11/5/18

No. 18-604

In The
Supreme Court of the United States

LORINA G. DELFIERRO

Petitioner,

v.

PENSCO TRUST COMPANY CUSTODIAN FBO JEFFREY D. HERMANN IRA ACCOUNT NUMBER 20005343

Respondent,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION(s) PRESENTED:

1. When the Internal Revenue Code 26 U.S § 408 requires a Custodian for a Self-Directed IRA to Operate in Commerce and the Contractual Arrangement Between the Self-Directed IRA Custodian and the Self-Directed IRA Beneficiary Clearly Establishes a Custodial Arrangement Rather than a Trustee arrangement. Does the Formulated Plan/Account, Name as "**Custodian For Benefit of the Beneficiary IRA Account Number**" Have the Requisite Article III Standing to Invoke the Jurisdiction of the Court on Litigation Over a Plan/Account Asset Consisting of an Assignment of a Promissory Note Purchased by the Beneficiary of the Self-Directed IRA Without Joining the Beneficiary?

2. Did the Ninth Circuit Violate Petitioner's Due Process Rights as Guaranteed by the 5th and 14th Amendment by Recognizing a Plan/Account in the Caption, Name as "**Custodian For Benefit of the Beneficiary IRA Account Number**" as the Self Directed IRA Custodian Having the Requisite Standing to Invoke the Jurisdiction of the Court, Rather than the Account Beneficiary "For Benefit Of" the Account, When the Contractual Arrangement Between the Custodian and Beneficiary Clearly Establishes a Custodial Arrangement rather than a Trustee arrangement, and the Beneficiary Has Expressly Indemnified the Custodian?

LIST OF PARTIES

1. Petitioner, "Lorina G. Delfierro," is an individual and resident of the United States of America. Mrs. Delfierro is sole owner of the Real Property which has been at issue during this litigation, located in the State of Washington, County of King, Assessor's Parcel Number: 873196-0830-0, with the common street address of: 4009 SW 323rd Street, Federal Way, Washington 98023.

1. Respondent, "Pensco Trust Company, Custodian FBO Jeffrey D. Hermann IRA, Account Number 20005343,"the Plan, a conglomeration of a Self-Directed IRA Custodian, a Self-Directed IRA Account Owner/Holder/Beneficiary, and a Self-Directed IRA Account itself. As such a stated conglomeration, it does not actually constitute a viable party or a Real Party In Interest in this Litigation, but nonetheless has been listed and judicially treated as a party in interest throughout this litigation. Account Number 20005343 is a Self-Directed Individual Retirement Account (IRA) index under the IRC 408. The Account was formed on February 15, 2011. The IRA account Beneficiary is Jeffrey D Hermann for whose benefit the IRA was esta-blished. Pensco Trust Company, serves as the Investment manager and document processor of the IRA Account under the direction of the beneficiary, Jeffrey D. Hermann, and through the contractual documentation between Hermann and Pensco, making Pensco the "custodian" of Hermann's Self-Directed IRA for purposes of Internal Revenue Service Code and other Investment related statutory and Regulatory Authorities. Attorney for respondent
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1. COUNTERCLAIM DEFENDANT AND NONE PARTY TO JUDICIAL FORECLOSURE PENSCO Trust Company (PENSCO), is not the party on the Foreclosure Complaint Caption but is being treated and acting as the Respondent in this case. PENSCO is the party in the Petitioner's counterclaim. PENSCO, as Custodian is an entity, as defined in IRC 408(n), that has the approval of the IRS to act as Custodian of a self-directed IRA and will allow investments into non-traditional investments. PENSCO's address: 1560 Broadway, Suite 400, Denver, CO 80202-3308.

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The Western District Court of Washington, Granted Respondents Motion for Summary Judgment, Denied Petitioner's Motion for Summary Judgment.(App.7-16) And Denied Petitioner's Counterclaim. (App. 17-23).

The Ninth Circuit Court of Appeals Affirmed the District Court Judgment,(App.3-5) and Rehearing and En Banc Review was sought by the Petitioner, and was denied by the Ninth Circuit Court. (App. 2)

JURISDICTION

The Judgment of the District Court was entered on August 11,2017. A notice of appeal was filed on August 11,2017, and the case was docketed in the Ninth Circuit Court of Appeals on that date August 11, 2017.The Ninth Circuit rendered unpublished decision on April 19,2018. The Re-Hearing and En Banc review was denied on August 8, 2018. Petitioner filed this petition for Writ of Certiorari on **November 2, 2018.** (28 U.S.C. § 2101(e).). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lorina G. Delfierro, respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the United State District Court, Western District of Washington at Seattle, that was affirmed by United State Court of Appeals for the Ninth Circuit.

