No. 18-8930

IN THE

Supreme Court of the United States

AMY R. GURVEY, *US Patentee Pro Se,*

Petitioner,

v.

COWAN, LIEBOWITZ & LATMAN, PC, CLEAR CHANNEL COMMUNICATIONS, INC. LIVE NATION, INC., INSTANT LIVE CONCERTS, LLC. NEXTTICKETING INCORPORATED, WILLIAM BORCHARD, MIDGE HYMAN, BAILA CELEDONIA, CHRISTOPHER JENSEN, DALE HEAD, STEVE SIMON, NICOLE ANN GORDON, SUSAN SCHICK, MICHAEL GORDON, DOES I-X INCLUSIVE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

PETITION FOR REHEARING

Petitioner pro se, Amy R. Gurvey, a US Patentee, respectfully requests that this Court grant rehearing of its order dated October 7, 2019, which denied certiorari, and that the Court now grant certiorari.

The **petition for certiorari** previously filed herein on July 15, 2019 presented ten questions for determination. The **petition for certiorari** discussed the national importance of questions presented by the Second Circuit's two conflicting decisions in this 12-year patent lawsuit. The first appeal was won by Plaintiff in 2012 but 2d Circuit's remand mandate was contumaciously defied by the new SDNY magistrate and judge for five years between 2012 and 2017. 462 Fed. Appx.26. The District Court's defiance of the mandate was subsequently never cited by the 2d Circuit even in interlocutory appeals, which are issues of national import to the country. There are 400+ entries on the SDNY docket since the filing of this patent lawsuit on February 15, 2006 and Plaintiff is a pro se litigant. [1]

The 2d Circuit first remand mandate upheld Plaintiff's claims for patent practitioner breach of fiduciary duty and fraudulent breach of fiduciary duty, defiance of governing USPTO conflict of interest statutes, malpractice and breach of attorney client privilege for discovery and an amended pleading against the defendant NYC law firm of Cowan Liebowitz & Latman. Plaintiff's first issued

1. Contrary to the SDNY magistrate's orders on remand since 2012, Plaintiff was formally retired from the 3d Dept. in NYS in 1998 based on ADA disability and never practiced law in NYS or had any office for the practice of law since being admitted to the 3d Dept. in 1985.

US patents of 2009 and 2011 that issued during the stay of appeal ordered by the 2d Circuit were damaged and missing valuable priority dates and enforceable claims based on the Cowan defendants' abandonment and conflict of interest torts before the USPTO in 2003. The Commissioner's orders in Plaintiff's continuation applications finding defective patents were filed with the district court and set forth in a motion to correct the record. They mandated that an amended pleading be granted for service including to recover strict liability aiding and abetting infringement and patent delay damages under unanimous Federal Circuit law. [2] Plaintiff moved to correct the record, to compel document discovery and to amend her complaint immediately on remand in 2012 based on the defective patents that issued to her and had very limited enforceability. Fraudulent breach of fiduciary duty by patent practitioners has a six-year statute in NYS and the US Supreme Court adopts a discovery accrual policy in breach of fiduciary duty cases over state statutes that find accrual in simple malpractice cases when substandard acts are committed.

There was never any ruling by the 2d Circuit in 2012 that this case is a case of simple malpractice. Instead, the footnotes in the order establish that the 2d Circuit believed the case was one where conflicts of interest mandates were violated by the Cowan defendants before the USPTO

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2. 35 USC 271; *Grant Williams v. Citibank*, 659 F. 3d 208 (2d Cir. 2011); *St. Johns University v. Bolton*, 757 F. Supp. 2d 144 (EDNY 2010)(and cases cited therein); *Vaxiion Therapeutics v. Foley & Lardner*, 593 F. Supp. 2d 1153 (footnotes)(SDCAC 2008); *Pei-Herng Hor v. Ching-Wu*, 699 F. 3d 1331 (Fed. Cir. 2012); *Medina v. Bauer*, 2004 WL 136636 (SDNY 2004)(Chin J.); *In Re Hultquist*, 136 AD 3d 170 (2d Dept. 2016).

to benefit other clients. Certain defendant clients of the Cowan firm, subsidiaries of Clear Channel and Live Nation Entertainment (merged with Ticketmaster in 2010), defendants Instant Live Concerts and NexTicketing, were never dismissed or ordered to answer for infringement on remand.

The denial of Plaintiff's mandated patent document discovery and an amended pleading by the SDNY for five years on remand between 2012 and 2017, was itself a breach of administrative duty that could only be reviewed by the Federal Circuit under its exclusive appellate jurisdiction related to patents. 28 USC §§1338, 1291. The defiance by the Cowan defendants of patent practitioner statutes, 37 CFR 2.19, 10.66, 11.116, 1.36 define Plaintiff's causes of action. Ergo, the 2d Circuit was required to transfer the appeal to the Federal Circuit in response to Plaintiff's 2017 motion and further abused discretion in denying that motion, demonstrating a conflict with prevailing patent law and unanimous orders of the US Supreme Court.

