

1 BAKER HOSTETLER, LLP,

2 *Defendant.*

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5 APPEARING FOR APPELLANTS: STEPHEN M. LOBBIN, SML Avvocati P.C.,
6 San Diego, CA.

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8 APPEARING FOR APPELLEES: PORTER F. FLEMING (Jonathan A.
9 Herstoff, Jason A. Kanter *on the brief*), Haug
10 Partners LLP, New York, NY.

11 Appeal from a ruling of the United States District Court for the Southern
12 District of New York (Analisa Torres, *Judge*).

13 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
14 AND DECREED that the appeal of the judgment entered by the district court on
15 March 11, 2019 is in part DISMISSED and the judgment is AFFIRMED. The order
16 entered by the district court on June 22, 2020, is AFFIRMED. The cross-appeal is
17 DISMISSED as moot.

18 Appellants LCS Group and Stephen Lobbin (generally, "LCS") appeal from
19 a 2019 judgment dismissing LCS's amended complaint and imposing sanctions as
20 well as a 2020 order by the district court adopting a magistrate judge's
21 recommendation as to the amount of sanctions. LCS raises three issues for review.
22 First, it argues that the district court improperly dismissed its breach of contract
23 claim against the defendants (generally, "Shire"); next, that the district court

1 improperly imposed Rule 11 sanctions against it; and, finally, that the attorney's
2 fees awarded as sanctions are excessive. On cross-appeal, Shire argues that the
3 district court erred in finding that the magistrate judge's fee calculation was a
4 report and recommendation rather than a final order. From this premise, Shire
5 urges that LCS's appeal of the amount of sanctions is untimely.

6 On review, we determine that we lack jurisdiction to review the district
7 court's dismissal of the breach of contract claim, and, as to LCS's appeal of the
8 sanctions order, we conclude that the record and procedural history of this case
9 easily demonstrate the appropriateness of the sanctions that the district court, in
10 its discretion, imposed on LCS. Further, in light of LCS's failure to preserve its
11 challenge, we decline to second-guess the amount of attorney's fees that the
12 district court ordered LCS to pay as that sanction. We assume the parties'
13 familiarity with the underlying facts, procedural history, and arguments on
14 appeal, to which we refer only as necessary to explain our decision.

15 **I. LCS's Breach of Contract Claim**

16 In its opening brief, LCS argues at length that the district court erred by
17 dismissing its contract claim. We may not consider the merits of this argument,

1 however, because LCS did not file a timely notice of appeal as to the judgment.
2 Accordingly, we lack jurisdiction to review the dismissal.

3 Federal Rule of Appellate Procedure 4(a)(1)(A) requires that a notice of
4 appeal be filed within thirty days of the entry of judgment. This requirement is
5 jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 210 (2007).

6 The Supreme Court has further held that “a decision on the merits is a ‘final
7 decision’ for purposes of [appeal] whether or not there remains for adjudication a
8 request for attorney's fees attributable to the case.” *Budinich v. Becton Dickinson &*
9 *Co.*, 486 U.S. 196, 202–03 (1988). This court has found that subsequent motions for
10 Rule 11 sanctions generally do not render a merits decision non-final. *Johnson v.*
11 *Univ. of Rochester Med. Ctr.*, 642 F.3d 121, 124 n.3 (2d Cir. 2011) (per curiam). Unless
12 the sanctions order is “inextricably intertwined” with the merits of the case (as
13 discovery sanctions may be), a pending sanctions motion does “not extend the
14 time to appeal the merits judgment.” *Id.*; see *Cooper v. Salomon Bros. Inc.*, 1 F.3d 82,
15 85 (2d Cir. 1993) (“[W]e hold that we may exercise jurisdiction over the final
16 decisions rendered in this case even though we lack jurisdiction over the Rule 11
17 question.”).

1 On March 11, 2019, the district court entered judgment dismissing LCS's
2 amended complaint, including its breach of contract claim, and granting Shire's
3 motion for sanctions. In the same order, the district court ordered that LCS pay
4 Shire's attorney's fees as sanctions. It did not set an amount, however. The present
5 appeal was filed on July 22, 2020, over a year past the thirty-day deadline that was
6 triggered by the March 2019 entry of judgment. As a result, we lack jurisdiction to
7 review the dismissal of LCS's breach of contract claim.

8 LCS offers two counterarguments, neither persuasive. First, it argues that
9 the district court's March 2019 judgment was not final because the judgment "dealt
10 with intertwined, interlocutory issues" and did not determine the sanctions
11 amount. Appellant Reply 8 n.5. LCS does not explain, however, why the issue of
12 sanctions and the breach of contract claim are either "intertwined" or
13 "interlocutory." The district court analyzed the motion to dismiss and motion for
14 sanctions separately, and its analysis of the former did not rely on its reasoning in
15 the latter. The dismissal order was clear that all claims had been dismissed and
16 that leave to amend had been denied. Nothing about that determination depended
17 on the final calculation of attorney's fees that was part of the sanctions award.

