No. 18-9373

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID SHU – PETITIONER

vs.

MEGAN BRENNAN, POSTMASTER GENERAL – RESPONDENTS

10

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question1:

"Whether it's proper that a Title VII of the Civil Rights Act discrimination case drafted by a pro se US citizen whose native language is not English has been dismissed with prejudice for the reason of the 95-page pleading paper being too long, not up to the standard drafted by lawyers and the district court ruled without considering the viability, plausibility and the strength of the case?"

Question 2:

"Whether the Petitioner's Seventh Amendment right to a jury trial was deprived?"

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page

[x] 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;

1. Donald E. Swartz

2. Johnny Ala

3. Priscilla Jeng Rivera

4. Jennifer Vo

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A, B 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[✓] is unpublished.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 United States district court appears at Appendix C, D 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[✓] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

[x] For case from federal courts;

The date on which the United States Court of Appeals decided my case was November 8, 2018

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 9, 2019 , and a copy of the order denying rehearing appears at Appendix B.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

Seventh Amendment "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutory Provisions

(I) Federal Rules of Civil Procedure (F.R.C.P.) Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:
(2) a short and plain statement of the claim showing that the pleader is entitled to relief;

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.
(1) In General. Each allegation must be simple, concise, and direct. No technical form is required

(2) Alternative Statements of a Claim or Defense. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(II) 42 U.S. Code § 1981a.Damages in cases of intentional discrimination in Employment

(c) Jury trialIf a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury;

STATEMENT OF THE CASE

Petitioner was employed by the US Postal Service in 2000 and had no any negative and discipline record. He was injured on duty due to US Postal Service manager Jennifer Vo discriminatory actions on 9/22/2003.

On 10/6/2003, Petitioner filed a discrimination EEO/EEOC complaint.

On 11/7/2003, US Postal Service manager Jennifer Vo retaliated Petitioner, unlawfully and wrongfully terminated Petitioner.

On 4/3/2009, Petitioner filed a discrimination retaliation complaint in the Federal Court Central District of California. (CV09-02326 AHM (AGRx)).

On 1/20/2010, the employment discrimination complaint Settlement Agreement was executed and Defendant rescinded the wrongful removal and reinstated Petitioner to Santa Maria post office in California. The district court Dismissal Order stated that the enforcement of the Settlement Agreement was still under the jurisdiction of Honorable Judge Matz and/or

Honorable Judge Rosenberg's courtroom (APPENDIX F).

During working for the Santa Maria post office, despite the fact that the Petitioner was working diligently and did not have any negative/discipline record, he was still discriminated and retaliated by postmaster Priscilla Jeng Rivera who was a long time friend of Jennifer Vo (since had moved up and became one of Priscilla Jeng Rivera's managers), Donald E. Swartz and Johnny Ala. Petitioner was unlawfully and wrongfully removed again in the age of almost 62 on 9/27/2013. Petitioner moved his family to Santa Maria based on the Settlement Agreement, he and his family were devastated and had suffered tremendous financial loss including his job, income and all the career retirement benefits.

On 10/20/2013, Petitioner filed the EEOC discrimination retaliation claim.

District Court Proceedings

07/21/2017 Employment Discrimination Retaliation and Breach of Discrimination Settlement Agreement complaint filed in Federal Court Central District of California and summons issued. However, district court failed to assign this case to Honorable Judge Matz or Honorable Judge Rosenberg's courtroom as requested. The original case was settled under Judge Matz and Judge Rosenberg who had jurisdiction on the enforcement of the Settlement Agreement. However, the court assigned this case to another district judge which Petitioner disagreed.

11/01/2017 After requested two times of time extensions for more than 120 days after the Complaint pleading was served, Defendant submitted a motion to

dismiss for the reason of Petitioner's pleading was too long and the writing style was not up to lawyers' standard and violated F.R.C.P. Rule 8.

11/10/2017 Petitioner submitted an opposition to explain due to (1) the 15-year long proceedings, continuously discriminatory actions and the nature of the case, and (2) in order to satisfy US Supreme Court's pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) which requires a pleading set out a "plausible" claim. It is necessary and reasonable for the Petitioner to include sufficient factual allegations in the pleading in order to establish "plausibility" requirement. And it is reasonable for the Petitioner to provide sufficient facts. Obviously, the more factual allegations that Petitioner provides the closer to cross the required "plausibility" line. Therefore the pleading is longer. In the pleading, Petitioner also indicated to the court that Defendant violated and failed to follow local rule 7.3 to confer with the Petitioner at least 7 days prior to submit the motion because Defendant's attorney contacted Petitioner only 2 days prior to filing the motion.

12/04/2017 District court issued an order granted Defendant's motion based on violation of F.R.C.P. Rule 8(a)(2), (d)(1). In addition, district judge incorrectly and unfairly blamed Petitioner by using the reason that Plaintiff "refused" to confer with Defendant's attorney and warned Petitioner that a sanction will be imposed to Petitioner in the future for violating the local rule 7.3 which requires both parties to confer 7 days prior to submit a motion.

In fact, Petitioner never "refused" to confer with the Defendant's attorney. It was the Defendant's attorney who submitted the motion but did not follow local rule 7.3 and failed to contact the Petitioner 7 days prior to filing the motion on 11/01/2017. Defendant's attorney contacted Petitioner just 2 days prior to submit the motion which violated the local rule 7.3. And yet, the district judge did not state anything to Defendant's attorney, but instead, blamed the Petitioner and wanted to punish a Pro Se litigant for something that he did not do and was due to Defendant's attorney's failure to follow the local rule.

12/26/ 2017 Petitioner followed the order and timely submitted amended complaint. Petitioner also followed F.R.C.P. Rule 8 (a)(2), (d)(1)(2)(3) and tried his very best to cut about 40% of the original complaint. The Amended Complaint contained 95 pages to cover this 15-years long history case, factual statements and proceedings, and this was about 60% of the original complaint's length. There are 7 causes of actions in the pleading and each of the 7 allegations contains a short and plain statement of the claim showing Petitioner is entitled to relief. And each allegation is simple, concise and direct.

Petitioner's amended complaint contains 2 major claims: Discrimination Claims (Causes of Action 1, 2, 3, 4, 5, 7) and Breach of Settlement Agreement Claim (Cause of Action 6). There seven (7) allegations are: Cause of Action 1: Retaliation Discrimination. Cause of Action 2: Age Discrimination. Cause of Action 3: Race/National Origin Discrimination, Cause of Action 4: Failed to Prevent Discrimination, Cause of Action 5: Failed to Hire (Promote), Cause of Action 6:

Breach of Federal District Court Settlement Agreement, and Cause of Action 7: Vacate Defendant's Internal Arbitration Award. (APPENDIX D)

In addition, Petitioner explained in the amended complaint that how each Defendant U.S. Postal Service manager Jennifer Vo, Priscilla Jeng Rivera, Donald E. Swartz and Johnny Ala, did to Petitioner; when the defendant did it; how Petitioner was treated unfavorably by comparing with other employees at the same facility; how defendant's discriminatory actions harmed Petitioner; and, what specific legal right and law the Petitioner believed the defendant violated and prayer for relief (greater than $75,000). Most importantly, Petitioner submitted sufficient factual contents in order to satisfy the U.S. Supreme Court's *Twombly* and *Iqbal* Rule 8(a)(2) pleading requirement that a complaint must establish plausibility of its claims. It is reasonable and understandable that the more specific facts the Petitioner provides the better chance to cross the required plausibility line and won't stop short of the line between possibility and plausibility of entitlement to relief.

