sallie Mae's Supplemental Appendix is cited as "SA_."

² Sallie Mae, Inc. is the corporate management, student loan servicing, and marketing subsidiary of SLM Corporation. Of the four Sallie Mae entities named as defendants, Sallie Mae, Inc. is the sole surviving entity and the successor-in-interest. After the parties discussed entering a stipulated dismissal order as to USA Group Guarantee Services, Inc., USA Servicing Corp., and Sallie Mae Servicing, L.P. (A62, A64), the district court instructed Salmeron's counsel to "get them out." A63. However, Salmeron never dismissed the defunct entities (A86), which therefore technically remain parties to this appeal.

2008, the district court granted Salmeron's motion to dismiss USA Funds from the case. R. 287; R. 289.

On May 14, 2008, the district court dismissed Salmeron's complaint without prejudice for failure to prosecute. R. 232. On May 21, 2008, the court granted Salmeron's Rule 59(e) motion to reinstate her case and imposed monetary sanctions on Salmeron's counsel as a "final warning." A18; A21; A23.

On August 18, 2008, the district court dismissed Salmeron's case with prejudice as a sanction for her attorney's disclosure to the media of a commercially sensitive document that he had agreed to keep confidential. A69-91; A92. Salmeron's appeal followed. On October 1, 2008, the United States filed a motion for non-involvement in this appeal, which this Court granted on October 6, 2008. No. 08-3375 Dkt. #7-8.

STATEMENT OF FACTS

A. The Parties

Sallie Mae is the nation's leading provider of student loans. See <http://www.salliemae.com/about>. It originated as a government-sponsored entity but has been wholly private since 2004. Sallie Mae provides primarily federal and private student loans for undergraduate and graduate students and their parents. *Id.*

USA Funds is a guarantor of federally guaranteed student loans. R. 185, at 8. Sallie Mae contracts with USA Funds to provide services for certain student loans in USA Funds' portfolio, including the retention of collection agencies to

collect on defaulted student loans. *Id.* at 8-10. ERS is one such collection agency, and Scott Nicholson is an employee and officer of ERS. *Id.* USA Funds periodically performs audits of the collection agencies retained by its contractors. *Id.* at 12.

Salmeron is a former ERS employee and was its general manager from 1998 to 2002. R. 185, at 10. After being fired in 2002, Salmeron sued ERS on a variety of employment claims. *Salmeron v. Enterprise Recovery Sys., Inc.*, No. 03 CV 03332 (N.D. Ill.). That suit settled in March 2004. In August 2005, less than four months after Salmeron received the final installment payment pursuant to her settlement with ERS, she filed this False Claims Act action. R. 56 ¶¶ 11, 15. ERS later sued Salmeron for fraudulently inducing ERS to enter into the settlement agreement. Ultimately a judgment of \$150,000 plus costs was entered in favor of ERS. Order, *Enterprise Recovery Sys., Inc. v. Salmeron*, No. 06 L 7643 (Circuit Court of Cook County, June 3, 2008).

B. Salmeron's False Claims Act Lawsuit

In August 2005, Salmeron initiated a *qui tam* action against ERS under the False Claims Act, 31 U.S.C. §§ 3729-3733, alleging that ERS falsified certain records of its collection activities. R. 1. Her First Amended Complaint named USA Funds as an additional defendant and alleged that USA Funds failed to properly audit ERS and thereby facilitated its misconduct. R. 82. Her Second Amended Complaint added as defendants ERS officer Scott Nicholson and the three defunct Salle Mae affiliates. R. 160. Her Third Amended Complaint added

Sallie Mae, alleging that Sallie Mae failed to detect ERS's fraud and used false records created by ERS to seek payments from the federal government (allegations that Sallie Mae denies). R. 185, at 5-6, 14-17.

The United States government, the true party in interest in Salmeron's False Claims Act case, declined to intervene. R. 10. However, the government was on the service list and was kept informed of all proceedings in the district court. *Id.*

C. The Confidentiality Agreement

On August 3, 2006, the district court granted ERS's motion for a protective order to ensure the confidentiality of certain documents to be produced in discovery. The order covers not only trade secrets but all "confidential information entitled to protection under the [FRCP] or Rules of Evidence," as well as "commercial information, the disclosure of which would or might adversely affect business dealings and competitive positions." A2-A3 ¶ 3. Under the order, the court must approve confidentiality designations, but neither party may disclose information flagged as confidential while a motion for such approval is pending. A3-A4 ¶ 5. Confidential materials may be viewed only by specified persons and used "only for the purposes of the litigation" and not "for any business or other purpose except upon written consent of both the producing and designating party." A4-A6 ¶¶ 6, 9.

On November 13, 2006, shortly after Salmeron added USA Funds as a defendant, USA Funds' attorney Mark Sweet informed Salmeron's primary

counsel Jorge Sanchez that USA Funds wished to have the existing protective order modified to cover information produced in discovery by USA Funds. SA20-21. Sanchez agreed to treat documents that USA Funds produced and designated as “confidential” as being for “attorneys’ eyes only” until a mutually agreeable protective order could be entered. *Id.*

Based on that agreement, USA Funds produced documents to Salmeron on January 31, 2007. SA23-24. One of its produced documents was the Guarantee Services Agreement between USA Funds and Sallie Mae (the “Agreement”), which set forth the terms on which Sallie Mae provided certain services to USA Funds. *Id.* at 24. A cover letter from Sweet stated that the production included documents for which USA Funds would seek confidential treatment once the modified protective order was entered. The cover letter specifically designated the Agreement as one of those confidential documents. *Id.*

On that same day, Sweet also sent an e-mail to Sanchez, attaching a draft protective order covering USA Funds, noting that Sanchez had said he wished to modify it to cover documents from Salmeron’s home computer, and asking Sanchez to add his changes. SA26. Sanchez responded with an e-mail stating that he had not yet reviewed the draft protective order and promised to do so “as soon as I can get to it.” *Id.*

USA Funds produced additional documents to Salmeron on March 2, 2007. SA29. Sweet again included a cover letter reiterating that USA Funds sought confidential treatment for the Agreement. *Id.* Sweet again asked Sanchez

for his edits to the proposed modified protective order so that USA Funds could move for confidential treatment once the order was entered. *Id.* Sanchez never responded to Sweet’s request and never provided his promised changes to the proposed protective order. A88. As a result, the district court did not enter a protective order covering USA Funds and Sallie Mae until July 2008—well after Sanchez had publicly disseminated the Agreement. R. 267.

D. The Dismissal For Want Of Prosecution

Throughout the litigation, which was still at the pleading stage nearly three years after Salmeron filed suit, Salmeron’s counsel, including Jorge Sanchez, repeatedly failed to comply with deadlines and court orders and even to show up at all for status conferences. A70-A78. In light of this pattern of “repeated delinquencies,” on May 14, 2008, the district court *sua sponte* dismissed Salmeron’s case without prejudice for want of prosecution but said that it would entertain a motion to reinstate the case. R. 232, at 1-2.