1 Next, in its statements of jurisdiction, LCS suggests that because the district
2 court has entered no single, unified order disposing of both the merits and money
3 award, there is no final judgment to appeal. LCS is apparently arguing that we
4 lack jurisdiction over the appeal that it has tried to bring. Presumably, it envisions
5 that at some future date a “complete” final judgment will be filed, permitting it to
6 appeal the dismissal of its claims. But, as discussed above, a pending Rule 11
7 sanctions determination neither affects the finality of the judgment nor tolls the
8 thirty-day limit to appeal a decision on the merits. *See Cooper*, 1 F.3d at 85.

9 LCS urges the court to take a “practical view” and proceed to address the
10 merits of its appeal notwithstanding these jurisdictional issues, but its arguments
11 are without merit. We are bound by Rule 4 and precedent applying Rule 4. Its
12 appeal of the breach of contract claim dismissal is untimely, and the court lacks
13 jurisdiction to review it.

14 **II. Rule 11 Sanctions**

15 LCS also seeks review of the district court’s sanctions orders under Federal
16 Rule of Civil Procedure 11 against itself and its counsel, Stephen Lobbin. Shire
17 counters that the district court acted within its discretion in imposing sanctions
18 and that this court lacks jurisdiction to consider this component of the appeal.

1 Given the ease with which we can dispose of LCS's argument on the merits, the
2 uncertain statutory jurisdictional posture, and the absence of any related
3 constitutional concern, we will assume jurisdiction and address the merits. Having
4 done so, we hold that the district court did not abuse its discretion by imposing
5 sanctions.

6 **a. Jurisdiction**

7 ***1. Timeliness of LCS's notice of appeal of June 2020 order***

8 In support of its position that this court lacks jurisdiction to review the
9 imposition of Rule 11 sanctions, Shire first asserts that LCS failed to file a notice of
10 appeal within 30 days of the district court's June 2020 order adopting the
11 magistrate judge's ruling as to the amount of attorney's fees owed. The record,
12 however, does not support this claim.

13 After the parties were unable to come to an agreement as to the amount of
14 attorney's fees owed under the sanctions order, the district court referred the
15 matter to a magistrate judge. On June 22, 2020, the district court adopted the
16 magistrate judge's ruling setting the fees at \$133,803.75. On July 7, 2020, LCS
17 moved for reconsideration of that order. On July 22, 2020, thirty days after entry

1 of the district court order, LCS filed a notice of appeal. Although the filed notice
2 was available to download from the court's electronic docket, in the docket entry
3 related to its notice of appeal LCS failed to specify the order from which it was
4 appealing. This resulted in a filing error—that is, the notice of appeal was rejected
5 by the electronic filing system. LCS corrected the error the next day, and its notice
6 of appeal then appeared on the docket as having been filed on July 23.

7 Shire argues that LCS's notice of appeal should be considered filed 31 days
8 after the order. As discussed above, the court has jurisdiction to hear only those
9 appeals filed within thirty days. Fed. R. App. P. 4(a)(1)(A). A timely filed motion
10 for reconsideration, however, tolls the thirty-day deadline. *See* Fed. R. App. P.
11 4(a)(4). LCS filed such a motion 15 days after the order. *See* Fed. R. Civ. P. 59(e)
12 (requiring that motions to amend judgment be filed within 28 days). Thus,
13 whether LCS's appeal was filed thirty or 31 days after the court's June 22 order, it
14 arrived within the newly extended deadline.

15 In response, Shire points to a Fifth Circuit case holding that a motion for
16 reconsideration of sanctions did not toll the time to appeal an order to remand.
17 *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 446 (5th Cir. 1999). In that case,

1 however, the Fifth Circuit reasoned that the sanctions were collateral to the
2 remand order. In this case, the sanctions are the central issue of the order being
3 appealed. Accordingly, we are not troubled by *Anderson*. LCS filed a timely notice
4 of appeal with respect to the June 22 order.

