No. _____

In the Supreme Court of the United States

EFRAIN AREIZAGA,

Petitioner,

v.

ADW CORPORATION.

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EFRAIN AREIZAGA, *PRO SE*
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Blessed are those who act justly, who always do what is right. Psalm 106:3

QUESTIONS PRESENTED

The following un-disputed facts in this case presents the grounds on which the petitioner frames his question to the court.

On 7/8/16 & 7/11/16 the petitioner met with respondent's attorney JOHN HERRING and he stated to petitioner that this case will not end on the merits and that the respondent will only pay cost and nothing else. In mediation on 8/2/16, the respondent and their attorney JOHN HERRING made the following unlawful threats, thru a mediator, coercing the petitioner into signing a mediation agreement for cost only;(1) that petitioner had taken proprietary information from the respondent without consent and that they can sue petitioner's employer Bartos Industries; (2) that the petitioner had also used proprietary information from his employer Bartos Industries in his motion for summary judgment; (3) that petitioner can be black listed in the industry.

(1) Did the United States court of appeals affirm a decision that exceeds their authority and lacks subject matter jurisdiction by suspending section 31.03 of the Texas penal code, the Hobbs Act, the FLSA and grants the respondent and their attorneys immunity against prosecution by holding that un-lawful threats of retaliation, an in *terrorem tactic* as stated in *Jacques v. DiMarzio, Inc.*, 216 F. Supp. 2nd at (144), are protected by mediation confidentiality and

QUESTIONS PRESENTED - continued

attorney client privilege which infringes on petitioner's constitutional right to access to the courts, due process and the equal protection clause?

(2) Did the United States court of appeals affirm a decision that infringed on petitioner's constitutional rights to due process and equal treatment of the law, by refusing to render a decision in a non-final order denying plaintiff's motion for reconsideration to strike respondent's answer pleading where the lower court deviated from the established principles of law by: (1) not following the doctrine of *stare decisis* and by incorrectly applying the tolling provisions of Rule 12(a)(4)(A) to rule 81; (2) by acting in excess of its jurisdiction by allowing respondent's affirmative defense claim of be a "non-traditional engineering firm," which is strictly prohibited by the Texas Engineering Practice Act; (3) and by applying the "plausibility standard" pursuant to *Bell Altlantic Corp. v Twombly*, 550 U.S. 544 (2007) and clarified in *Ascroft v. Iqbal*, 129 S.Ct. 1937 (2009), to petitioner's complaint and amended complaint and failing to apply the same standard to respondent's answer pleadings? (Please note that the review of this question is based on this court's finding upon review of the merits that the mediation agreement and final judgment was obtained by fraud, see previous question).

PARTIES TO THE PROCEEDINGS

The parties & interested parties to the proceeding in the United States Court of Appeals for the 5th Circuit are as follows;

(1) Efrain Areizaga, *Pro Se*

Petitioner

(2) ADW Corp.,

Respondent

(3) David Crittenden, Owner & President of ADW Corp.

(4) Woody Gunter, Owner & Vice-President of ADW Corp.

(5) Respondent's law firm & Attorneys (third party litigants)

Norton Rose Fulbright US LLP

John Herring

Norlynn B. Price

Danielle Alexis Matthews

Jordan C Campbell

Barrett Robin

(6) State of Texas

(7) All intentionally misclassified employees in the United States

(8) All manufacturer's representative intentionally misclassifying employees to enrich themselves.

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OPINION AND ORDER

The 5th Circuit court of appeals' opinion, rendered on January 3, 2020, addressing the first question presented (App. 1-8) is unreported and reproduced at App. 1-8, affirming the District court Judge Memorandum Opinion and order denying plaintiff's motion to set aside final judgment on February 12, 2018 reproduced at App. 9-19.

The district court's order denying petitioner's motion for reconsideration of plaintiff's motion to strike defendant's answer pleading, rendered on August 17, 2015 is reproduced at App. 20-24 addressing petitioner's second question. The 5th Circuit court of appeal as stated above denied jurisdiction, by denying petitioner's appeal on petitioner's first question herein. This Court's reversal on merits of petitioner's first question, makes the second question immediately reviewable by this court.

JURISDICTION

The Court has jurisdiction over this case under 28 U.S.C. § 1254(1) based on the 5th Circuit Court of appeals entry of a final judgment on January 3, 2020 (App. 1-8) & District Court's Memorandum Opinion and Order on February 12, 2018 (App. 9-19) addressing the first question. Question two is dependent on this Court's reversal on the merits of petitioner's first

question, then the order reproduced at App. 20-24, becomes an immediate reviewable non-final order.

The petitioner initially filed this brief on March 26, 2020 and received by the clerk's office on April 1, 2020. The Clerk returned plaintiff's brief to correct deficiencies pursuant to 14.5 and 29.2 providing the petitioner with 60 days.

NOTICE TO THE TEXAS ATTORNEY GENERAL & U.S. SOLICITOR GENERAL

Pursuant to the Supreme Court Rules 29.4(c) & 14.1(e)(v) the petitioner provides notice of certification of service to the Texas Attorney General, because the Constitutionality of the State of Texas and US Law was drawn into question by the 5th Circuit Court of Appeals which suspends section 31.03 of the Texas penal code, the Hobbs Act, the FLSA and grants the respondent and their attorneys immunity against prosecution by holding that un-lawful threats of retaliation are protected by mediation confidentiality and attorney client privilege infringing on Texas constitutional Article I section 28 which states that "no power of suspending laws in this state shall be except by the Legislature," and other US laws.