In summary, Petitioner's amended complaint did not violated F.R.C.P. Rule 8 (a)(2), (d)(1). Petitioner's followed F.R.C.P. Rule 8 (a)(2), (d)(1),(d)(2) and (d)(3). The amended pleading is 95-page-long but each claim contains a short and plain statement of the claim showing that the pleader is entitled to relief; The amended complaint contains seven (7) causes of actions as stated above and is permitted according to Rule 8 (d)(3) and each of the cause of action is simple, concise, and direct according to Rule 8 (d) (1). Although there are 2 or more statements in some

causes of action, but it is also permitted by Rule 8 because the pleading is sufficient when any one of the statements is sufficient according to Rule 8 (d) (2).

12/26/2017 , By looking at all the orders that this particular judge had issued, Petitioner felt that this particular judge had demonstrated a bias against the Petitioner and was in favor of the defendant in every aspect. And especially by giving the fact that this particular judge and Defendant's attorney had previous university, school, and working associations (both doing the same job at the same facility). Therefore, Petitioner filed a motion for recusal respectfully requested this district judge to recuse himself from this case and hopefully can have the original court judge(s) residing because the original judges, i.e. Honorable Judge Matz and/or Rosenberg were familiar with the case and could ensure the consistency. Most importantly, enforcement of the settlement agreement is under their courtrooms' jurisdiction as the settlement agreement spelt out. (APPENDIX F)

12/29/2017 Petitioner's Motion for Recusal was denied. Another District Judge, Honorable Judge Philip Gutierrez issued the order and made clear that when Petitioner disagreed with the District Judge's order, Petitioner could appeal the ruling. (APPENDIX E)

01/23/2018 After Petitioner timely submitted the Amended Complaint, Defendant merely copied its first motion and once again submitted its second Motion to Dismiss for the same reason of Petitioner's 95-page pleading was still too long, writing style and the form of showing exhibits were not up to professional lawyers' standard and therefore, violated Rule 8.

02/02/2018 Petitioner submitted Opposition because Petitioner did follow district judge's order to reduce the pleading length and exhibits significantly. The Amended Complaint did contain short and plain statements of the claim showing the Petitioner is entitled to relief. And each of the 7 allegations in the claim is simple, concise and direct.

Moreover, Defendant did not point out as to which parts of the complaint were too long and unable to answer, but just blankly rejected the entire complaint and refused to answer any of the claims. Without specific requirements as to the limitations about the length of the pages and paragraphs and did not specify which claim(s)/allegation(s) that Defendant could not answer, and why could not answer, but just refused to answer any and all the claims and blankly attacked Petitioner's writing style and the 95-page pleading was too long. Without specific explanation, that would leave Petitioner in the dark and won't be able to know which part of the pleading he should revise again and that will further lead to the next objection by the Defendant again. This is an unfair situation to the Petitioner.

02/22/2018 District judge issued an order and granted Defendant's second motion again to dismiss the amended complaint for the same reason of violation of Rule 8(a)(2), (d)(1). Petitioner believed that he had already followed the previous order and cut almost 40% of the original complaint's length and the order contained errors to dismiss the case including the resubmission pleading date/year 2017, which should also be an error and should be corrected as 2018 because we were already in 2018 for a couple of months already when the judge issued the order.

02/28/2018 Petitioner believed the district judge's order contained errors and also did not provide specific areas that need to be cut again. Therefore he followed Honorable Judge Philip Gutierrez's 12/29/2017 order and filed Appeal and Notice to 9th Circuit Court of Appeals to review district court judge's order and stated clearly that if the appeal was denied, he will amend again and Petitioner did not refuse to amend again. (Docketed as 18-55290 in the Ninth Circuit)

03/15/2018 The district court judge contradicted with his own 2/22/2018 order and issued another order to punish the amended complaint again for the same violating of Rule 8(a)(2),(d)(1) but this time dismissed the entire case with prejudice. In his 2/22/2018 order, the district judge stated that if the Petitioner failed to submit another amended complaint, the case may be dismissed. It did not state the case may be dismissed with prejudice. And yet, in 03/15/2018's order, the district judge punished Petitioner harshly and dismissed the entire case with prejudice without warning. This is unfair to the Petitioner because he was unaware and was not warned by the district judge that his case would be dismissed with prejudice.

The entire case was dismissed with prejudice by the district judge for the reason of 95-page pleading excessive length and not up to pleading form standard drafted by professional lawyers (including the way of labeling exhibits) The district judge also denied Petitioner's change venue request as moot.

03/23/2018 Petitioner filed the second Appeal and Notice to 9th Circuit Court of Appeals for district's 3/15/2018 order. (Docket as 18-55438 in the Ninth Circuit)

Ninth Circuiy Court of Appeals Proceeding

04/08/2018 Petitioner filed a motion to consolidate appeals 18-55290 (District Court 02/22/2018 order) and 18-55438 (District court 03/15/2018 order) to one appeal and requested refund for one appeal because he paid 2 appeals. Motion was granted but refund of one appeal was denied.

05/11/2018 Petitioner submitted opening brief

06/26/2018 Defendant requested extension of filing Answering Brief

06/26/2018 Court ordered Defendant's Answering Brief due on 08/01/2018

07/31/2018 Instead of filing Answering Brief, Defendant filed a motion for summary affirmance one day before the Answering Breif due date on 08/01/2018

08/03/2018 Petitioner opposed Defendant's summary affirmance because the record showed that there are 7 claims in the Amendment Complaint and each of the seven claims contained a short and plain statement, and each allegation is simple, concise and direct. All the issues including but not limited to the followings: discrimination retaliation, breach of settlement agreement, improper dismissal (with prejudice) based on the pleading "form" drafted by a pro se for violating Rule 8(a)(2), (d)(1) judged based on lawyers' drafting standard, and pro se litigant's constitutional right to a jury trial was denied. These issues are not "so insubstantial". Petitioner requested the appeal to be reviewed by a regular merit panel to adjudicate whether Petitioner's amendment complaint violate F.R.C.P. Rule 8(a)(2), (d)(1), whether a 95-page of pleading for a case having a 15-year-long proceeding history that contained seven claims could be reasonably accepted, if not

all, some portions; and whether the dismissal and dismissal with prejudice were too harsh for a pro se litigant for violation of F.R.C.P. Rule 8(a)(2), (d)(1) judged by using lawyers' standard without even considering the contents, strength and plausibility of the case.