With these facts a given and law of the case, the 2d Circuit entered a seemingly conflicting order in 2018 after the SDNY defied the 2d Circuit's mandate on all counts for five years. The district court magistrate denied Plaintiff all patent document discovery, refused to sign subpoenas authorized by the USPTO General Counsel in 2014 to discover the Cowan defendants complete filings, denied an amended complaint absolutely owed based on the issuance of defective patents with limited enforceability, and threatened sanctions against Plaintiff if she did not drop her case against the Cowan defendants "*now that she had issued patents*". This demonstrates that Plaintiff was denied constitutional access to the court to protect her intellectual property.

The sine qua non, however, was that the new sitting judge, while denying the magistrate's improper and frivolous recommendations for sanctions in 2015, ordered Plaintiff to pay $10,000 into the SDNY Cashier to pay for a special patent master who was never hired. It took 2 1/2 years to get that money refunded. Moreover, in retaliation for Plaintiff's applications to disqualify the Cowan defendants' defense attorneys at Hinshaw & Culbertson, LLP, mandated by NY Legislature's enactment of NY's Judiciary Law Part 1240 amended statutes, the court, allowed Supple and the Hinshaw firm to file summary judgment motions in 2017 that were frivolous. In response to defendants' papers, the district court somehow defied the record and found that diversity of citizenship, which did not exist, allowed application of 3-year state statutes of limitation for simple malpractice, when there was no simple malpractice alleged and when Plaintiff and Cowan partners all reside in New Jersey.

JL Part 1240 in fact mandated immediate disqualification of Hinshaw and defense lawyer Richard Supple, Esq. no later than October 1, 2016, the effective date of the amended statutes. The statutes also precluded the 2d Circuit from allowing defense counsel to appear on behalf of all appellees in the 2018 appeal. Defense counsel never even appeared at the 2d Circuit's scheduled oral argument.

If the 2018 final decision of the 2d Circuit is permitted to stand, it will mean that law of the case orders issued by federal appellate courts in patent cases have no meaning, that patent practitioners who cause defective patents to issue to an inventor and defy conflict of interest mandates causing the inventor-client to forfeit years of patent

protection and enforcement rights, will be insulated from liability, which cannot be the law.

It is impossible for an inventor who is the subject of practitioner breach of fiduciary duty to know within three years of retaining a patent practitioner if he has a simple malpractice case, a fraudulent breach of fiduciary duty, a nonjoinder case or an aiding and abetting case, which requires the issuance of actual patents. The relevant claims have different prevailing statutes of limitation, which must be explained and noticed by this Court. The 2d Circuit 2018 orders conflict with prevailing Federal Circuit law in this country. If permitted to stand, they will also mean that district courts in New York do not have to cite defense attorneys who engage in documented crimes against pro se litigants even in frivolous parallel state cases to achieve unfair litigation advantages.

In 2009, NYS judicial officers at the First Dept. Attorney Grievance Committee ("AGC"), chief counsels and appointees were found by the SDNY to have been illegally retaliating against individuals, attorneys and retired lawyers turned-inventor-entrepreneurs in violation of the First Amendment who file ethics complaints or sue NYC lawyers and patent practitioners. See, e.g., *Bernstein v. State of NY*, 591 F. Supp. 2d 448 (2009). The victimized AGC triage attorney, Christine Anderson, who has never worked again, was found to have been unlawfully terminated in 2005 for assisting the cause of aggrieved clients who file ethics complaints. *Anderson v. State of NY*, 614 F. Supp. 2d 404 (SDNY 2009)(Headnotes 15, 16 citing specific AD judicial officers and presiding justices). Attorney Anderson was in fact assisting Plaintiff achieve state orders against the Cowan

defendants to return her complete patent files when she was terminated. Patent files are federally-mandated from USPTO practitioners who admit to conflicts of interest and abandon pending applications in prosecution. It is the administrative duty of state AGC officers to compel production of patent files from registered practitioners who practice in their jurisdiction. 37 CFR 2.19, 10.66, 11.116. See *Virginia Office of Protection and Advocacy v. Stewart*, 563 US 247 (2011)(Scalia J.)

According to NY Statutes, Plaintiff having been admitted to practice in NYS to the 3d Dept. in 1985 and listed as formally retired from the 3d Dept. in 1998, was and is only subject to 3d Dept. rules and disciplinary jurisdiction. JL Part 1240.2. If defense attorney Supple wanted to unlawfully retaliate against Plaintiff by filing ethics complaints against Plaintiff in his undisclosed capacity as a state AGC officer, he had to do so before the 3d Dept. *Ibid.* Plaintiff never heard a peep from the 3d Dept. that any ethics complaint had ever been filed against her in 35 years and that she has nothing but an otherwise stellar record. That Plaintiff never practiced law in NYS means that by factual impossibility no client could ever have filed an ethics complaint against her.

