No. 18-____

In the Supreme Court of the United States

JAMES H. BRADY,

Petitioner,

–v–

JOHN GOLDMAN, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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JULY 24, 2018

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QUESTIONS PRESENTED

The Attorney-Defendants and law firms in this case were being sued for colluding to use false statements, false legal arguments, false instruments, calls for retaliation and using their "relationships" with the Court's to help their clients get away with seizing the $70-90 million dollars' worth of air rights they all knew were contractually appurtenant to Petitioner's 12th Floor and Roof Unit apartment.

A scheme was made wherein Petitioner was told to waive his rights for free or otherwise Attorney-Defendants would litigate and use their relationships with the New York State Courts to steal the rights they knew were contractually guaranteed to Petitioner in the Co-op's Offering Plan contract.

The District Court dismissed the Complaint with prejudice. Although the Court stated it had no subject-matter jurisdiction, it blasted Petitioner with *ad hominem* attacks and issued a filing injunction against him forbidding any further litigation "pertaining to the air rights appurtenant to his 12th Floor and Roof Unit apartment." The Court of Appeals affirmed in a Summary Order and reargument and *En Banc* Rehearing was denied.

THE QUESTIONS PRESENTED ARE:

1. Was it unconstitutional for Petitioner to be deprived of his right to sue for damages the lawyers and law firms that schemed together and used false statements, false legal arguments, calls for retaliation, and their influence over the courts to help their New York City developer clients get away with stealing the $70-90 million in air rights they all knew were

contractual appurtenant to Petitioner's 12th Floor and Roof Unit Apartment?

2. Was it unconstitutional for the court to implement a filing injunction to prevent any further litigation pertaining to the air rights the court acknowledged are "appurtenant" to Petitioner's Manhattan commercial co-op apartment?

3. Are courts permitted to disregard waivers in commercial transactions?

PARTIES TO THE PETITION

Petitioners

- James H. Brady

Respondents

- Richard M. Asche, Litman, Asche & Gioiella, LLP
- Edward J. Reich, Dentons US LLP
- Kristen B. Weil, Dentons US LLP
- Jamie Rebecca Wozman, Lewis Brisbois Bisgaard & Smith LLP
- Jennifer Smith Finnegan, Herrick, Feinstein LLP
- Joseph P. Augustine, Augustine & Eberle LLP;
- Thomas Dewey, Dewey Pegno & Kramarsky LLP
- Keara A. Bergin, Dewey Pegno & Kramarsky LLP
- Adam J. Richards, O'Reilly Stoutenburg Richards LLP

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The instant appeal arises from two Southern District of New York Court Opinions and Orders dated January 11, 2017 and February 3, 2017, in the matter of *James H. Brady v. John Goldman, et al.*, No. 16-Civ-2287, by Judge George Daniels. (App.6a, 13a) The Order appealed from granted Defendant-Respondent's pre-Answer motion to dismiss with prejudice and without leave to replead. Petitioner also appealed the filing injunction

The Second Circuit Court of Appeals affirmed the District Court decision in a Summary Order dated March 1, 2018. (App.1a). Request for panel rehearing and *En Banc* review were denied on April 25, 2018. (App.57a).

The Court should take judicial notice that the present case and two other related cases, *James H. Brady v. Associated Press, et al*, No.17-0268(cv), and *James H. Brady v. Eric Schneiderman, Attorney General of the State of New York*, No. 15-cv-9141 (RA), were also dismissed by the same pane of judges on the same date in summary order. Leave to appeal to the Supreme Court is being sought in both.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The appeal is from a final judgment that disposes of all of Petitioner-Petitioner's claims in this action.

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. V**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **U.S. Const. amend. XIV, § 1**

  All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Recently retired Appellate Division Justice David Saxe, now a partner at Morrison Cohen LLC, offered an assessment of the New York State Courts in a June 2017 New York Post article:

> "Our state court system is absolutely insane. It has enabled political people to control the courts, and they don't want to give up—so it's very hard to get legitimate change that would be beneficial to the public."

The present case is a glaring example of what Justice Saxe is describing. Attorney-Defendants represent politically-connected real estate developers, law firms, and title insurance companies who have colluded to seize $70-90 million dollars' worth of development rights that they, and all parties to these cases knows, are contractually guaranteed to Petitioner in the Offering Plan contract and are appurtenant to his 12th Floor and Roof Unit apartment in a Manhattan co-operative commercial building.

The Seventh Paragraph Footnote to the Schedule of Units of the Amended Offering Plan reads as follows:

> "[Seventh Paragraph—New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."

The Appellate Division, First Department, February 11, 2010 Decision ended with the following words.

> "Pursuant to paragraph 7, that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."

Defendant lawyers, law firms and powerful clients persuaded the court to ignore these documents and write this new contract. Justice Kornreich's Supreme Court July 15, 2014 Decision rewrites the above to read:

> It has already been adjudged that while the owners of the unit may have the right to erect additional structures on the roof, that right does not entitle them to use any floor area in doing so (Prior Action, decision and order, Mar 13, 2009 at *2 & *4-*5 ["Nothing herein shall be construed as holding that plaintiffs have the right to use all or any part of the TDRs in connection with such construction or extension"] *Brady v. 450 W. 31st St. Owner's Corp.*, 70 AD3d 469, 470 [1st Dept 2010] [holding that the offering plan "reserves for plaintiffs the right . . . to construct or extend structures on the roof that may be built without the use of the building's development rights."]