11/8/2018 Instead of reviewed and adjudicated by a regular panel, a motion panel granted Defendant's motion for summary affirmance by the reason that all the issues that Petitioner have raised in the Appeal are "so insubstantial" and therefore disallowed a regular merit panel to review the case. (APPENDIX A)

11/11/2018 Petitioner filed Motion for Reconsideration and Motion for reconsideration en banc

04/09/2019 Petitioner's motion for reconsideration is denied and motion for reconsideration en banc is also denied. (APPENDIX B)

REASONS FOR GRANTING THE PETITION

(REASON I) The Ninth Circuit District Court's Decision Conflicts with Decisions of the Second, Third, Fifth, Seventh, Ninth (It's Own Circuit), Tenth Circuits and District of Columbia Circuit on a Fundamental Issue and Legal Principal of Ruling Whether a Pro Se Litigant Violates F.R.C.P. Rule 8(a)(2),d(1) and Pro Se Litigant's Title VII Civil Rights Act 1964 Complaint Should Not Be Dismissed With Prejudice for Violation of F.R.C.P. Rule 8(a)(2),d(1) Without Considering Claim's Plausibility and Strength

(A) SECOND CIRCUIT: *Wynder v. McMahon,* 360 F.3d 73 (2d Cir. 2004):

Similar to Petitioner's case, this is a Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e complaint. The district court dismissed *Wynder's* second amended complaint without prejudice but was reversed by a Second Circuit's regular panel.

> "In this appeal, we must determine (1) whether the district court may — on pain of dismissal — require a plaintiff's complaint to meet a higher pleading standard than that set forth in Fed.R.Civ.P. 8(a); and, if it may not, (2) whether *Wynder's* second amended complaint in fact complies with the dictates of Rule 8. We believe the answer to the first question is no; and to the second, yes. Accordingly, we vacate and remand this case..."

The Second Circuit ruled that the district court's dismissal of plaintiff's amended complaint for violating F.R.C.P. 8(a) was abuses its discretion when "its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or . . . its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 169 (2d Cir. 2001) (footnote omitted)."

Furthermore, the Second Circuit characterized these dismissals as "harsh remed[ies]" that are 'appropriate only in extreme situations.' *Lucas v. Miles,* 84 F.3d 532, 535 (2d Cir. 1996)...The fact that both *Salahuddin* and *Simmons* involved *pro se* plaintiffs whose pleadings we read more liberally, *see Green v. United States,* 260 F.3d 78, 83 (2d Cir. 2001)..."

The Second Circuit established a principal to reasonably satisfy Rule 8 by striking those particular portions of the complaint, if any, to satisfy Rule 8:

> "Moreover, we by no means preclude the district court from striking those particular portions of the complaint, if any, that do not satisfy Rule 8. We

> leave that specific determination to the discretion of that court. *See Salahuddin,* 861 F.2d at 43 (suggesting that courts may simply strike redundant or immaterial matter, leaving the facially valid claims to be litigated); *see also* Fed.R.Civ.P. 12(f) (court may strike any portions that are redundant or scandalous)." "We are satisfied that the core of *Wynder's* complaint is sufficient for purposes of Rule 8, and that the district court's *in toto* dismissal was improper."

Petitioner's district court not only failed to follow the same legal principle to render "more liberally" to Petitioner's pleading for his pro se status, but also failed to provide alternative(s) including simply could strike the portions in the pleading as this case ordered. Instead, Petitioner's district court imposed the maximum penalty to dismiss the case with prejudice. Petitioner's district court even imposed a higher pleading standard than F.R.C.P. Rule 8(a)(2), (d)(1) to require and blame Petitioner for incorrectly labeling the exhibits (attachments) and used this requirement to dismiss the case with prejudice. The fact is, Rule8 (a)(2), (d)(1) do not contain the exhibits labeling requirement. All the above actions made by Petitioner's district court are not in consistent with this case's decisions.

(B) THIRD CIRCUIT: *Washington v. Grace,* 353 F. App'x 678, 680 (3rd Cir. 2009)

The District Court dismissed Plaintiff's amended complaint under Rule 8 and Rule10 (b). The Third Circuit reversed the district court's decision:

Rule 8(a) requires a short and plain statement setting forth: (1) the grounds upon which the court's jurisdiction rests; (2) the claim(s) showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief sought by the pleader. See F.R.C.P. 8; See also *In re Westinghouse Sec. Litig.,* 90 F.3d at 702.

The Third Circuit stated: "In a § 1983 case, a plaintiff need only satisfy the liberal notice pleading requirement of "Rule 8. *Abbott v. Latshaw,* 164 F.3d 141, 149

(3d Cir. 1998). Courts are to construe complaints so "as to do substantial justice," Fed.R.Civ.P. 8(e), keeping in mind that pro se complaints in particular should be construed liberally. *Dluhos v. Strasberg,* 321 F.3d 365, 369 (3d Cir. 2003)."

The Third Circuit regular panel also analyzed the complaint and found although it's long and not clear in some places, majority of the paragraphs, the plaintiff described the facts supporting the claim. Nevertheless, it had provided defendant with "fair notice" about the claims and "it's not unintelligible and might be worthy of worthy of appointment of pro bono lawyer" the Third Circuit continued:

> "Although *Washington's* amended complaint is lengthy, at nearly 80 pages, and lacks clarity in some places, we do not agree that it violated the basic pleading requirements under Rule 8. At a minimum the amended complaint provided defendants with 'fair notice' of Washington's claims."
>
> "In the majority of the paragraphs, Washington described the facts supporting the claim and the dates on which the alleged violations occurred... Indeed, another of the District Court's orders suggests it thought the amended complaint might be sufficiently meritorious to be worthy of appointment of pro bono counsel. (January 15, 2008, 2008 WL 163053, Order at p. 8, n. 2, dkt. # 25)."
>
> "For these reasons, we do not agree that the defendants were incapable of answering Washington's amended complaint. See *Alston v. Parker,* 363 F.3d 229, 233 (3d Cir. 2004). While the amended complaint may not be clear in all respects, it is not unintelligible. We find that it met the notice pleading requirement under Rule 8.

Similarly, Petitioner's pleading is not unintelligible and has given "fair notice" about the 7 claims to defendant. And many of the paragraphs, like this case, Petitioner described the facts which are all relevant to the case to supporting these 7 claims. But Petitioner's district court dismissed with prejudice for the pleading length and never considered to provide a pro bono counsel as this case.

