United States Court of Appeals

for the

Third Circuit

Case No. 20-

EDITA APPLEBAUM

Petitioner

On Review from the United States District Court
for the District of New Jersey
Civil Action No. 2:18-cv-11023-KM-JAD

The Honorable Magistrate Judge Joseph A. Dickson
United States Magistrate Judge

The Honorable Judge Kevin McNulty
United States District Judge

PETITION FOR WRIT OF MANDAMUS

The Perez Law Firm
Santos A. Perez
151 W. Passaic St., 2nd Fl.
Rochelle Park, NJ, 07662
(201)875-2266
Attorney for Petitioner
www.NJLawCounsel.Com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Petitioner has experienced heart-wrenching torment since her husband suddenly passed away, allegedly testate, in November of 2012. Decedent left his late wife, and his *three children*, with resources which would guarantee financial security for a lifetime. These resources included "THC" – a profitable business which grosses *fourteen million dollars* annually, "the Toben/Linden property" - a profitable commercial property appraised at *two million dollars*, and a 401K account valued at *one hundred thousand dollars* of which petitioner was the sole beneficiary. As of even date, however, insolvent petitioner has been *completely* disinherited by defendants, with the approval of a recently appointed probate court judge.

The trauma inflicted upon petitioner began with her husband's untimely death, and was then followed by her discovery of a *four hundred thousand dollar* lawsuit against the executor which nearly caused the liquidation of THC (the "**Sun Bank Fraud Lawsuit**"). This lawsuit led to plaintiff's comprehensive whistleblower activities – for which she was *explicitly* penalized by the probate court at the insistence of the executor and his counsel. To be sure, however, petitioner's comprehensive whistleblower activity - which included hours of consensually recorded "tapes"- in fact let to her discovery that defendants had misappropriated *one hundred thousand dollars* in 401K proceeds - of which she was the sole beneficiary. Further whistleblower activities led to plaintiff's disheartening

discovery of widespread unabated fraud at her late husband's company, e.g.: (**i**) the payroll fraud, which consisted of the payment of an unorthodox and unprovable *six hundred thousand dollar* debt, through fictious THC payroll payments to the order of the executor, and (**ii**) the "fire sale" of the profitable "Toben" commercial property for *eight-hundred-thousand* dollars, despite a recent appraisal of two million dollars – the executor pocketed nearly the entire proceeds of this sale, without Court approval, by using the shell company "*Morey La Rue*" to launder the proceeds.

Petitioner, with the aid of her modest school teacher salary, filed a state court lawsuit in March of 2014. This lawsuit only prompted defendants to brazenly engage in unrestrained litigation-based chicanery. A recently-appointed probate judge effectively ratified defendant's litigation shenanigans, and penalized plaintiff for her whistleblower activities (because she "was digging for dirt" per one witness).

The defendants' probate-court "defense" to petitioner's massive proofs of fraud was indeed rather straightforward: uninhibited, wholesale, spoliation, e.g. fraudulent concealment. In furtherance of this scheme, defendants *inter alia* signed professionally-prepared certifications denying their own prior recorded admissions (e.g. the "tapes"), denying other compelling documentary proofs of fraud (e.g. board meeting minutes), and denying compelling sworn testimony of key witnesses (e.g., testimony of two bankers who characterized the concealment of the executor's financials as being "absolutely" material, as well as testimony by the scrivener of

the last will and testament - who all but asserted that a purported "employment agreement" used by the executor to justify the payroll fraud was itself fraudulent).

In the case of the **Sun Bank fraud lawsuit** against the executor - a prominent well-documented lawsuit which was referenced by all parties *ad nauseum* - the defense attorney in probate court, with the approval of a recently-appointed probate Judge, brazenly personally signed and filed a certification in late 2018 claiming - *three times* - that the five-year-old Sun Bank fraud lawsuit was essentially a figment of petitioner's imagination, that it had *never* been filed. This brazen and deleterious misrepresentation secured defense counsel's nearly *five hundred thousand dollars* in attorney's fees, as it prevented the removal of his financier - the executor - for fraud. This misrepresentation also effectively disguised the executor's unscrupulous skulduggery, as set forth in the detailed Sun Bank fraud complaint counts against the estate. *Ergo*, damages herein include probate court defense counsel fees.

Federal Court, wherein petitioner levied primarily RICO-based spoliation claims, has also turned out to pose formidable obstacles for this petitioner. In fact, in over two years since the filing of plaintiff/petitioner's federal RICO complaint in June of 2018, the district court has issued *not one* substantive ruling, despite plaintiff/petitioner's pending motion to file a second amended complaint, filed in January of 2019, and despite a pending motion to dismiss by defendants, filed twice on December 28, 2018, and the again on February 11, 2019.