These lawyers have used their influence to have the same court issue $500,000 in sanctions that were not warranted and advance as true the false statements

that they presented to the court. Justice Kornreich's decision included the following statements:

> "It is clear from the papers and the transaction's history that Brady acted in bad faith in bringing the instant cases." (p. 21).
>
> "His misinterpretation of prior judgment, his feigned ignorance or the origin or the meaning of the phrase "transferable development rights," and his argument that a decision, which he appealed to no avail, is not binding are but a few examples of the frivolous arguments made in the instant actions." (p. 21).
>
> "In short, Brady has dragged more than twenty parties into court to litigate matters that have already been determined and claims that lack any substance." (p. 22).
>
> "The trial court and the appellate court courts in the Prior Action have denied him such control. Undeterred, he has ignored these courts' rulings and brought these meritless actions, abusing the judicial process." (p. 23).
>
> "This is a near perfect example of frivolous conduct that warrants defendants request for the imposition of sanctions." (p. 23).

These statements are directly at odds with what was said at the March 18, 2014 Oral Arguments, where the Defendants repeatedly had to recognize Petitioner's rights. Joseph Augustine, the Co-op corporation's litigation lawyer, stated the following:

THE COURT:—which means you're going to have to commit the coop board to tell me: What does Paragraph 7 mean?

MR. AUGUSTINE: It means he has the right to build structures once he submits a plan. And if those structures are permissible by law, such as Department of Buildings, and those plans do not pose a structural risk or any other risk to the building in order to—for him to service the space that he has there, then the board would be inclined to approve it.

THE COURT: But what Petitioner is saying is he does have that right, though, under paragraph 7.

MR. AUGUSTINE: He has—our understanding he has a right to build structures. That's what it says. No one disagrees. The courts all said the same thing, he has a right to build structures.

A. The 2007-2010 Litigation Was Successful for Petitioner

Petitioner is the owner of a commercial co-op apartment located at 450 West 31st Street, 12th Floor and Roof Unit, New York, NY 10001. The Second Amendment to the Schedule of Units of the Offering Plan contract, which was a condition precedent to making the Offering Plan effective, expressly and exclusively conveys the any permissible development rights that may from time to time be given to the premises to the 12th Floor and Roof Unit for its exclusive utilization.

The Seventh Paragraph Footnote to the Schedule of Units of the Amended Offering Plan, which reads as follows:

> "[Seventh Paragraph—New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."

Applicable law changed in 2005 pursuant to a rezoning of the area and the creation of the Hudson Yards District of Manhattan. Suddenly, the premise was permitted to construct and extend up to 190,000 square feet of additional development rights on its parcel of land. In 2006, the Co-op corporation had these rights appraised at $44 million dollars.

In 2007, the Co-op Board of Directors attempted to the sell the premise's development rights to Extell Development Corp. At that time, Extell offered Petitioner $2.5 million to waive our rights to the development rights in light of the Seventh Paragraph Footnote.

During May 6, 2008 court ordered settlement talks, Justice Friedman had Extell withdraw that offer and replace it with a $500,000 offer from the co-op corporation to waive his rights under the threat that she would make Petitioner "sorry" if he did not accept the offer. Petitioner refused and did not waive his rights, which had been up to this point acknowledged by all parties.

At the time of the litigation with Extell Development Corp., the parties to the contract perfectly understood what the contract means. In the first round of

litigation, Stanley Kaufman, the co-op's litigation attorney, stated in "Defendant's Reply Memorandum of Law," April 14, 2008, p.5 (A.21):

> The clear intent was to grant the 12th floor unit owner some latitude in adding additional space, or structures, so long as in doing so, the owner did not violate the local building code, zoning regulations, or other ordinances.

And further:

> The clear and logical meaning of the added footnote number 7 of the Second Amendment was to grant 12th floor owner some latitude in adding additional structures, so long as in doing so, the owner did not endanger anyone else's health or safety or violate the building Code, zoning laws or any other laws or ordinances." (*Ibid.* p. 28).

And further, Franklin Snitow, Extell's litigation counsel, stated in his "Affirmation for Defendants *Extell Dev. Corp.*", et al., March 18, 2008, p.2 ¶ 3:

The intent is evidenced in the decision of the original owner of the 12th floor unit to build an 1,800 square foot penthouse on the roof. Thus, the intent of the Amendment is clear on its face." (R: 310).

During May 6, 2008 court ordered settlement talks between the Co-op, Extell and Petitioner, Justice Friedman had Extell withdraw the $2.5 million offer and replace it with a $500,000 offer from the Co-op corporation under the threat that she would make Petitioner "sorry" if he did not accept the offer.

During the July 1, 2008 phone conference with the Court and attorneys, Justice Friedman said in essence that she was going to rewrite the contract since the Bradys had refused to waive their rights. As a result, Petitioner's then attorney, Margaret Dale of Proskauer Rose, wrote Justice Friedman a letter the following day, July 2, 2008:

> No authority, whether statutory or precedential, allows a court to ignore or overrule clear and unambiguous terms in an offering plan. In this case, the Court cannot ignore that the new 7th paragraph of the Second Amendment further describes what is included as part of the 12th Floor and Roof Unit. The Court cannot ignore that all of the rights to the space above the Building's roof belong to, and is part of, the 12th Floor and Roof Unit. The rights to all of the space above the Building's roof has been conveyed to the 12th Floor and Roof Unit to the extent that is "permitted by applicable law"—not just the 25,000 square feet that the Defendant Cooperative Corp. reserved for itself. Such language was inserted into the Offering Plan for a reason, and none of the Defendants presents any alternative meaning to the plain language. No authority, whether statutory or precedential, allows a co-op to seize part of a shareholder's unit without consent. No authority, whether statutory or precedential, allows a court to completely disregard multiple experts' undisputed testimony that states that the proposed sale to Extell violates and destroys Plaintiff's rights.