Illegal and unprotected targeting of this Plaintiff in the known total absence of jurisdiction and power by the same cited AD officers in collaboration with defense lawyer Richard Supple, **was finally found by the AD First Dept. in an order entered April 21, 2016.** Plaintiff's ADA-associated retirement 3d Dept. bar files were confirmed as corrupted ex parte by Supple's abuse of his concealed state AGC appointment and insertion

of forged and unserved documents. [3] These acts are crimes and when combined by administrative violations by state officers in failing to protect the confidentiality of Plaintiff's ADA retirement bar files, demonstrate serious constitutional transgressions. However, Supple's crimes were successful in that they wrongly induced the extrajudicial bias of the SDNY on remand from the 2d Circuit in 2012 based on unserved documents that Supple had himself manufactured and inserted. That the district court defied NY's Part 1240, denied Plaintiff's application for disqualification of Supple and the Hinshaw firm and told Plaintiff at a hearing on November 29,l 2016 to file another lawsuit[4], demonstrates that the SDNY allows defense lawyers to engage in high crimes against pro se litigants regardless of the damages and consequences. This Court that is the final authority on protecting the

3. J. Richard Supple, Esq. is managing partner of the NYC office of the national malpractice insurance defense law firm of Hinshaw & Culbertson, LLP, and upon information and belief, a co-author of NY Attorney Discipline, a treatise publication released by the New York Law Journal.

4. While Supple's crimes have been reported to the US Attorney for the SDNY and to the Manhattan District Attorney, Hon. Cyrus Vance, Jr., the SDNY's failure to disqualify Supple and his firm, Hinshaw & Culbertson as mandated by NY's Judiciary Law Part 1240.6, has necessitated Plaintiff's filing of but another federal lawsuit before EDNY, 19-cv-4739, seeking injunctive relief against AD presiding justices to produce the corrupted files and vacate the documents inserted in the total absence of jurisdiction and power. See *Wilcox v. Supreme Council of Royal Arcanum*, 210 NY 370 (1914). Plaintiff also seeks treble damages against Supple and the Hinshaw firm pursuant to Judiciary Law Section 487 for engaging in fraud and obstruction of justice both before the SDNY and 2d Circuit during the instant patent lawsuit and appeal. See, *Amalfitano v. Rosenberg*, 572 F. 3d 91 (2d Cir. 2009)

public from corruption in the courts, cannot allow this type of corruption against the public to continue.

Rehearing is therefore properly granted to this Plaintiff. See, *Gondeck v. Pan American World Airways*, 382 US 25 (1965). Plaintiff must be found to have been entitled to the benefit of the new JL Part 1240 statutes as amended by NY's Legislature during the case and disqualification of defense counsel prior to the district court entertaining and granting frivolous summary judgment motions. Plaintiff made a further motion to the 2d Circuit to certify the date of mandatory disqualification to the NY Court of Appeals, which Plaintiff argues was also improperly denied in 2018. See, e.g., *King v. Fox*, 28 Fed. Appx. 95 (2d Cir. 2012). This patent case was left in limbo based on multiple improper and constitutionally deficient orders contrary to the national repertoire and cannot be permitted to stand.

In the aftermath of *Gunn v. Minton*, 133 S. Ct. 1059 (USSC Tex. 2013)(Roberts J.), iterations by this Honorable Court are sorely still needed to set and notice the prevailing statute of limitations in favor of inventor-clients when patent practitioners engage in any one of fraudulent breaches of fiduciary duty, defy governing USPTO conflict of interest mandates, unlawfully withhold the client's files, and breach attorney client privilege on patentable inventions.

Petitioner found it is virtually impossible for an inventor-client to retain a new patent lawyer once a practitioner engages in prosecution prejudice and abandons valuable applications that have been published and outsourced by larger companies. Conflicts will

be declared by tens of law firms representing the major technology OEMs who scout the dockets and outsource good disclosures that are delayed in languished prosecution. The large companies wait to see if enforceable good patents issue to the inventor, and even if they do, the current trend is to file invalidation or interference proceedings before the USPTO, to delay enforcement rights further.

This Petition therefore challenges 2d Circuit inconsistency and arbitrary adjudications in patent practitioner damage appeal cases in violation of equal protection.

Because there exists a clear and express conflict of decisions among the circuits on an important questions of federal patent law including prevailing statutes of limitation on diverse practitioner misconduct claims affecting many small entity inventors in different parts of the country, compelling reasons are evident why the questions presented should be reviewed and definitively determined by this Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the **petition for certiorari** previously filed, rehearing and certiorari should now be granted.

Dated November 1, 2019

Respectfully submitted,

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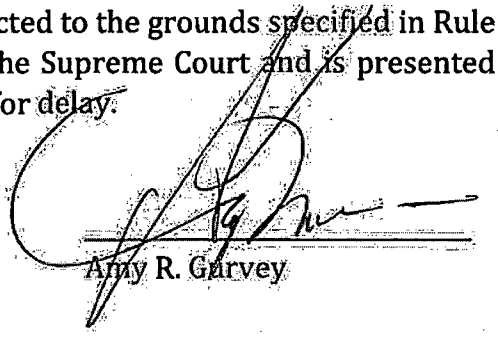
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.



Amy R. Garvey