RELIEF SOUGHT

This Honorable Court Should Set a Scheduling Order Setting Forth the Time for Resolution of Years-Old Motion to Amend and Motion to Dismiss

The Petitioner respectfully seeks three forms of relief. First, an order directing the district court to rule upon petitioner's motion to file second amended complaint, filed in January of 2019, no later than by November 1, 2020. Second, petitioner respectfully requests an order directing that the district court Judge rule upon respondent's (dispositive) motion to dismiss, filed twice on December 28, 2018, and the again on February 11, 2019, within sixty days of the magistrate Judge's opinion/findings on the motion to amend, and if petitioner or respondent object(s) to the magistrate judge's findings/opinion, that *both* the objections to the magistrate Judge's findings/opinion, as well as the motion(s) to dismiss, be resolved/decided within 60 days of the filing of any objections to the magistrate Judge's findings and/or opinion. Third, to the extent the Court partially dismisses petitioner's federal claims, and leaves other claims intact, that any motion(s) for reconsideration, or motions to certify finality of the interlocutory order, be resolved by the district court Judge within 30 days.

ISSUES PRESENTED

Whether the District Court Should be Compelled to Rule on the Outdated Motions, Whereas Said Court Has Issued No Substantive Rulings In Over Two Years Since the Federal Complaint Was Filed on June 25, 2018.

RELEVANT BACKGROUND

I. A Pyrrhic Endeavor: The State Court Proceedings of March 31, 2014 to Present

A. **Verified Complaint**: Filed on March 31, 2014 in Middlesex County Superior Court, Chancery Division, Probate Part

The petitioner filed her initial eleven-count probate court verified complaint on March 31, 2014, less than two years after her husband passed in November of 2012.[1] The lawsuit was filed after plaintiff had engaged in comprehensive pre-litigation whistleblower activities[2], and subsequent to her December of 2013 discharge from her former husband's family-run company (THC) – wherein she was discharged and escorted by the police from the premises[3]. The probate court

[1] APP19, 28, 78, 98.

[2] See APP325, *footnote 13*.

[3] APP114, Federal Complaint, ¶319. The Edison Police Department officers were in fact was aghast that she had been told to leave her former husband's company – despite having committed no crime.

complaint, filed in the (limited jurisdiction) Probate Part of the Middlesex County Superior Court, sought temporary restraints, including the removal of the executor, as well as compensatory damages - excluding damages for spoliation[4]. Despite four motions for the removal of the executor, filed by three different attorneys for the plaintiff/petitioner, the Court refused to remove said executor[5]. The Probate Judge in the first two such motions in fact did not consider or apply the correct legal standard for the removal of a personal representative - instead seeking a compromise[6] which would also incidentally avoid a scandalous *status quo*. The third removal motion, as well as the fourth *reconsideration* motion - which also sought a plenary hearing, were both based on the correct "*clear and definite proof of fraud*" standard for the removal of a personal representative. Both motions were denied by a new probate judge who had been recently appointed. This new probate judge also refused to order a plenary hearing, and he mischaracterized plaintiff's certifications as "useless", while also maintaining that petitioner's overall proofs of

---

[4] APP19, APP98.

[5] APP99, APP242, APP329.

[6] E.g. the issuance of quarterly statements by a personal representative who had been sued for fraud by Sun National Bank, and who readily admitted the 600K payroll fraud in plaintiff/petitioner's "tapes", *infra*. APP118.

fraud constituted "fake news," *infra*. The prior (retired) probate judge, in contrast, had repeatedly asserted a need for a plenary hearing.

B. ***Suppressio Veri***: **The "Sun Bank Fraud Lawsuit"** Against The Executor/Defendant-Respondent Alleging Fraud Exceeding 400k; Petitioner's Consequential Whistleblower Activities and Defendant/Respondent's Brazen Attempts to Conceal This Lawsuit From a New Probate Judge (Spoliation)

The (new) probate judge during the probate proceedings, *circa* late 2018, readily accepted a **clearly frivolous and unethical certification by probate court defense counsel**, who outrageously attempted to conceal the "**Sun Bank Fraud Lawsuit**" in an *exclusive* certification he *personally* signed[7]. This "Sun Bank" lawsuit had accused the executor of rampant fraud, and nearly resulted in the liquidation of decedent's family-run company, THC[8]. The lawsuit was cited *ad nauseum* by all parties at nearly every hearing and in every document, and defined nearly every aspect of petitioner's state court litigation.[9] It was also the catalyst

[7] See April 5, 2019 Proposed Second Amended Complaint, Count XV (Fraudulent Concealment), APP219, 228.

[8] April 5, 2019 Proposed Second Amended Complaint, Count XV (Fraudulent Concealment), APP219, 319, 329 (*Defense counsel himself at a prior hearing with a prior Judge asserted that the Sun Bank lawsuit was essentially catastrophic – as it nearly resulted in the liquidation of THC*).