Notwithstanding the absence of any legal authority, Justice Friedman ignored the law (as she had ignored all expert testimony submitted by Petitioner), and filed a decision on July 7, 2008, ruling that:

> "the court finds that paragraph 7 is not ambiguous, and that it gives Appellants the right to build structures on or above the roof but does not convey air rights to Appellants."

The words "that may from time to time be permitted under applicable law" were taken out and replaced with the words "but does not convey air rights to plaintiffs." (Supreme Court of the State of New York, New York County, 2008 NY Slip Op 31894(U) (N.Y. Misc. 2008) July 2, 2008).

Extell walked away from the deal, unable to satisfy the title insurance company's requirement for clear title because the decision made no sense since the right to construct structures above the roof is air rights. Thus, Petitioner was successful in the first round of litigation in preventing the sale of the air rights, which had been his goal.

A reargument motion was made on November 15, 2008. Stanley Kaufman, Owners Corp.'s litigation attorney relates what occurred in his "Affirmation in Opposition to Petitioner' Motion for Reargument," on August 15, 2008:

> The Court should be made aware of the fact that the development rights transaction between Cooperative and Extell has now fallen through . . . While Cooperative disputes that it is in breach of the contract, to avoid costly

> litigation with Extell, the Cooperative has agreed to return Extell's contract deposit.

In the August 15, 2008 Affirmation Mr. Kaufman states that "the contract between the Cooperative and Extell involved the sale of 'development rights,' which were created by the New York City Zoning Resolution to build floor area." (Kaufman affirm. ¶ 3). He goes on to quote the New York City Zoning Glossary, defining "development rights" as:

> The maximum amount of floor area permissible on a zoning lot. The difference between the maximum permitted floor area and the actual floor is referred to as "unused development rights." Unused development rights are often described as air rights. (*Id.*)

It is precisely this difference between what is built and what is permitted that has been seized from Petitioner's apartment and has been the subject of litigation, along with easements being placed over Petitioner's unit for the benefit of Defendant's clients, after twice asking Petitioner for a Waiver.

Prior to ruling on Petitioner's motion for reargument, Justice Friedman mentioned that she had seen an October 2008 NEW YORK POST article on the case, which included the following expert opinion:

> Stuart Saft of Dewey & LeBoeuf, who represents many co-ops but is not involved in this matter, said Brady has a right to at least some of the new development rights and as a result the co-op should have at the very least obtained a waiver.

> "The language [in the second amended offering plan] is so broad it would cover any kind of addition to the top of the building, but Petitioner don't think it gives Brady the rights to take those development rights to trade then to an adjacent property," Saft said.

In March 13, 2009 reargument decision, Justice Friedman put all her judicial powers into an ORDERED, ADJUDGED and DECLARATION that again rewrote the contract by adding her own provision to the end of the contract:

> "pursuant to paragraph 7, plaintiffs, have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be given under applicable law. PROVIDED THAT: Nothing herein shall be construed as holding that plaintiffs have the right to use all or any part of the TDRs in connection with such construction or extension."

B. The Appellate Division, First Department's February 11, 2010 Decision

The Appellate Division removed the unlawful provision added to the end of the contract. The First Department's February 11, 2010 decision included a clear and unequivocal conveyance of the utilization of the premise's development rights:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time

> to time be permitted under applicable law, unanimously affirmed, without costs."

This decision clarified that the contract provision did not convey ownership of the air rights to Petitioner's block of shares (which was never in dispute) but rather confirmed Petitioner's right to the utilization of the air rights to the extent that may from time to time be permitted under applicable law.

C. The Co-Op's Second Attempt to Sell the Premise's Air Rights

In 2011, the Co-op Corporation again sought to enter into a zoning lot and merger transaction that entailed selling the air rights appurtenant to Petitioner's apartment, along with placing light and air easements over Petitioner's apartment for the benefit of the adjoining lot formerly owned by Extell Development Corp., now owned by Sherwood Equities. All attorneys involved with the transaction fully understood that based on the Offering Plan contract and the February 11, 2010 decision, they would need a Waiver of Petitioner's rights.

In 2011, Sherwood Equities sent Petitioner and email through a realtor explaining that they "did not want to end up like Extell Development," and that they "knew they had to pay the piped piper." Emails from 2012 prove unequivocally that Attorney Defendants knew they were required to obtain a Waiver from Petitioner and his wife pursuant to the February 11, 2010 Appellate Division decision. For example, Petitioner wrote Defendants Stanley Kaufman on May 1, 2012:

From: Jim Brady <bradyny@gmail.com>
Date: Tue, May 1, 2012 at 11:00 AM
Subject:
To: "Stanley M. Kaufman"
<skaufman@kfpgllp.com>

Dear Stanley:

The offer from the Co-op that you conveyed to me yesterday makes no sense. Jane and I are being asked to waive our unit's right to have the utilization of the premises permissible development rights in exchange for being permitted to have the right to buy back from the DIB up to 15,000 square feet of the development rights that Petitioner's unit already possesses. Why would we do that?