(C) FIFTH CIRCUIT *Atwood v. Humble Oil & Ref. Co.,* 243 F.2d885,889 (5th Cir. 1957)

The Fifth Circuit Court of Appeals also reversed a district court's dismissal decision for violating Rule 8(a). The Court analyzed the complaint thoroughly and found the complaint's lengthy pleading did not violated Rule (8) due to the long history of the proceedings and the complexity of the case, which were identical to Petitioner's case. The Fifth Circuit Appeal Court observed;

> "This the Court could have accomplished by measures as well adapted to the end desired and much less drastic than putting the plaintiff entirely out of court. Was the complaint redundant, repetitious, argumentative, verbose? If so, the offending portions could be stricken. Did it contain scandalous or impertinent matter? These could be eliminated by the like procedure. Rule 12(f) F.R.C.P."
>
> "The pleadings, the orders of the Court, and the arguments reflect that the issues involved in this case are many and varied...the leases involved are long and complicated, and various phases of the cases have been and are being litigated in other courts, and at best a complaint of some length would be required to get all of the contentions presented by such a situation before the court.'
>
> "What is a 'short and plain' statement depends of course on the circumstances of the case."

These circumstances are similar to Petitioner's case. However, not in consistent with the Fifth Circuit's decision, Plaintiff's district court failed to perform any of the measures to accomplish the court desired result such as stricken the unnecessary portions and failed to provide less drastic than dismissal with prejudice. Instead, the court dismissed the entire complaint with prejudice and blankly put the Petitioner's entire claims out of court. The decision made by the

Defendant's district court was not in consistent but was in conflict with the decisions and the legal principals established by the Fifth Circuit.

(D) SEVENTH CIRCUIT

(1) In an opinion authored by the Seventh Circuit explained that pleading's unintelligibility is distinct from length, and often unrelated to it. Petitioner's pleading is not unintelligible, not irrelevant and had sufficiently given fair notice to Defendant. Petitioner's district court improperly dismissed the case with prejudice on the ground that the 95-page pleading length and not up to lawyers' drafting standard but without considering the "plausibility" and the strength of the case is in conflict of the Seventh Circuits cases. In *Kadamovas v. Stevens,* 706 F. 3d 843 (Court of Appeals, 7th Cir. 2013): the court stated:

> "Length and unintelligibility, as grounds for dismissal of a complaint, need to be distinguished...Unintelligibility is distinct from length, and often unrelated to it. A one-sentence complaint could be unintelligible... Often, it is true, 'surplusage can and should be ignored,' *United Statesex rel.. GARST v. Lockheed-Martin Corporation,* 328 F.3d 374, 378 (7th Cir. 2003)...a complaint may be long...because it contains a large number of distinct charges..."

Furthermore, the Appeal Court stated: "The word 'short' in Rule 8 (a)(2) is a relative term. Brevity must be calibrated to the number of claims and also to their character, since some require more explanation than others to establish their plausibility and the U.S. Supreme Court requires that a complaint establish the plausibility of its claims. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see*

also McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir.2011); *Atkins v. City of Chicago,* 631 F.3d 823, 831–32 (7th Cir.2011)."

> "Thus in *Twombly* the Court held that ..."an allegation of parallel conduct...gets the complaint close to state a claim' but 'without some further facture enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief' 559 U.S. at 557...[T]he fact that the allegations undergirding a plaintiff's claim could be true is no longer enough to save it."

Most importantly, the Seventh Circuit pointed out: "Since a plaintiff must now show plausibility, complaints are likely to be longer – and legitimately so – than before *Twombly* and *Iqbal*... Typically complaints are long and complicated. One-hundred page complains that survive a motion to dismiss are not rarities." "The judgment dismissing it for 'unintelligibility must be reversed."

The regular panel of the Court of Appeals for the Seventh Circuit reviewed the pleading thoroughly and determined that "far from being unintelligible," thus concluded that *Kadamovas'* 99 pages long complaint did "not violate any principle of federal pleading," and remanded the case for further proceedings.

However, Petitioner's case was not given a chance to be reviewed by a regular panel of the Court of Appeals for the Ninth Circuit. By given the fact that Petitioner's case has more than 15 years continuous history, contains 7 causes of action, in order to establish 7 "plausible claims", Petitioner should and must provide more specific facts to satisfy the *Twombly* and *Iqbal* pleading requirement to contain "sufficient facts". Petitioner's amended complaint is not

unreasonable, is not unintelligible and should not have been dismissed with prejudice by the court below,

(2) *United States of America By and Through Joseph E. Garst, v. Lockheed-Martin Corporation, et al.,* 269 F.3d 818 (7th Cir. 2001)

In this case, the district court provided detailed instructions as to how to amend the complaint, and observed that *Garst* had not given any specific example of a fraudulent claim.

The Court of Appeals noted that: "Some complaints are windy but understandable. Surplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case. A district court is not 'authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading'. *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 820 (7th Cir.2001)."

However, in Petitioner's case, the district court's decision to insisting Petitioner to perfect his pleading up to Defendant lawyers' standard and beyond Rule 8(a)(2),(d)(1) requirement, i.e. labeling the attachments, and used these reasons to dismiss the case with prejudice, clearly contradicted the above legal principal and not in consistent with this case as well as other cases.

(3) *Davis v. Ruby Foods, Inc.* United States Court of Appeals, Seventh Circuit 269 F.3d 818 (7th Cir. 2001)

A similar discrimination in violation of Title VII case, the defendant moved to dismiss the complaint for failure to comply with Rule 8. The district judge granted

the motion and the case dismissed without prejudice. When the date passed without his filing anything, the dismissal became a final, appealable judgment. *Otis v. City of Chicago,* 29 F.3d 1159, 1166-67 (7th Cir. 1994). *Davis* actually filed his notice of appeal the day before the judgment became final.

In Petitioner's case, when 3/12/2018 the amended complaint filing date had passed, the 2/22/2018's dismissal (without prejudice) order should have become final. However, contradicted with this case, the district judge in Petitioner's case issued another order on 3/15/2018 again to punish the same amended complaint the second time. But the second order was "dismissed with prejudice". It seemed that Petitioner was suffered double jeopardy for his amended complaint's violation of rule 8. i.e. the amended complaint was punished twice.

The Seventh Circuit pointed out that although Mr. Davis's complaint does not satisfy these requirements, but the complaint nevertheless performs the essential function of a complaint under the civil rules, which is to put the defendant on notice of the plaintiff's claim. *Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit,* 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Bennett v. Schmidt,* 153 F.3d 516, 518-19 (7th Cir. 1998); *Ostrzenski v. Seigel,* 177 F.3d 245, 251 (4th Cir. 1999). "Indeed, because of its prolixity, it gives the defendant much more information about the plaintiff's conception of his case than the civil rules require" And therefore, the claim should not be dismissed.