Sanchez filed a motion under Rule 59(e) to reopen Salmeron’s case; as the court said, it was “perhaps the first time that he acted expeditiously.” A80; R. 233. Sanchez argued that he should have received a warning before dismissal and tried to blame the defendants for his failures. R. 233, at 3-6. Although the court granted the motion and reinstated Salmeron’s case, it chastised Sanchez and his co-counsel for “repeated episodes” of delay, imposed monetary sanctions for the fees incurred by the defendants in relation to the 59(e) motion, and emphasized that it had issued a “final warning.” A14; A18.

E. Public Disclosure Of The Agreement

About a month later, on June 24, 2008, the defendants learned that the Agreement was posted on a website called Wikileaks. A81. Wikileaks bills itself as “an uncensorable version of Wikipedia for untraceable mass document leaking and analysis.” See <http://wikileaks.org/wiki/Wikileaks:About>. The website displayed the entire Agreement along with a purported summary and “13 inflammatory questions about the possible ‘criminality’” of the contractual relationship between Sallie Mae and USA Funds. A81. The posted copy of the Agreement bore the Bates stamp of the copy that USA Funds produced to Salmeron in discovery and had specifically designated as confidential in the two cover letters. A82.

Two days later, on June 26, 2008, the leaked Agreement was featured in an article entitled “Contract Raises New Concern Over Sallie Mae’s Ties to Guarantor,” which appeared in the online version of the *Chronicle of Higher Education*. SA38-39; A81. According to the article, the *Chronicle* obtained the Agreement “several days” before it appeared on Wikileaks and “had no involvement in providing the material to Wikileaks.” SA38. The *Chronicle* published two more articles analyzing the Agreement in early July. A82.

USA Funds’ attorney Melissa Furrer Miller contacted Sanchez immediately after learning that the leaked Agreement was posted on Wikileaks. SA66-67. She noted that the leaked document bore USA Funds’ Bates stamp; that USA Funds had identified the Agreement “in writing on multiple occasions as a confidential

document for which USA Funds intended to seek confidential treatment, just as soon as you provided your comments to the proposed modified protective order”; and that Sanchez had agreed to keep such documents for “attorneys’ eyes only” until the protective order was entered. *Id.*

In response, Sanchez admitted that the Agreement posted on Wikileaks was “the same redacted document that was produced to us.” SA65. He did not admit or deny giving it to Wikileaks, but instead sought to blame the defendants on various grounds. SA 65-66. In particular, he complained that Miller’s e-mail “makes it seem as if someone at some point said *this document* in particular, is confidential when no such communication was ever made.” SA66. Sanchez made no reference to the cover letters which *expressly* designated the Agreement as confidential. Sanchez also complained that the produced Agreement was missing a page (SA66), to which Miller replied that focusing on that “administrative error” was simply “gamesmanship.” SA65.

F. Sanchez’s First Response: “I Didn’t Leak The Agreement.”

On July 1, 2008, USA Funds moved to dismiss the case as a sanction for Sanchez’s misconduct. SA4. In support of its motion, it submitted an affidavit from Mark Sweet, its attorney who had reached the for “attorneys’ eyes only” agreement with Sanchez, and copies of the cover letters in which USA Funds had designated the produced Agreement as confidential pending entry of a modified protective order. SA20; SA23; SA29. Sallie Mae, the other party to the Agreement, adopted USA Funds’ motion with the court’s leave. SA57-59; R. 266.

Salmeron's brief opposing the motion to dismiss, signed by Sanchez and filed on July 2, 2008, denied that he had anything to do with the leak of the Agreement. It stated that the Agreement "apparently has been leaked and published without plaintiff's counsel's knowledge or approval." SA61 (emphasis added). Other than by the word "apparently," his statement that he did not know or approve of the leak and publishing of the Agreement was unqualified.

G. Sanchez's Second Response: "I Did It And I'm Sorry."

At a July 3, 2008 hearing on the motion to dismiss, the district court called Sanchez's bluff on that statement in open court, pointing out that the Agreement posted on Wikileaks contained the USA Funds Bates numbering. A26. In response, Sanchez denied giving the Agreement to Wikileaks but admitted giving it to the *Chronicle*, as well as to an unidentified out-of-state lawyer not involved in this case and to Salmeron herself. A26-28; R. 256. Sanchez suggested that—but claimed not to know whether—the out-of-state lawyer gave the Agreement to Wikileaks. A42.

The court reminded Sanchez that USA Funds had produced the "sensitive" Agreement based on an agreement that it would be for "attorneys' eyes only" pending entry of a modified protective order and that Sanchez had repeatedly failed to provide the modifications he had promised. A29-32. The court found Sanchez's admitted dissemination of the Agreement "extraordinarily damaging" in light of the allegations of criminal violations in the Wikileaks posting, and the court noted that the Bates numbers on the posted copy of the Agreement "means

that there is only one potential source for that.” A33. The court added that it had given Salmeron’s counsel “a lot of slack in the past,” but concluded that Sanchez’s leak of the Agreement was “improper” and “not excusable.” A30; A34.

In reply to the court’s query as to why the case should not be dismissed as a sanction, Sanchez replied: “I apologize to this court for overstepping, exercising bad judgment,” and he suggested that a fine would be a more appropriate sanction for his “improper disclosure.” A34. In other words, he did not try to justify his disclosure (as Salmeron’s current attorneys do on this appeal) but instead recognized that he had acted improperly and threw himself on the mercy of the court.

The court then repeated that there was not “any justification” for Sanchez’s disclosure of the Agreement to the *Chronicle* and observed that the copy obtained by Wikileaks “had to come either from someone in your bailiwick or the Chronicle” because there was “no way otherwise” for Wikileaks to have obtained it. The court gave Sanchez a week to suggest “an appropriate sanction.” A35; R. 256.

H. Sanchez’s Third Response: “I Didn’t Know They Would Give It To Others.”

On July 11, Sanchez filed his “Submission on Sanctions,” in which he again apologized “to the Court and to defendants and their counsel” and admitted that he provided the Agreement to “third parties.” SA68-69. However, he contended that he “did not know or suspect” that they “would further disseminate it via the internet.” *Id.* Admitting that “he did not respond” to repeated requests for

comments on the draft protective order, Sanchez offered as an excuse that those requests “came during an unusually busy and even hectic period.” SA69. He was busy with other cases; one of his colleagues moved to Milwaukee; he had his third child, which generated “pressure, responsibilities and distraction”; and he provided legal services during a labor union election. SA69-71. As a result, he said, the promised protective order modifications “got away from Mr. Sanchez.” SA72.

However, Sanchez admitted that he received the “cover letters and disks” from USA Funds. SA72. He also admitted that if he had “referred to the correspondence that accompanied the disks he would have noted that USAF was seeking a confidential designation for this and similar documents.” *Id.* Because he disregarded those cover letters, he “sent the documents to two individuals.” *Id.* Sanchez said he made an “error in judgment” by providing it to a reporter for the *Chronicle of Higher Education*. SA73. He also said he provided the Agreement to the out-of-state lawyer and did not “tell him that USAF wanted to seek protection of it as confidential.” *Id.* Sanchez claimed he had “no reason to believe” that the unnamed lawyer “would publish or otherwise disseminate the document.” *Id.* Sanchez speculated that this lawyer “was somehow and for some inexplicable reason behind publishing the document [to Wikileaks.]” A74. The record does not identify this lawyer, noting only that he resides in Mississippi (SA85), and this potential “additional counsel” (SA73) never became involved in Salmeron’s case.