The fact that no money was offered adds insult to injury. The Co-op's passed attempt at selling the premises development rights without a waiver of Jane and Petitioner's rights resulted in years of litigation and caused Jane and I financial, mental and physical destruction.

As you know Jane and I have a Supreme Court ORDER, ADJUDGE and DECLARATION that was affirmed by The Appellate Court First Department stating that "plaintiff's have the right to construct or extend structures on the roof or above the same, to the extent that may from time to time be permitted under applicable law". This is clearly why Sherwood is requiring a waiver of the Brady's rights from the Co-op as a term needed before closing on the transaction.

> In order for Jane and Petitioner to agree to sign the waiver that Sherwood is requiring we need to be compensated for the damages that we were subjected to as well as for the rights we will be giving up.
>
> Sincerely,
> James Brady

D. Defendants' Request of Waiver from Appellant Proves They Knew the Appellate Division February 11, 2010 Decision Affirmed Petitioner's Rights to the Utilization of the Development Rights

The Co-op twice asked for a Waiver because the parties involved in the transaction knew they needed one. Attorneys Defendants are liable for tortious interference with contract for closing without the Waiver. By requesting it—twice, they acknowledge they needed it. In New York State, a waiver is an explicit relinquishment of a known right.

A review of a Waiver Form shows that the rights defined in the Waiver were taken away from Petitioner; they are precisely the rights the Appellate Division's February 11, 2010 Decision states belong to Petitioner's Unit. The Waiver state, *inter alia*:

(1). Waives any right they may have to execute that certain Declaration of Zoning Lot Restrictions to be entered into by and between 450 Corp. and Sherwood respecting the Premises and certain adjoining properties (. . .)

(2). Waives any right Releasor may have to execute that certain Zoning Lot Development and Easement Agreement (the "ZLDEA") to

be entered into by and between 450 Corp. and Sherwood respecting the Premise's and Adjoining Property and consents to the execution of same;

(3). Without limiting the foregoing, (a) releases of Excess Development Rights (as defined in the ZLDEA) from any claims, right, title or interests Releasor may have in same, (b) waives any right to construct improvements in the Developer's Easement Area (as defined by the ZLDEA); and (c) waives any claim, at law or in equity, that Releasor may have against 450 Corp. and/or Sherwood (i) asserting that Releasor is entitled to compensation on account of 450 Corp.'s sale of the Excess Development Rights, (ii) asserting that Releasor is entitled to compensation for the purchase or use of the Reserved DIB FAR.

Defendants admit on the one hand that they asked Petitioner for a Waiver detailing specific rights they sought he and his wife waive, and on the other hand that he has no rights to waive. It is criminal for Officers of the Court to close the transaction without the requisite closing documents, which included the Waiver they requested, and then fights in court to litigate that Petitioner had no rights at all.

E. Petitioner Filed Law Suits Against the Co-Op Board, Sherwood Equities and the Other Parties Involved in the Transaction

In November 2013, Petitioner filed two lawsuits against the clients of Named Defendants for tortious interference with contract; breach of contract; breach

of covenant of good faith; negligent misrepresentation; slander of title; gross negligence; and prima facie tort. Defendants submitted court papers asserting that Petitioner had lost the prior litigation and the cases were barred by *res judicata*, and Petitioner should be sanctioned for filing the law suits.

F. The March 18, 2014 Oral Arguments Proves Defendants Were Litigating to Steal Contract Rights and Affirmed Rights

At the March 18, 2014, Defendants' strategy entirely collapsed. The Attorney-Defendants had to acknowledge Petitioner's rights under the Offering Plan. The court first asked the co-op attorney, Mr. Augustine, about the February 11, 2010 decision:

> THE COURT:—which means you're going to have to commit the coop board to tell me: What does Paragraph 7 mean?
>
> MR. AUGUSTINE: It means he has the right to build structures once he submits a plan. And if those structures are permissible by law, such as Department of Buildings, and those plans do not pose a structural risk or any other risk to the building in order to—for him to service the space that he has there, then the board would be inclined to approve it.
>
> THE COURT: But what Petitioner I'm saying is he does have that right, though, under paragraph 7.
>
> MR. AUGUSTINE: He has—our understanding he has a right to build structures. That's what

it says. No one disagrees. The courts all said the same thing, he has a right to build structures.

THE COURT: No. He has—he specifically bought a right under Paragraph 7. And Petitioner I'm asking you what that right is.

MR. AUGUSTINE: Well, at the time that was written, the original owner, Petitioner believe, was his predecessor—

THE COURT: It doesn't matter. The contract is the contract. It wasn't changed when he bought it. He bought that right. What does that right mean?

MR. AUGUSTINE: It's precisely as Petitioner said, Your Honor. Once—

THE COURT: Petitioner don't know what you s said.

Daniel Millstein of Greenberg Traurig LLP, attorneys for Frank McCourt

MR. MILSTEIN: Now, again, if you want Petitioner's unsolicited opinion or maybe solicited opinion, but in which Petitioner's client doesn't have an interest as to where the limits are on this, it's clear what the plaintiff is saying is not that "Petitioner can build a structure, 20 feet, 15 feet. There's something Petitioner can build that was, although Petitioner won't tell you what it is that Petitioner want to build, Petitioner's rights were impinged." What he says is, "Petitioner have the right, either to control

through veto authority or ownership," the Court rejected both of those, "over—

THE COURT: The sale of air rights.