Moreover, the district's court's failure to strike respondent's affirmative defense that respondent was "a non-traditional engineering firm," without providing any facts that they were a registered engineering firm pursuant to the Texas Engineering Practice Act § 1001.405 of the Texas state statues – where the of engineering is carried out only by licensed professional

engineers. The Texas Engineering Practice Act § 1001.403 protects the public – where the professional identification and use of the word "engineering" in documents, pamphlets, advertisement or another similar written or printed form of identification is limited to a person or firm licensed under this statue.

STATUTORY PROVISIONS INVOLVED

The U.S. Constitution, Article VI section 2 is commonly referred to as the supremacy clause. It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. It prohibits states from interfering with federal government' exercise of its constitutional powers and from functions that are exclusively entrusted to the federal government. Not only does the federal government have express powers under the U.S. constitution, it also has implied powers, or powers not specifically mentioned in the Constitution, see *McCulloch v. Maryland*, 17 U.S. 316 (1819). The goal of an opinion is to show how like cases are properly to be decided in the future, *County of Los Angeles v. Kling*, 474 U.S. 936, 940 n. 6 (1985). Federal appellate courts' twin duties are to decide appeals and to articulate the law, see *United Stated v. McFarland*, 311 F.3d 376, 417 (5th Cir. 2002). Whether express or implied, federal law will almost always prevail when it interferes or conflicts with state law, except in circumstances where the federal law is deemed unconstitutional or where the supremacy clause does not apply.

The provisions U.S. Constitution, Article III, section 2 setting out the powers of the Federal Judiciary,

define those powers in using two different but related words "cases" and "controversies". In framing judicial authority these words also represent limits. The Federal courts do not, under Article III, have the power to resolve legal questions that do not arise out of an actual dispute between real parties, see *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) and *Renne v. Geary*, 501 U.S. 312 (1991).

To qualify as a case fit for federal court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed," see *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990), *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974).

Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it, see *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934), *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977). And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit, see *United States v. Corrick*, 298 U.S. 435, 440 (1936).

In short, we have authority to make such disposition of the whole case as justice may require, see *U.S.*

Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 21 (1994).

In litigation generally and in constitutional litigation most prominently, courts in the U.S. characteristically pause to ask: Is this conflict really necessary, when anticipatory relief is sought in federal court against a state statue, respect for the place of the States in our federal system calls for close consideration of that core question, see *Poe v. Ullman*, 367 U.S. 497, 526 (1961). Warnings against premature adjudication of constitutional questions bear heightened attention when a Federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state act not yet reviewed by the State's highest court, see *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. at 573-574 (1947). Concerns of justiciability go to the power of the courts to entertain disputes and to the wisdom of their doing so. We presume that federal courts lack jurisdiction "unless the contrary appears from the record, see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986), *King Bridge Co. v. Otoe County*, 120 U.S. 226 (1887).

The Petition Clause provides appellants with the right to petition the government for redress, see U.S. Constitution amendment I. The right to petition is enshrined in the constitution as a fundamental right and includes the right to access the courts, see *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 510 (1985). The right of access to the courts is indeed but one aspect of the right of petition, see *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*,

365 U.S. 127, 138 (1961). The right of petition is one of the freedoms protected by the Bill of Rights, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). The key to discovering whether a right is fundamental ... lies in assessing whether the right is explicitly or implicitly guaranteed by the Constitution.

The right of access is a fundamental right, entitled to heightened protection under the due process and equal protection clauses, see *Marbury v. Madison*, 5 U.S. 137 (1803). Once the government allows a plaintiff to file his claim and thereby assumes control over its disposition, however, it must do so fairly and reasonably, in other words afford due process. Anything which might invade or restrain a fundamental right must be closely scrutinized and carefully confined, see *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

The 5th Amendment of the U.S. Constitution has an explicit requirement that the federal government not deprive individuals of life, liberty or property without due process of law and an implicit guarantee that each person receive equal protection of the laws. The unequal treatment must be closely scrutinized and carefully confined, see *Harper*, 383 U.S. at 670. To survive this scrutiny, the unequal apportionment of reasoned must be narrowly tailored to achieve a compelling government interest, see *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Due process is violated if a practice or rule offends some principle of justice so rooted in the traditions

and conscience of our people as to be ranked as fundamental, see *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Due process is that which comports with the deepest notions of what is fair, right and just, see *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950). Strict scrutiny is also applied to classifications that impinge on a fundamental right. The Supreme has recognized that the right to have access to the courts is a fundamental right, see *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

STATEMENT OF THE CASE

The Petitioner is a former employee of the respondent, ADW Corp., who is a manufacturer's representative in the Heating Ventilation & Air conditioning (HVAC) Industry across the country. The respondent's sole business is to sale products for manufacturers in the Dallas-Ft. Worth area. The petitioner did production work incidental to the sale of a manufacturer's product. Petitioner sued the respondent for over-time wages, unpaid commissions and other tort violations in state court on 7/9/14. The respondent filed a notice of removal to federal court on 8/13/14 pursuant to the federal rules of civil Procedures (FRCP) rule 81(c)(1) which applies to civil actions when it is removed from state court, and the petitioner did not object.