Also, an important question that the Seventh Circuit must decide, is whether a district court is authorized to dismiss a complaint merely because it contains

repetitious and irrelevant matter, a disposable husk around a core of proper pleading. "As our use of the word "disposable" implies, we think not, and therefore that it is an abuse of discretion (the normal standard applied to decisions relating to the management of litigation, and the one by which dismissals for violation of Rule 8 are reviewed, *Kittay v. Kornstein,* 230 F.3d 531, 541(2d Cir. 2000); *In re Westinghouse Securities Litigation,* 90 F.3d 696, 702 (3d Cir. 1996); *Kuehl v. FDIC,* 8 F.3d 905, 908 (1st Cir. 1993); *Mangan v. Weinberger,* 848 F.2d 909, 911 (8th Cir. 1988)) to dismiss a complaint merely because of the presence of superfluous matter."

Furthermore, the Seventh Circuit regular panel ruled: "But the complaint contains everything that Rule 8 requires it to contain, and we cannot see what harm is done anyone by the fact that it contains more. Although the defendant would have been entitled to an order striking the irrelevant material from the complaint, F.R.C.P. 12(f), we doubt that it would have sought such an order, unless for purposes of harassment, because the extraneous allegations...They are entirely ignorable. Excess burden was created in this case not by the excesses of Davis's complaint but by the action of the defendant in moving to dismiss the complaint and the action of the district court in granting that motion.

Most importantly, the Seventh Circuit re-emphasized the principal for properly issuing a dismissal: "But when the complaint adequately performs the notice function prescribed for complaints by the civil rules, the presence of extraneous matter does not warrant dismissal. "Fat in a complaint can be

ignored." *Bennett v. Schmidt,* 153 F.3d 516, 517 (7th Cir. 1998). "If the [trial] court understood the allegations sufficiently to determine that they could state a claim for relief, the complaint has satisfied Rule 8." *Kittay v. Kornstein, supra,* 230 F.3d at 541. "Were plaintiffs' confessed overdrafting their only sin, we would be inclined to agree that dismissal was an overly harsh penalty." *Kuehl v. FDIC, supra,* 8 F.3d at 908. See also *Simmons v. Abruzzo,* 49 F.3d 83, 87 (2d Cir. 1995). Indeed; the punishment should be fitted to the crime, here only faintly blameworthy and entirely harmless."

In Petitioner's case, the Petitioner's amended complaint adequately performs the notice function and contains seven (7) plain and short allegations. The district judge (and defendant) understood all the 7 allegations and identified all the 7 allegations in his order (APPENDIX D). Therefore, the amended complaint should not have been dismissed with prejudice for violating Rule 8 because the Petitioner has performed the essential function of a complaint under the civil rules, which is to put the Defendant on notice of the Petitioner's 7 claims. Petitioner district judge's ruling of dismissal with prejudice would be in conflict with this case's (and other cases cited above) legal principle that a court should not dismiss a complaint merely because of the presence of superfluous matter.

The Seventh Circuit manifested an important principal for dismissal of a complaint for violation of Rule 8: "To the principle that the mere presence of extraneous matter does not warrant dismissal of a complaint under Rule 8, as to most generalizations about the law... Have a heart!"

In conclusion, the Seventh Circuit pointed out: "We also take this opportunity to advise defense counsel against moving to strike extraneous matter unless its presence in the complaint is actually prejudicial to the defense. *Stanbury Law Firm, P.A. v. IRS,* 221 F.3d 1059, 1063 (8th Cir. 2000) (per curiam). Such motions are what give "motion practice" a deservedly bad name."

(E) TENTH CIRCUIT *Nasious v. Two Unknown B.I.C.E. Agents* 92 F.3d 1158, 1163 (10th. Cir. 2007)

A Civil Rights complaint was dismissed for violating F.R.C.P. Rule 8. The Tenth Circuit reversed the district court's dismissal and stated: "Dismissing a case with prejudice, however, is a significantly harsher remedy – the death penalty of pleading punishments – and we have held that, for a district court to exercise soundly its discretion in imposing such a result, it must first consider certain criteria. See *Olsen*, 333 F.3d at 1204; *Gripe v. City of Enid, Okla.,* 312 F.3d 1184, 1188 (10th Cir. 2002); see also *Ciralsky*, 355 F.3d at 669-70 (discussing the "harsh sanction" of dismissal with prejudice as opposed to dismissal without prejudice)."

The Tenth Circuit also established a criteria for imposing such hard punishment:

> "Specifically, [t]hese criteria include '(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.'" *Olsen*, 333 F.3d at 1204 (quoting *Mobley v. McCormick,* 40 F.3d 337, 340 (10th Cir. 1994)); see also *Gripe*, 312 F.3d at 1188 (quoting *Ehrenhaus v. Reynolds,* 965 F.2d 916, 921 (10th Cir. 1992) (same) (hereinafter, the "*Ehrenhaus* factors").

After the Tenth Circuit Court of Appeals regular panel reviewed the case, the court found no indication that the district court considered the *Ehrenhaus* factors before

dismissing the case. The Tenth Circuit stated: "Though we can of course affirm a district court's dismissal based on our own independent assessment of its legal propriety, we find ourselves unable to do so in this case." "Our inability to affirm arises from our concern over the application of the remaining three *Ehrenhaus* factors...Likewise, with the final factor of the *Ehrenhaus* test, we see no indication that the district court considered the practicability of alternatives to dismissing Mr. Nasious's cause with prejudice, such as dismissal without prejudice or perhaps partial dismissal, leaving intact any claims that are adequately stated (if any exist).

Most importantly, the Tenth Circuit concerned about imposing such extreme penalty on Pro Se litigants. Pro se litigants should not be held to the same standard as admitted or bar licensed attorneys. The Panel stated: "We are particularly concerned with attention to this aspect of *Ehrenhaus* when a party, like Mr. Nasious, appears pro se, having previously explained that in such cases, the court should carefully assess whether it might appropriately impose some sanction other than dismissal [with prejudice], so that the party does not unknowingly lose its right of access to the courts because of a technical violation." *Ehrenhaus*, 965 F.2d at 920 n.3."

In Petitioner's case, appeared pro se, he was unaware of that if he did not submit another amended complaint, his case would be dismissed for prejudice and district's 2/22/2018 order did not specify and clearly stated that. Petitioner thought that he had followed another District Judge Gutierrez's order (APPENDIX E) and had timely filed the appeal to the Ninth Circuit to get this 2/22/2018 order reviewed.

He had no idea that his case would be dismissed with prejudice while waiting for the Ninth Circuit's review.

Most importantly, Petitioner's district court also failed to consider the *Ehrenhaus* factors before dismissing the case. Petitioner district judge's dismissal (with prejudice) penalty is too harsh, improper and was not in consist but was in conflict with the decisions made by the Tenth Circuit such as this case.