MR. MILSTEIN: "—overbuilding multiple stories above Petitioner's roof, adding on, "that he basically has the right to add many stories above his roof to use all of that FAR.

THE COURT: And that was rejected by both—by the courts.

MR. MILSTEIN: Right.

THE COURT: Petitioner understand.

MR. MILSTEIN: And that's because his roof wouldn't be a roof anymore, it would be in the middle of the building.

(Laughter)

MR. MILSTEIN: And Petitioner think that's fairly good guidance as to what the term meant when it said "you have the right to use the roof." And, in addition to that—

THE COURT: It doesn't say that. It doesn't say "You have the right."

MR. MILSTEIN: It says—

THE COURT: In says, "In addition to the utilization of the roof."

MR. MILSTEIN: Right. And that's the context. The context is—

THE COURT: It says in addition to the utilization of the roof he has the right to construct or extend structures upon the roof or above

the same to the extent that may from time to time be permitted under applicable law.

MR. MILSTEIN: Right, Your Honor. Petitioner think that the—you interpret contracts in accordance with their context in the circumstances. The circumstances were that there was no more FAR at the time, so you weren't talking about building FAR, building floors.

THE COURT: But there was. When he bought it, the zoning had been changed.

MR. MILSTEIN: The contract was way before he bought it. That language was in place for years before he bought it.

THE COURT: But the language says, "From time to time be permitted under applicable law."

MR. MILSTEIN: Right. Well zoning—

THE COURT: And he bought with the contract.

MR. MILSTEIN: Petitioner understand.

THE COURT: And, at the time he bought, the applicable law allowed building on the roof.

Now, whether building on the roof meant all of the air rights, which clearly the Court says it didn't, but what does it mean?

MR. MILSTEIN: Well, again, Petitioner don't think it's necessary to resolve any of these motions, but Petitioner think the context is a clue. It says, "In addition to the utilization of the roof, you'll have the right to build and extend structures on it or above it." Petitioner think the structures that are built on

or above have to be in context and supporting the use of the roof. If you're changing it and it's not going to be a roof anymore because you're building floors above it, Petitioner would say that that's not consistent. Petitioner think there's probably a lot of guidance as to what—

THE COURT: Petitioner agree with you. Petitioner think your interpretation makes sense, but how would you possibly build structures on the roof, even if it meant just one story or extending the structure, if there is a structure already there, without the use of air rights?

MR. MILSTEIN: Well, Petitioner think what counsel just told you, and Petitioner I'm not an expert in that area of law at all, but he said—

THE COURT: Oh, so then what you're saying doesn't make—it doesn't matter.

MR. MILSTEIN: Well, what Petitioner I'm saying is that Petitioner thought his explanation was convincing, which is if you have zero extra FAR.

THE COURT: But you do have extra FAR when he bought and pursuant to the contract. Since you're not an expert, Petitioner don't need to hear it.

MR. MILSTEIN: Okay.

THE COURT: Okay, Petitioner was just hoping that someone was. Okay, next. Who else? Is

there anybody else? Petitioner guess not. (42:25-46:13).

Mark Anesh, attorney for Stanley Kaufman

THE COURT: How do you interpret the decision of the lower court? How would you interpret the decision of the lower court—the decisions of the lower court and the Appellate Division?

MR. ANESH: As Petitioner just said, even though Petitioner don't have a dog in the race, "Petitioner's interpretation is he doesn't have the right to transfer any air rights, he doesn't have the right to consent or obtain a waiver. However, there is some space under applicable law that he is allowed to build or erect structures on—under—under the right—under the space that was transferred.

THE COURT: Well, let me ask you this: The seventh paragraph says, "The 12th Floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law." We know that zoning laws were changed and blah blah blah.

And then the—both the lower court and the Appellate Division have held that he has those rights, but he has no air rights. If he has no air rights, how can he possibly build structures on the roof?

MR. ANSEH: Petitioner think the court is distinguishing between the air rights and the space he has to build structures.

THE COURT: Petitioner don't understand how you can build a structure on a roof if you have no air rights.

MR. ANSEH: Your Honor, with all due respect, if you put a doghouse on top of the roof that's ten feet tall, would you consider that air rights?

THE COURT: Petitioner don't know. You tell me.

MR. ANSEH: Petitioner wouldn't. Petitioner wouldn't. Based upon what Petitioner read—

THE COURT: So they gave him the ability to build a doghouse, even though—

MR. ANSEH: No, Your Honor, Petitioner used that as an example. What is was trying to say, perhaps not as adeptly as Petitioner should, is that he has the ability to build certain structures on that roof under whatever the applicable building or code—the codes that apply to building. And obviously there is a certain height that he can build, but—

THE COURT: It doesn't say that there is a certain height, it says he can build up and out.

MR. ANESH: Petitioner agree. Petitioner agree. It doesn't say, it doesn't specify.

THE COURT: And the Appellate Division and lower court didn't say, "You can only build

to a certain height," they said, "yeah, he has the right to build up and out but he can't use the air rights," which is really an enigma.

G. At the March 18, 2014, Justice Kornreich Also Acknowledged Petitioner's Rights

THE COURT: The courts said that he has no air rights, but he has the right. But Petitioner think, perhaps, the courts didn't understand that air rights, FAR, all of that is probably the same things, development rights, so— (Transcript, p.12:9-13).