[9] There are 165 References to the Sun Bank lawsuit in Plaintiff's SAC. See April 5, 2019 Proposed Second Amended Complaint, APP1 to 248.

which prompted petitioner's comprehensive whistleblower activities[10]. Nonetheless, the defense attorney in probate court brazenly *signed* and filed an "exclusive" certification claiming - *three times* - that said Sun Bank lawsuit was essentially a figment of petitioner's imagination, that it had *never* been filed.[11] In fact, however, vast documentary proofs - including defense counsel's attendance at numerous depositions and hearings, *demonstratively* show that defense counsel was *keenly* aware of the Sun Bank lawsuit, and that it had been filed (in his own words, the lawsuit nearly resulted in the liquidation of decedent's profitable company, THC).[12] This effort by probate court defense counsel to conceal the Sun Bank lawsuit from a recently-appointed probate judge essentially constituted (successful) spoliation, *i.e. fraudulent concealment,* of the executor's fraud, in order to protect counsel's own payment of *five hundred thousand dollars* in attorney's fees paid by

---

[10] APP319. Her comprehensive whistleblower activity included consensual recordings of board meetings between 2012 to 2013, *infra*, as well as her two lawsuits. See APP325, *footnote 13* (Comprehensive list of plaintiff's whistleblower activity stemming from the Sun Bank fraud lawsuit).

[11] APP235.

[12] See April 5, 2019 Proposed Second Amended Complaint, Count XV (Fraudulent Concealment), APP219, 228.

the (fraudulent) estate[13]. The probate court Judge readily accepted this, and other outrageous shenanigans.[14]

C. **Probate Court Defendant's Successful Explicit Attempts to Disinherit Petitioner As Punishment for Her Lawsuits and Whistleblower Activities**: Petitioner *And Her Children* Having Been Paid Nothing From the Her Former Husband's Estate In Nearly Ten Years, As a Result of the Probate Court Judge's Draconian Ruling Permitting Her Disinheritance.

The probate Judge during the probate proceedings granted the executor's punitive pleadings, which explicitly sought petitioner's complete disinheritance[15] as punishment for her whistleblower activities.[16] In doing so, the probate Judge did not *specifically* address plaintiff's vast proofs of fraud[17], instead generalizing his

---

[13] APP237.

[14] The probate Judge, in disinheriting plaintiff as punishment for her whistleblower activities, also glossed over a valuation report prepared by plaintiff's expert, who had valued the THC company at a more reasonable market value than defendant's valuation - which defense valuation all but deemed the THC company worthless.

[15] APP114.

[16] In fact, defendants readily set forth *ad nauseum* that they did not want petitioner to inherit 40% of decedent's company, because she would literally "**destroy**" the family company with her lawsuits, APP15, 27-28, 115-116, 149, and because she was "**digging for dirt**." APP162, 199, 180, 192, 324.

[17] I.e., the Judge did not claim that the elements of statutory bank fraud were missing, or that the payroll fraud was missing the element of scienter. He merely generalized plaintiff's vast fraud proofs by literally calling same "fake news", and uttering that she has "no case," or that her certifications were "useless". APP326.

arguments by claiming that plaintiff had absolutely *zero* proofs, and explicitly calling plaintiff's proofs "fake news", while characterizing her certifications as "useless"[18]. Plaintiff's vast proofs of fraud in fact also included the deposition testimony of two bankers, who testified under oath that the FBI could have been called[19] had the bank been alerted to the concealment of the executor's financials, and that the concealment was "absolutely" a material omission[20]. Her proofs also included hundreds of pages of damning and uncontroverted documentary evidence regarding the payroll, and other forms of fraud at decedent's company[21], as well as recordings[22] of various board meetings (the "tapes"). APP325 (footnote 13). In one such board meeting in August of 2013, which was meant to save the company from the Sun Bank fraud lawsuit fallout, the executor brazenly uttered:

> ***We're not reporting anything to anybody at the end of the day. I don't know why I let you record this, but you better erase that part……..you know how Todd owes me all this money, right? If I put that on the corporate books, then Sun Bank would never have loaned us a dime or Wells Fargo. If I put that on the books now, Wells Fargo won't make the loan. So I have to keep everything from me off the books, but if I drop dead, you know, I expect my family to be paid***.

[18] APP326.

[19] APP 48-49.

[20] APP63-64.

[21] APP321, 327.

[22] Recorded with the consent of the executor.

APP 9, 137, 314.

The executor and his counsel in probate court set forth a contemptuous – and clearly fraudulent- defense to this damning utterance, by falsely claiming that this admitted connivance regarding concealment of his financials was in reality a sinister plot to conceal *from plaintiff's children*, at least one of whom was "in" on the plot, the fact that grandma gave the executor *one hundred thousand dollars* in life insurance proceeds she had received as a beneficiary.[23] The recently-appointed probate court Judge readily accepted this, and other outrageous shenanigans, meant to disguise or spoliate the executor's prior (recorded) admission(s) regarding a clear on-going conspiracy to conceal his financials from the world, including the probate court itself[24].