5 ***2. Finality of the magistrate judge's May 2019 ruling***

6 In its cross-appeal, Shire offers a second argument as to why we lack
7 jurisdiction to review the sanctions order. Shire argues that the sanctions ruling
8 became final when the magistrate judge ruled on the amount of attorney's fees,
9 and not when the district court later construed the ruling as a report and
10 recommendation and adopted it. As a result, Shire contends, LCS was required to
11 file a notice of appeal within 30 days of the magistrate judge's May 2019 sanctions
12 ruling, rather than within 30 days of the district court's June 2020 order. Under
13 this analysis, the current appeal is untimely. In making this argument, Shire asks
14 us to resolve a significant question that we declined to decide in *Kiobel v. Millson*—
15 whether “magistrate judges have authority to impose Rule 11 sanctions.” 592 F.3d
16 78, 79 (2d Cir. 2010). We need not resolve this difficult issue now, however, because

1 it is statutory in nature and, accordingly, we may assume hypothetical jurisdiction
2 and proceed to address the appeal's merits.¹

3 Before we may reach the merits of a case, we must generally determine
4 whether we have jurisdiction over the case under Article III of the Constitution.
5 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). When, however, “the
6 jurisdictional constraints are imposed by statute, not the Constitution, we have
7 found it particularly prudent to assume hypothetical jurisdiction where the
8 jurisdictional issues are complex and the substance of the claim is plainly without
9 merit.” *Butcher v. Wendt*, 975 F.3d 236, 242–43 (2d Cir. 2020) (quotation marks and
10 alterations omitted); *see also Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 122–23 (2d
11 Cir. 2020); *Conyers v. Rossides*, 558 F.3d 137, 150 (2d Cir. 2009); *Ivanishvili v. U.S.*

¹ Shire also states, in passing, that we must determine exactly when the sanctions order became final, arguing that the determination is necessary for the related calculation of interest. On the record provided to us, Shire does not appear to have raised this issue in the district court. Shire also fails to address the critical preliminary question that is still open in this circuit—whether, under 28 U.S.C. § 1961, interest on an attorney's fees award begins to accumulate when judgment entitling the party to attorney's fees is entered or at the point of the later calculation of the fees. *See Hubbard v. Total Commc'ns, Inc.*, 623 F. Supp. 2d 270, 271 (D. Conn. 2009) (noting that the issue is unresolved in this circuit and describing the former approach as the “majority rule.”); *Strauch v. Computer Scis. Corp.*, No. 3:14-CV-956 (JBA), 2020 WL 4289955, at *13 (D. Conn. July 27, 2020)); *see also Est. of Calloway v. Marvel Ent. Grp., a Div. of Cadence Indus. Corp.*, 9 F.3d 237, 241 (2d Cir. 1993) (applying § 1961 to Rule 11 sanctions). Accordingly, we deem this argument waived. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (holding that “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived”).

1 *Dep't of Just.*, 433 F.3d 332, 338 n.2 (2d Cir. 2006). This approach allows us to avoid
2 difficult questions of statutory jurisdiction when an appeal has no merit. *See*
3 *Butcher*, 975 F.3d at 242-43. A jurisdictional issue is statutory when it arises from a
4 statute or rule, and not from the Constitution. *See id.*; *Fama v. Comm'r of Corr. Servs.*,
5 235 F.3d 804, 817 n.11 (2d Cir. 2000) (applying hypothetical jurisdiction to avoid a
6 potential jurisdictional question arising from a federal rule of procedure).

7 In this case, we would need to resolve a complex question of statutory
8 interpretation—that is, whether or not magistrate judges are authorized to issue
9 final orders on Rule 11 sanctions—to determine whether LCS's notice of appeal
10 was timely under Federal Rule of Appellate Procedure 4(a). *See* 28 U.S.C.
11 § 636(b)(1)(A); *compare Kiobel*, 592 F.3d at 89-90 (Cabranes, J. concurring) *with id.* at
12 91-95 (Leval, J. concurring) (offering competing statutory analyses of the question).
13 And, as the well-argued concurrences in *Kiobel* make clear, it is a question not
14 easily resolved. Meanwhile, as we discuss below, LCS's substantive arguments are
15 either waived or without merit. Accordingly, because the jurisdictional question
16 raised here does not implicate Article III, we exercise hypothetical jurisdiction and
17 resolve the Rule 11 sanctions issue on the merits.

1 **b. The Merits**

2 The district court imposed sanctions on two grounds. First, the court found
3 that LCS had filed its fraud-related claims with an improper purpose, in violation
4 of Federal Rule of Civil Procedure 11(b)(1). The court ruled that LCS knew its fraud
5 claims were frivolous because they had already been litigated and dismissed in a
6 strongly worded decision in a previous lawsuit brought in the District of South
7 Carolina. Second, the court imposed sanctions under Rule 11(b)(1) and (2) based
8 on its assessment of LCS's RICO claim. It found that "[e]ven a cursory review of
9 RICO case law would demonstrate to a reasonable attorney that LCS's RICO
10 allegations are frivolous," App. 213, and that LCS's conduct regarding the claim
11 indicated an intention to harass Shire.

