No. 18-____

In the Supreme Court of the United States

AFOLUSO ADESANYA and ADENEKAN ADESANYA,

Petitioners,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 3rd Circuit Appeals Court erred in upholding the decision of Federal District Court to dismiss Petitioner One employment discrimination Lawsuit as a sanction, without any prior court finding or warning of discovery violation or disobedience to a discovery order against petitioner.

2. Whether the 3rd Circuit Appeals Court erred in upholding the Federal District Court's engagement in unlawful Ex-parte communications with respondent, in violation of the Code of Conduct for United States Judges, to the disadvantage and detriment of petitioners.

3. In the Interest of Justice; are Pro Se litigantŝ' rights in the law for self-representation in US courts just for window dressing while attorneys get a free pass in instances when the opponents are Pro Se?

PARTIES TO THE PETITION

PETITIONERS

- Afoluso Adesanya and Adenekan Adesanya, who are husband and wife.

RESPONDENT

- Novartis Pharmaceuticals Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Afoluso Adesanya and Adenekan Adesanya, respectfully asks that a writ of certiorari issue to review the opinion of the United States Court of Appeals, 3rd Circuit, filed on October 11, 2018, which affirmed the Judgment and Opinion of the Federal District Court of New Jersey dated June 5, 2017.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated October 11, 2018, is included below at App.1a. The Opinion of the District Court of New Jersey, dated June 5, 2017, is included below at App.10a. This opinion incorporated and superseded a prior District Court Opinion dated August 15, 2016, which is not included in the appendix. These opinions have not been designated for publication.

JURISDICTION

The decision of the 3rd Circuit Court of Appeal for which petitioner seeks review was issued on October 11, 2018 and the petitioners' timely petition for rehearing was denied by the appeals court on November 14, 2018. This petition is filed within 90 days of the order denying petitioner's petition for rehearing by

the 3rd Circuit Court of Appeals, per Rules 13.1 and 29.2 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, PROCEDURAL RULES, AND JUDICIAL CANONS INVOLVED

The following statutes, rules of civil procedure and judicial canons are reproduced in the Appendix.

- Occupational and Safety Health 29 US Code Chapter 15. Relevant sections of 29 U.S.C. § 654(a)(1) and (2) are included below at App.47a.
- Federal Rules of Civil Procedure (Fed. R. Civ. Pro or FRCP), 41(b) and 37(b)(2)(A), reproduced at App.53a and App.48a respectively, both deal with dismissal of cases as a sanction for failure to prosecute, or comply with rules or a court order.
- Fed. R. Civ. Pro 45(d)(3)(A)(iv) is reproduced at App.55a.
- Fed. R. Civ. Pro 56(d) is reproduced at App.56a.
- Code of Conduct for United State Judges; Canon 3(A)(4), with Commentary for Canon 3(A)(3) and (4) is is reproduced at App.59a.

STATEMENT OF THE CASE

Petitioner One (Afoluso Adesanya) was employed by respondent Novartis Pharmaceuticals Corporation

(NPC) from February 2010 to September 2013 when she was wrongfully terminated. She promptly filed a discrimination lawsuit in September 2013, under the Family and Medical Leave Act (FMLA) and the New Jersey Law Against Discrimination (NJLAD), at the Federal District Court of New Jersey (Newark, New Jersey). Respondent after filing a response, also filed counterclaims.

A Rule 16 conference was held in August of 2014 and discovery began in September 2014. Petitioner One was initially represented by counsel who withdrew in August 2015, there-after Petitioner One chose to continue as Pro Se in the case for a period of 4 months from September 1, 2015 up to when the court stopped discovery in January 2016, and up till this present time. Petitioner Two (Adenekan Adesanya, is a Non-party but husband of Petitioner One) was dragged into this on the spurious basis of disobedience to a court order which upon review by the court will be found as unlawful and abuse of discretion and is in conflict with rulings in other jurisdictions with similar situations of an improperly subpoenaed non-party.