In addition to the foregoing, in permitting the punitive disinheritance of plaintiff/petitioner, the recently-appointed probate Judge accepted the executor's specious certification in which said executor denied (and concealed) *detailed*

[23] APP368, September 11, 2020 Letter to Magistrate Judge Joseph A. Dickson, footnote 5. This outrageous "defense", which constitutes **fraudulent concealment**, was brazenly repeated by probate court defense counsel in the Appellate Division – and reasonably led to the New Jersey Appellate Division declining to hear petitioner/plaintiff's motion for interlocutory review.

[24] APP251.

statements made at a prior (recorded and professionally transcribed) August 29, 2013 meeting of the THC board, at which meeting the executor set forth, with striking specificity, each and every detail of the *six hundred thousand dollar* payroll fraud.[25] The executor also admitted, in interrogatory answers, that he conspired to conceal the payroll fraud from the IRS.[26]

D. **State Court Appeal Filed on September 30, 2019:** Currently Pending; Resolution of This Appeal is Not Necessary for Resolution of Petitioner's Federal Claims, As The Probate Court Lacks Jurisdiction Over Some Federal Claims, E.g., the "Sun Bank Fraud Lawsuit" Spoliation Claim.

The recently-appointed probate court Judge on April 30, 2019 issued a draconian, inhumane, and demonstratively erroneous, final ruling, APP251, which gave the executor the discretion to *punish* plaintiff/petitioner widow by nearly completely disinheriting her, essentially leaving her with a 15% interest in THC by way of a testamentary trust, which trust hasn't paid plaintiff/petitioner – or *her*

[25] APP73 (Detailed August 2013 payroll fraud admission at board meeting), See also APP74 (**April 20, 2016 sworn certification denying, or fraudulently concealing, the admissions made at the August 2013 board meeting**).

[26] APP193 (" *In fact, in interrogatory answers, Mr. Fabian [executor] admitted that he did not begin these fraudulent payroll payments in 2011 because the company was under IRS audit*.")

children - any monies in nearly ten years. **Absent this draconian and punitive final ruling, her effective ownership of the company would have been 55% : 40% direct ownership, and 15% in the trust**.

In sum, the recently-appointed probate court Judge refused to remove the executor, refused to order a plenary hearing, refused to award plaintiff any monetary relief, refused to permit plaintiff's attorney's fees to be paid from the estate, refused to recuse himself, refused to order the deposition of the company accountant despite three motions, permitted the "fire sale" of the "Toben" commercial property through shell company accounting, and he refused to transfer to plaintiff/petitioner 40% of THC, as per the "residuary clause" of decedent's last will and testament. APP251, (April 30, 2019 Final Ruling). The probate Court's punitive final ruling essentially left plaintiff/petitioner – and her children- insolvent, while defendants walked away with millions. A meritorious appeal was filed in September of 2019, which is currently pending before State Court appellate division.

It is respectfully set forth that resolution of the Probate Court appeal is not necessary for resolution of petitioner's Federal claims, as the Probate Court lacks jurisdiction over some Federal claims, e.g., the "Sun Bank fraud lawsuit" spoliation claim, *supra*.

II. **The Federal Lawsuit of June 25, 2018 to Present**

A. **The Federal Lawsuit**: Filed on June 25, 2018, Seeks Relief Under RICO, and Contains New Claims Not Germane to the State Court Appeal, E.g., Spoliation ("Litigation Fraud") Claims.

In *Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014), this Court set forth pertinent guiding tenets:

> **New Jersey's Supreme Court has never recognized the litigation privilege to immunize systematic fraud, let alone fraud calculated to thwart the judicial process.**

Ibid.

Federal Court has also turned out to pose formidable obstacles for this innocent petitioner, as she and her children have been *de facto* permanently disinherited as a result of the substantial delays in her case – and not one plenary hearing or jury trial in nearly ten years of litigation. In fact, in over two years since the filing of plaintiff/petitioner's federal complaint on June 25, 2018, the district court has issued no substantive rulings, despite plaintiff/petitioner's pending motion to file a second amended complaint, filed in January of 2019, and despite a pending motion to dismiss by defendants, filed twice on December 28, 2018, and the again on February 11, 2019.

The original amended federal complaint contains eleven counts which primarily allege RICO claims. The counts also include ERISA claims regarding the

theft of plaintiff's 401K plan in the amount of *one hundred thousand dollars*, Counts V and VI, APP196, as well as a defamation cause of action stemming from defendant's fraud-ridden claims in probate court that petitioner can *literally* singlehandedly "*destroy*" a fourteen-million dollar company with a minority 40% ownership, Count III, APP158. Plaintiff's complaint also includes claims regarding the fraudulent "fire sale" of the "Toben" commercial property for *eight hundred thousand dollars*, despite a recent two million dollar appraisal – and the laundering and subsequent transfer of the sale proceeds to the executor with the aid of shell company "*Morey La Rue*", Count I, ¶345, APP120. The original amended complaint also set forth **spoliation** counts, primarily as wire, mail, and common law fraud RICO predicate acts, Count I, APP29. However, the original amended complaint did not explicitly include "fraudulent concealment" spoliation counts, and more importantly it (inevitably) did not reference the fraud that took place in late 2018, after the federal complaint was first amended, during the final accounting and removal hearings in probate court. *Ergo*, the original amended federal complaint did not include *specific* "fraudulent concealment" claims as to all parties, and it also did not reference probate court defense counsel's *successful* concealment of the Sun Bank lawsuit from a recently-appointed Judge who was not familiar with the significance of said Sun Bank fraud lawsuit – not having been privy to prior hearings regarding that lawsuit. See footnote 38, *infra*. The original federal complaint also

did not (inevitably) reference the company accountant's fraud in probate court which took place in late 2018 – said accountant having brazenly denied in a certification *any* knowledge of the all-encompassing Sun Bank lawsuit.[27]

