

APPEAL NO.:

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROCHELLE DRIESSEN,

Petitioner/Appellant,

-vs-

ROYAL BANK OF SCOTLAND, a brand
of the Royal Bank of Scotland Group,

Respondent/Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT
CASE NO.: 16-1496-cv

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION (S) PRESENTED

WHETHER THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT'S MAY 25, 2017, SUMMARY ORDER IS IN DIRECT CONFLICT WITH A DECISION OF THE UNITED STATES SUPREME COURT IN NEITZKE v. WILLIAMS, 490 U.S. 319 (1989)

LIST OF PARTIES

- ☒ All parties in the caption of the case are listed on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Appellant respectfully prays that a writ of certiorari be granted to review the Judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the U.S. Court of Appeals for the Second Circuit appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the U.S. District Court appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the court appears at Appendix __ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from the **federal courts**:

The date on which the U.S. Court of Appeals decided my case was on **May 25, 2017**. A copy of the decision appears at Appendix **A**.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **September 28, 2017**, and a copy of the order denying rehearing at Appendix **B**.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was on _____ . A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1915 – Proceedings In Forma Pauperis

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted

STATEMENT OF THE CASE

This cause came up for rehearing pursuant to 28 USC § 1254(1) on the United States Court of Appeals for the Second Circuit's Summary Order entered on May 25, 2017, affirming the district court's March 30, 2016 Judgment, (See Appendix "A"), and denying Appellant's Petition for Rehearing on September 28, 2017.

The Second Circuit held in its May 25, 2017, Summary Order "" [W]e review *de novo* a district court's dismissal of a complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)." *Milan v. Wertheimer*, 808 F.3d 961, 963 (2d Cir. 2015). "A district court must dismiss an *in forma pauperis* action if the action is frivolous An action is frivolous when either: (1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory." *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (internal quotation marks omitted). The district court correctly concluded that Driessen's complaint was frivolous and therefore properly dismissed it."

However, the Second Circuit erred in its panel decision wherein the Second Circuit reviewed *de novo* the district court's dismissal of Plaintiff's complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) with respect to Plaintiff's initial motion for leave to proceed *in forma pauperis*, and not Plaintiff's subsequent April 4, 2017 motion for leave to proceed on appeal *in forma pauperis* filed in the district court where U.S. District Court Judge Alvin W. Thompson granted Plaintiff leave

to proceed on appeal *in forma pauperis* by entry of Order on April 22, 2016 pursuant to 28 USC § 1915 after the entry of the March 30, 2016 Judgment entered by the district court clerk.

U.S. District Court Judge Alvin W. Thompson did not determine Plaintiff's appeal as frivolous under the screening provisions of 28 USC 1915(e)(2)(B)(i), nor did he incorporate the magistrate's Recommend Ruling in granting Plaintiff leave to proceed on appeal. Plaintiff prevailed in Plaintiff's objections to the magistrate's Recommended Ruling pursuant to U.S. District Court Judge Alvin W. Thompson's ruling in his February 22, 2016 Order Re Recommended Ruling in which he ruled "[T]he plaintiff objects to the recommended ruling, emphasizing that under Neitzke v. Williams, 490 U.S. 319 (1989), the Court must exercise "caution in dismissing a case under section 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous." (Pltf.'s Obj: (Doc. 7) at 2.) The plaintiff's objections accurately states the standard under Neitzke."

Therefore, the magistrate's Recommended Ruling is not the subject of this appeal. Plaintiff's standard under Neitzke is the subject of this appeal pursuant to the U.S. District Court Judge Alvin W. Thompson's February 22, 2016 Order Re Recommended Ruling.

REASONS FOR GRANTING THE WRIT

Appellant's complaint has met the *in forma pauperis* screening provision standards pursuant to Neitzke v. Williams, 490 U.S. 319 (1989) to proceed on

appeal, and therefore Appellant's complaint is not frivolous wherein the district court ruled in its February 22, 2016 Order Re Recommended Ruling "[T]he plaintiff's objections accurately states the standard under Neitzke, which is as follows:

To the extent that complaint filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal. But the considerable common ground between these standards does not mean that one invariably encompasses the other. When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. This conclusion follows naturally from § 1915(d)'s role of replicating the function of screening out inarguable claims which is played in the realm of paid cases by financial consideration.

Neitzke, 490 U.S. at 328."

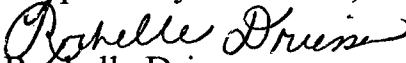
The magistrate's arguable questions of law in the magistrate's Recommended Ruling recommending dismissal of Plaintiff's *in forma pauperis* complaint as frivolous and for failure to state a claim under the *in forma pauperis* screening provisions pursuant to 28 USC § 1915(e)(2)(B)(i)(ii) were resolved by the district court against plaintiff on the grounds of frivolous, however, pursuant to the district court's ruling that plaintiff's objections correctly states the standards in Neitzke, the district court misapplied Plaintiff's standards in Neitzke wherein dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. The district court's dismissal of Plaintiff's complaint as frivolous and the Second

Circuit's affirming the district court's decision are in conflict with the Supreme Court of the United States' decision in Neitzke v. Williams, 490 U.S. 319 (1989).

The Second Circuit incorrectly ruled at p. 3 of the Summary Order "[T]he district court properly applied *Neitzke*'s holding that an action is not frivolous merely because it fails to state a claim upon which relief can be granted. *See id* at 328," which is Plaintiff's Neitzke's standard as ruled by the district court in the district court's Order Re Recommended Ruling and not the district court's holding of Neitzke. The Second Circuit's and the district court's misapplications of Neitzke v. Williams, 490 U.S. 319 (1989) in dismissing Plaintiff's complaint as frivolous are sufficient grounds for granting Appellant rehearing and/or rehearing *en banc* wherein Plaintiff's complaint prevailed on the district court's issue of failure to state a claim which entitles Plaintiff her appellate rights to proceed on appeal.

CONCLUSION

Petitioner respectfully request the Court to grant Petitioner's Petition for Writ of Certiorari, and any and all other relief as required under the law.

Respectfully submitted,

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Date: 12/4/2017