Sanchez concluded by admitting that “he and only he was responsible for the disclosure of this document to third parties” and suggested that an appropriate sanction would be a fine or a bar on using the Agreement. SA76. He also offered to tell the *Chronicle* reporter and Wikileaks to remove references to the Agreement from the internet (*id.*), which demonstrates that he had not already done so despite having previously promised Judge Shadur that he would “ride herd” on those to whom it had been disclosed. A42-43. Finally, Sanchez—an experienced practitioner—said that this situation had “educated” him on how to handle confidential documents and promised that he would engage in “no repetition of the errors in this case.” A76.

I. The District Court’s Sanction Order

On July 21, 2008, the district court invited the defendants to submit a proposed dismissal order by August 1. R. 266. Salmeron responded by moving for a continuance of that date pending an “ongoing investigation” into who leaked the Agreement to Wikileaks. SA89. Instead of establishing the need for more time, however, the motion (signed by Sanchez’s co-counsel John Moran) argued against the imposition of sanctions.

Contradicting Sanchez’s prior statements, and in conflict with the USA Funds Bates-numbers on the Agreement posted on Wikileaks, Salmeron’s motion argued that there was “no reason to assume” that “any leak of this document to ‘Wikileaks’ came from one of Relator’s attorneys or from any third party to whom the Relator’s attorney might have given it.” SA89. Sallie Mae and ERS both

opposed the continuance, and the district court denied it. SA92; SA95; R. 280. Shortly thereafter, Salmeron voluntarily dismissed USA Funds from the case. R. 289.

The day before the court issued its dismissal sanction order, Salmeron filed an “Opposition to Proposed Dismissal Order,” which was signed by Sanchez’s law partner, Thomas Geoghegan. SA99. Salmeron argued that dismissal was unwarranted because Sanchez had not violated any court order or rule of civil procedure; Sallie Mae had not shown that the Agreement was confidential; and defendants were responsible for some of the delays in this case. SA103-110.

Rejecting these arguments, the district court granted the motion to dismiss with prejudice. A69. In a thorough memorandum opinion, the court placed Sanchez’s disclosure of the Agreement in context by detailing his “virtually unbroken pattern of dilatory and irresponsible conduct.” A70. Based on dozens of factual findings, the court showed that from the beginning of this lawsuit, Sanchez exhibited “a pattern of behavior that involved repeated delays and repeated noncompliance with this Court’s orders.” A71.

With respect to the leak of the Agreement, the court found, *inter alia*, that the copies provided to Wikileaks and the *Chronicle* were “the selfsame document that USA Funds had provided to Sanchez”; under the terms of his agreement with Sweet, Sanchez “was obligated to treat [the Agreement] as being for ‘attorneys’ eyes only’ until such time as a modified protective order could be entered”; Sanchez “has admitted that he released the document to a reporter with the

Chronicle, to an unnamed attorney and to Salmeron herself”; Sanchez offered “totally unconvincing excuses” for his “truly indefensible behavior”; Sanchez demonstrated a “failure to appreciate the seriousness of his actions”; his provision of the Agreement to the *Chronicle* was “willful”; that provision allowed confidential commercial information of Sallie Mae and USA Funds to be disclosed to their competitors and caused them “significant negative publicity”; and the resulting damage is neither “curable [n]or quantifiable.” A82-86.

Based on those findings, the district court concluded that Sanchez’s offense was “truly inexcusable,” in part because “no real explanation has been offered.” A87. The court rejected the contention that Sanchez’s disclosure was permissible because no protective order had been entered. As the court explained, that was “unquestionably due to” Sanchez’s own failure to provide his “promised” modifications to the draft protective order. A88. Citing its inherent authority to address egregious misconduct, and noting that the United States, which had thus far “declined to involve itself,” could still “take up the cudgels [against] any culpable defendant,” the court dismissed Salmeron’s case with prejudice. A88-92.

Three days later, the district court issued a “Supplement” to its memorandum opinion and order. SA1. The court clarified that the dismissal was with prejudice with respect to Salmeron but not to the United States. The court reiterated that the United States is the real party in interest and could “re-enter the battle to pursue its rights even though standard bearer Salmeron has been shot down.” SA2. The court concluded that although “the misdeeds of Salmeron’s

counsel (and possibly Salmeron herself)” justified revoking the “privilege of sharing in the proceeds of any recovery,” the government’s rights were not terminated by the dismissal order. SA2-3.

Having received the district court’s dismissal order and supplement, the government has not sought to “re-enter the battle” and has expressly declined to participate in this appeal. See No. 08-3375, Dkt. # 7-8.

SUMMARY OF THE ARGUMENT

I.

The district court did not abuse its discretion in dismissing Salmeron’s lawsuit as a sanction for her attorney’s misconduct. Courts have inherent authority to impose a dismissal sanction for egregious misconduct and bad faith. Sanchez’s leak of the Agreement certainly qualifies. He breached his “attorneys’ eyes only” agreement with USA Funds by unilaterally providing the Agreement to a reporter, to a lawyer unconnected to this case, and to Salmeron herself. Sanchez admittedly did not tell the lawyer the Agreement was confidential (SA73), and he never indicated that he told the *Chronicle* or Salmeron to keep it confidential. Those disclosures were at least objectively reckless, resulting in a posting on Wikileaks for which Sanchez—and therefore Salmeron—bears ultimate responsibility. Sanchez initially denied that he had leaked the Agreement, only to backtrack when he could not sustain that position, and these inconsistencies have proliferated with each submission. To this day, Salmeron has not provided a plausible explanation for her counsel’s leak of the Agreement. We do know,

however, that the leak was the culmination of a longstanding pattern of noncompliance by Salmeron's attorneys, for which they had been duly warned by the district court.

II.

None of Salmeron's purported justifications or excuses for her attorney's misconduct can withstand scrutiny. She now argues that the First Amendment protects the leak of the Agreement and bars sanctions. But that argument is waived because Salmeron never raised it to the district court, and, in any event, there is no First Amendment right to breach an agreement to maintain the confidentiality of documents produced in discovery and not filed in court. Salmeron claims that her counsel violated no protective order or discovery rule. But it is well settled that dismissal may be ordered as a sanction for bad-faith abuse of the judicial process notwithstanding any such violation. Compliance by attorneys with their agreements and representations is essential to the proper functioning of our civil litigation process, as are meaningful sanctions for failures to comply. Salmeron contends that the district court should have issued more warnings before dismissing her case. But warnings are not always required where the conduct is so egregious and the consequences so irremediable that a dismissal sanction should have been expected, and in any event the court previously had given Salmeron's attorneys a "final warning" about their pattern of misconduct. Finally, Salmeron claims that dismissal was an unduly harsh sanction. But it was proportionate to the offense, imposed only after due deliberation and

consideration of lesser sanctions, and in the circumstances well within the district court's considerable discretion. Moreover, the United States, the true party in interest, retains its right to pursue this claim (which thus far it has shown no interest in doing).