Ergo, the proposed Second Amended Complaint ("SAC"), filed on April 4, 2019, sought the addition of five additional counts, including the pivotal Count XV, APP219, which set forth fraudulent concealment allegations, both individually and as RICO predicate acts, against all parties. Count XV also set forth RICO and fraudulent concealment allegations against a new party - probate court defense counsel. Count XV, APP219. Collaterally, the proposed SAC also sought *inter alia* SEC Rule 10b-5 amendments, both as it relates to RICO predicate acts and as a distinct cause of action, stemming from the fraudulent transfer and theft of plaintiff's 40% shares in late 2018, early 2019. Count XII, APP212.

The crux of the SAC is thus Count XV, APP216-245, which sought fraudulent concealment amendments against a proposed additional party – probate defense counsel. Consequently, the District Court markedly emphasized the litigation privilege and the Noerr-Pennington doctrine(s) during proceedings relating to the SAC.

[27] APP241. This misrepresentation shielded the accountant, and the executor, from removal. These brazen misrepresentations are also the **proximate cause** of petitioner/plaintiff's formidable damages – as but for same, the executor would have been removed, and damages would have been awarded to plaintiff/petitioner.

B. **Respondent's Pending Motion to Dismiss** filed December 28, 2018, and then again on February 11, 2019.

Respondents filed their motion to dismiss the *amended* complaint in December 28, 2019, and then again on February 11, 2019, after plaintiff/petitioner had filed her cross motion to file a *second amended complaint* ("SAC") on January 22, 2019, and after the District Court had administratively terminated the December 28, 2019 motion to dismiss, pending resolution of plaintiff/petitioner's cross motion to file a SAC. This prompted the Court to administratively terminate the February 11, 2019 motion to dismiss, resulting in the administrative termination of respondent's motion to dismiss for a second time.[28]

C. **Petitioner/Plaintiff's Opposition To Motions to Dismiss, and Cross Motion to File Second Amended Complaint**: Filed January 22, 2019.

The plaintiff/petitioner on January 22, 2019, opposed the respondent's December 28, 2019 motion to dismiss, and contemporaneously also filed a motion for leave to file a second amended complaint ("SAC"), APP1 to 248. The cross motion *inter alia* sought the amendments described *supra,* including the joinder of

[28] None of the orders administratively terminating respondent's motions to dismiss were formalized in printable orders. Rather, they were "text-based" orders submitted electronically via ECF. As such, neither order has been submitted to this Honorable Court.

probate court defense counsel as a party relative to the fraudulent concealment and RICO counts. Count XV, APP216-245.

The District Court subsequently scheduled a hearing to take place on August 12, 2019, to argue the merits of the proposed SAC, e.g, futility[29].

D. **Oral Argument on the Motion To Amend on August 12, 2019**: The Filing of Supplemental Briefs By Plaintiff and Defendant on September 20, 2019 and October 4 2019, Respectively, Regarding the Litigation Privilege, RICO Standing, and the Noerr-Pennington Doctrine, as it Relates to the Second Amended Complaint and Probate Court Defense Counsel as a Party.

At oral argument on August 12, 2019, APP259 to 307, the Court began by placing the onus on federal defense counsel to explain why the proposed SAC was futile. Defense counsel then set forth three defenses, *to wit*, the litigation privilege, the probate exception, and Rule 10b-5 standing. APP266. The District Court then

[29] *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000)("*Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted*.) The district court, however, did not consider, contemplate, or apply the standards of FRCP 19 in deciding whether probate court defense counsel should be joined as a necessary party - thus potentially underscoring the proposition that but for (potential) futility arguments, the joinder of probate court counsel is necessary for plaintiff/petitioner to obtain proper and complete relief from her insolvency.

inquired whether the punitive and fraud-ridden[30] divestiture of plaintiff/petitioner's 40% stock in her husband's family-run company was an "administrative" function within the scope of the probate exception. APP268. A colloquy between defense counsel and the District Court then ensued, with the Court seemingly making no distinction between Rule 10b-5 standing, and general RICO standing with Rule 10b-5 as a predicate act.[31] Neither did the Court and defense counsel address the dichotomy – and case law – between harm to a shareholder in a closely held private company versus harm to a shareholder in a publicly traded company.[32] Both of these arguments had been referenced in the initial moving briefs, but not comprehensively. The Rule 10b-5 standing and probate court exception colloquy between defense