Summary judgment motion with sanctions was filed by respondent in February 2016 to which after a response by Petitioner One, the District court ruled in favor of respondent in August 2016 who then filed for fees and costs. A final ruling including judgment award was filed by the court in June 5, 2017.[1]

During preparation for Appeal process to the 3rd Circuit in July 2017, review of respondent attorney time sheet, showed that respondent attorneys had

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[1] Federal District Court ruling is attached at App.10a.

engaged in a deluge of 18 ex-parte communications with the court between October 2015 and January 2016. Petitioners immediately raised this with the Federal district court who argued that this was for administrative purposes only due to the "voluminous and confusing filings by petitioners". However, the District and 3rd Circuit Courts failed to explain why (on the basis of transparency, prompt case management control and in keeping with the Code of conduct of United States Judges); petitioner was not informed promptly when these occurred and if not for detailed review of documents in preparation for appeal would not have discovered this more than 18 months after it occurred. Regardless of Court and respondent posturing, documents do show that many of these ex-parte communications occurred at eve of court hearings and in discussions to edit and approve court orders. The most egregious ex parte communication occurred in November 2015 when the respondent attorney called the court and instructed verbatim the writing of a court order to favor their client, with the court calling back to find out if respondent was okay with the order as written (*See* relevant copy of respondent attorney timesheet detailing ex parte interaction with two court clerks in order to manipulate judicial proceedings is attached as App.62a).

Petitioners immediately flagged these extensive and egregious ex-parte communications on appeal but in a departure from its long held abhorrence with ex-parte communications[2], the 3rd Circuit Appeals court

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2 "We have pointed out in this section that the Code of Conduct for United States Judges proscribes ex parte communications except where the judge has entered into them with the consent of all the parties" *In RE: Kensington International Limited and*

did not address these specific ex-parte communications that obviously provided advantage to respondent on a merit issue as a court order worded specifically to the advantage of respondent. Petitioners were not informed when this happened and up till today do not know what specific court order was amended based on verbatim instruction by respondent's counsel. These types of egregious ex-parte communications both in sheer volume and specificity would definitely make a reasonable enquirer have doubts as to the credibility and impartiality of the court.

Petitioner also flagged in the appeal to the 3rd Circuit, evidence of discovery misconduct on part of respondent attorneys who communicated directly with non-parties that Petitioner One had issued subpoenas to. The end result of such communications was blockage of discovery which was further thwarted by the court when discovery was halted just before a hearing on her motion to compel discovery from respondent and for sanctions for blocking discovery. A potentially violent directive by a then executive of respondent that had overall supervisory responsibility for Petitioner One's department was also flagged to the 3rd Circuit. An order was given by the executive to: "Wait for year end and clamp down" against Petitioner One which resulted in stalking and other harassment actions against her. Such order may have resulted in a very harmful situation including and up to death, a direct

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Springfield Associates (petitioners) on Petition for Writ of Mandamus to the United States Bankruptcy Court for the District of Delaware (Related to Bankruptcy Nos. 00-03837, 01-01139 and 01-02094) 3rd Circuit Appeals Precedential Opinion, filed May 16, 2004. Pg. 29.

violation of Occupational and Health Safety law[3]. Despite the serious nature of this directive and the resultant adversarial actions against her at work place, the District court stayed discovery and refused Petitioner One request under Fed. R. Civ. Pro 56(d).

The Appeals Court affirmed the District court order and judgment, in its own assessment, based on the fact that Petitioner One did not vehemently challenge the dismissal as a sanction order. Although to the contrary, Petitioner One did in both original and reply briefs to the 3rd Circuit but was obviously not given any weight by the Appeals court.

Petitioner promptly applies to this Court for a writ for petition of certiorari to review the Opinions and Judgment orders of the 3rd Circuit Court of Appeals and the Federal District Court of New Jersey (Newark, New Jersey).