III.

Salmeron also complains that three of the many factual findings made by the district court to support its sanctions order were clearly erroneous. She is wrong. She first contends that no evidence supports the existence of the Sanchez-Sweet agreement to keep certain produced documents confidential pending entry of a modified protective order. But in the district court Salmeron never denied the existence of that agreement, and Sweet's unrebutted affidavit on that score is more than enough to sustain the district court's finding. Salmeron next contends that the district court erroneously found that the Agreement contains trade secrets. In fact, Sanchez's own misconduct prevented the district court from ever having an opportunity to evaluate whether the Agreement contained information subject to protection. Under the terms of the proposed protective order, the defendants would have been required to establish good cause for protecting the Agreement, and Salmeron could have opposed protection; instead, Sanchez circumvented the entire process by unilaterally disseminating the Agreement. Finally, Salmeron contends that the district court erred in finding that Sanchez acted willfully. But even if willfulness were required to support a dismissal sanction (it is not because bad faith or fault is enough), Sanchez repeatedly

admitted that he deliberately gave the Agreement to a news reporter and others, thereby supporting the district court's finding of willfulness.

ARGUMENT

Standard of Review. “Findings of fact must stand unless clearly erroneous, and a district judge’s decision that a party’s misconduct is serious enough to justify dismissal with prejudice is reviewed for abuse of discretion.” *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Am., LLC*, 516 F.3d 623, 625 (7th Cir. 2008). “Abuse of discretion exists only where the result is not one that could have been reached by a reasonable jurist or where the decision of the trial court strikes us as fundamentally wrong or is clearly unreasonable, arbitrary, or fanciful.” *Greviskes v. Univ. Research Ass’n*, 417 F.3d 752, 758 (7th Cir. 2005). In other words, sanctions must be upheld unless it is “clear that no reasonable person would agree [with] the trial court’s assessment of what sanctions are appropriate.” *Marrocco v. General Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992). “Most are unable to meet so demanding a standard.” *Id.*

I. The District Court Did Not Abuse Its Discretion By Imposing Dismissal As A Sanction For Sanchez’s Misconduct.

As demonstrated below, courts have inherent authority to impose dismissal as a sanction to punish and deter abusive conduct, and Sanchez’s conduct was sufficiently egregious to warrant that sanction.

A. Courts have inherent authority to order dismissal as a sanction for bad-faith or other abusive conduct.

District courts have inherent power to control proceedings before them, a power that “extends to a full range of litigation abuses.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); accord *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003). For that power to be meaningful, courts must be able to order dismissal in appropriate circumstances. As the Supreme Court has explained, the dismissal sanction is an important tool of district courts, “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). And this Court has added that “the power to sanction through dismissal is essential to the district courts’ ability to manage efficiently their heavy caseloads and thus protect the interests of all litigants.” *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1177-78 (7th Cir. 1987).

B. Sanchez’s egregious misconduct warranted dismissal.

If a dismissal sanction was proper for an attorney’s failure to appear at a pretrial conference, as the Supreme Court held in *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962), *a fortiori* such a sanction was within the district court’s discretion for the far more egregious conduct exhibited here by Salmeron’s counsel.

The egregiousness of Sanchez’s conduct is manifest. After agreeing to maintain identified documents for “attorneys’ eyes only” until a draft protective

order could be presented to the district court, and after the produced Agreement was expressly identified as such a document, he handed it over to a reporter with an axe to grind, to a lawyer with no connection to this case, and to his client. Whether or not Sanchez intended that the Agreement be posted on Wikileaks, he cannot have been surprised that the Agreement would be further disseminated, he did nothing to prevent that public dissemination, and it is undisputed that the Bates-stamped Agreement posted on Wikileaks had to come from him or one of his distributees.

Egregious misconduct warrants a severe sanction. In *Greviskes*, 417 F.3d at 759, this Court instructed district courts to “consider the egregiousness of the conduct in question in relation to all aspects of the judicial process.” In *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993), this Court upheld a dismissal sanction due in part to “[t]he egregious conduct of the plaintiff’s lawyers in this case.” And in *National Hockey League*, 427 U.S. at 643, the Supreme Court upheld a dismissal sanction for “flagrant bad faith” and “callous disregard” of counsel’s responsibilities.

Salmeron argues as though breaching a confidentiality agreement between attorneys is a minor lapse worthy of no more than a slap on the wrist. But attorneys must be able to rely on such agreements if civil litigation is to operate smoothly (and indeed remain civil). Thus, this Court requires attorneys practicing in this Circuit to “adhere to all express promises and to agreements with other counsel, whether oral or in writing.” *Standards for Professional*

Conduct Within the Seventh Federal Judicial Circuit, Lawyers' Duties to Other Counsel, ¶ 6.³ Sanchez's bad-faith breach of his agreement with USA Funds' counsel cannot be reconciled with that standard. Attorneys must have confidence that their counterparts' promises will be kept in good faith, and rigorous sanctions must be available when they are not.

Salmeron offers numerous excuses for Sanchez's conduct, which we address below in Part II. But even if Sanchez thought that disclosure to the *Chronicle* and others was somehow justified (which beggars belief), the way he did it underscores his bad faith. He did not alert defendants' counsel to the fact that he was about to publicly disseminate the Agreement, nor did he ask the district court for leave to do so or to deem the Agreement disclosable. Sanchez acted unilaterally and secretively, saying not a word to anyone about it until he was caught and exposed.

Sanchez's misrepresentations and constantly changing story confirm the propriety of the imposed sanction. See *Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305, 308 (7th Cir. 2002) (affirming dismissal sanction for lying as "a classic judgmental ruling"). The first court document he filed on this issue said that the Agreement "apparently has been leaked and published without plaintiff's counsel's knowledge or approval." SA61. Only when Judge Shadur questioned that statement in open court did Sanchez admit that he gave it to the *Chronicle* and others. A26-A28. See *Greviskes*, 417 F.3d at 759 (failure to "admit

³ <http://www.ca7.uscourts.gov/Rules/rules.htm#standardsothercounsel>.

* * * initial wrongdoing to the district court” evinced bad faith). The story kept evolving and has changed again in this Court. But the one consistent thread is that Salmeron has **never** explained why Sanchez gave the Agreement to the *Chronicle*, why he gave it to a lawyer with no connection to this case, why he did not tell the lawyer (and presumably the other distributees) that the Agreement was subject to a confidentiality agreement, and why he initially denied having any knowledge that it was leaked and published. The district court rightly was troubled by this lack of any “real explanation.” A87. See *Toon v. Wackenhut Corr. Corp.*, 250 F.3d 950, 954 (5th Cir. 2001) (affirming sanctions where counsel offered “no credible justification” for publicizing confidential settlement agreement). The court’s dismissal sanction was fully warranted in these circumstances, just as it was in *Ridge Chrysler*, 516 F.3d at 626, where this Court noted that the plaintiff had “lied to Judge Andersen” and, when he was caught, “filed another affidavit taking another tack.” Here, as in *Ridge Chrysler*, “[t]he district court didn’t have to buy the latest story.” *Id.*

Sanchez’s blatant violation of his agreement with USA Funds’ counsel, his repeated misrepresentations, and his shifting apologies and excuses all show, as the district court found, a “failure to appreciate the seriousness of his actions.” A84. Moreover, as the court also found, the unauthorized disclosure of the Agreement’s terms to competitors of the contracting parties is neither “curable [n]or quantifiable.” A86. Given this record, dismissal proportionately fit the

crime. The court could have no confidence that a fine or other lesser sanction would serve as a deterrent or uphold the integrity of the judicial process.