THE COURT: The decisions don't—don't address this, because, at least in this Court's mind, Petitioner don't see how you can build and build up without going into air rights or— you know, so Petitioner don't understand the decisions. Petitioner I'm asking you for guidance. (Transcript, p. 17:18-22).

THE COURT: And the Appellate Division and lower court doesn't say, "You can only build to a certain height," they said "Yeah, he has the right to build up and out but he can't use the air rights," which is really an enigma. (Transcript, p. 27:3-29:3).

THE COURT: Petitioner don't understand how you can build a structure on a roof if you have no air rights. (Transcript, p. 28:4-5).

Mr. BRADY: So the correct reading it's an inconsistent decision. Please square the two, Your Honor. Square—

> THE COURT: Petitioner don't know how. (Transcript, p. 53:17-19).
>
> THE COURT:—it was the sponsor who put this in, it was the sponsor who owned the penthouse and roof. Perhaps that was his intent. (Tr. p. 54:11-20).

H. The District Court Decision

Justice Daniel's dismissed Petitioner's Complaint with the following:

> Defendants' motions to dismiss are GRANTED with prejudice. The Complaint fails to allege diversity jurisdiction and is barred by the Rooker-Feldman doctrine and collateral estoppel. Plaintiff has also failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

But there is no truth in these statements. The charges against these litigants were never made, so they could not be barred by collateral estoppel. And Petitioner is not a state court loser, so Rooker-Feldman would not apply.

The Court also quoted a July 15, 2014 New York State Court decision by Justice Kornreich stating that Petitioner had filed "vexatious and frivolous litigation." Judge Daniels states throughout the decision that Petitioner is a "state court loser" who is seeking an appeal through the federal courts:

> Before this Court is Magistrate Judge Netburn's Report and Recommendation, ("Report," ECF No. 70), noting that this action is a part of Plaintiff's repetitive and

> vexatious litigation, and recommending that this Court grant with prejudice Defendants' seven motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim pursuant to Rule 12(b)(6).2 (p.1-2).

Had Judge Daniels genuinely believed that Petitioner was in the wrong court, he would not have ruled on the merits of the case.

> It is well established that "where the court does not have subject matter jurisdiction, it should refrain from any further exercise of power." *Matter of CRP/Extell Parcel, L.L.P. v. Cuomo*, 2011 NY Slip Op 30151(U), January 19, 2011, Sup Ct, New York County (Docket Number: 113914/10).

Nevertheless, Petitioner satisfied the criteria for District Court federal jurisdiction. The crime took place in the Southern District of New York. A Supreme Court justice rewrote a higher court Appellate Division, First Department decision, and rewrote a New York State offering plan contract for the benefit of developers. All of the law firms and Respondents have offices in Manhattan. The ten lawyer Defendants all work in New York, and they colluded and conspired together in New York. The subject premises is in New York, along with Petitioner's shares in the co-operative. A state court judge unjustly and unconstitutionally blocked Petitioner's access to state courts through making deliberately deceptive claims against Petitioner. The amount in question far exceeds the $75,000/$250,000 threshold.

Judge Netburn and Judge Daniels made these false claims even after seeing the testimony of the co-

op sponsor himself. All the false claims are adaptations of what the court was told to say by Defendants.

Q. Getting right to it, could you tell me about the second amendment to the offering plan? It's the seventh paragraph footnote to the scheduling units, where it says: That the 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures on the roof or above the roof to the extent that may from time to time be permitted under applicable law.

Can you tell me what you meant by that footnote?

A. Could you read that again?

Q. Yes. It's the seventh paragraph. It's a new paragraph seven footnote to the schedule of units. And it says: The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law.

Now, to refresh your memory, this footnote change was a modification that was made in this second and final amendment to the offering plan. It states that it was a final term in which you agreed to declare the foregoing plan effective.

Petitioner can show you the second paragraph footnote to the schedule of units, because

you made two other changes at the time. So if you were to interpret the whole communication that would be great.

This is the second amendment, and these are the amended footnotes found on page 2.

(Witness peruses document.)

A. Petitioner believe at the time there was a limitation on what you could add to the building. The building had reached its maximum limit for construction. Probably the intent was to, if you could build more than—if they approved, you can build more than—you still have to go through co-op to get approval to build, but you can add on if the co-op will give it to you.

Q. Does it say here anything permitting under applicable law is reserved for the 12th floor and roof unit, was that your intent?

A. In the existing space, yes.

Q. And the purpose of reserving this floor area was so that, just to be clear, any permissible development rights or zoning changes or for other purposes that is permitted it was for the exclusive use of that particular 12th floor which Petitioner believe you reserved for yourself; is that true?

A. Yes.

(Transcript p. 4:19-6:16)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. ATTORNEYS CANNOT BE PERMITTED TO STEAL CONTRACTUAL RIGHTS UNDER THE GUISE OF ADVOCATING FOR THEIR CLIENT

The false assertions made by Attorney Defendants in their respective motions to dismiss are violations of Judiciary Law § 487. Petitioner repeatedly pointed to Attorney Defendants' false statements and fraud upon the court as Officers of the Court in the prior cases, but the lower court ignored him.