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[3] 29 U.S. Code § 654-Duties of employers and employees:

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

REASONS FOR GRANTING THE PETITION

I. DISMISSAL OF PETITIONER COMPLAINT AS A DISCOVERY SANCTION:

The 3rd Circuit opinion and order on dismissal of petitioner complaint as a sanction is a departure from its own standards. Petitioner had challenged this particular point amongst many other inequalities designed that gave respondent advantage in this case. The 3rd Circuit itself noted in page 4 (footnote 4) of its opinion, of six factors to be considered in dismissal as a sanction. The Court did not go into any analysis of the 6 steps as it relates to this case, overlooking respondent misconducts and the merits of Petitioner One complaint and availability of lesser sanction. It is unjust and error of discretion for a district court to allow even arguably so, assuming that respondent deserved this, for a motion for sanctions under (FRCP, 41(b) and 37(b)(2)(A) to be moved at the same time as a motion for summary judgment, while overlooking the court's own finding of respondent's discovery misconducts[4]. This approach devoid of any lesser sanction, denied petitioner rights and due process under the law.

Both FRCP 41(b) and 37(b)(2)(A) require that a party in the proceeding have been disobedient to a

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4 "[Defendant's letter is typical of the tactics that have become common in this litigation—oppose everything, even when the request is reasonable. The animosity between the Parties is already high and not helped by dueling letters, objections to every request, anticipatory disputes, motions filed over every dispute, and the latest tactic of appealing pre-trial decisions." *See* 12/1/15 Opinion, at p. 2 (Docket Entry # 174).

prior court order or failed to follow proceeding in a way as prejudicial to the other parties.

Here in this case, the 3rd Circuit one-sidedly acknowledges respondent's frustration and hence the filing of the motion for dismissal with disregard to Petitioner One's extreme frustration with respondent's discovery behavior that was also acknowledged by the district court. Hence because Rule 41(b) and 37(b)(2)(A) are seen as complaint termination sanctions, the common standards across all circuits is actually to weigh the District Court's decision, which therefore places the burden of proof on the court, and not Petitioner One, to prove that its decision was just and proper. As will be seen below, other Circuits have reversed District courts' use of this sanction especially when it did not propose nor use the lesser sanction alternative. Thus, such sanction was prejudicial against Petitioner One because the process did not avail her the opportunity to be warned by the court, neither was she found to be in disobedience of any discovery order. No alternative or lesser sanctions were proffered or administered to cure if any, alleged violations.

Conflicts with other US Appeals Court Holdings on Dismissal as a Sanction:

i. The Sixth (6th) Circuit court of appeals has a four (4) factor test to determine whether dismissal as a sanction is warranted under both FRCP 41(b) and 37(b)(2)(A).[5]

   In *Marsh v. Rhodes*, the 6th Circuit after careful analysis of the appeal held that

[5] *Marsh v. Rhodes*, 2017 U.S. App. LEXIS 25354 (6th Cir. Dec. 14, 2017).

disobedience to numerous court orders to respond to discovery including one order as a lesser sanction met the standard for dismissal as a sanction.

ii. The Ninth circuit reversed a dismissal sanction in[6] *R&R Sails Inc. v. Insurance Company of the state of Pennsylvania*; partly because the District court had not made any findings to support its sanction including availability of lesser sanctions. Similar in Petitioner One's case, the District court did not make any independent findings, not offered the possibility of lesser sanction but rather chose to close discovery at the point when Petitioner One's critical discovery matters were about to be heard by the Magistrate Judge.

iii. The Fifth Circuit also reversed a dismissal sanction[7] after finding that the District court did not meet the standard of appropriateness for lesser sanctions that would prompt diligent prosecution. The Fifth Circuit even held that in the instant case, ignoring a single court order and failing to prosecute a claim for two months is not sufficient evidence of clear delay to warrant dismissal with prejudice.

Therefore, it can be concluded from review of the other US Circuit Courts of Appeals, that dismissal as

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[6] *R&R Sails, Inc. v. Insurance Company of the State of Pennsylvania*, ___ F.3d ___, 2012 WL 933830 (9th Cir. 2012).