[30] The divestiture was punitive – in that it explicitly sought to remove plaintiff/petitioner from the company because she was "digging for dirt," APP140, SAC ¶427, because she "stared" at company men, Ibid, and, as probate defense counsel set forth repeatedly, because of her lawsuits. See e.g., APP186, (probate defense counsel: it *doesn't take much "imagination" to set forth that if plaintiff inherits 40% of the company, she will file shareholder minority oppression suits*). See also APP 187 (probate defense counsel: *the lawsuits are the "best evidence" justifying the divestiture of plaintiff's minority shares*). Furthermore, had the executor and his counsel not have engaged in spoliation, the executor would have been removed, thus losing his ability to penalize plaintiff/petitioner for her lawsuits.

[31] See *Holmes v. Securities Investor Protection Corporation*, 503 US 258 (1992) (Justice Sandra Day O'Connor, concurring: "… I would [also] hold that a **plaintiff need not be a purchaser or a seller to assert RICO claims predicated on violations of fraud in the sale of securities**.")

[32] See, e.g., *Tully v. Mirz*, 2018 WL 6204908 (N.J. Super. Ct. App. Div. Nov. 29, 2018) ("In the context of a closely-held corporation, **courts have [the] discretion to construe a derivative cause of action as a direct claim…**").

counsel and the Court, also excluded case law which all but abrogated the probate exception[33], and case law which explicitly permitted tort claims in federal court, including claims of fraud, against a personal representative[34].

Federal defense counsel then began discussing the joinder of probate court defense counsel, SAC Count XV, and cited the litigation privilege on his behalf. APP280-APP284. After a lengthy colloquy with federal defense counsel relative to plaintiff's motion to amend, plaintiff's counsel – the undersigned – then began to argue the merits of RICO Rule 10b-5 standing, and Rule 10b-5 standing as *distinct* from general RICO standing.[35]

---

[33] *Marshall v. Marshall*, 547 U.S. 293, 312 (2006) ("As the Court of Appeals correctly observed, [plaintiff's] claim does not 'involve the administration of an estate, the probate of a will, or any other purely probate matter'….[Plaintiff's] claim…alleges a widely recognized tort.")

[34] See, e.g, *Kennedy-Jarvis v. Wells*, 113 F. Supp. 3d 144, 153 (Dist. of Columbia 2015) (In a case which had been stagnant in the New Jersey Probate Court for six years, the Court stated that "**personal tort claims against estate administrators are not barred by the probate exception……..[t]he probate exception can no longer be used to dismiss 'widely recognized torts' such as … fraudulent misrepresentation merely because the issues intertwine with claims proceeding in state court**.")

[35] APP290. The following is a circumstance which will be confronted candidly at the outset. Indeed, despite seemingly clear case law (e.g, the litigation privilege's inapplicability to fraudulent *acts* - versus its applicability to defamatory *statements*), and despite compelling facts (e.g., an exclusive certification *in fact* signed by probate counsel concealing a well-known fraud lawsuit), it appeared throughout the colloquy that the district court judge was in agreement with federal defense counsel's every factual and legal premise – while disagreeing with plaintiff's counsel on nearly every point. This is not unlike the probate judge's actions - who placed →

During the ensuing colloquy with the plaintiff/petitioner's counsel, the District Court became inquisitive as to whether or not a concurring opinion by former Justice Sandra Day O'Connor on proximate cause and RICO 10b-5 standing had been ratified by this Honorable Court (Third Circuit), and asked the parties to brief same. APP290-291. The Court then shifted its focus to the probate exception -and the joinder of probate defense counsel. APP292. The undersigned plaintiff's counsel then referenced case law regarding the *narrow* probate exception[36], and in addition referenced the issue of defendants' fraudulent misappropriation of

---

every imaginable obstacle in plaintiff's way and who ultimately left plaintiff insolvent. One common factual underpinning which may offer much-needed context is *that an adverse ruling by any Court may subject defendants to criminal process*. **However, the plaintiff has fabricated no facts, and should bear no accountability for the defendant's gross systematic malfeasance, which also left her two daughters with no assets or funds from the estate of their male progenitor**. The apparent bias can thus be appreciated at APP290, wherein the district court claimed that a legal tenet regarding RICO and 10b-5 standing cited by plaintiff's counsel was part of Justice Sandra Day O'Connor's *dissent* – when in reality, as per plaintiff's comprehensive initial motion brief, it was part of a *concurring opinion* which sought to extend the majority's holding. In addition, the Court seemingly chastised the plaintiff's counsel at APP289, claiming that plaintiff's counsel briefed the issues in connection with "other" motions and should instead have briefed the issues in connection with the motion being argued. *In fact, there were no other motions – or briefs- filed by plaintiff/petitioner* – and plaintiff/petitioner had already briefed most of the issues which the Court asked to be re-briefed. Lastly, in over two years of litigation, no motions have been ruled on by the district court. It is respectfully submitted that something more significant than the *merits* of plaintiff's case is the culprit, and perhaps this is a topic that will be touched upon thoroughly at the appropriate time.