The respondent filed a timely motion to dismiss the original state compliant on 8/20/14 pursuant to FRCP rule 81(c)(2)(c). Thereafter on 9/9/14 the petitioner filed an amended complaint without leave of court pursuant to Rule 15(a)(1). The respondent then

filed a second motion to dismiss on 9/30/14 and after the court ruled on that motion, the respondent finally filed their answer pleading to petitioner's amended complaint on 4/2/15, approximately 254 days late.

On 6/13/16 the petitioner filed a motion for summary judgment where the petitioner's total damages sought was $215,147.52 and petitioner's total cost of litigation expense was $13,590.72. Pursuant to ADW's attorney, JOHN HERRING's own admission during a hearing seeking discovery, the respondent did not have any evidence that would contradict petitioner's motion for summary judgment.

The following are un-disputed facts pursuant to petitioner's testimonial declaration in petitioner's motion to set aside final judgment.

On 7/8/16 & 7/11/16 petitioner personally met with respondent's attorney JOHN HERRING and he stated to petitioner that this case will not end on the merits and that respondent will only pay cost and nothing else.

The respondent and their attorneys had a duty to disclose to petitioner their communications with CHRISTIAN YOUNG with Bartos Industries under rule 33(b)(3) of the Federal rules of civil procedures. Where each interrogatory must, to the extent it is not objected, be answered separately and fully in writing under oath. Petitioner served on the respondent thru their attorney JOHN HERRING, petitioner's first set of interrogatories to ADW Corp. on July 8, 2016.

INTERROGATORY #3 stated as follows;

Identify every person (other than your attorneys) with whom you have had contact or communications, or with whom you in any matter have discussed the events, allegations, affirmative defenses either before or after this lawsuit was filed.

On 8/11/16, DAVID CRITTENDEN, President of ADW Corp., submitted his answer to petitioner's first set of interrogatories, where DAVID CRITTENDEN under oath testified that he did not have any contact or communications with anyone other than Benny Stafford, Eric Groh and Leah Upchurch, pursuant to interrogatory no. 3 in ADW Corp. objections and answer to petitioner's first set of interrogatories.

The fact that DAVID CRITTENDEN listed Benny Stafford an IT independent contractor with ADW Corp and not a current or former employee of ADW Corp. shows that DAVID CRITTENDEN and their attorneys understood the question was with regards to contact or communications of this lawsuit to others which included CHRISTIAN YOUNG president of Bartos Industries and one of petitioner's manager.

Please, note that on page 13 of ADW Corp's answer to petitioner's first set of interrogatories, the certificate of service was signed by BARRETT ROBIN one of respondent's attorney. It was BARRETT ROBIN who communicated the retaliatory threats, as stated above to petitioner's current employer Bartos Industries via CHRISTIAN YOUNG. Defendant's attorney

BARRETT ROBIN acted on behalf of the respondent at all times.

Petitioner's definition and instructions #1 & #2 in petitioner's first set of interrogatories to ADW Corp. made it clear that #1 "Communications means the transmittal of information in the form of data, facts, ideas, opinions, inquiries or otherwise," and #2 "ADW Corp., ADW or Defendant means any employees, agents, attorneys, representative, as well as any other person acting on behalf of the respondent..."

Mediation was scheduled for 8/12/16. Upon arriving to mediation on 8/12/16 the respondent and petitioner were kept in separate rooms, where the mediator communicated with each of us one at a time. Petitioner attended the mediation, and DAVID CRITTENDEN, WOODY GUNTER for the respondents and JOHN HERRING attorney for the respondent. ADW and their attorney JOHN HERRING, thru the mediator, repeated refused all offers made by the petitioner for over-time wages in this case. During the mediation the respondent stated that he was a close friend with CHRISTIAN YOUNG, president of Bartos Industries, my employer, and that they played golf together.

By the end of the mediation, ADW and their attorney JOHN HERRING made an offer thru the mediator to settle only for cost of litigation. Then the respondent and their attorney JOHN HERRING made the following unlawful retaliatory threats during mediation; "(1) that petitioner had taken proprietary information from ADW Corp. without consent and that

they can sue petitioner's current employer Bartos Industries, (2) That petitioner had also used proprietary information from Bartos Industries in petitioner's motion for summary judgment, and (3) that petitioner can be black-listed in the industry." During this time petitioner was going thru a financial hardship and petitioner was in fear of immediately losing his job, being homeless and losing his reputation in the industry which would destroy his livelihood. Petitioner felt at the time that he had no choice but to agree to their cost of litigation settlement offer and give up his right to over-time wages. So, on 8/17/16 petitioner was coerced into sign a compromise settlement agreement and release and filed a dismissal with prejudice within 3 days. On 8/18/16 the court rendered an order of dismissal with prejudice.

On 9/13/16 petitioner had his annual evaluation with CHRISTIAN YOUNG, president of Bartos Industries and PAM ROBERTSON, Director of Bartos Industries. During petitioner's evaluation CHRISTIAN YOUNG informed petitioner that BARRETT ROBIN attorney for ADW Corp. hand called him in June of 2016 and informed him that petitioner had use proprietary information belonging to Bartos Industries in his testimonial declaration for petitioner's motion for summary judgment. CHRISTIAN YOUNG continued to state that petitioner had also taken proprietary information from ADW Corp. without consent and that ADW Corp. can sue Bartos Industries for said theft. In addition, CRISTIAN YOUNG stated he was a close and personal friend of DAVID CRITTENDEN and they play golf together and that's why ADW Corp. will not sue Bartos Industries.