[7] *Linus Mayes; Angela Mayes v. Fedex Freight Incorporated; John Doe; ABC Insurance*, Filed Nov 26, 2014, Fifth Circuit.

a sanction, is actually a burden of proof on the issuing District Court to meet the standard of the Federal Rules that govern such practice and the substantive laws. The 3rd Circuit in its opinion held that Petitioner One did not challenge the District court dismissal sanction again overlooks the clear mention in the initial and reply briefs with an emphasis that there was no discovery violation or order by the court against Petitioner One. Since the burden of proof is on the District court and in the interest of justice, a copious challenge by Petitioner One was not necessary nor required, as it was also quite clear that the District court had but did not meet the required burden of proof.

Therefore in consideration of how other circuit courts have handled similar matters, this Court should therefore grant the Petitioner One the writ of certiorari and to standardize the burden of proof on courts as a reviewable issue in the use of dismissal as a sanction in light of this court's own holding in this issue[8].

II. EX-PARTE COMMUNICATIONS

Petitioner One has dealt extensively with the issue of Ex Parte communication in the statement of the case (pg. 4-6 of this petition) and those are reincorporated in this section.

The 3rd Circuit court has long held that the Code of Conduct for United States Judges proscribes ex

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[8] Courts are vested with great discretion in imposing sanctions under their inherent powers, limited by the principles that inherent powers must be exercised with "restraint and discretion," and that the particular sanction must be tailored to address the harm identified. *Id.* at 44-45, 111 S.Ct. 2123.

parte communications except where the judge has entered into them with the consent of all the parties. The Code of conduct for United States judges also provides for notification to parties when this happens. Petitioners rights were subverted for whatever reason in this regard and when challenged, the district Court responded that they were necessary for administrative reasons. Yet, the unusually high number of ex-parte communications and especially the egregious ones of verbatim dictation of court orders to 100% favor respondent and pre-hearing conferences definitely prejudiced petitioner and should have served as a basis for the 3rd Circuit to reverse the District court because of the blemish and loss of credibility. Based on a previously egregious ex-parte communication with the verbatim instruction on a court order in favor of respondent, it is extremely difficult to rule out that respondent did not instruct the District court in writing and approving this judgment order before release.

Another perhaps even more troubling aspect of these ex-parte communications is that the court allowed these 18 freewill but improper ex-parte communications to give respondent editorial approval over its orders, assist respondent with motions, take part in pre-hearing strategy conferences; does show that the court did not exert, and inextricably lost control over the judicial process. Again a reasonable mind cannot but infer that this was excessive and things would have occurred in the which Petitioner One would have been prejudiced and no amount of sanitizing excuses makes up for the fact that they shouldn't have happened at all and if they did, should have been recorded and Petitioners informed.

III. THE COURT ENDED DISCOVERY WITHOUT CONSIDERING PETITIONER'S MOTIONS FOR DISCOVERY

Petition for Writ of Certiorari must be granted in the interest of Justice.

Petitioner One's Due process for discovery, amendment of claims and observed workplace violence were tactfully circumvented in January of 2016, after her imminent discovery motion also due for hearing in January 2016 was subrogated and halted by a court order that ended discovery. The Court order was from the District Court Judge and not from the Magistrate Judge in charge of discovery.

The 3rd Circuit in its opinion, sided with the District court order ending discovery just after 1.5 years in the interest of time, overlooking respondent's discovery misconduct as identified by and to the court and presented to the 3rd Circuit court as well. Ending discovery benefitted only the respondent and prevented Petitioner One's day in court, a violation of Code of Conduct of United States Judges[9].

Petitioner One also expressed this frustration in her Summary Judgment motion response, requesting for a rule 56(d), which was denied by the court.

The 3rd Circuit also in its opinion, sided with the District court on Petitioner One's frustrations about not being granted opportunity to amend her claims[10], as not formally presented when in actual

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[9] Canon 3 A(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law.

[10] *See* pg. App.5a of Opinion footnote.

fact the court accepted informal motions during that process until it pronounced that from October 30, 2015, all motions would have to be formal from both sides. The Court did not deny those previous motions and refused to rule on its merits when in comparison it accepted respondent's informal briefs and gave rulings to that effect. For the Court to now say those motions are informal and the 3rd Circuit's review of those motions without considering the allowed practice before the court as at the time the motions were filed is prejudicial to Petitioner One.