The District Court improperly shifted the burden upon Petitioner to prove the SDIRA custodian, (Pensco Trust Company) lacked standing, which she did by presenting the assignment of rights and contract between PENSCO and the SDIRA Beneficiary/Owner, (Jeffrey D. Hermann), and two federal authorities determining the IRA

Beneficiary/Owner is the proper party plaintiff. A long line of authorities from this Court mandate that where a court lacks the constitutional power to adjudicate a case, it must dismiss it for lack of subject matter jurisdiction. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982); *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982); *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977); *Mansfield, C. & L.M.R. Company. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884); *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). Nonetheless, the District Court determined the SDIRA Custodian had standing to sue petitioner in a judicial foreclosure.

The Ninth Circuit acknowledged the standing issue, acknowledged the lack of authority from this Court on the issue - then refused to rule upon the issue.

Three federal cases have determined the owner of a self-directed IRA has standing to sue on behalf of his or her own IRA. The fundamental basis was because the owner of the Self-Directed IRA manages, directs, and controls the investments not the custodian. Likening the situation to a trust, rather than the custodian, it is the account owner who is the trustee and the only real party in interest with the requisite standing to prosecute actions. The IRA custodian is just that - a ministerial custodian, not the actual party controlling and directing the investment. The account beneficiary/owner who is the only "real party in interest" with the requisite standing to invoke the jurisdiction of the Federal Court system.

Only two published District Court cases appear to have determined the issue. Without authority, the District Court determined PENSCO had standing. The Ninth circuit declined to rule upon the issue, and this Court has yet to reach the issue. With self-directed IRA investments abound nowadays, guidance, direction and the rule of law on the issue for the Country as a whole is painfully required from this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition for Certiorari involves the following provisions:

Article III, § 2 of the United States Constitution, which provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

The Fifth Amendment to the United States Constitution Section 1

> "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 offense 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."

The Fourteenth Amendment to the United States Constitution Section 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

On July 16, 2007, Petitioner refinanced her mortgage loan to Equifirst Corporation, a member of MERS. See App.133-134. Parties outside Equifisrt and MERS later asserted rights to ownership of her loan. See App. 55-56. There were serious issues with

the accounting, no recording of assignments, no 1099 tax form and with the alleged transfers of the loan servicing rights and beneficial ownership. The issues and questions were litigated in several cases, e.g. who owns the note?: State Civil Court (see App.83-86), a Federal Bankruptcy Court (see App. 75, 81 and 102), State Civil Court (see App. 56 and 132), Appellate Court Division 1 (see App. 35, 111, 112 and 131), Federal District Court, (see App. 15, 94, 101-103,) and then the Ninth Circuit, ending in this appeal.

On December 21, 2009, Superior Court of Washington for King County ordered to dismiss the Unlawful Detainer Action with prejudice and void the Trustee's Deed of Second Mariners Fund II, REO, LLC (Mariners 1) and return the lien to its Original position. See App. 85. Unknown to the Court Mariners 1 was a non-existing entity.

On April 15, 2011, the U. S. Bankruptcy Court of Western District of Washington at Seattle affirmed the Admitted Facts that the Note was purchase from Equifirst, a MERS member by Second Mariners **Investment** Fund II REO, LLC (Mariners 4) as the presented evidence was the assignment of Deed of Trust of MERS (ADOT#1)and Mariners 4 recorded it on March 3,2010. (App. 75, 80 and 102). The Respondent and co-harts were successful to gain standing and bankruptcy Trustee released the monies of the Petitioner. Unknown to the court these were false claims.

In June 2012, the Petitioner filed a Complaint against the Mariners entities, the Respondent (Plan/Account) and Hermann, the Beneficiary and other entities.

At Trial and after years of litigations the Mariners entities and Attorney Hermann took a complete about face in 2014 Trial and declared Mariners 1 was

a non-existing entity and Mariners 4 did not purchased the note from MERS and Fidelity. App.113 ¶15. Further stated that the ADOT#1 was erroneous then presented new claims and evidence at Trial. See App. App.116-117.

In 2014, the State Trial Court set forth the transfers as follows:

> 6. The beneficial Interest of the Note and Deed of Trust was transferred several times prior to April, 2009. The original lender and beneficiary was Equifirst Corporation. Equifirst sold its interest to Sutton Funding, LLC. Sutton Funding, LLC sold its interest to FCDB FF1, LLC, one of several entities commonly referred to as "Fortress."
>
> 7. On April 14, 2009, Second Mariners Investment Fund II REO, LLC purchased for value the beneficial interest in Ms. Del Fierro's Note and Deed of Trust from FCDB SNPWL TRUST, commonly referred to in court as "Fortress." The Master Asset Sale and Interim Servicing Agreement for this sale was submitted as Exhibit 3 in the trial court over Plaintiff's objection. App. 55-56

There is a clear "gap," with no stated sale between FCDB FF1, LLC, and FCDB SNPWL TRUST. Further, the Master Asset Sale and Interim Servicing Agreement submitted by the Mariners companies who claimed to sell to PENSCO, FBO Jeffrey D. Her-man Account # 20005343, stated that "a foreclosed property" was sold – not a Mortgage Loan Promissory Note. (App.131-132.) This "gap" was simply ignored by multiple courts.