[36] APP292. See, e.g., *Marshall*, and *Kennedy-Jarvis*, footnotes 33 and 34, *supra*.

plaintiff's *one hundred thousand-dollar* 401K plan. Ibid. The undersigned plaintiff's counsel then began arguing the merits of Count XV, which sought the joinder of probate Court defense counsel. APP294-298. After arguing that probate court defense counsel essentially committed spoliation[37] with his sworn certification, the district court was nonetheless inquisitive as to why those "statements"[38] were not protected by the litigation privilege (which generally only protects defamatory statements in the context of a defamation cause of action – not litigation fraud.[39]). After expressing further factual and legal skepticism, the Court asked that the

---

[37] I.e. fraudulent concealment of the Sun Bank lawsuit, which the proofs *demonstratively* show he was aware of. APP228.

[38] "Statements" which were meant to conceal the Sun Bank lawsuit from a recently appointed Judge who was not privy to prior hearings – particularly a hearing in 2014 at which probate defense counsel *specifically* referenced the Sun Bank fraud lawsuit as being nearly catastrophic. See, e.g., APP233, SAC Count XV, ¶39 (On May 22, 2014, at a hearing with the first probate Judge (now retired), probate defense counsel quipped "*I would point out also, [that the executor] actually came in and took $350,000 of his own money to save this business, which is when the Sun Bank issue became such a* ***big problem*** *in the spring, late spring/early summer of last year. And he came forward with the money that was necessary to make Sun Bank agree to drop the lawsuit.* ***If that had not happened, we would not be here today arguing about the continuation of the company, its operations or anything because the company would no longer exist***."). In late 2018, probate defense counsel filed an exclusive certification *denying* – before a new Judge - that this lawsuit had *ever* been filed, *supra*. This, and other acts by these defendants, is in fact the proximate cause of plaintiff/petitioner's insolvency.

[39] APP298. See, e.g., *Williams v. BASF Catalysts LLC*, 765 F.3d 306 (3d Cir. 2014) ("**But New Jersey's Supreme Court has never recognized the litigation privilege to immunize systematic fraud, let alone fraud calculated to thwart the judicial process.**")

litigation privilege, the Noerr/Pennington Doctrine, and the probate exception, be re-briefed in a supplemental brief. APP299.

The plaintiff/petitioner promptly complied with the Judge's directive, and filed her supplemental brief on September 20, 2019, APP308. Respondent/defendants filed their supplemental briefs on October 4, 2019, APP348.

The Judge did not ask the parties to brief, and the defendants did not raise, the issue of collateral estoppel. Nonetheless, as the topic of collateral estoppel had been *briefly* suggested at a settlement conference, the undersigned on September 11, 2020, wrote a letter to Judge Joseph A. Dickson, USMJ, APP368, essentially setting forth that the potential argument regarding collateral estoppel was yet another obstacle levied against plaintiff over the years, and that in fact collateral estoppel was not germane to resolution of the plaintiff's complaint, or her motion to file a second amended complaint, both of those complaints largely consisting of claims of litigation fraud, e.g., spoliation or fraudulent concealment – topics clearly not within the jurisdiction of the probate court.

ARGUMENT

Mandamus Review is Appropriate Since The District Court Has Issued No Substantive Rulings Since The Complaint Was Filed Over Two Years Ago, Despite Years-Old Pending Motions, To Wit, A Motion to Dismiss, and A Motion for Leave To File Second Amended Complaint

In *United States v. Wexler,* 31 F.3d 117, 128 (3d Cir.1994) , this Court set forth that the standard for issuing a writ of mandamus is "stringent." Ibid. A petitioner must prove "abuse of discretion" or a "clear error of law". Ibid. In addition, " the petitioner must generally show that, other than mandamus, [she] has no means of adequate relief." Ibid. Typical reasons for mandamus relief include situations in which the district court exceeded its lawful jurisdiction, and situations wherein the district court "**declined to exercise a non-discretionary power."** *Wexler*, *supra*, 31 F.3rd at 128. (emphasis supplied).

In *United States v. Wright*, 776 F.3d 134, 146-6 (3d Cir. 2015), this Court summarized the general tenets of mandamus relief:

> Such relief, however, is extraordinary, and is appropriate only upon a showing of (1) a clear abuse of discretion or clear error of law; (2) a lack of an alternate avenue for adequate relief; and (3) a likelihood of irreparable injury.

Ibid.

In *Madden v. Myers*, 102 F.3d 74, 78 (3d Cir. 1996), this Court issued further guidance which is specific to the facts of the case *sub judice*:

> Congress has demonstrated a grave concern about delay in civil cases, *see, e.g.,* Civil Justice Expense and Delay Reduction Plans, 28 U.S.C. §§ 471-482 (requiring district courts to implement plans intended in part to "ensure just, speedy, and inexpensive resolutions of civil disputes"). **Mandamus petitions provide an avenue for dealing with the situation** (which fortunately occurs infrequently) where **cases have been unduly delayed in the district court**. *See, e.g., McDonnell Douglas Corp. v. Polin,* 429 F.2d 30, 30-31 (3rd Cir.1970) (ordering district court not to defer ruling on a motion for transfer until all discovery was completed).