Defendants asked that Petitioner be sanctioned and "barred from commencing any more law suits or making any more motions related to the air rights at issue in the Complaint." In other words, they are asking a Federal Court judge to join in the conspiracy to defraud Petitioner of obtaining justice and compensation for the air rights that even the attorneys for this motion admit are appurtenant to Petitioner's apartment.

For example, Herrick Feinstein states: "This action, like the 2013 actions before it, is yet another 'near perfect example' of frivolous and abusive conduct." (Herrick Feinstein Motion to Dismiss, p. 2). Every statement in that document is untrue and advancing a fraud upon the court by Officers of the Court. The memorandums of law sees them all chanting "he lost, he lost," as if to give life to Hitler's dictum "If you tell a lie big enough and keep repeating it, people will eventually come to believe it."

Herrick Feinstein LLP states on page 6 of their motion to dismiss: "All Herrick Defendants did, and all that Petitioner alleges that they did, was advocate, successfully, on behalf of their clients based upon the existing record, existing law and citation to Petitioner's own public statements."

That, of course, is not what they did. What Defendants did was conspire and collude to steal the development rights by closing on the transaction with the co-op without obtaining the Waiver they sought as a closing document, and then litigate through the inconsistent decisions that Petitioner lost the litigation.

A sample of Defendants assertion in court papers shows further proof:

> "Plaintiff has now commenced ten patently frivolous lawsuits. Plaintiff has forced dozens upon dozens of litigants to incur hundreds of thousands of dollars to defend against these meritless claims. Moreover, these lawsuits have resulted in a significant waste of judicial resources. Such conduct should not be permitted and instead should be punished. (Memo of Law in Support of Motion to Dismiss Plaintiff's Complaint, Lewis Brisbois, May 18, 2016).
>
> "This action, like the 2013 actions before it, is yet another 'near perfect example' of frivolous and abusive conduct." (Memo of Law in Support of Motion to Dismiss Plaintiff's Complaint, Herrick Feinstein LLP, May 20, 2016).

> "This is a near perfect example of frivolous conduct and warrants defendants' requests for the imposition of sanctions." (Memo of Law in Support of Motion to Dismiss, Litman, Asche & Gioiella LLP, May 17, 2016).

Mr. Asche follows his lie with an inadvertent admission regarding Plaintiff's rights under the Offering Plan contract:

> "A footnote in the Offering Plan for the co-op gave the penthouse occupant the right to build or extend a "structure" on the roof in compliance with applicable law." (*Id.* p.5).

A. The Exhibits Submitted by Richard Asche, Attorneys for Daniel Millstein, Steven Sinatra, and Greenberg Traurig LLP, Actually Help Prove Appellant's Claims

In their Notice of Motion, Defendants Daniel Millstein also point to Justice Friedman's July 2, 2008 decision is Exhibit B; the March 13, 2009 is Exhibit C; the February 11, 2010 decision is Exhibit D; a Court of Appeals October 14, 2010 decision is Exhibit E; the July 15, 2014 decision is Exhibit F; the January 22, 2015 Appellate Division decision is Exhibit I; as Exhibit J, they include an Appellate Division denying Plaintiff's motion for leave to appeal; as Exhibit K, they included the October 1, 2015 and December 3, 2015 Appellate Division decisions; Exhibit L is a March 29, 2016 decision from the Court of Appeals; the November 23, 2015 decision by Justice Chan is Exhibit M; as Exhibit N, they cite the case against the Commission on Judicial Conduct; as Exhibit O, they cite the case against Attorney General

Eric Schneiderman in the Southern District; and Exhibit P is the docket for *Brady v. Associated Press, et al.*

Of all of these Decisions mentioned by Mr. Asche, the highest court Decision to define plaintiff's contract rights is the Appellate Division's February 11, 2010 Decision which states pursuant to paragraph 7 "plaintiffs have the right to construct or extend structures on the roof or above the same, to the extent that may from time to time be permitted under applicable law." The July 2015 Decision from Justice Kornreich adjudges that it was these rights that that were transferred and deliberately violated and seized after the co-op attorneys, Sherwood Equities' attorneys, and Chicago Title failed to obtain the waiver that they demanded and threatened to take if Plaintiff would not waive his rights.

II. IT IS UNCONSTITUTIONAL FOR THE COURTS TO IGNORE THE NEED FOR WAIVERS

Property rights cannot be just seized and sold without waivers from the holders of those rights, as admittedly happened in the July 15, 2014 Decision by Justice Kornreich in which she acknowledged that Sherwood Equities and the Co-op tortuously interfered with Petitioner's contract, and that Defendants closed without a waiver:

> Initially, the Co-op and Sherwood sought to obtain a waiver from the Bradys regarding the air rights. However, when Brady refused to sign the waiver as presented, the Co-op and Sherwood proceeded without his consent. (July 15, 2014 Decision, page 5)

> That the Co-op or Sherwood initially sought a waiver from Brady does not constitute an "admission" that the ZLDEA interfered with any of Brady's rights. Indeed, according to Brady, he was specifically told by the Co-op that "the transaction will be consummated with or without your waiver."