As a result of this communication by BARRETT ROBIN on behalf of the respondent, petitioner was denied his annual raise and petitioner's bonus was significantly lower than previous years. Petitioner estimates that he lost approximately $48,000.00 in career earnings as a result of ADW Corp., retaliation and unlawful threat to sue petitioner's employer.

REASONS TO GRANT THE PETITION

I

The United States court of appeals affirmed a decision that exceeds their authority and lacks subject matter jurisdiction by suspending section 31.03 of the Texas penal code, the Hobbs Act, the FLSA and grants the respondent and their attorneys immunity against prosecution by holding that un-lawful threats of retaliation, an in *terrorem tactic* as stated in *Jacques v. DiMarzio, Inc.*, 216 F. Supp. 2nd at (144), are protected by mediation confidentiality and attorney client privilege which infringes on petitioner's constitutional right to access to the courts, due process and the equal protection clause.

The un-disputed retaliatory threats by the respondent during a mediation conference as follows; "(1) that petitioner had taken proprietary information from ADW Corp. without consent and that they can sue petitioner's current employer Bartos Industries, (2) That petitioner had also used proprietary information from Bartos Industries in

petitioner's motion for summary judgment, and (3) that petitioner can be black-listed in the industry."

The un-lawful retaliatory threat above is also know as Texas extortion law which charges the crime as theft. Extortion occurs when an individual gains property or money by some type of force of violence, property damage, harm to reputation or unfavorable government action. The difference between this kind of threat and robbery is that the victim is not placed in imminent fear of physical danger. Instead, the threatened conduct could occur sometime in the future and could affect things other than the victim's physical body, such as his or her reputation.

Texas penal code § 31.03(a) a person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property and (b) appropriation of property is unlawful if it is without the owner's effective consent. Section 31.01(C) deception is preventing another from acquiring information likely to affect his judgment in the transaction. Section 31.01(3)(A) consent is not effective if induced by deception or coercion.

The Fair Labor Act (FLSA) prohibits retaliation by employers against employees for asserting their rights under the FLSA in violation of section 15(a)(3) of the act which prohibits "to discharge or in any other manner discriminate against any employee because such employee has filed any compliant or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding ...

To establish a prima facie case of retaliation, an employee must prove that (1) he or she engaged in a protected activity under the FLSA; (2) his or her exercise of this right was known by the employer; (3) thereafter the employer took an employment action adverse to him; and (4) there was a causal connection between the protective activity and the adverse employment action ..., *see Adair v. Charter Cty. of Wayne*, 452 F.3d 482, 489 (6th Cir. 2006).

Any adverse employment action is a violation of the above anti-retaliation provision of the proximate or motivating reason is the employee's exercise of his or her rights under the act. These prohibitions were designed to permit employees to feel free to approach officials with grievances and to enhance compliance with the substantive provisions of the FLSA.

An employer may not interfere with a former employee's ability to obtain and/or retain subsequent employment. The former employer can accomplish this purpose by disclosing to a prospective employer that the employees had filed a wage and hour compliant. Employers cannot be permitted to punish former employees by seeking to have them "black listed" by potential employers. The goal of anti-retaliation provisions is to maintain unfettered access to statutory remedial mechanisms, *see Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The second circuit has held that the potential of retaliation to undermine enforcement of the law by deterring "other employees ... from protecting their rights ... or from providing testimony for the plaintiff ... may be found to constitute irreparable injury," *see Holt v. Cont'l Group, Inc.*, 708 F.2d 87, 91

(2nd Cir. 1993). Former employee is protected under FLSA against any type of harassment after employment has ended, *see Hayes v. McIntosh*, 604 F.Supp. 10 (N.D. Ind. 1984).

This desire to punish the individual for engaging in protected activity and to deter others from acting similarly, is what makes it retaliation, *see Brissette v. Franklin County Sheriff's Office*, 235 F.Supp. 2d 63 (2003). Legal proceedings including counterclaims can constitute actionable retaliation if they are filed against an employee in response to the employee asserting statutory workplace rights, *see Jacques v. DiMarzio Inc.*, 216 F.Supp. 2d 139, 141-43 (E.D.N.Y. 2002). A lawsuit ... may be used by an employer as a powerful instrument of coercion or retaliation and my dissuade individuals from pursuing their claims, *see Rosania v. Taco Bell of Am., Inc.*, 303 F.Supp. 878, 885 (N.D. Ohio 2004). Even the threat of a lawsuit can constitute an adverse employment action because it is designed to deter the protected activity, *see Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223.

Respondent's coercive conduct and that of their attorneys was a willful violation of the FLSA. A violation under the FLSA is willful if the employer "knew or showed reckless disregard for ... whether its conduct was prohibited by the statute," *Singer v. City of Waco, Tex.*, 324 F.3d 813, 821 (5th Cir. 2003). The burden of showing that an FLSA violation was willful falls on the petitioner, *see Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356 (5th Cir. 1990). Since, petitioner's facts were un-disputed by the respondent and

their attorney, they are considered true as a matter of law in these proceedings.

The un-lawful retaliatory threats by the respondent and their attorneys is a subject matter that is not part of petitioner's litigation and therefore does not have the confidentiality required in mediation. A Texas court has found no confidentiality when the material sought did not relate to the substantive issues of the mediation, *see In re Daley*, 29 S.W.3d 915, 918 (Tex. App. Beaumont 2000, no pet.).