The propriety of the court's dismissal sanction is bolstered by the sad sequence of missed deadlines and failures to appear at scheduled hearings that led to the earlier "shot across Salmeron's bow" dismissal for want of prosecution. A70-A78; A87. Even after the earlier dismissal without prejudice, Salmeron's attorneys continued their "extended pattern of noncompliance." A18. Three months after being fined as a sanction for that noncompliance, Sanchez still had not paid the fine. A65; A81. Sanchez also falsely represented to the court that he had held a required meet-and-confer conference before moving to compel discovery. A81; R. 264, at 8-9. And he disobeyed the court's instructions to voluntarily dismiss the three defunct Sallie Mae affiliates as defendants. A86. Salmeron's assertion (Br. 41) that "Sanchez did not miss any more deadlines and attended all scheduled court conferences" after May 21, 2008 disregards this continued flouting of the court's orders and rules. The court would have acted within its authority if it had dismissed Salmeron's case on that basis alone. See *Martinez v. City of Chicago*, 499 F.3d 721, 727-28 (7th Cir. 2007) (affirming dismissal for "pattern of delay and noncompliance"); *Greviskes*, 417 F.3d at 759 (upholding dismissal sanction given "record of delay"); *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 352 (9th Cir. 1995) (dismissal "the only real alternative" where plaintiff shows "abiding contempt" and "continuing disregard" for court orders). Instead, the court dismissed only when Sanchez's

pattern of misconduct reached its nadir with his unilateral public disclosure of the Agreement in breach of his promise to keep it for “attorneys’ eyes only.”

II. Salmeron’s Arguments For Reversal Lack Merit.

Salmeron seeks to persuade this Court that the public disclosure of the Agreement was not a sanctionable wrong or that dismissal was too harsh a sanction. But the Court would be obliged to affirm even if it would not “as an original matter have dismissed the action” so long as the district court did not abuse its discretion. *Nat’l Hockey League*, 427 U.S. at 642 (courts of appeals must resist their “natural tendency” to be influenced in hindsight by the severity of dismissal as a sanction); accord *Ball*, 2 F.3d at 760. We demonstrate below that Salmeron has not come close to showing the required abuse of discretion.

A. Salmeron’s First Amendment argument is waived and in any event meritless.

Salmeron contends (Br. 26-31) that Sanchez had a First Amendment right to breach his agreement with USA Funds’ counsel and unilaterally distribute the Agreement to the *Chronicle* and others. But Salmeron did not raise a First Amendment argument in any of her numerous filings in the district court, much less contend, as she does now (Br. 31), that “the district court’s dismissal sanction was unconstitutional.” Salmeron’s First Amendment argument is therefore waived on appeal. *Metzger v. Illinois State Police*, 519 F.3d 677, 681-82 (7th Cir. 2008) (“if a party fails to press an argument before the district court, he waives the right to present that argument on appeal”).

Furthermore, Salmeron's First Amendment argument is misplaced because disclosure of information obtained through discovery may be restrained without violating the First Amendment. Salmeron cites cases recognizing the public's right to access court documents. But that right pertains to documents filed in court, not to discovery exchanged between litigants. As the Supreme Court has explained, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information" and therefore do not implicate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). This Court too has recognized that "the media's right of access does not extend to information gathered through discovery that is not part of the public record." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994). The rationale is that discovery may produce "information that not only is irrelevant but if publicly released could be damaging to reputation and privacy." *Seattle Times*, 467 U.S. at 35.

Salmeron relies on inapplicable cases that involved court-filed documents. For example, *Citizens First National Bank v. Cincinnati Insurance Co.*, 178 F.3d 943 (7th Cir. 1999), addresses whether a court-filed appendix should have been sealed pursuant to a protective order. And *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000), which also addresses court-filed documents, expressly distinguishes discovery materials: "Portions of discovery may be conducted in private to expedite disclosure. Much of what passes between the parties remains out of public sight because discovery materials are not filed with the court"

(citation omitted). See also SA50-51 (Christopher Carmichael, *The Misunderstood Protective Order*, Circuit Rider 27, 29 (June 2008) (presumption of access to court records does not apply to materials exchanged in discovery)).

Salmeron argues (Br. 27) that because no protective order covering the Agreement had been entered, she was free to disclose the Agreement to whomever she chose. But confidentiality agreements by their very nature represent a voluntary waiver of the parties' First Amendment rights. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (upholding damages for breach of "self-imposed" contractual restrictions on freedom of speech). And Salmeron ignores the actual circumstances here, including Sanchez's agreement with Sweet not to disclose the Agreement to anyone other than Salmeron's counsel pending entry of a protective order; Sanchez's own responsibility for the delayed presentation of the proposed protective order to the court; and the fact that Sanchez's leak of the Agreement to the press and others prevented the district court from having an opportunity to consider the propriety of a protective order and confidential status for the Agreement. See *Marrocco*, 966 F.2d at 223 (plaintiff could not fault defendants' inability to explain what evidence would have shown where plaintiff wrongly tampered with evidence before defendants could review it).

Salmeron (Br. 29) also tries to justify Sanchez's conduct based on the purported "public interest" in the contents of the Agreement. She argues (Br. 29-30) that the Agreement is a matter of public interest because of an inquiry into

whether a contract between Student Assistance Corporation (a subsidiary of SLM Corporation) and USA Funds for default aversion services after Sallie Mae acquired substantially all the assets of USA Group, Inc. (former owner of USA Funds) violated a federal regulation. But as she concedes (*id.*), the Department of Education (in a December 28, 2004 letter) formally rejected the view of the Department's Office of Inspector General that the regulation was violated. The notion that an inquiry in which the Department of Education found no violation somehow gave Sanchez the unilateral right to disclose the terms of a confidential contract obtained in discovery is groundless. Moreover, Sanchez did not try to justify his conduct on that basis in the district court.

Salmeron further argues (Br. 30-31) that a reference to the Agreement in an affidavit filed in the district court by a USA Funds official somehow gave Sanchez the right to hand over the Agreement to the media. But the affidavit does not disclose the terms of the Agreement and certainly did not authorize Sanchez to do so. See R. 195-3 ¶ 5. Salmeron suggests (Br. 31) that the filing of this affidavit "bolstered Mr. Sanchez's understanding that the Agreement was not confidential." But furthering the public interest was not among Sanchez's own explanations for his conduct to Judge Shadur (indeed, he admitted he exercised "bad judgment" (A34)), and Salmeron should not be permitted to put words in his mouth on appeal.