The parties continued to claim they possessed the original promissory note. See App. 106. But when pressed to produce it, a Shakespearean prevarication of a "lost note" was fervently detailed, See App. 58-61 and somehow adopted by the trial court. App. 71-72

The State trial court finally determined that Petitioner was the owner of the real property at issue. App. 63 ¶ 4 ,70. But adopting this "lost note" prevarication, despite the MSA showing a foreclosed property being sold, the trial court also ruled that "possession" of the Promissory Note was with the IRA Custodian fbo Hermann and his account, but that they had not proven that they had a right to enforce the note and foreclose. This oral ruling was incorporated and signed on the Findings of Facts and Conclusions of Law. See App. 63, 71, 72 and 132.

The Trial court stated:

> THE COURT: Okay. So let's go to paragraph four. Okay. So we can see it's just a few words' difference, but they're pretty important. My ruling was that, of course, the property belongs to Ms. Delfierro and **potentially** a subject of the lien of the deed securing Plaintiff's obligation under the note. Okay. So number four is fine in the Defendants'. PENSCO has satisfied the requirements. (at App. 70.)

Then the Court Further:

> "I'm just deciding who owns the note. So if you think –- I'm not encouraging more litigation, but if that turns out to be a problem for Mr. Hermann, so be it. So again, I'm not foreclosing. We all know that, to foreclose, a lot of requirements have to be in place, but that's a different problem than this, based particularly on the long history of litigation. I had no

> question that Mr. Hermann bought at arm's length a transaction, you know - pardon me, dents and all, whatever the weaknesses were of the loan. That's not a comment at all about Ms. Delfierro, but he knew that this had been in litigation.
> He knew it had been in bankruptcy and I'm satisfied that he is the owner of the note. If he has a dent in what he owns, that's going to be his problem on another day." (at App. 71-72).

Petitioner appealed In the Court of Appeals of the State of Washington Division 1 .

Respondents and co-harts answered the Appeal and then did a complete about face for the third time and claimed that the Mariner 4 purchased the Note from FCDB FF1, LLC.

Meanwhile, on January 22, 2015 PENSCO, (at but without so being stated), caused the assignment of the deed of trust (ADOT#1) already admitted erroneous/-improper in the State Court, (See App. 115-118) to be "Re-recorded" in the County Recorder's Office of King County, Washington. The False Notice was again re-filed. This False Notice was an effort to deceive not only the public but the Courts and PENSCO Trust Company and its counsels were successful. Then this rerecorded ADOT#1 was presented to the District Court and to the Ninth Circuit Court. See App. 101-103). On contrary to the Trial Court rulings the unrecorded assignment of the deed of trust (UADOT) was not recorded as promised to the Trial Court. See App.15 and 129-130. Instead PENSCO electronically recorded the 2015 newly executed assignment of deed of trust (ADOT#3) of long time dead entities of the Mariners Companies in the County Recorder's Office and presented the new

assignment to the District Court as a document litigated in 2014. See 94-96.

On December 9, 2015, in the Court of Appeals of the State of Washington Division 1 affirmed the Trial Court's ruling, but the Div. 1 Court ruled differently on the Note that it was purchased from FCDB FF1, LLC. See App. 35. This entity that was not in the Master Sale Agreement. See App. 132. This ruling contradicted the Trial Court findings.

On June 29,2016, The Supreme Court of Washington denied the Petition for review of Delfierro. On July 22,2016 on appeal, the State Supreme Court and Court of Appeal determinations and Mandate required the matter to return to the Superior Court for additional findings and conclusions:

> " This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision." At App. 29

In November 16, 2016, rather than returning to the Trial court for proper findings and conclusions in accordance with the Washington State Supreme Court and the Court of Appeal Division Mandate, PENSCO, FBO Jeffrey D. Herman, Account Number 20005343, the Plan/Account through PENSCO filed a Judicial Fore-closure Complaint, a new case against the Petitioner in the Superior Court of Washington for King County filed as Dkt.#4. App. 93-94.

Contrary to the open-court-admissions of the Mariners Companies, PENSCO, as directed by Hermann, then presented the new assignment to the District Court as previously litigated and legally accepted documents in 2014. (App.15, 95-97,98-100 and 101-103). The Petitioner filed a counterclaim against PENSCO Trust Company due to the fact that

it knew that these documents are false and he recorded these documents in the Washington King County Recorder's Office and filed the documents in the Court. See. App 92.