Moreover, the respondent waived confidentiality of mediation when they disclosed these threats to a third party CHRISTIAN YOUNG petitioner's supervisor, several months prior to the mediation conference. The respondent and their attorneys waived the confidentiality of the mediation pursuant to rule Texas ADR Act LR 6-12 where communications made in connection with a mediation ordinarily may not disclosed to the assigned judge or to anyone else not involved in the litigation, **unless otherwise agreed**. The respondent committed a *de facto* violation prior to mediation by disclosing the threats prior to mediation to a third party not in the litigation. Thereby voluntarily waiving the mediation confidentiality clause in the Texas ADR, and by virtual of respondent's disclosure, the petitioner also waived confidentiality on the same issues when he filed a motion to set aside the final judgment due to fraud. The waiver was mutual and an exception to the Texas ADR pursuant to LR 6-12.

In evaluating a claim of attorney-client privilege, we review factual findings for clear error and the application of the controlling law de novo, *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir. 2003). When a party entitled to claim attorney-client privilege uses

confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege, *Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005).

The attorney client privilege is governed by Texas law. If attorney-client privilege existed, a communication must be confidential in order to gain the protection of the attorney-client privilege. Further, not only must a privileged communication be made in confidence, it must remain confidential. The un-lawful retaliatory threats were made to the petitioner during the mediation and petitioner is not a client of defendant's attorneys and has no duty to keep these threats confidential.

Furthermore, as per the un-disputed facts, respondents attorneys are active participants of the fraud by conspiring with the respondent in planning the fraud and concealing the fraud prior to mediation.

In an interrogatory under oath DAVID CRITTENDEN failed to disclose that his attorney had spoken to CHRISTIAN YOUNG, petitioner's supervisor about the case prior to mediation. This a material fact gave the petitioner the false impression that no retaliatory threats were made to petitioner's employer and that petitioner's career was safe and the extortion plot was in full force. If DAVID CRITTENDEN stated the truth as per the rule of law, the deception and extortion plot would have failed. The cat was out of the bag. Meaning the unlawful threats had lost its power and that the petitioner was already in peril. There would have been no coercion to prevent the petitioner from continuing with his motion for summary judgment for the $215,147.52 in damages.

A party may engage in rule 60(b)(3) misconduct if he fails to disclose evidence he knows about the production of such evidence was clearly called for by any fair reading of the discovery order, *see Government Fin. Servs. One L.P. v. Peyton Place, Inc.*, 62 F.3d 767, 772-73 (5th Cir. 1995). The case law under rule 60(b)(3) does not often articulate this distinction between out of court conduct and trial related conduct, *see Roger Edwards, LLC v. Fiddes & Sons Ltd.*, 427 F.3d 129, 134 (1st Cir. 2005). "Coercion occurs if someone is compelled to perform an act by force or threat." *In re D.E.H.*, 301 S.W.3d at 828; *Arnett*, 2008 Tex. App. LEXIS 3184, at *4 (quoting *In re D.E.H.*, 301 S.W.3d at 828). "[T]he essence of an undue influence claim is overcoming the free will of an individual and substituting the will of another, thereby causing a person to do an act which he would not otherwise have done." *In re D.E.H.*, 301 S.W.3d at 828 (quoting *B.A.L. v. Edna Gladney Home*, 677 S.W.2d 826, 831 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (internal quotations omitted).

Moreover, during the planning stages of the fraud by the respondents and their attorneys prior to mediation and during mediation there was no attorney-client relationship. The attorneys and the respondents were active participant of the fraud and co-conspirators of the fraud. There can be no attorney-client relationship when the attorney and the client are participating in the fraud.

Texas Rule of Evidence 503(a)(5) states that if a matter for which the privilege has been asserted has

been disclosed to a third party, the party asserting the privilege has the burden to prove that no waiver occurred, see Arkia, Inc., 846 S.W. 2nd at 630. The respondent never meet the burden of proof that the attorney client privilege was not waived.

Texas Rule of Evidence 503(d)(1) lawyer client privilege exceptions. There is no privilege under this rule if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonable should have know to be a crime or fraud. This rule is also known as the crime-fraud exception to the attorney-client privilege, the privilege can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity, see *United States v. Edwards*, 303 F.3d 606, 618 (5th Cir. 2002).

It is important to understand the reasoning behind this exception to the privilege, using federal law as a guide. The Supreme Court set forth in its reasoning in a 1989 decision as follows; the attorney-client privilege is not without its costs. Since the privilege has the effect of withholding relevant information from the fact finder. It applies only where necessary to achieve its purpose. The attorney-client privilege must necessarily protect the confidence of wrongdoers, but the reasons for that protection- the justice – ceases to operate at a certain point, namely where the desired advice refers not to prior wrongdoing, but to future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between the lawyer and

client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime, see *U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989).

The opinion by the 5th Circuit court of appeals App. 1, gives the respondents and their attorneys, a special privilege of immunity from prosecution from alleged fraudulent conduct by petitioner's un-disputed facts of un-lawful retaliatory threats and conceals the conduct by ruling that the evidence is protected by mediation confidentiality and attorney client privilege. This case is about plaintiff's controversies of over-time wage pursuant to FLSA and not about misconduct which is a subject matter that is not a part of the litigation. Therefore, the judgment and opinions of the lower courts are without the authority required by the provisions of the U.S. Constitution, Article III, section 2. The ruling and opinion are null and void. Therefore, there is competent substantial evidence that the respondent and their attorneys committed fraud on the court, so the U.S. Supreme court has immediate jurisdiction to review the non-final order in question II in App. 2 as follows.