B. The absence of a protective order did not justify Sanchez's dissemination of the Agreement.

Salmeron claims (Br. 31) that the district court improperly placed the burden on her to show good cause for protecting the Agreement from disclosure. In fact, the district court never made *any* ruling on “good cause” because Sanchez leaked the Agreement before a protective order could be entered and the district court could be given an opportunity to determine whether the Agreement should be protected.

First, Sanchez repeatedly insisted on modifications to the draft protective order but failed to provide his promised changes. Then, with no protective order in place due to Sanchez's “failure to provide a response as he had promised” (A88), he unilaterally provided a copy of the Agreement to a newspaper and others. Thus, the district court's supposed failure to determine whether there was “good cause” for protecting the Agreement resulted from the very misconduct for which the court sanctioned her attorney. As the district court observed (A88), this is much like the killer of his parents complaining of being an orphan. See *Young v. Gordon*, 330 F.3d 76, 82 (1st Cir. 2003) (“Since Young himself contributed significantly to the bellicose nature of the proceedings, he scarcely can be heard to advance fractiousness as a reason for disregarding the judge's directives”). If Salmeron wished to challenge the proposed protective order or confidentiality status for the Agreement, she should have offered her views to the district court *before* Sanchez engaged in self-help. Having failed to do so, she cannot leapfrog over the district court and seek a ruling on those issues on

appeal. See *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) (“Public disclosure of discovery material is subject to the discretion of *the trial court* and the federal rules that circumscribe that discretion”) (emphasis added).

Salmeron next complains (Br. 32) that the Agreement was not stamped “confidential.” Again, because of Sanchez’s misconduct, there was no protective order in place to authorize such a “confidential” designation. But in any event there was certainly the equivalent of a “confidential” stamp. The cover letters accompanying USA Funds’ production expressly stated that USA Funds “will seek confidential treatment” for the Agreement as soon as a protective order was in place (SA24; SA29), just as Sanchez had agreed with Sweet. In *Greviskes*, too, improperly disclosed information “was not marked ‘Confidential’” and thus the disclosure did “not technically” violate a protective order, but this Court held that, given the plaintiff’s misconduct, the district court “rightfully invoked its inherent authority to dismiss [the] suit.” 417 F.3d at 759. The same is true here.⁴

The cases relied on by Salmeron are inapt. In *Jepson, Inc. v. Makita Electric Works, Ltd.*, 30 F.3d 854 (7th Cir. 1994), the Court held that a protective order should not have been entered absent a showing of good cause. Here, no protective order was entered due to the admitted failures of Salmeron’s counsel.

⁴ Salmeron inaccurately asserts (Br. 33) that “USA Funds has acknowledged that its failure to identify certain documents clearly as confidential was its own ‘administrative error.’” The record does not indicate what USA Funds meant by the reference to “administrative error” in the cited e-mail, but it appears to refer to a copying error that resulted in the omission of a page from the produced copy of the Agreement. See SA65.

In *Hobley v. Burge*, 2005 WL 256481, at *7 (N.D. Ill. Jan. 21, 2005), the court refused to sanction an attorney for allegedly discussing a confidential police file with the media because it found that the attorney “did not, in fact, discuss the content of [the] file.” In contrast, Sanchez admitted giving copies of the Agreement to a news reporter and other third parties.

Salmeron next argues (Br. 33) that the district court lacked authority to dismiss her case where there had been no violation of a specific discovery order or procedural rule. But a court’s inherent authority to impose a dismissal sanction for bad-faith conduct is independent of its authority under specific rules or statutes. *Chambers*, 501 U.S. at 46 (courts have the power to order “outright dismissal” whether or not a statute or rule of procedure specifically provides for sanctions); accord *Mañez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 585 (7th Cir. 2008). Thus, for example, in *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981), this Court affirmed a dismissal sanction despite the plaintiff’s “literal compliance” with discovery and protective orders. Because the plaintiff “had a duty not only to comply minimally with what was ordered, but to assist in the resolution of the suit,” the Court rejected its “technical arguments” for why “its conduct was acceptable.” *Id.* at 581.

Here, Sanchez was sanctioned primarily for bad-faith misconduct—in particular, for violating his agreement with USA Funds’ counsel not to disclose the Agreement before the district court had an opportunity to determine whether it should be protected. Whether that misconduct also violated a specific rule or

order is beside the point. “A court, under its inherent powers, may sanction conduct that it finds to be an abuse of the judicial process,” including conduct “in bad faith.” *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 386 (7th Cir. 2008); see also *Wade v. Soo Line R.R.*, 500 F.3d 559, 564 (7th Cir. 2007) (affirming dismissal sanction for attorney’s bad faith in concealing documents that favored adversary); *Greviskes*, 417 F.3d at 758-59 (upholding dismissal sanction for “bad faith” conduct under court’s “inherent authority”).

Salmeron’s cited cases (Br. 34) do not suggest otherwise. In *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 391 (7th Cir. 2002), this Court held that a district court could not impose a sanction of attorneys’ fees as a substitute for a punitive damages award that state law barred for breach of contract. Nothing of the sort is at issue here. In *Kovilic Construction Co. v. Missbrenner*, 106 F.3d 768, 773-74 (7th Cir. 1997), this Court reversed a sanction for failing to file required appearance and ethical conduct forms because the attorney was merely “negligent” and not “in bad faith.” Here, in contrast, there can be no plausible contention that Sanchez’s far greater misconduct—deliberately providing the Agreement to the *Chronicle* and the unnamed out-of-state-lawyer in violation of his agreement with Sweet—was merely negligent.

C. The district court was not required to provide further warnings to Sanchez before ordering dismissal.

Salmeron contends (Br. 35) that the district court abused its discretion by imposing its sanction “without warning.” She is wrong as a matter of both law and fact.

A prior warning is not required before a sanction may be imposed in every case. A court “is not required to fire a warning shot” where, as in this case, the defaulting party’s conduct was “egregious” and “her dealings with the court were less than honest.” *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987). In particular, dismissals without warning are appropriate in cases where “counsel must have *expected* his actions (or inaction) to be answered with dismissal.” *In re Bluestein & Co.*, 68 F.3d 1022, 1026 (7th Cir. 1995) (emphasis added); accord *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998).

That was certainly the case here. Sanchez should have expected a stiff sanction for handing over a document that he had agreed to keep confidential to a newspaper reporter, as well as to an attorney unconnected to this case without telling him to keep it confidential. Indeed, the fact that he did so surreptitiously confirms that he knew he was engaging in serious wrong. Moreover, Sanchez’s misconduct was not only egregious but non-curable. The information revealed by the *Chronicle* and Wikileaks to the world (including competitors of USA Funds and Sallie Mae) cannot be unrevealed, as Sanchez had to know when he disseminated the Agreement. Further, Sanchez already had been sanctioned and

received a “final warning” for his “extended pattern of noncompliance.” A18. Both Salmeron and her attorneys were thereby on notice that continued abuse of the judicial process could lead to dismissal. They cannot legitimately have expected anything less than dismissal in these circumstances.