12 LCS argues that neither of these grounds supports imposition of the
13 sanctions. This court "review[s] the imposition of sanctions for abuse of
14 discretion." *Huebner v. Midland Credit Mgmt., Inc.*, 897 F.3d 42, 53 (2d Cir. 2018).
15 "An abuse of discretion occurs when a district court bases its ruling on an
16 erroneous view of the law or on a clearly erroneous assessment of the evidence, or
17 renders a decision that cannot be located within the range of permissible

1 decisions.” *Id.* (quoting *Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce*
2 *Factory, Ltd.*, 682 F.3d 170, 175 (2d Cir. 2012)).

3 **1. *Fraud claims***

4 First, we consider LCS’s challenge to the sanctions related to its fraud claims.
5 We understand LCS to argue that the district court erred in concluding that the
6 present suit was brought for an improper purpose merely because its previous
7 lawsuit was dismissed. It observes that the current lawsuit involves new claims
8 and different parties. “Thus,” LCS argues, “the prior proceedings did not provide
9 notice that the new claims raised in this action were in any way improper.”
10 Appellant Br. 33.

11 The district court did not find that the breach of contract claims that were
12 raised for the first time in this lawsuit were sanctionable. Rather, it focused on the
13 numerous claims in the amended complaint alleging fraud arising from the same
14 inter partes review proceeding that LCS challenged in the earlier lawsuit. These
15 are the allegations that the District of South Carolina had previously found lacked
16 “any arguable basis in law or fact” and that amounted to “ongoing, abusive use of
17 legal process.” Suppl. App. 39.

1 In the district court, LCS first raised the safe harbor issue in its sur-reply to
2 the motion for sanctions. The district court found that the issue had not been
3 properly raised, but also ruled that it was not a meritorious argument. Generally,
4 “this court has discretion to consider arguments waived below.”² *In re Nortel*
5 *Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (per curiam). The court is
6 more likely to exercise its discretion to consider a waived argument when “either
7 (1) ‘consideration of the issue is necessary to avoid manifest injustice’ or (2) ‘the
8 issue is purely legal and there is no need for additional factfinding.’” *Off.*
9 *Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d
10 147, 159 (2d Cir. 2003) (quoting *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000)).
11 On the other hand, we generally decline to consider arguments on an issue where
12 “there is no justification for the failure to pursue it” earlier. *Patterson v. Balsamico*,
13 440 F.3d 104, 113 (2d Cir. 2006). In this instance, LCS has offered no justification
14 for its delay in raising the issue, and, although the district court ruled on it, the

² Courts, in recent years, have distinguished between waiver and forfeiture. See *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (“Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.”); *United States v. Spruill*, 808 F.3d 585, 596 (2d Cir. 2015) (“This Court, in its discretion, may “correct errors that were *forfeited* because not timely raised in the district court, but no such discretion applies when there has been true *waiver*.”)). Although it may be more accurate to refer to LCS as having forfeited, rather than waived, many of the arguments it raises here, for convenience we refer to both their action and inaction here in terms of “waiver.”

1 parties now contest related factual points in their briefing. Accordingly, we decline
2 to consider the argument. LCS has failed to establish that the district court abused
3 its discretion by imposing sanctions.

4 **III. The Attorney's Fees Award**

5 Finally, we consider LCS's objection to the magistrate judge's calculation of
6 the amount of attorney's fees due as a sanction. Here, again, we do not reach the
7 merits because LCS's argument is waived.

8 Federal Rule of Civil Procedure 72 requires that a party "serve and file
9 objections" with the district judge "within 14 days" if it takes issue with a
10 magistrate judge's order or proposed findings. Fed. R. Civ. P. 72(a). Further, "[the]
11 party may not assign as error a defect in the order not timely objected to." *Id.*; see
12 *Marcella v. Cap. Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002)
13 (reading the timeliness requirement to apply to both Rule 72(a) and (b)). This court
14 has held that "'failure to object timely to a magistrate's report operates as a waiver
15 of any further judicial review of the magistrate's decision.'" *F.D.I.C. v. Hillcrest*
16 *Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995).

1 of contract claim is DISMISSED for want of jurisdiction. The judgment of the
2 district court as to the imposition and amount of sanctions is AFFIRMED. Because
3 we affirm on the merits, Shire's cross-appeal is DISMISSED as moot.

4 FOR THE COURT:

5 CATHERINE O'HAGAN WOLFE, Clerk of Court

A handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written in a cursive style and is positioned over a circular official seal.

The seal of the United States Second Circuit Court of Appeals. It is a circular emblem with a red border. The words "UNITED STATES" are at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom. There are two small stars on either side of the center text.