II

The United States court of appeals affirmed a decision that infringed on petitioner's constitutional rights to due process and equal treatment of the law, by refusing to render a decision in a non-final order denying plaintiff's motion for reconsideration to strike

respondent's answer pleading where the lower court deviated from the established principles of law by: (1) not following the doctrine of *stare decisis* and by incorrectly applying the tolling provisions of Rule 12(a)(4)(A) to rule 81; (2) by acting in excess of its jurisdiction by allowing respondent's affirmative defense claim of be a "non-traditional engineering firm," which is strictly prohibited by the Texas Engineering Practice Act; (3) and by applying the "plausibility standard" pursuant to *Bell Altlantic Corp. v Twombly*, 550 U.S. 544 (2007) and clarified in *Ascroft v. Iqbal*, 129 S.Ct. 1937 (2009), to petitioner's complaint and amended complaint and failing to apply the same standard to respondent's answer pleadings.

Rule 12(a)(4)(A) tolling provision is inapplicable to cases removed from state courts where the time to answer the original complaint is specified by rule Rule 81(c)(2) of the Federal rules of civil procedures and the controlling rule requiring a response to an amended pleadings is rule 15(a)(3). Petitioner's originally filed this case in state court on July 9, 2014 and the respondent was served with a summons on 7/28/14 July 22, 2014, requiring the respondent to respond to the complaint within pursuant to the Texas rules of civil procedures. Notice of removal was filed on 8/13/14 and rule 81(c)(1) applies to civil actions after it is removed from state court. Rule 81(c)(2) states that a defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

> (A) 21 days after receiving – through service or otherwise – a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or
(C) 7 days after the notice of removal is filed.

Rule 81 requires an answer or to present other defenses or objections. Pursuant to rule 81(c) respondent filed a timely motion to dismiss original complaint on 8/20/14. August 20, 2014 is the longest period of time the respondents have to respond to the original complaint/pleading under Rule 81(c). Deadline to respond is to the original complaint/pleading is unmistakably set by Rule 81. The petitioner filed an amended complaint without leave of court as a matter of law pursuant to rule 15 of the federal rules of civil procedures on 9/9/14. Rule 81 appears to only toll the time to answer an original complaint until an amended complaint is filed, then rule 15 (a)(3) controls.

The respondent claimed that rule 12(a)(4)(A) tolled the time to file an answer until the court renders a disposition on the motion to dismiss petitioner's original complaint. Rule 15(a)(3) controls the time to respond to an amended complaint, where the rules specifically states that "Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later. Just because the respondent filed a motion to dismiss under rule 12, it does not change the time to respond to the original complaint/pleading set by Rule 81(c) as 8/20/14. Therefore rule 12, in this case is never controlling as the time to file an answer to the original

complaint/pleading. The adjusted deadline to respond to petitioner's amended complaint was adjusted by rule 15(a)(3) by adding 14 days to September 9, 2016, which is the filing date of appellant's amended complaint. Therefore, the longest time to respond/answer then becomes September 24, 2014. The respondent filed their answers to petitioner's amended complaint on April 2, 2015 approximately 253 days late.

Rule 12(a)(4) is unambiguous and by its express terms applies only to Rule 12(a)(1)-(3), which are the times to respond to the original compliant when filed in federal court. The period of time to answer an original complaint removed from state court and the time to answer an amended complaint pursuant to Rule 15, is not only missing from this list of affected periods, but it is in relevant circumstances of different lengths. Rule 12(a)(4) does not extend the time for filing an answer to an amended complaint when "the time remaining for response to the original pleading" has elapsed. The respondent was required to file an answer 14 days after plaintiff filed his amended complaint.

The following circuit court case on point makes the following finding in *Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3d 1378 (Fed. Cir. 2007), re-affirming *Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 487 F.3d 1376, 1377 (Fed. Cir. 2007) rehearing & rehearing En Banc Denied:

> The relevant tolling provision is found in Fed.R.Civ.P. 12(a)(4)(A). Although neither party cites authority that construes Rule

12(a)(4)(A)—and we have found none ourselves—by the terms of that rule, the filing of a motion to dismiss does not extend the time for filing an answer to an amended complaint, at least in the circumstance here where the time for responding to the original complaint has already run. Rule 12(a)(1)-(3) sets forth the deadlines for answering original complaints and cross-claims under various circumstances. Rule 12(a)(4) then provides that "[u]nless a different time is fixed by court order, the service of a motion permitted under this rule [including a Rule 12(b)(6) motion to dismiss] alters *these periods of time*" so as to extend the deadline until a motion is ruled upon. Fed.R.Civ.P. 12(a)(4) (emphasis added). However, the time for answering an *amended complaint* is not one of "these periods of time." Rather, the deadline for responding to an amended complaint is established separately under Rule 15: "A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Fed.R.Civ.P. 15(a).

Thus, because no time "remain[ed] for response to the original pleading" when General **Mills** filed its amended complaint, **Kraft** had only 10 days after service of the amended complaint—not 10 days after the district court's ruling on the motion to dismiss—to file an answer and counterclaim or take such other action as may have been permitted to protect its interests.