The prior “shot across Salmeron’s bow” (A87) also refutes her contention that she received no warning before the dismissal sanction was imposed. In addition to that “final warning,” Salmeron and her attorneys were given multiple opportunities to explain both in open court and in written submissions why she should not be sanctioned and why she should receive a lesser sanction than dismissal. See *supra*, pp. 8-11. As this Court has instructed, while “due warning” is normally warranted, “[d]ue warning’ need not be repeated warnings and need not be formalized in a rule to show cause. A judge is not obliged to treat lawyers like children.” *Ball*, 2 F.3d at 755.

D. The sanction was not unduly harsh.

Salmeron contends (Br. 45) that dismissal was an “unduly harsh” sanction in this case. She is wrong. The district court did not abuse its discretion in ordering dismissal in these circumstances.

To be sure, dismissal is draconian. But as this Court has explained: “Draco got it right every once in awhile, and today, when district courts have several hundred cases on their dockets, there are times when the ‘draconian’ remedy is appropos.” *Banco Del Atlantico, S.A. v. Woods Indus. Inc.*, 519 F.3d 350, 354 (7th Cir. 2008) (upholding dismissal sanction for intentionally impeding discovery).

Certainly the dismissal sanction should be employed sparingly. But it may be justified based on “the egregiousness of the conduct in question.” *Dotson*, 321 F.3d at 667. “There are species of misconduct that place too high a burden for a court to allow a case to continue.” *Id.* at 665. In particular:

[M]isconduct may exhibit such flagrant contempt for the court and its processes that to allow the offending party to continue to invoke the judicial mechanism for its own benefit would raise concerns about the integrity and credibility of the civil justice system that transcend the interests of the parties immediately before the court.

Id. at 668 (upholding dismissal sanction “not only to reprimand the offender, but also to deter future parties from trampling upon the integrity of the court”).

Sanctions should be proportionate, that is, fit the crime. But dismissal is not disproportionate as a sanction for “an abuse of the federal court’s process.” *Ridge Chrysler*, 516 F.3d at 626. In many cases, only dismissal would be likely to deter parties and their attorneys from similarly trampling on the integrity of the judicial process in the future. That is particularly true where, as here, the damage inflicted by the misconduct is irremediable.

The district court did not impose the dismissal sanction lightly. In *Wade*, 500 F.3d at 564, this Court thought it significant, given the abuse of discretion standard, that the district court “recognized that dismissal should not be used lightly” and that “[t]he punishment should fit the crime.” Here, too, after comprehensively reviewing the relevant facts, the district court explained why dismissal was the appropriate and proportionate sanction for Sanchez’s misconduct in light of the applicable law. A87-90. As the court concluded, “[i]t is

truly inexcusable, no real explanation has been offered, and its damaging effect cannot be quantified.” A87. “Thoughtful consideration of this kind is the antithesis of abuse of discretion.” *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223-24 (7th Cir. 1991) (affirming default judgment sanction); see *Ball*, 2 F.3d at 760 (upholding dismissal sanction based on the “deference that we accord to the discretionary rulings of an able and experienced district judge”).

Salmeron’s assertion (Br. 51) that the district court “refused to consider the availability of lesser sanctions” is flat wrong. Sanchez himself proposed a fine or a bar on using the Agreement, which the district court considered and reasonably deemed insufficient. A34; A84; SA76; A87-91. The district court’s choice of sanction must be upheld if not an abuse of discretion even if this Court “might” have imposed a lesser sanction. *Roadway Express, Inc. v. U.S. Dep’t of Labor*, 495 F.3d 477, 484-85 (7th Cir. 2007); accord *C.K.S. Eng’rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1209 (7th Cir. 1984). In any event, Salmeron offers no plausible reason why a mere fine would have been sufficient given the egregiousness of Sanchez’s misconduct, the importance of deterring future misconduct of that sort, and the centrality of attorney integrity to the judicial process. And a court “is not required to impose graduated sanctions—what in labor relations is termed ‘progressive discipline’”—where the circumstances warrant dismissal. *Ball*, 2 F.3d at 756.

Salmeron complains (Br. 48) that the district court dismissed a “likely-meritorious” lawsuit based on attorney misconduct “that had no meaningful

impact on * * * the litigation.” First, the alleged meritoriousness of a lawsuit cannot possibly give an attorney *carte blanche* to engage in reprehensible behavior. Second, her evidence of meritoriousness is far from compelling. She notes that defendants’ motions to dismiss had been denied, but such Rule 12 rulings say nothing about whether she would have been able to prove her allegations. She also relies on the United States’ declaration of a strong interest, but she ignores the fact that the United States has repeatedly declined to participate in this case. *E.g.*, R. 9; R. 159.

As for Salmeron’s assertion that the misconduct had no impact on the litigation, the only plausible explanation for why Sanchez publicly distributed the Agreement was to exert settlement pressure on USA Funds and Sallie Mae, *i.e.*, to impact the litigation. He was prevented from attaining that goal only because he was caught and sanctioned. In other words, the only reason his leak has not had an impact on this litigation is because the district court prevented such impact by dismissing the case.

To prevent such extra-judicial impact on litigation, a district court’s sanctioning power unquestionably extends to conduct that takes place “beyond the courtroom.” *Chambers*, 501 U.S. at 57. Here, Sanchez’s misconduct took place both in the litigation (breaching the discovery agreement made with Sweet) and outside it (leaking the Agreement to the *Chronicle* and others). Salmeron’s reliance on *Barnhill v. United States*, 11 F.3d 1360 (7th Cir. 1993), is misplaced. There the Court rejected a dismissal sanction as too severe where the conduct in

question—the delayed appearance of a peripheral witness at trial and an attorney’s lack of forthrightness on that point—did not undermine “the integrity of the judicial system” or have any “prejudicial effect” on the other parties. *Id.* at 1370. Here in contrast, where the misconduct was far more egregious and prejudicial, without a severe sanction the integrity of the judicial process would have been severely undermined.

Salmeron also asserts (Br. 48) that dismissal was too harsh because she is “totally blameless.” Courts have repeatedly rejected such contentions, explaining that parties must take responsibility for the conduct of the attorney-agents they engage. In *Link*, 370 U.S. at 633-34, the Supreme Court found “no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.” This Court reiterated that principle in *Ball*, 2 F.3d at 756, explaining that “dismissal for failure to prosecute is an appropriate sanction for lawyers’ delays and defaults even if the plaintiff is blameless; the sins of the agent can be visited upon the principal.” Accord *Wade*, 500 F.3d at 564; *Martinez*, 499 F.3d at 728; *Roland*, 811 F.2d at 1180. The fact that Salmeron did not replace her attorneys after the earlier dismissal had notified her of their pattern of wrongful conduct simply underscores her responsibility for their further misconduct.