The District Court noticed Petitioners assertion regarding the standing of the Respondent. Dkt. #55

> "payments. See Dkts. #45 and #51. Instead, Defendant asserts that Plaintiff, as a mere "account," does not have standing to bring this action. Id. She seems to argue that Jeffrey Hermann, as the beneficiary of the account, is the real party in interest, but that the account itself has no ability to bring the foreclosure claim. Dkt. #45 at 3-9. Federal Rule of Civil Procedure 17(a) states that "An action must be prosecuted in the name of the real party in interest." At App. 10-11

C. Defendant Delfierro's Motion

> "In her motion for summary judgment, Ms. Delfierro raises only the standing issue addressed above. Dkt. #45. Because the Court has rejected that argument, Defend-ant's Motion for Summary Judgment must be denied." At App. 16

The District court responded on the Petitioner's argument that the Respondent was an Account. The District Court Granted the Motion to Change Caption where the spelling of the "Penso" to " Pensco" was only corrected. (App. 26-27). The District Court left the ambiguous name of the Account, the standing less party in place in the Caption and Court rulings were made in the name of PENSCO Trust Company, the Custodian.

The District Court ignored the Petitioner's presented Assignment of Cause of Action, wherein PENSCO assigned any and all right to Hermann to litigate on behalf of his IRA and the Counsel does not represent PENSCO Trust Company.

> " Nothing herein shall authorize or entitle Jeffery D. Hermann or his representatives or attorneys to represent or defend PENSCO's own interests, i.e., interests other than those affecting assets in the Jeffery D. Hermann IRA, in any action or proceeding, nor shall this assignment have the effect of joining PENSCO as a party to such proceeding." App. 123

Petitioner also presented the indemnification agreement of Hermann and PENSCO Trust Company.

> " I agree to release, indemnify, defend and hold PENSCO Trust Company harmless for any claims arising out of this payment. This includes, but is not limited to, claims that this payment is not prudent, proper, legal, or diversified. I also understand and agree that PENSCO Trust Company will not be responsible for taking any action should the investment noted herein become subject to default, including fraud, insolvency, bankruptcy, or other court order or legal process." At App. 126

The Petitioner filed a Motion for Summary Judgment to dismiss the Respondent for lack of standing. App.11-14. The District Court acknowledged the two federal cases. The District Court adjudicating that an account beneficiary/owner has the requisite standing to prosecute an action, as opposed to the account custodian. Without countering authority, the district court decided:

> "[h]owever, those cases are distinguishable from the instant matter. First, they can be factually distinguished. Indeed, those cases (which are not binding on this Court in any event) do not stand for the proposition that a custodian can never be a real party in interest. Rather, those cases focus on the relationships between the asserted parties in interest based on the specific facts of those cases. Here, Defendant makes no showing that the current Plaintiff does not have the capacity to sue. Indeed, she makes no effort to demonstrate the relationship between Mr. Hermann and PENSCO as the custodian of his IRA account, and provides no evidence of the type of account held by PENSCO for the benefit of Mr. Hermann. Moreover, as noted above, the state court found, and this Court has affirmed, that PENSCO is the beneficial owner of the mortgage note and has the authority to enforce the note. Defendant cites no Wash-ington cases or other legal authority that would preclude Plaintiff from pursuing this action to enforce its interests." App. 14
>
> . . .
>
> In her motion for summary judgment, Ms. Delfierro raises only the standing issue addressed above. Dkt. #45. Because the Court has rejected that argument, Defend-ant's Motion for Summary Judgment must be denied. App. 16

The district court ignored the Assignment of Cause of Action, the fact Hermann managed, controlled and directed all investments, and the fact PENSCO was

simply a ministerial custodian for IRS and SEC regulation purposes.

Using and ambiguous name in the caption is misleading, deceptive and detrimental to any expectation of due process to the public and the participants of the case. PENSCO Trust Company's name appears throughout this litigation but has never joined the complaint Caption with the Beneficiary who also failed to join the Complaint. PENSCO Trust Company is not represented by plaintiff's council. Yet the name PENSCO Trust Company is holding a primary role in this and previous litigation's involving the same asset.

As a great amount of personal wealth in this country is held in the equity value of real property both Federal and State law makers have gone to great lengths to have laws in place to protect these investments from unscrupulous participants in the market.

These rules protect the property owners as well as the lenders and investors only when they are followed and enforced when not. This leads to the ultimate responsibility of maintaining a fair marketplace upon the courts. The anti-fraud laws rely heavily on documentation, which when not handled properly opens the opportunity for fraud. As such, **the Public Interest in the questions raised in this appeal is significant.** It involves the lower courts responses to lost and missing documents, false documents, unre-corded documents and violations of the state recording act. All of which are controlled by State and Federal law.

On appeal to the Ninth Circuit, Petitioner claimed:

> 1. Did the District Court abused its discretion by allowing the Caption on the Judicial Foreclosure to remain ambiguous in the name of the Appellee, the multi-

> party account, Pensco Trust Company, Custodian FBO Jeffrey D. Hermann IRA Account # 20004353 as the Real party of interest that prevented the Appellant from providing a proper defense as the source of the false information being provided to the court is alleged as being from the "Account" who is voiceless.(App. 89.)