Ibid.

In the case *sub judice*, the district court has seemingly stayed two pending motions for over twenty-one months. In over two years, in fact, the district court has issued no substantive rulings, *supra*.

Moreover, the petitioner has no other relief available – motions for reconsideration, interlocutory appeals, or final appeals are a veritable impossibility. In addition, if these motions remain stagnant, petitioner will suffer irreparable injury – since the merits of her spoliation damages claim cannot ever be assessed until a district court issues a ruling.

It is therefore respectfully submitted that mandamus relief is appropriate in the case *sub judice*.

CONCLUSION

Substantial litigation delays, whether by way of judicial "filibusters", or because of the congested dockets of our honorable tribunals, merit scrutiny and review by both our legislature, as well as by appellate tribunals – in the case of delays which are unusually lengthy and cannot be fully explained by reference to congested dockets alone. The petitioner in the case *sub judice*, to be sure, has not only been left insolvent, but has also encountered a Court system which has *clearly* exhibited scant empathy - if any at all - for her and her children. Indeed, given the overwhelming proofs against the executor and others, petitioner reasonably expected that her initial probate court order to show cause, filed over six years ago, would have been granted – and that the estate of her late husband would have been administered in a lawful, prudent manner. She did not expect open, wholesale, and unadjudicated spoliation in our honorable tribunals, and neither did she anticipate a delay of one year, two years, three years, four years, five years, let alone six years, for her woes to be judicially acknowledged, and proper relief granted. Indeed, **daddy's smallest child, petitioner's daughter, was forced to subsist during her college years without access to the financial security her father worked so diligently to achieve**. This ostensive near-total collapse of our justice system in the case *sub judice* indeed merits further, candid, scrutiny.

Such candid scrutiny entails an acknowledgement that true nature of these litigation delays is not explicit - it must be scrupulously inferred. *Ergo*, it is most respectfully submitted that any reasonable unbiased objective observer, if privy to the substantive and procedural realities of petitioner's plight, would exercise marked empathy towards this litigant, and would find the *status quo* to be an unbelievable perplexing anomaly which is characteristic of despotic regimes, not the freedom-inspiring United States of America, a perpetual beacon of hope for those who persist in countries with fallible governments and tribunals worldwide.

To be sure, a handful of misinformed and eternally-obdurate critics may, at some point if not already, question whether petitioner's attorneys should bear the burden of such an Orwellian unworldly calamity. However, petitioner has had no less than three different competent attorneys – all of whom agreed, and filed motions thereto, that the executor should have been removed, and damages awarded, *ab initio*.

Nearly ten years *ex post facto* the passing of her late husband, this petitioner now places complete faith in this Honorable Tribunal.

Respectfully Submitted.

Dated: September 27, 2020

Santos A. Perez /s/
Santos A. Perez, Esq.
Attorney for Petitioner

CERTIFICATE OF BAR MEMBERSHIP AND COMPLIANCE

I, Santos A. Perez, hereby certify that I am filing the attached Petition for Writ of Mandamus on behalf of Petitioner, and:

1. Pursuant to L.A.R. 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 2l(d)(l). This brief contains **7,111 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word Version 16.40 was used to calculate the word count.

3. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), (6) and the type style requirements of L.A.R. 32.2. This brief has been prepared in a proportionally-spaced typeface using Microsoft Word Version 2008 in 14-point Times New Roman type style.

4. Pursuant to L.A.R. 31.1(c), I hereby certify that a virus detection program was run on the electronic version of this brief and that no virus was detected.

Dated: September 27, 2020

/s/ *Santos A. Perez, Esq.*
Santos A. Perez, Esq.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 27, 2020 I caused to be filed the foregoing Petition for Writ of Mandamus with the Clerk of this Court by electronic filing in PDF form using the Circuit's electronic submission system for Original Proceedings.

I also certify that I caused a copy of the foregoing Petition for Writ of Mandamus to be served upon each of the following, in compliance with Rule 25 of the Federal Rules of Appellate Procedure:

David A.Ward, Esq.
Kluger Healey LLC
165 Passaic Avenue, Suite 306
Fairfield, New Jersey 07004
dward@klugerhealey.com

Stuart Gold, Esq.,
Mandelbaum Salsburg, P.C.
3 Becker Farm Road, Suite 105
Roseland, NJ 07068
sgold@msgld.com

The Honorable **Joseph A. Dickson**,
United States Magistrate Judge
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street Room MLK 2B
Newark, NJ 07101

The Honorable **Judge Kevin McNulty**,
United States District Judge
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street Room MLK 2B
Newark, NJ 07101

Dated: September 27, 2020

/s/ Santos A. Perez
Santos A. Perez