Salmeron's further assertion (Br. 48) that dismissal was too harsh because it may deprive the Government of recompense is without merit. The district court stressed in both its dismissal order (A91) and its Supplement thereto (SA1-SA3) that the dismissal of Salmeron's case does not prevent the Government from bringing suit, and the Government has declined all invitations to do so. Salmeron's suggestion (Br. 50) that the statute of limitations stands in the way of a Government suit ignores the fact that the United States is on the service list in this litigation and appeal, has been served with the district court's dismissal orders and all related filings, and has shown no interest in bringing suit. And Salmeron's assertion that the Government had to give written consent to dismissal is baseless. The Government effectively consented by not seeking to take the helm, and in any event the statutory consent requirement "does not apply to involuntary dismissals." *United States ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 n.1 (2d Cir. 2004); see also *United States ex rel. Shaver v. Lucas Western Corp.*, 237 F.3d 932, 934 (8th Cir. 2001) ("the Attorney General's consent is required only where the relator seeks a voluntary dismissal"); *Minotti v. Lensink*, 895 F.2d 100, 103 (2d Cir. 1990).

In *Ridge Chrysler*, 516 F.3d at 627, this Court noted that the dismissal sanction against the plaintiff dealer did not affect separate litigation by borrower-victims of the alleged lending discrimination. Here too, the dismissal of Salmeron's case does not bar the Government, which Salmeron recognizes is the "real party in interest" (Br. 49), from protecting its interests.

III. The District Court’s Factual Findings Are Not Clearly Erroneous.

Salmeron challenges three of the district court’s factual findings as clearly erroneous. But she offers nothing to create a “definite and firm conviction that a mistake has been committed” (*NutraSweet Co. v. X-L Eng’g Co.*, 227 F.3d 776, 790 (7th Cir. 2000)), much less one that would affect the propriety of the imposed sanction.

First, Salmeron contends (Br. 35-36) that the court “clearly erred” in finding that Sanchez and Sweet had agreed to keep USA Funds’ designated documents as for “attorneys’ eyes only.” But that argument is waived because neither Salmeron nor Sanchez ever challenged the existence of that agreement in the district court proceeding. To the contrary, Salmeron referred in court papers to the “private out-of-court agreement.” SA100. And when, after learning of the leak, USA Funds attorney Melissa Furrer Miller wrote to Sanchez that “counsel for USA Funds and Salmeron *agreed* at the initial discovery planning conference on November 13, 2006” to maintain USA Funds’ confidential documents as for “attorneys’ eyes only,” Sanchez did not respond that there was no such agreement. SA44-45 (emphasis added). In any event, Sweet’s unrebutted affidavit averment that “Salmeron’s counsel agreed to treat the confidential documents of USA Funds as being for ‘attorney’s eyes only’ until such time as a modified protective order could be entered” (SA21) is more than sufficient to support the district court’s finding.

Second, Salmeron contends (Br. 38) that the district court erroneously found that the Agreement contains trade secrets. But the court simply referenced “trade secrets” in passing when finding that Sanchez’s leaks “publicized” the terms of the Agreement “to USA Funds’ and Sallie Mae’s competitors.” A85. The court did not engage (and cannot have engaged) in a trade secret analysis because Sanchez’s unilateral dissemination of the Agreement deprived the court of an opportunity to determine whether the Agreement contained trade secrets or the “commercial” or other “confidential” information subject to protection under Federal Rule of Civil Procedure 26(c). Thus, the question before the district court was solely the appropriate sanction for Sanchez’s breach of his agreement with USA Funds and his leak of the Agreement—not whether the Agreement contained trade secrets.⁵

Finally, Salmeron claims (Br. 40-45) that the district court clearly erred in finding Sanchez’s misconduct willful. As an initial matter, this Court has rejected the contention that “sanctions should be limited solely to situations where the noncompliance is wilful or deliberate.” *Marrocco*, 966 F.2d at 224. Instead, sanctions may be appropriate “where the noncomplying party acted *either* with wilfulness, bad faith *or* fault. These three measures of culpability are each wholly distinct from one another.” *Id.* (citing *Nat’l Hockey League*, 427 U.S. at 640).

⁵ Salmeron wrongly asserts (Br. 40) that the Agreement could not contain confidential information because federal student loan regulations provide “methods for calculating various fees.” In fact, those regulations address fees paid by the federal government, not the split between private entities like USA Funds and Sallie Mae. See 34 C.F.R. § 682.404.

In any event, the district court had more than sufficient evidence to support a finding of willfulness as well as bad faith. Sanchez expressly stated that “he and only he was responsible for the disclosure of [the Agreement] to third parties.” SA76. Sanchez also admitted that he intentionally gave the Agreement to the *Chronicle* (A26), which he had to expect would publish its terms, and the circumstances support an inference that he did so as a litigation tactic. The willfulness of Sanchez’s conduct is confirmed by his admission that he resisted repeated requests from the *Chronicle* before ultimately deciding (for reasons never explained) to hand over the Agreement. SA72. Sanchez further admitted that he intentionally gave the Agreement to the unidentified out-of-state lawyer without telling him it was confidential. A27; SA73. Sanchez himself suspects that this lawyer gave the Agreement to Wikileaks. A42. Although Sanchez denies responsibility for the Wikileaks posting, the transfer from Sanchez to Wikileaks through the lawyer at least raises a reasonable inference of “laundering.”

Providing the Agreement to the *Chronicle* and the lawyer was certainly objectively reckless with respect to further dissemination, which is enough to constitute willfulness or bad faith. See *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201, 2208-09 (2007) (willfulness includes recklessness); *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006) (“reckless indifference” is sufficient to qualify as “objective bad faith”); *Stive v. United States*, 366 F.3d 520, 522 (7th Cir. 2004) (recklessness is “a near synonym for intentionality”). And even if Sanchez’s “Keystone Kops” story of how he misplaced the cover letters were

accurate (Br. 43-44), his rush to publicly disclose the document without confirming that he was authorized to do so itself supports a conclusion of willfulness or bad faith.

In light of these admitted facts, and Sanchez's failure despite numerous opportunities ever to plausibly explain why he leaked the Agreement, the notion that he was "at worst negligent" (Br. 43) is not credible, and Salmeron's assertion that "there is no evidence" to support a finding of willfulness (Br. 45) is pure bluster. At a minimum, the district court did not clearly err in finding that Sanchez violated his agreement with Sweet willfully and in bad faith. See *Negrete v. National R.R. Passenger Corp.*, 547 F.3d 721, 724 (7th Cir. 2008) (rejecting plaintiff's argument that "his mistakes were innocent" and affirming a dismissal sanction because district court's finding to the contrary was not "clearly erroneous"). That conclusion holds no matter what the evidentiary standard for willfulness, whether the "clear and convincing" standard suggested in *Maynard* or the "preponderance-of-the-evidence" standard suggested in *Negrete*, 547 F.3d at 724 n.1, *Ridge Chrysler*, 516 F.3d at 625-26, and *Wade*, 500 F.3d at 564.

CONCLUSION

The district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendant-Appellee Sallie Mae, Inc. certifies that the foregoing brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,644 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 SP3 in 13-point Georgia.

CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), the undersigned attorney certifies that a copy of the foregoing Brief in native PDF format and all of the supplemental appendix items that are available in non-scanned PDF format were filed electronically with the Court.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on March 25, 2009 two hard copies of the foregoing Brief and Supplemental Appendix were served by hand delivery, and a digital version was served by e-mail, on the following:

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