The Ninth Circuit Court declined to accept and give credit to the Trial Court Incorporated Oral ruling .See App. 64, 70-72.

To have a standing one must have identifiable damages, concrete damages, no speculation, there must be a connection between the harm and the person being sued and that can be corrected by the court. The Account or the Plan did not suffered injury -in-fact. The Custodian did not suffered injury-in-fact. The Beneficiary may suffer a loss but not damages in this case.

The beneficiary entered into a purchase from other than the collateral owner, for value, of what was known to the purchaser to be damaged goods. As the Trial court had stated Jeffrey Hermann knew he purchased investment had already been through a "scratch and dent" sale in its history as well as a failed attempt to foreclose and lacked the necessary documentation to guarantee a return.

In a SDIRA the custodian has certain IRS mandated responsibilities but control of what assets are acquired or disposed in the SDIRA account is solely under the control of the beneficiary. The beneficiary is, by contract, to provide all purchase and sale directives to the Custodian in writing and include in each such directive an agreement to indemnify the Custodian of any responsibility as to the results of such purchase or sale, which the custodian will make.

Respondent, "PENSCO Trust Company, Custodian FBO Jeffery D. Hermann IRA Account 20005343" is a documented retirement plan/account so named to comply with IRS requirements. It exists due to a contract entered into between PENSCO Trust Company a legal entity and one Jeffery D. Hermann, a real person. The Respondent the Self-Directed IRA Account, is "the Account" a non-legal entity, a ledger, non-juristic personality, has no active capacity, can't sue and can't be sued alone, cannot be bound by a contract. The "Account" is also called Trust, Fund, Plan, or Custodial Account under the Internal Revenue Code, IRC 408 that is created when a Beneficiary, an Individual, an Investor or a Plan Representative transfers asset to the Custodian to hold for the benefit of one or more beneficiaries under the rules of the IRC 408. The plan/account owns nothing, has nothing to lose, is responsible for nothing and in its own existence cannot make decisions or affect others.

As to Jeffrey D. Hermann, the Trial court ruled owner or beneficiary of the IRA acts as a trustee for all intent and purposes and manages, directs, and controls the investments. Hermann has the sole responsibility for decisions of the Account/Plan. Hermann directs the Custodian. Hermann is the only true party vulnerable to harm.

The Custodian, who is indemnified by the beneficiary by agreement merely represents a property interest held by a beneficiary for the benefit of the beneficiary, it lacks standing and the capacity to bring the lawsuit and is not the real party in interest. PENSCO Trust Company has nothing to lose, he has no fiduciary duty, he is not responsible for anything and cannot make decisions and by contract it serves only by the directives of Hermann and acts only upon the written requests of Hermann.

There is no known law or doctrine that provides automatic standing for a retirement plan owned by the beneficiary and managed by approved IRS entities. Therefore, the account, as utilized in the complaint, has no standing unless joined by Hermann, the beneficiary.

The District Courts decision has petitioner not knowing which party she is to respond to. District Court had granted the change of the Caption of the Complaint. (App. 26-27). As the "Beneficiary", must be joined with Pensco Trust Company, Custodian FBO Jeffery D. Herman IRA Account #20005343, the " Account " as with those parties missing, the court cannot accord complete relief among the existing parties

Consequently, the Ninth Circuit Court affirmed the District Court that PENSCO has standing; the doctrine of res judicata applies, and that PENSCO was entitled to judgment. See App. 3-5

The District Court and Ninth District Court contra-dicted the Supreme Court ruling Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). This case involve the same course of wrongful conduct. However, the suit alleges new facts and new actions that were unadjudicated and worsened the earlier conditions. The Respondent and its counsels are far short of their burden to establish Res Judicata here but in order to mislead the Courts they presented new claims that looked like they were old litigated claims. and Petitioner's Counter Claim was improperly cut short. Petitioner's, like any other defend-ants, should be allowed to substantiate their well-pleaded claims in the District Court. App. 92

The Ninth Circuit Court stated that res judi-cata bars litigations of claims that could have been raised in the prior actions.(App. 4 page 2) Petitioner's cannot predict in 2014 that the PENSCO Trust

Company, in the name of the Respondent will in 2015 execute and record new ADOT#3 of dead entities together with their new claim the note was purchased from MERS, and claimed this chain was the Trial Court and Appellate Court Division 1 had ruled on, this worsened the earlier conditions.

The Ninth Circuit affirmed the striking of the one day late of the Petitioner's response to Dismiss Count-erclaim due to printer malfunction. See App.5. Petitioner was permitted by the Court Clerk via telephone conversation to file the response that was due on May 30 with a Noting date of June 2. See App.90-91. The rules shall be liberally construed so as to avoid undue prejudice. There was no harm done and it was an un intentional error. The case. should be decided on the merits rather than on a procedural default, when possible. See Marino v. King, 355 S.W.3d 629, 634 (Tex. 2011) ("Constitutional imperatives favor the determination of cases on their merits rather than on harmless procedural defaults."