Attorney-Defendants understood they needed a waiver from Petitioner because they were selling the rights appurtenant to their apartment. Any sale without a waiver violated their February 11, 2010 First Department decision. The Waiver, Consent and Release Defendants asked Petitioner to sign for free lists precisely the rights that were seized from Petitioner as admitted to by the NYS courts:

> (3) Without limiting the foregoing, (a) releases of Excess Development Rights (as defined in the ZLDEA) from any claims, right, title or interests Releasor may have in same, (b) waives any right to construct improvements in the Developer's Easement Area (as defined by the ZLDEA); and (c) waives any claim, at law or in equity, that Releasor may have against 450 Corp. and/or Sherwood (i) asserting that Releasor is entitled to compensation on account of 450 Corp.'s sale of the Excess Development Rights

III. THE IMPOSITION OF A FILING INJUNCTION AGAINST PETITIONER WAS UNCONSTITUTIONAL

Judge Daniels also signed a filing injunction against Petitioner, yet his two decisions acknowledge that the development rights are appurtenant to Peti-

tioner's unit. The injunction was admittedly issued in order to silence Petitioner and to never having to address his claims on the merits.

Judge Netburn's errors are obvious and can be proven simply by reading her January 10, 2017 Report and Recommendation. In the same Report and Recommendation that she states on page four that "Brady has now presented a long series of lawsuits that could only be considered vexatious, harassing and duplicative and which he has no objective good-faith expectation of prevailing," she admits repeatedly her full undertaking that the premise's air rights were "appurtenant" to Plaintiff's Unit before they were unlawfully seized and sold in 2012.

For example, on page 1 of her Report and Recommendation, the Court "Ordered Brady to show cause by January 2017 as to why a filing injunction should not be issued barring him from instituting and further litigation relating to the air rights appurtenant to his cooperative unit at 450 West 31st Street, New York, NY."

On page 6 of her Report and Recommendation, where the Court writes: "The Plaintiff should be required to seek leave of the Court before commencing any new action in the Southern District of New York that relates in any way to the air rights appurtenant to his cooperative unit at 450 West 31St Street, New York, NY."

"The Court emphasizes, however, that this injunction should be broadly construed to bar the filing without leave of Court of any case, against any defendant that has a factual predicate the air rights

appurtenant to Brady's cooperative unit or any of the collateral actions that have arisen to it."

Three times in the same sentences that Judge Netburn recommends "a broadly construed filing injunction," she admits her understanding that the air rights were contractually "appurtenant" to his [Brady's] cooperative unit on the 12th Floor of the property located at 450 West 31st Street New York, NY."

Judge Netburn seeks a "broadly construed filing injunction" so that those who participated in seizing those rights will never be held accountable for their actions.

A. Justice Daniels Also Acknowledges Plaintiff's Rights in His Decision

The second sentence of Judge Daniel's January 10, 2017 Memorandum Decision and Order proves that he also inadvertently admits his full understanding that, pursuant to the contract and February 11, 2010 Appellate Division, First Department Decision, the premise's air rights were adjudged "appurtenant to Petitioner 12th floor and roof unit apartment." The first two sentences of Judge Daniel's January 10, 2017 Memorandum Decision and Order read as follows:

> "Plaintiff James Brady initially filed this action against ten individual-named lawyers and seven law firms who appeared as counsel in previous actions he filed. Those actions centered around the Plaintiff's claims regarding the air rights appurtenant to his cooperative unit on the twelfth floor of the

property located at 450 West 31st Street in Manhattan."

In addition to the inadvertent full admissions by Judge Daniels and Judge Netburn that the premise air rights were "appurtenant" to Petitioner's 12th Floor and Roof Unit each and every one of lawyers who spoke during the March 18, 2014 oral arguments also admitted the same thing, one after the other.

Indeed, both Judge Netburn and Judge Daniels were given the March 18, 2014 oral argument transcript, where each attorney who spoke admitted they fully understood that based on the contract and February 11, 2010 Decision, it was adjudged that the premises air rights were "appurtenant" expressly and exclusively to Petitioner's 12th Floor and Roof Unit pursuant to the seventh paragraph footnote to the Schedule of Units in the Appended 1980 Offering Plan.

The lawyer's admissions on March 18, 2014 that the premises permissible air rights were appurtenant to Petitioner's unit completely conflicts with that they wrote in the papers submitted in the 2013 litigation and they totally conflict with the papers submitted in this litigation. That does prove that they know what they wrote in their papers was false which means they were guilty of perjury and 487 violations. The fact that attorneys argued in their 2013 papers and the papers submitted to this Court that Petitioner "lost" the litigation that ended in 2010 when they admitted otherwise during the March 18, 2014 Oral Arguments proves Petitioner's common law fraud claims and the Defendants intentional infliction of emotional Distress.

The unlawful acts of Attorney Defendants were done so that their clients could get away with seizing the air rights that they knew were contractually appurtenant to plaintiff's 12th floor and roof unit at 450 west 31st Street in New York, NY. Indeed it is undisputed that in 2012, the scheme was created that if Petitioner did not agree to waive his rights "for free" the Co-op, its attorneys, the developer Sherwood Equities and their attorneys and their title insurance company would use their power, influence, "*quid pro quo* relationships" and most likely more than that to have a Court adopt their false legal arguments that Petitioner lost the litigation that ended with the Appellate Division, First Department February 11, 2010 Decision. It is obvious that the Attorney Defendants and law firms did the exact same thing again. This time the persons who persuaded to make deliberately wrong Decisions are Judge Netburn and Judge Daniels.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari. The Supreme Court must be the moral compass of the United States of America. Not one single other state or federal judge has acknowledged seeing any wrong doing or acknowledgment that the contract was rewritten to void what it said on its face.

Respectfully submitted,

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