Finding out 18 months after and during appeals that egregious ex parte communication had taken place which denied Petitioners rights is injustice and partial. The Court had a duty to have informed Petitioners immediately to avoid appearance of impropriety and to have included them right from the onset in setting rules to approach the court. When a party to the case has to instruct the court verbatim on phone on a court order to its 100% advantage is unfair and injustice of which such must not be allowed in order to protect the public confidence in administration of justice. A Court must also show that it has control of its Court room and case management, allowing 18 ex-parte communications should not have happened and an impartial court should have conducted a hearing to address the root causes if any.

The 3rd Circuit also on pg. 4 of its opinion[11] specifically mentioned that raising an issue in a reply brief is insufficient to preserve for review, and went further to opine that the 3rd court has refused

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[11] App.4a 1st paragraph.

to consider arguments raised in pro se reply brief. This position is fraught with risk and prejudicial to Pro Se litigants. Did the court actually mean to say across board and includes all parties or only for Pro Se litigants? If the reading of the text is as plain as it is, then the question must be asked; Is self-representation by Pro Se litigants a futile practice before the courts? Are they subject to different standards than attorneys? Are attorneys given a pass, even including submitting untruths in briefs, improper behavior pushing the limits of candor before a court? Is it a cardinal sin to appear as Pro Se? that even the Appeals Court would go as far as raising that point of differentiation? Nevertheless, in this particular issue, Petitioner One was responding to an issue raised by the Respondent in their response to Petitioners initial brief and it was to state clearly that there was no discovery order against her neither did the court find her in violation of prosecuting the case. Where the District court erred was not in holding the Sanctions motion earlier and if independently found by the court to be in violation, then the court should have issued an appropriate order, to which there is none. For the Court to admit that the only appropriate remedy in this case was a motion to dismiss again shows a court that had lost control over its administrative process.

A reasonable mind will find enough of irregularities, improper process by respondents that should been restrained by the court. Such grave injustice must be addressed by the granting of this writ of certiorari and subsequent reversal of the District court order and opinion. It would appear based on the District court and 3rd Circuit court, a pro se's submissions were dead on arrival, and the respondent

because of legal representation had free sailing. The District court had a duty to control its case and court room and in accordance with the Code of Conduct for U.S. Judges, lay out impartial rules in this case, which was not. This Court as the Guardian of the Law in the United states of America must correct this injustice.

IV. COURT DID NOT ADDRESS VALIDITY OF SUBPOENA

Petitioner Two was denied justice. Petitioner Two was caught up in the web by respondent due to a challenge of a subpoena that was served to him to produce documents under his possession and control. Petitioner Two co-operated with subpoena to the extent that he had documents under his control. He then approached the court based on Rule 45(d)(3)(A)(iv) to clarify the burdensome aspects of the subpoena. For example, Respondent demanded Petitioner Two to produce all medical school and other educational credentials of Petitioner One, employment records of Petitioner One for last 10 years. It also directed Petitioner Two to produce as an individual, company documents that was directed to him as a person and not in his role as a statutory officer of the business. In a similar case[12], the court dismissed the subpoena as an individual cannot represent a company.

The Court's response was for Petitioner Two to produce documents he had control and in possession of. The Court did not rule on the impropriety of being

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12 *Roy and Sheila Bowers, Plaintiffs, v. Mortgage Electronic Et Al, defendants* (Registration Systems Civil Action) Case No. 10-4141-JTM–DJW. In The United States District Court for the District of Kansas.

asked to produce Petitioner One's records as if she was under his control and possession which legally and culturally in the USA is unlawful. The Court also did not acknowledge the co-operation that Petitioner Two had given to the subpoena and did not address his request for the court to assess the validity of the subpoena as being burdensome nor the illegality of making him produce company documents in light of the cited case above for a subpoena that was not served to him as the company statutory officer. This honorable court should grant the writ of certiorari for review of this issue.

CONCLUSION

For the foregoing reasons, petitioners requests that this Court grant the petition for certiorari.

Respectfully submitted,

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