The Ninth Circuit refused to rule on the issue of Standing of the Custodian to bring the Judicial Foreclosure Complaint for benefit of the self-directed IRA beneficiary/owner. (App.3-5)

Ultimately, all the judicial determinations against the Petitioner were made without the Real Party in Interest ever being made a party to the case.

REASONS TO GRANT THE WRIT

1. The IRA Beneficiary/Owner, Rather than the IRA Custodian, is the Only Party Able to Claim a Redressable Injury Under Article III of the Constitution.

Article III of the Constitution limits the authority of the federal courts to decide "Cases" & "Controvers-

ies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). For a dispute to be within the power (the subject-matter jurisdiction) of a federal court, the plaintiff must have standing.

This "irreducible constitutional minimum" of standing has three elements: (1) the plaintiff has suffered a concrete injury; (2) that injury is fairly traceable to actions of the defendant; and (3) it must be likely—not merely speculative—that the injury will be redressed by a favorable decision. Id. at 560–61. The minimum requirement for an injury-in-fact is that the plaintiff have legal title to, or a proprietary interest in, the claim." Id. at 106 (emphasis added) (citing *Sprint Communications Company v. APCC Services, Incorporated*, 128 S.Ct. 2531, 2543-44 (2008).

The question of who owns the claim, thus, is the real party in interest, is a two-step process: First, the court must assess whether the plaintiff shows a redressable Article III injury at the hands of the defendant. If not, the plaintiff lacks standing. If so, the court proceeds to the second step, assessing whether the plaintiff is entitled to bring the claim (e.g., whether the plaintiff still owns the claim, has transferred it, etc.). *Allstate Insurance Company v. Global Medical Billing, Incorporated.*, 520 F. App'x 409, 412 n.2 (6th Cir. 2013) ("[A]n analysis under Rule 17 can only be conducted after a party has established its standing to sue."); *Lincoln Properties Company v. Roche*, 546 U.S. 81, 90 (2005) (stating that Rule 17(a) does not address subject-matter jurisdiction and that the federal rules do not extend or limit jurisdiction). Authority from this Court specifically explains the interplay of Article III and Rule 17.

In *Zurich Insurance*, because the plaintiff was never the entity with a claim to an injury, it lacks

constitutional standing. 297 F.3d 528. This occurred through an insurance company without connection to the underlying damage wrongfully bringing suit to recover. The insurance company had a common owner with the proper insurance company, causing the mix-up, resulting in the suit being filed in the wrong insurance company's name. This Court held that the minimum showing of Article III standing was lacking because the plaintiff was never injured. Id. at 531. Thus, the district court lacked Article III jurisdiction and there was no authority to reach the second step and consider whether the real party in interest should be substituted under Rule 17.

Analysis of the two federal authorities relied upon by Petitioner reveal the Self-Directed IRA Account Beneficiary/Owner as the only possible real party in interest in litigation over the Self-Directed IRA Account investments, when analyzing the issue from a Rule 17 and Article III standing perspective, not the ministerial custodian.

First, in *Vannest v. Sage, Rutty & Company, Incorporated.*, 960 F.Supp. 651 (W.D.N.Y. 1997), the Defendant moved to dismiss all claims on the grounds the Plaintiff was not the purchaser his IRA Rollover was. *Id.*at 657-58. The Plaintiff opposed, asserting that as the beneficiary of his self-directed IRA account, he had standing to bring the claims because he controlled the investment decisions and, as the beneficiary, it is he who stood to gain or lose from the purchase and or sale of the securities. *Id.* at 658.

The District Court agreed with the Plaintiff, stating: "[b]ecause Vannest controlled the investment decisions, he certainly was a purchaser/seller for all practical purposes. Investors in self-directed IRAs have standing as "purchasers/sellers" to assert claims under the securities laws. See *Atchley v.*

Qonaar,1982 WL 1313 (N.D.Ill. 1982) reversed on other grounds, 704 F.2d 355 (7th Cir.1983). Thus, I find that plaintiff Vannest has standing to assert otherwise valid claims." Id. at 658.

Second, in *FBO David Sweet IRA v. Taylor*, 4 F.Supp.3d 1282, (Dist. Court, MD Alabama, 2014), the Plaintiff Sweet was the sole decision maker on all investments and actions on behalf of his IRA. Equity Trust Company (ETC), an independent company which was the holding company/administrator for the IRA, did not provide investment advice or related services. The court determined that "a Self-Directed IRA, [like the one at issue in Petitioner's case], is unique in that the owner or beneficiary of the IRA acts as a trustee for all intent and purposes. While the IRS and SEC require that all IRA's be placed with a holding company that serves as a trustee or custodian of the account, it is the owner of the Self-Directed IRA who manages, directs, and controls the investments." *Id.* at 1285.