> Because **Kraft** did not do so before its deadline had passed, the district court did not abuse its discretion in finding that **Kraft** had abandoned its counterclaim. *See Johnson v. Berry,* 228 F.Supp.2d 1071, 1079 (E.D.Mo. 2002) (holding that a counterclaim was abandoned when the defendant failed to respond to an amended complaint).

The district court without any compelling reason deviated from precedence in *Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, which specifically interpreted the rule stating "that the tolling provisions of Rule 12(a)(4)(A) apply only to the time to respond to the original complaint under rule 12(a)(1)-(3)...," and therefore is inapplicable to Rule 81 time to respond to the original complaint, *see Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3D 1379 (Fed. Cir. 2007). *Stare decisis* assures equality of treatment for litigants similarly situated, spare judges the task of re-examining rules of law with each succeeding case and affords the law a desirable measure of predictability. The Supreme Court has identified four virtues of the consistency that *stare decisis* brings; predictability, fairness, appearance of justice and efficiency, *see Hohn v. United States*, 524 U.S. 236 (1998). *Stare decisis* carries such persuasive force that the court has always required a departure from precedent to be supported by some special justification, *see Dickerson v. United States*, 530 U.S. 428, 429 (2000).

The respondent's assertion that they were a "non-traditional engineering firm" without providing any facts that they were a registered engineering firm

pursuant to the Texas Engineering Practice Act § 1001.405 of the Texas State Statues - where the practice of engineering is carried out only by licensed professional engineers. The Texas Engineering Practice Act § 1001.403 protects the public - where the professional identification and use of the word "Engineering" in documents, pamphlets, advertisement or another similar written or printed form of identification is limited to a person or firm licensed under this statue. In addition, § 1001.004(c)(2) only a person licensed under this chapter may (A) engage in the practice of engineering; (B) be represented in any way as any kind of "engineer"; or (C) make any professional use of the term "engineering"; and (3) this chapter shall be strictly enforced. Section § 1001.004(c)(3) this chapter shall be liberally construed to carry out the intent of the legislature. The respondent has no vested right to claim in their affirmative defense that they are a "non-traditional engineering firm," which creates impression with the public that they are authorized to practice engineering in the state of Texas. No firm, partnership, association, corporation or other business entity shall hold itself out to the public or any member thereof as being engaged in the practice of engineering..., *see Kilpatrick v. State Board of Registration for Professional Engineers*, Tex. Civ. App., 610 S.W.2d 867 (1981).

A judgment is void under rule governing relief from judgment because the court that issued it lacked the power to do so, not because it was erroneous, see *City Cab Co. of Orlando, Inc. v. All City Yellow Cab, Inc.*, 581 F. Supp. 2d 1197 (M.D.Fla. 2008). Motion to strike under rule 12(f) is not normally granted unless prejudice would result to movant from denial of

motion, but it may be granted where defense is clearly legally insufficient as for example where there is clearly no bona fide issue of fact or law, *see United States v. 729.773 Acres of Land*, 531 F.Supp. 967 (DC Hawaii 1982).

Respondent's denial in their affirmative defense that they are a "non-traditional engineering firm," is not only prejudicial to the general public. The legislative purpose & intent; liberal construction of the Texas Engineering Practice Act § 1001.004 (b) the purpose of this chapter is to; (1) protect the public health, safety, and welfare; (2) enable the state and public to identify persons authorized to practice engineering this state; and (3) fix responsibility for work done or services or acts performed in the practice of engineering.

A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators, see *Stoll v. Gottlieb*, 305 U.S. 171-172 (1938). A court exercises its law-declaring power when a ruling has an effect on "primary conduct," see *Hanna v. Plumer*, 380 U.S. 460, 475 (1965). As a result of the district court's lack of subject matter jurisdiction allowing an affirmative defense and claim that respondent is a "non-traditional engineering firm" violates the Texas Practice Engineering Act and the fact that respondent's answer pleading was late, justice requires that the court must strike respondent's answer pleading with prejudice. Action of striking pleading is drastic remedy to be resorted to only when required for purposes of

justice, *see Augustus v. Board of Public Instruction of Escambia County*, 306 F.2d 862 (C.A.5 Fla. 1962).

The court infringed on petitioner's constitutional rights to equal treatment of the law by miss-applying rule 59(e). Rule 59(e) applies only to a motion "to alter or amend a judgment." It does not apply to "orders," *see Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42, 48 (D.D.C. 2001). On the other hand a motion for re-consideration of an interlocutory order is pursuant to rule 54(b) "any order ... that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... may be revised at any time before the entry of a judgment adjudicating all the parties 'rights and liabilities." The trial court has inherent power to reconsider and modify interlocutory orders prior to entry of final judgment, *see Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970), because the order was interlocutory, the trial court at any time before final decree could modify or rescind it, *see John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88 (1922). A motion for re-consideration of an interlocutory order is pursuant to rule 54(b) "any order ... that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... may be revised at any time before the entry of a judgment adjudicating all the parties 'rights and liabilities." Under rule 54, a district court has "the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient, *see Melancon v. Texas, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981). This rule is liberally construed, *see Robinson v. Lorillard Corp.*, 444 F.2d 791 (1971). Reconsideration of interlocutory orders may be granted as justice requires, *see Cobell v. Norton*, 224 F.R.D. 266 (D.D.C.