(F) District of Columbia Circuit *Adam J. Ciralsky, v. Central Intelligence Agency, et al.*, No. 02-5306. January 30, 2004:

This was a case decided prior to *Twombly* and *Iqbal*, and it's not a pro se drafted pleading case. Nevertheless, the appeal court remanded the case because the appeal court was concerned the district court reacted to the amended complaint not only by dismissing the action, but by dismissing it with prejudice. Because "such a dismissal would have constituted a harsh sanction, as it would have imposed the bar of res judicata against any future filing..."

The appeal court made clear that "it will generally be an abuse of discretion to deny leave to amend when dismissing a nonfrivolous original complaint on the sole ground that it does not constitute the short and plain statement required by Rule 8." *Salahuddin*, 861 F.2d at 42; see *Micklus v. Greer*, 705 F.2d 314, 317 n. 3 (8th Cir.1983)

The appeal court stated: "After all, Rule 8 does not require a "short and plain complaint," but rather a "short and plain statement of the claim." Fed.R.Civ.P. 8(a)(2) (emphasis added). Indeed, Rule 8(e)(2) provides that: "A party may set forth two or more statements of a claim or defense alternatively. A party may also state

as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed.R.Civ.P. 8(e)(2). Moreover, it is "each averment of a pleading" that Rule 8(e)(1) states "shall be simple, concise, and direct" - not each pleading itself. As we have noted above, the government does not contend that the plaintiff's claims are frivolous on their face. And other things being equal, our "jurisprudential preference [is] for adjudication of cases on their merits rather than on the basis of formalities." *Salahuddin*, 861 F.2d at 42; see 5 *Wright & Miller* § 1217, at 178 (2d ed.1990)."

Also the U.S. Supreme Court pointed out in *Swierkiewicz v. Sorema N.A.* that "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of the claim. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" 534 U.S. at 514, 122 S.Ct. at 998-99 (quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957)).

In Petitioner's case, the district court did not contend that Petitioner's claims are frivolous. Petitioner district's decision of dismissal with prejudice based on the basis of formalities rather than the merit is in conflict with this case.

(REASON II) This Ninth Circuit District Court Decision Conflicts with it's Own Circuit's Decisions: In Civil Rights Employment cases, the Ninth Circuit has made clearly that Rule 8(a) dismissals for excessive length are disfavored.

(A) *Hearns v. San Bernardino Police Dept.,* 530 F.3d 1124, 1131 (9th Cir. 2008):

The Ninth Circuit regular merit panel reversed both dismissals for violation of Rule 8(a)(2): "Neither complaint warranted dismissal under Rule 8...although each set forth excessively detailed factual allegations, they were coherent, well-organized, and stated legally viable claims." The Ninth Circuit regular panel stated: "This court reversed the dismissal based on Rule 8(a)(2). In doing so, this court stated that a dismissal for a violation under Rule 8(a)(2), is usually confined to instances in which the complaint is so `verbose, confused and redundant that its true substance, if any, is well disguised.' Id. at 431 (quoting *Corcoran v. Yorty,* 347 F.2d 222, 223 (9th Cir.1965)). The claim at issue did not satisfy those criteria.

The Ninth Circuit also made clear that "*Agnew* has never been cited by this court as standing for the proposition that a complaint may be found to be in violation of Rule 8(a) solely based on excessive length, nor does any other Ninth Circuit case contain such a holding."

The Ninth Circuit stated: "Decisions from other circuits are also consistent with the view that verbosity or length is not by itself a basis for dismissing a complaint based on Rule 8(a). See *Wynder v. McMahon,* 360 F.3d 73, 80 (2d Cir.2004) (holding that district court erred in dismissing on Rule 8 grounds when the complaint, though long, was not "so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised" (internal quotation omitted)); *Garst v. Lockheed-Martin Corp.,* 328 F.3d 374, 378 (7th Cir.2003) ("Some complaints are windy but understandable. Surplusage can and should be ignored.")

The Ninth Circuit continued: "By contrast, the complaint at issue here was not "replete with redundancy and largely irrelevant. It set out more factual detail than necessary, but the overview was relevant to Plaintiff's causes of action for employment discrimination. Nor was it "confusing and conclusory." Cf. *Nevijel*, 651 F.2d at 674. The FAC and the original complaint contain excessive detail, but are intelligible and clearly delineate the claims and the Defendants against whom the claims are made." And these analysis and characters should also be applied to Petitioner's case. But the district court did not do so and Petitioner's complaint and appeal briefing were not allowed to be reviewed by a merit panel.

Instead of imposing harsh dismissal, the Ninth Circuit ruled that district court should have first considered and provided less drastic alternatives; "The district court also has ample remedial authority to relieve a defendant of the burden of responding to a complaint with excessive factual detail. One option would have been to simply strike the surplusage from the FAC. See *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995); *Fallon v. U.S. Gov't,* No. CIV S-06-1438, 2007 WL 707531, *2 (E.D.Cal. March 6, 2007); *Grayson v. Schriro,* No. CIV 05-1749, 2007 WL 91611, *3 (D.Ariz. Jan. 11, 2007) (quoting *Marshall v. United Nations,* No. CIV S-05-2575, 2006 WL 1883179, *3 E.D.Cal. July 6, 2006). Many or all of the paragraphs from 33 through 207 of the FAC, covering 38 pages, could have been stricken. Alternatively, the judge could have excused Defendants from answering those paragraphs."

The Ninth Circuit also established the principal and proper process prior to issue a dismissal: "Because dismissal with prejudice is a harsh remedy, our

precedent is clear that the district court "should first consider less drastic alternatives." *McHenry*, 84 F.3d at 1178."

In weighing possible alternatives against the consequences of dismissal with prejudice, the district court should consider, for example, whether "public policy strongly favor[s] resolution of this dispute on the merits." *Dahl v. City of Huntington Beach,* 84 F.3d 363, 366 (9th Cir.1996). The court should also consider whether "dismissal [would] severely penalize[ ] plaintiffs . . . Even when the litigant is the one actually responsible for failure to comply with a court's order, which evidence before the court did not show is the situation here.

The Ninth Circuit stated: "[t]he sanction of dismissal should be imposed only if the deceptive conduct is willful, in bad faith, or relates to the matters in controversy in such a way as to interfere with the rightful decision of the case." *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir.1986) (citations omitted); see also *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1430 (9th Cir.1990) (noting that even in light of party's misconduct, district court should generally consider alternatives to dismissal with prejudice)."

In Petitioner's case, the Petitioner did not engage in any deceptive conduct which is willful, in bad faith or any misconduct. But the district court failed to consider any less drastic alternatives as the Ninth Circuit regular panel established above. Instead, the district court imposed two punishments i.e. two dismissals: dismissal and dismissal with prejudice, to punish the same Amended Complaint. These are in conflicts with the Ninth Circuit's decisions.

