

NO. 18-8515

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

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**E. DRAKE,**

Petitioner,

v.

**MURPHY, AUSTIN, ADAMS, SCHOENFELD; NIELLO PERFORMANCE  
MOTORS, INCORPORATED; RICHARD SEEBORG; GARLAND E.  
BURRELL, JR.; EDWARD J. GARCIA; LAWRENCE K. KARLTON; JOHN A.  
MENDEZ; KIMBERLY J. MUELLER; TROY L. NUNLEY; WILLIAM B.  
SHUBB; LAWRENCE J. O'NEILL; EDMUND F. BRENNAN; ALLISON  
CLAIRE; CRAIG M. KELLISON; MICHAEL J. SENG; JENNIFER L.  
THURSTON,**

Respondents.

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On Petition for Writ of Certiorari to the United States District Court  
Court of Appeals for the Fifth Circuit  
Case No. 2:17-CV-01826-JAM-EFB

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**OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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and NIELLO PERFORMANCE MOTORS, INC.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to this Court's Rule 29.6, Respondent, Niello Performance Motors, Inc. hereby files its corporate disclosure statement as follows:

Respondent Niello Performance Motors, Inc. is a wholly-owned subsidiary of The Niello Company.

# **BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI**

## **INTRODUCTION**

Petitioner Eric Drake (“Drake”) asks this Court to resolve a non-existent conflict on a question of law, based on unfounded allegations of fact that contradict the record below. The Petition violates this Court’s Rules requiring accuracy, brevity, and clarity. Drake does not demonstrate any basis warranting review by this Court. The Petition should be denied.

## **COUNTERSTATEMENT OF THE CASE**

As noted by the Fifth Circuit Court of Appeal, this lawsuit is the fourth in a series of lawsuits filed by Petitioner Eric Drake (“Drake”), a Texas resident, against Respondent Niello Performance Motors, Inc. (“Niello”), a California automobile dealership, concerning Drake’s purchase in California of a used Mercedes from Niello.<sup>1</sup> In this lawsuit, filed in the U.S. District Court, Southern District of Texas, Drake also sued Niello’s attorneys, Respondent Murphy Austin Adams Schoenfeld LLP (“Murphy Austin”), a California law firm, along with thirteen judges and magistrates of the U.S. District Court, Eastern District of California, and one judge of the U.S. District Court, Northern District of California. The judges, who Drake alleged were racists and corrupt, were not served. Drake’s expansion of his litigation to include counsel and members of the judiciary is in keeping with his history as a vexatious litigant. The U.S. Court of Appeals for the Fifth Circuit, in its opinion from which review is sought noted that the Fifth Circuit had “recently acknowledged that ‘Drake has been declared a vexatious litigant in Texas state

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<sup>1</sup> The third lawsuit was filed in the U.S. District Court, Northern District of California, and subsequently transferred to the Eastern District of California. That action was pending when Drake filed the instant lawsuit. Niello’s motion for judgment on the pleadings on the grounds of *res judicata* was granted in that action. Drake’s appeal of that judgment to the Ninth Circuit Court of Appeal is now pending. Drake has filed an Amended Notice of Appeal in that action, stating his intention to appeal the Eastern District’s ruling granting Niello pre-filing orders in light of Drake’s vexatious litigant activities. (*Drake v. The Niello Company, et al.*, Ninth Circuit Case No. 18-15763.)

courts ...’ *Drake v. Costume Armour, Inc.*, No. 17-20671, 2018 WL 4261989, at \*1 (5<sup>th</sup> Cir. Sept. 6, 2018).” (Petitioner’s Appendix p. 2a.)

Respondents Niello and Murphy Austin moved to dismiss this lawsuit, primarily on the grounds of lack of personal jurisdiction, relying on their essential lack of any contacts with the forum state of Texas. The District Court granted the motion to dismiss after a hearing. The Fifth Circuit reviewed the District Court’s dismissal *de novo*, applying the analysis for specific personal jurisdiction as set forth in *Monkton Ins. Servs., Ltd. v. Ritter*, 786 F.3d 429 (5<sup>th</sup> Cir. 2014) (Petitioner’s Appendix p. 3a.) The record on appeal supported a finding that “Niello’s only relevant contact with Texas was its Cars.com advertisement, which was not specifically directed at Texas.” The record on appeal also supported a finding that Murphy Austin is a “law firm organized under the laws of California, has no offices in Texas, does not advertise in Texas, and has no attorney licensed to practice law in Texas.” (Petitioner’s Appendix p. 3a-4a.) In addition, “Niello had not appeared, answered, or filed any responsive pleadings in the earlier suits filed in Texas,” and, “[i]n the instant case, Murphy Austin and Niello specially appeared and moved to dismiss.” (Petitioner’s Appendix p. 3a.) Based upon the record on appeal and other applicable Fifth Circuit precedent as set forth in its opinion, the Fifth Circuit concluded that the “district court’s analysis and conclusions are correct in all respects and are free of reversible error” and therefore affirmed the dismissal.