The court analyzed the contract, and the specifics of this ministerial custodial agreement:

> In the present case, ETC's Traditional Individual Retirement Custodial Account Agreement (the "Agreement") explains that ETC owes no fiduciary duties to the account owner or beneficiary. (Doc. #23-2.) Additionally, ETC expressly refuses to provide any "legal or tax services or advice with respect to [the] IRA." (Doc. #23.) Instead, ETC describes itself as being merely a "Passive Custodian." (Doc. #24-1.) Moreover, sole management and control of the IRA rests with Sweet. It is Sweet alone who is "responsible for the selection, due diligence, management, review and retention of all investments in [his] account," (Doc.

> #23), likening Sweet's position with that of a trustee rather than a beneficiary. Thus, under the limited facts and circumstances surrounding this unique situation, the Court finds that for the purposes of this case, ETC served as merely a holding company while Sweet acted as trustee of his Self-Directed IRA. Accordingly, Sweet's suit on behalf of David Sweet IRA is proper. (Id. at 1285).

The SDIRA Beneficiary/Owner, rather than the SDIRA Custodian, is the only party with the requisite standing under Article III of the U.S. Constitution, to invoke the jurisdiction of the Federal Court.

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)).

2. The District Court Improperly Shifted the Burden to Petitioner to Prove PENSCO Lacked Standing, and the Ninth Circuit Refused to Rule Upon the Issue.

This Court has laid down a foundational rule of law in Article III standing questions, expressly declaring that the plaintiff bears the burden to establish standing with the appropriate degree of evidence at each successive stage of litigation. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 561 (1992). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. Id. If the matter reaches the

summary-judgment stage, the plaintiff cannot rest on mere allegations but must set forth specific facts (assumed to be true at that stage) establishing injury. Id. And, finally, those facts of injury if they are controverted must be supported adequately by evidence adduced at trial. Id.

Here, PENSCO was never required to make such showing. Instead, District Court shifted the burden to the Petitioner, requiring her to produce facts and authority, as follows:

> Here, Defendant makes no showing that the current Plaintiff does not have the capacity to sue. Indeed, she makes no effort to dem-onstrate the relationship between Mr. Hermann and PENSCO as the custodian of his IRA account, and provides no evidence of the type of account held by PENSCO for the benefit of Mr. Hermann. See App.14

Worse, contrary to the District Court's statements, Petitioner actually presented the Assignment of Cause of Action, wherein PENSCO assigned any and all right to Hermann to litigate on behalf of his IRA, (App.122-123), **and presented the actual contract between PENSCO and Hermann.** (App.124-128.) Even if the burden were on her to show PENSCO lacked standing - *she made that showing.*

The District Court improperly placed the burden upon the Petitioner to produce evidence and authority showing Respondent lacked the requisite standing to invoke the jurisdiction of the court. Simultaneously, the District Court removed all burden from the Respondent to produce evidence it did have standing, and some form of authority supporting the argument.

The Ninth Circuit refused to rule upon the issue, despite an En Banc Review request. Relief is now respectfully requested from this High Court.

3. The Ninth Circuit Violated Petitioner's Due Process Rights Under the 5th and 14th Amendments In Refusing to Require the Proper Party Plaintiff Per Standing Requirements of Article III

The Fourteenth Amendment provides: "No State shall. deprive any person of life, liberty, or property, without due process of law ." U.S. Const. amend. XIV, § 1. The Fifth Amendment imposes the same limitations on the federal government. 12

The 5th Amendment to the U.S. Constitution states in relevant part:

> 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.

When the property right to a cause of action is jeopardized, the Due Process Clauses apply because they "protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

The rule that we first address our jurisdiction is so fundamental that "we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction." *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977) (citations omitted). "The general rule is that the parties cannot confer on a federal court jurisdiction

that has not been vested in that court by the Constitution and Congress. This means that the parties cannot waive lack of [subject-matter] jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3522, at 66-68; see, e.g., *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982).

When a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power. See *Oliver v. Trunkline Gas Company.*, 789 F.2d 341, 343 (5th Cir.1986) (Higginbotham, J.) "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Company. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Regarding the issue of a challenge to a Plaintiff's standing, a defendant has a recognized due process right to have the proper party plaintiff litigate against it in Court.

The *Vannest* and *FBO David Sweet IRA* cases, the improper burden-shift by the District Court, Article III standing requirements, and the Assignment and

contract between Hermann and PENSCO should have compelled the Ninth Circuit to act. Instead, the memorandum decision affirming the District Court judgment dismissing Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment was totally silent upon the Petitioner's arguments relating to Standing.