The Ninth Circuit regular merit panel further ruled; "The district court abused its discretion by imposing the sanction of dismissal with prejudice instead of imposing a less drastic alternative. Plaintiff's complaints were long but intelligible and allege viable, coherent claims... we conclude that the district court abused its discretion in dismissing with prejudice. ("A district court by definition abuses its discretion when it makes an error of law." (citation omitted)); *In re Dominguez*, 51 F.3d 1502, 1508 n. 5 (9th Cir.1995)."

(B) In United States Court of Appeals for the Ninth Circuit, No. 12-15890, D.C. No. 2:11-cv-01928-JCM-RJJ, *Greg Landers, v. Quality Communications, Inc.,* 2015, another regular merit panel in the Ninth Circuit ruled: "Pre-*Twombly* and I*qbal*, the pleading requirement could be met by a statement merely setting forth the elements of the claim...However, that state of affairs changed when the Supreme Court clarified in *Twombly* that to satisfy Rule 8(a)(2), a complaint must contain sufficient factual content 'to state a claim to relief that is plausible on its face...' 550 U.S. at 570..." "This requirement of plausibility was reinforced in *Iqbal.* See 556 U.S. at 678" "We also agree that the plausibility of a claim is 'context-specific' *Lundy*, 711 F.3d at 114 ...Obviously, with the pleadings of more specific facts, the closer the complaint moves toward plausibility."

And that's exactly the Petitioner's case. In order to establish the plausibility of Plaintiff's 7 claims, the amended complaint must contain sufficient specific facts, and that made this 15-year-history case complaint pleading paper reasonably longer. In order to satisfy the Post-*Twombly* and *Iqbal* pleading requirement to

establish 7 plausible claims, Petitioner submitted more specific facts in the pleading, just make sure that the complaint contains enough "sufficient facts" to pass the plausibility line, and therefore, the paper is longer. The district court below ignored this crucial and critical requirement established by the U.S. Supreme Court and failed to consider "plausibility" in the orders. Thus, the court below is in conflict with case(s) decided in the Ninth Circuit as well as in the U.S. Supreme Court.

Unlike Petitioner's case, *Landers* failed to state a plausible claim for relief under the FLSA. *Landers* also expressly declined to amend his complaint. However, in Petitioner's case, he clearly has established 7 plausible claims by providing if not "more than sufficient", definitely "sufficient" specific facts to support his claims.

Petitioner also made clear that he will amend his already-been-amended complaint again after the Ninth Circuit reviewed the case and rendered a decision.

The record showed that Petitioner did not refuse to remand again. In fact, he stated in the Opening Brief to the Ninth Circuit, not once but twice, on page 32 and 33 that he will cut more facts if the Ninth Circuit decides the 95 pages need to cut more and hopefully the court will provide a more detailed guideline.

(REASON III) This Ninth Circuit District Court Decisions Conflict with the U.S. Supreme Court's Decisions

(A) Question 1 Related U. S. Supreme Court Cases:

(1) Plaintiff is representing himself *pro se. Pro se* litigants are not held to the same standard as admitted or bar licensed attorneys.

The U.S. Supreme Court made clear in *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972): "Pleadings by *pro se* litigants, regardless of deficiencies, should only be judged by function, not form."

The U.S. Supreme Court also made clear that *pro se* document is to be liberally construed. As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 (1972), "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id., at 520 521, quoting *Conley v. Gibson*, 355 U.S. 41,45 46 (1957)."

However, in Petitioner's case, the district court's decision was in conflict with the U.S. Supreme Court's decision. Not only failed to follow the same legal principle to render "more liberally" to Petitioner's pleading document due to Petitioner's pro se status, but went to the opposite direction, take advantage of and pick on Petitioner's pro se status by imposing even a higher pleading standard than F.R.C.P. Rule 8(a)(2), (d)(1) to require and to blame Petitioner for incorrectly labeling the exhibits attachments (APPENDIX D) and used this form related requirement to dismiss the Petitioner's case with prejudice.

The district court below judged the case only by the deficiency, if there's any, of the form not by the function. The rulings made by Petitioner's district court were not consistent but were in conflict with the above legal principals established by the

Ninth Circuit, other Circuits as well as the US Supreme Court as to how to treating a document drafted by a pro se.

(2) In *Baldwin County Welcome Center v. Brown* 466 U.S. U.S. 147,104S.Ct., 1723, 80 L. Ed. 2d 196, 52 U.S.L.W.3751, The Supreme Court stated; "Rule 8(f) provides that 'pleadings shall be so construed as to do substantial justice.' We frequently have stated that *pro se* pleadings are to be given a liberal construction."

(3) In *Hughes v. Rowe et al.* 449 U.S. 5, 101S. Ct., 173, 66 L. Ed. 2d 163, 49 U.S.L.W. 3346

The US Supreme Court stated; "It is settled law that the allegations of such a [pro se] complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" See *Hains v. Kerner*, 404 U.S.519,520 (1972). See also *Maclin v. Paulson*, 627 F.2d 83, 86 (CA7 1980); *French v. Heyne*, 547 F.2d 994, 996 (CA7 1976)

(4) In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007), The US Supreme Court held that, to survive a motion to dismiss, a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face" "...stating a claim requires a complaint with enough factual matter to suggest an agreement... without further factual enhancement it stops short of the line between possibility and plausibility. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

(5) In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)

The US Supreme Court held that the complaint must "plausibly give rise to an entitlement to relief" which requires "more than the mere possibility of misconduct."

The Supreme Court held that *Iqbal's* complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination.

In order to satisfy "plausibility" requirement, Petitioner must include sufficient facts. "Obviously, with the pleadings of more specific facts, the closer the complaint moves toward plausibility." See *Landers v. Quality Communications, Inc.,* 771 F.3d 638 (9th Cir. 2014). As a result, the pleading is expected to be longer. The district court only used the length (form) of the document to dismiss the case with prejudice, and failed to consider the plausibility and strength of the case.

In *Twombly* and *Iqbal,* US Supreme Court made clear that to satisfy Rule 8(a)(2) the Court held, for the first time, that to show that the pleader is entitled to relief, a pleading must manifest facial plausibility. This, in turn, requires that a federal court in ruling on the validity of a complaint first disregard all conclusory allegations unsupported by facts, and then ask whether the remaining (factual) allegations allow the court to reasonably draw a plausible, not necessarily probable, but more than possible, inference that the defendant is liable for the misconduct alleged. But Petitioner's district court failed to do so.

In conflict with the US Supreme Court's decisions in *Twombly* and *Iqbal,* Petitioner's district court failed to disregard all the conclusory allegations and then evaluate the remaining factual allegations to reasonably draw a plausible inference that the defendant is liable for the misconduct alleged. Instead, the district court used pleading length to dismiss the case with prejudice.

(B) Question 2 Related U.S. Supreme Court Case:

Petitioner filed employment discrimination complaint in violation of Title VII of the Civil Rights Act of 1964, 42 U.S. Code § 1981a, § 2000e et seq and breach of discrimination in employment settlement agreement claims.