### **THE PETITION SHOULD BE DENIED**

Petitioner asks this Court to resolve a non-existent circuit conflict and several findings of fact with which he takes issue. The Fifth Circuit’s non-precedential and unpublished opinion does not warrant further review by this Court. The Petition should be denied.

1. The Petition does not comply with the Rules of the Supreme Court.

Petitioner's failure to comply with Supreme Court Rule 14 should be grounds for denial. Contrary to Rule 14(1)(a), Petitioner's "QUESTIONS PRESENTED" consists of six pages laden with unnecessary details and mischaracterizations of the law and facts. Additionally, Petitioner's "questions" are argumentative, repetitive, and filled with "facts" not supported by the record below.

More importantly, Petitioner has failed "to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration" pursuant to Rule 14(4). Such a failure "is sufficient reason for the Court to deny a petition." (Sup. Ct. Rule 14(4).)

Petitioner's statement grossly mischaracterizes the record below. For example, Petitioner's "Questions Presented," first through third, assume the following facts:

- That Niello "controls and operates an Internet website that is interactive, where they employ Internet salespersons to market and sale their products" (Question 1, Petition p. v.)
- That "Niello advertis[ed] their products on their website and Internet" (Question 2, Petition p. v.)
- That Niello "sign[ed] a contract where the buyer of a product resides [Texas], and the company, through its Internet sales department delivers their products to the buyers forum state [Texas]" (Question 3, Petition p. v.).

The facts as set forth by the Fifth Circuit in its opinion were:

- "Drake saw Niello's Cars.com advertisement," not any Niello website or Internet site; (Petitioner's Appendix p. 2a.)
- "Drake traveled to Sacramento, California to sign the settlement agreement," the contract by which "Niello would sell the car to Drake;" (Petitioner's Appendix p. 2a); and

- “Niello delivered the car to Shipping Experts, a California shipping company and a nonparty to this suit, to ship the car from California to Drake in Texas.” (Petitioner’s Appendix p. 2a.)

In addition, the Petition is an incoherent ramble of bits and pieces of case law on personal jurisdiction, what appear to be “cut and pastes” from law review articles, accusations of conspiracies, and Drake’s unfounded assertions of purported facts.

The Petition fails to comply with the Supreme Court Rules’ desire for accurate, clear and concise pleadings. As a result, Respondent respectfully requests that the Petition be denied.

2. The Petition should be denied because the unpublished decision below does not implicate any conflict in the circuit courts of appeal, or other proper basis for this Court’s review. Review on a writ of certiorari is discretionary and granted “only for compelling reasons.” (Sup. Ct. Rules, Rule 10.) Drake provides no such compelling reason.

Drake’s claims of conflict are unintelligible and spurious. He argues that the Fifth Circuit incorrectly applied this Court’s decisions in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Calder v. Jones*, 465 U.S. 783 (1984) in its decision below. Drake contends that lower courts, including the Fifth Circuit, have construed these decisions too narrowly, in his opinion. However, he does not – and cannot – point to any conflict between the unpublished decision below and another circuit court’s opinion “on the same important matter,” or a conflict between the unpublished decision below and “relevant decisions of this Court” on an “important federal question,” as set forth in Supreme Court Rule 10.

The judgment of the Fifth Circuit was correct and in accordance with both this Court’s decisions and controlling Fifth Circuit precedent on the extent of personal jurisdiction under the Constitution’s due process clause.

## CONCLUSION

Respondent respectfully requests that Petitioner Drake's Petition for Writ of Certiorari be denied because he failed to establish any conflict warranting this Court's review; he misstated the nature of the proceedings in the lower courts; and he failed to comply with the Supreme Court Rules in filing his Petition.

Dated: April 18, 2019

Respectfully submitted,

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