The Ninth Circuit decided:

> The district court properly granted summary judgment for PENSCO Trust -, FBO Jeffrey D. Hermann, IRA Account Number 20005343 ("PENSCO") because Delfierro failed to raise a genuine dispute of material fact as to whether PENSCO was not entitled to seek judicial foreclosure. See Wash. Rev. Code 61.12.040 (requirements for judicial foreclosure); *Deustche Bank Nat. Trust Co. v. Slotke, 367 P.3d 600, 604 (Wash. App. 2016)* ("[I]t is the holder of the note who is entitled to enforce it."). App. 4

The Ninth Circuit Court relied on *Deustche Bank Nat. Trust Co. v. Slotke, 367 P.3d 600, 604 (Wash. App. 2016)* for the Respondent's authority to enforce the note which allows the physical holder of the note to enforce the note but does not excuse the Respondent from proving there is a default in the Deed of Trust. The Trial Court ruled and affirmed by the Appeal court Division 1 that Hermann owns the note and **potentially** has a lien of the deed securing Petitioner's obligation under the note and she stated further that to foreclose, a lot of requirements have to be in place. Petitioner followed her borrower's rights - RESPA, 12 U.S. Code § 2605, she sent all claiming lenders and their servicers QWR and up to this day no one had responded. Requests for an

accounting of these monies has also been ignored. Without such an accounting and all documents required presented to the court there is no proof of a breach of Deed of Trust, the *Wash. Rev. Code 61.12.040* was not met.

The Ninth Circuit violated Petitioner's due process rights as guaranteed by the 5th Amendment and 14th Amendment by recognizing the Self-Directed IRA Custodian "For Benefit of" the Self Directed IRA Beneficiary, IRA Account Number, as the proper party plaintiff, and ignoring Petitioner's arguments expressly asserting PENSCO lacked the standing to invoke the Court's jurisdiction. This title involving the Custodian is required by Internal Revenue Service Code 26 U.S § 408, but is not the proper party in Federal Court litigation.

28 U.S.C. section 408, subsection "h" (IRC Code 408(h)), states:

> (h)Custodial accounts
> For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account described in subsection (a). For purposes of this title, in the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

But this title does not join PENSCO in this litigation, and PENSCO assigned any litigation rights to Hermann, and required Hermann to indemnify it, thus, by contract with Hermann, PENSCO will not participate in any litigation regarding assets held in one of their SDIRA accounts. (App.124-128.) Even more compelling, because IRAs can be more informal than trusts, their fiduciary representatives may have lighter fiduciary duties. For instance, some (but not all) courts have held that 26 U.S.C. 408 does not impose any fiduciary duties itself; such duties would instead be imposed by the contract governing the IRA. *See, e.g., Cowburn v. Leventis*, 619 S.E.2d 437 (S.C. Ct. App. 2005). Therefore, it may make sense to make the beneficiaries of an IRA the necessary representative parties to a suit against the IRA.

Hermann has not joined the litigation to defend the asset held in his name in his own name, nor has he been required to.

A self-directed individual retirement account (SDIRA), is an individual retirement account (IRA), in which the investor is in charge of making all the investment decisions. The self-directed IRA provides the investor with greater opportunity for asset diversification outside of the traditional stocks, bonds and mutual funds. Self-directed IRAs can invest in real estate, private market securities and more. All securities and investments are held in an account administered by a custodian or trustee.

(https://www.investopedia.com/terms/s/self-directed-ira.asp)

PENSCO assigned any and all right to Hermann to litigate on behalf of his IRA, (App.119-123), **and the actual contract between PENSCO and Hermann** clearly limits PENSCO to that of a ministerial custodian. (App.124-128.) Only the IRA Beneficiary/

Owner stood to gain or lose from the purchase and or sale of the mortgage investment. *Accord, Vannest, supra,* at 658. It is the owner of the Self-Directed IRA who "manages, directs, and controls the investments." *FBO David Sweet IRA, supra,* at 1285. The IRA Custodian, (PENSCO), was never involved in the decision-making process, had no control over management, direction or instruction regarding the actual investment, has no ownership interest in the IRA asset itself. Thus, the ministerial custodian, (PENSCO) cannot meet the minimum showing of Article III standing because the PENSCO was never injured. *Accord, Zurich Insurance, supra.* at 531. Petitioner had a due process right under the 5th and 14th Amendment to the U.S. Constitution to have the proper party plaintiff sue her. The duty to require such was avoided by both the District Court and the Ninth Circuit court.

Thus, Petitioner brings the question to this Court, seeking relief, and the rule of law from this High Court ultimately determining that the SDIRA Beneficiary/-Owner, not the SDIRA custodian, is the only Real Party in Interest with the requisite Article III constitutional standing to invoke the jurisdiction of the Court, redressing her issues and grievances, and according her all due process rights under the 5th and 14th Amendment to the U.S. Constitution to have the proper party plaintiff facing her in Federal Court.

This Court has yet to be availed the opportunity to squarely address the issue of "who" is the Real Party in Interest in self-directed IRA litigation - the ministerial custodian or the account owner/beneficiary?

This case provides this Honorable Court that opportunity.

CONCLUSION

Based on the foregoing, Petitioner humbly requests that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

Date: November 2, 2018

By: /s
Lorina G. Delfierro
PETITIONER, Pro se