The Seventh Amendment guarantees a jury trial for civil cases in the federal courts. In addition, according to; "42 U.S. Code § 1981a.Damages in cases of intentional discrimination in employment (c) Jury trial If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury;"

The US Supreme Court also confirmed the right to a jury trial in *Monterey v. Del Monte Dunes Atmonterey, LTD.* (97-1235) 526 U.S. 687 (1999) 95 F.3d 1422, the US Supreme Court ruled that "if a complaining party seeks compensatory ... any party may demand a trial by jury under §1981a(c)."

Therefore, the Petitioner should have the right to a jury trial under §1981a(c). However Petitioner's constitutional right was denied by the district court below.

(REASON IV) District Court's Decisions Contain Errors

As stated foregoing, in summary the district court made the following errors:

(1) Failed to consider plausibility and strength of the case but dismissed (and with prejudice) on both 2/22/2018 and 3/15/2018 orders.

(2) Improperly Dismissed the case (and with prejudice) by form, not by content on both 2/22/2018 and 3/15/2018 orders.

(3) Failed to held *Pro Se* with "less stringent standards than formal pleadings drafted by lawyers" but required Petitioner's pleading up to licensed lawyers'

standard and imposed beyond Rule 8(a)(2),(d)(1) requirement on both 2/22/2018 and 3/15/2018 orders.

(4) Dismissal (with prejudice) is too harsh for a Pro Se litigant's violation of Rule 8(a)(2), (d)(1), if there's any, district court failed to consider and provided less drastic alternatives on both 2/22/2018 and 3/15/018 orders.

(5) Petitioner's amended complaint did contain short and plain statement of the 7 claims showing that the Petitioner is entitled to relief and has given fair Notice to Defendant. The amended complaint should not have been dismissed (2/22/2018 order) and dismissed with prejudice (3/15/2018 order).

(6) Petitioner filed change of venue request (28 U.S. Code § 1404) and gave notices on 2/26/2018 and 3/5/2018 to the district court. However, the district court failed to timely adjudicate the change of venue request prior to dismiss the case with prejudice on 3/15/2018 and denied Petitioner's change of venue request as moot. (APPENDIX C)

(7) The Ninth Circuit should have this case reviewed by a regular panel because the district court's decisions are in conflict with other circuits, its own circuit and the U.S. Supreme Court's decisions. Plaintiff's constitution right to a jury trial was deprived. (2/22/2018 and 3/15/2018 orders)

(REASON V) The District Judge 3/15/2018 Decision Was In Conflict With the Case Which Was Cited and Relied Upon to Dismiss the Case With Prejudice; Was Inconsistent With His Own Order on 2/22/2018, and Also Was In Conflicted With Another District Judge Gutieze's Order on 12/29/2017 During the Proceeding:

(A) The district court dismissed Petitioner's Title VII Civil Rights Act of 1964 case with prejudice and was based upon only one cited case; *Cf. Jung v. K. & D. Min. Co.,* 356 U.S. 335, 78 S. Ct. 764, 2 L. Ed. 2d 806 (1958). (APPENDIX C)

However, this ONLY district court cited case is NOT a violation of Rule 8(a)(1),(d)(1) dismissal with prejudice case. Rather, it's a Security Act of 1933 case and the case was dismissed by district court for failure to state a claim, NOT for violation of Rule 8 (a) (2), d(1).

This cited case was irrelevant and had nothing to do with the Petitioner's case. Unlike Petitioner's case, that appeal was dismissed as untimely in 1958. Nevertheless, the U.S. Supreme Court reversed that appeal court's ruling and held the appeal was timely under Rule 73(a) of the Federal Rules of Civil Procedure.

Obviously, the district court below did not and could not find any similar case to support its dismissal with prejudice decision.

(B) The district court judge's 3/15/2018 order was inconsistent with his Own 2/22/2018 Order:

In addition to the dismissal order issued on 2/22/2018, on 3/15/2018 the district court issued another order to punish the amended complaint again for violating Rule 8(a)(2),(d)(1) but this time dismissed the entire case with prejudice.

However, in his 2/22/2018 order, the district judge stated that if the Petitioner failed to submit another amended complaint, the case may be dismissed. It did not state clearly that the case may be **dismissed with prejudice**. And yet, on 03/15/2018, the district judge again punished Petitioner's amended complaint harshly and

dismissed the case with prejudice without warning. This is unfair to the Petitioner because he was unaware and was not warned by the district judge that his case would be dismissed with prejudice on the 2/22/2018 order. The Petitioner's amended complaint was punished twice for the same violation of Rule 8, a double jeopardy.

(C) In 12/29/2017 Honorable Judge Gutierrez stated clearly in the order: "To the extent Plaintiff received an adverse ruling that he believes is erroneous, Plaintiff's claim of error may be properly addressed through a motion for reconsideration or an appeal. *See F. J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.* 244 F.3d 1128, 1145 (9th Cir. 2001)" (APPENDIX E page 2) Petitioner believed the 2/22/2018 ruling contained errors (including the submission date 3/12/2017, should be 3/12/2018 because we were already in the year of 2018 for a couple of months already) to dismiss the amended complaint for violation of F.R.C.P. Rule 8(a)(2), (d)(1).

Therefore Petitioner followed the Honorable Judge Gutierrez's order and also followed the proper Ninth Circuit appeal procedure to file the appeal seeking review and help from the Ninth Circuit, and also timely gave the appeal notice to the district court on 2/28/2018. And yet the district court punished him and dismissed the entire case with prejudice. Petitioner was shocked when he received district's order dated on 3/15/2018 that his entire complaint was dismissed with prejudice and previously submitted change of venue request was also denied as moot.

District's order seemed to be in conflict with Honorable Judge Gutierrez's order and disallowed Petitioner to file appeal. While the appeal was already in the Ninth Circuit Appeal Court's possession, reasonably the district court sould have

waited until the ruling from the Ninth Circuit because the case already had been dismissed (without prejudice) on 2/22/2018. Moreover, Petitioner did not refuse to amend. As previously stated, Petitioner made clearly that he will amend again if the Ninth Circuit issued a ruling to deny his appeal request.

(REASON VI) This Case Presents a Recurring Question of Exceptional Importance to Pro Se Litigants' Constitutional Right to a Jury Trial Warranting the Honorable Court's Immediate Resolution:

The Ninth Circuit district court's decision creates a massive unfairly impact to all pro se litigants who have been in the litigation process and in the future. This decision will allow defendant to use professional lawyers' legal drafting standard to attack and pick on pro se citizens for the purpose of blocking their accesses to justice and denying their constitutional rights to a jury trial and/or a fair trial.

CONCLUSION

For the forgoing reasons, the Ninth Circuit District Courts judgment should be vacated. Petition for Write of Certiorari should be granted.

Dated: May 18, 2019

Respectfully submitted,

David Shu, Petitioner
In Pro Se