2004). Interlocutory orders may be reconsidered by district court when to do so is consonant with justice or where court has patently misunderstood party, or has made decision outside the adversarial issues presented to the court by the parties, or has made error not of reasoning but of apprehension, *see Young v. Murphy*, 161 F.R.D. 61, (N.D.Ill. 1995).

The petitioner is prejudiced by respondent's denials which lack the necessary supporting facts to support their affirmative defenses, where the respondent's misrepresented that they have a mechanical/air conditioning, general contracting and engineering license. The petitioner is also prejudiced by respondent's claims in their affirmative defense stating that plaintiff's duties, which are incidental to a sale of a product, requires independent judgment and discretion. An answer to a complaint requires the respondent to provide a sufficient defense that can provide the petitioner with enough notice to prepare for trial. For a defense to be sufficient, the defendant has to provide how the sale of a product and/or how the list of duties require the use of independent judgment and discretion. Respondent's affirmative defense is unclear, insufficient and does not provide petitioner with enough notice to prepare for trial. Moreover, respondent's affirmative defense of independent judgment and discretion is insufficient and a legal definition which should be stricken as a matter of law. Rules (8)(e) states that pleadings must be construed as to do justice. Pleadings are intended to serve as a means of arriving at fair and just settlement of controversies between litigants, *see Maty v. Grasselli Chem. Co.,* 303 U.S. 197, 200 (1938). Moreover, the use of independent judgment and discretion in the HVAC

manufacturer's representative industry is barred by the Texas Engineering Practice Act (TEPA) § 1001.301(a) a person may not engage in the practice of engineering unless the person holds a license issued under this chapter.

TEPA § 1001.003 where the practice of engineering means the performance of an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering science to that service or creative work. The practice of engineering includes but not limited to the following; consultation, investigation, evaluation, analysis, planning, engineering for testing or evaluating materials for construction or other engineering use and mapping, design, conceptual design of engineering works or systems, engineering for construction, alteration, or repair of real property, engineering for review of the construction or installation of engineered works to monitor compliance with drawings or specifications The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense, *see Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). "... a defendant nevertheless must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff "fair notice" of the defense that is being advanced, *see Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

The district court applied the plausibility standard to petitioner's amended complaint and dismissed

some of petitioner's claims. The district court then infringed on petitioner's constitutional right under the 5th amendment of due process by failing in their duty to apply the "plausibility standard" to respondent's answers when it denied petitioner's motion for reconsideration. "An affirmative defense are pleadings and, therefore, are subject to all pleading requirements of the federal rules of civil procedures ...," *see Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). It is fundamentally unfair to apply two different standards of pleading review, specifically when the U.S. Supreme Court overturned the "no sets of facts" standard in *Conley v. Gibson*, 355 U.S. 41 (1957) and replaced it with the "plausibility" standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and clarified in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The Supreme Court elaborated on the new plausibility standard and extended its application to all civil cases. Fairness in pleading and under the Federal Rules should be symmetric, and the petitioner should be entitled to the same level of notice of the affirmative defenses asserted in the case as the respondent receives of the allegations against it. The basic reasoning of *Twombly* and *Iqbal* is that fairness dictates that the respondent receive notice of enough facts to state a plausible claim, applies with equal force to the affirmative defense. Equity thus requires that the plausibility standard apply not only to a petitioner's allegations, but to respondent's affirmative defenses as well.

Under the 5th Amendments, the substantive component of due process provides heightened protection against government interference with certain fundamental rights and liberty interest, *see Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008). If a government benefit is a matter of statutory entitlement for persons qualified

to receive them, then the government has created a due process property interest in that benefit. To show a 5th Amendment due process violation, an individual must prove that he or she was deprived of a protected interest and that the deprivation occurred without the "appropriate" level of process, *see Federal Lands Legal Consortium ex rel. Robart Estate v. U.S., 195 F.3d 1190* (10th Cir. 1999). Due process clause of the 14th Amendment, like its 5th Amendment counterpart, guarantees more than fair process; it also includes substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, *see Troxel v. Granville*, 120 S. Ct. 2054 (2000), *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001). An unconditional right of access to the courts exists for civil cases only when denial of a judicial forum would implicate a fundamental human interest, *see Abdul-Akabar v. Mckeive*, 239 F.3d 307 (3rd Cir. 2001). The right of access to the courts ... is found in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights, *see Wolff v. McDonnell*, 94 S.Ct. 2963 (1974). Constitutional rights would be of little value if they could be indirectly denied, *see Gomillion v. Bidwell*, 182 U.S. 244 (1901).

Petitioner believes that with the application of the "plausibility standard" to the answer pleading, the motion to strike will become as routine as the motion to dismiss with the goal being judicial economy, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and clarified in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

Justice, fairness and due process requires that the court apply the "plausibility" standard to respondent's answers and affirmative defenses where respondent must allege sufficient factual basis for its affirmative defenses to show that the defense is "plausibly viable" on its face or sufficient factual matter from which a court can infer potential viability. The possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause the tier of fact to draw unwarranted inference at trial is the type of prejudice that is sufficient to support the granting of a motion to strike, *see Jacobsen v. Katzer*, 609 F.Supp.2d 925 (N.D.Cal 2009).

CONCLUSION

The Court can review this writ *de novo* since there was no jury trial, no factual disputes and questions presented are purely legal in nature. The relentless pattern of decisions deviating from the rule of law by the lower courts, demonstrate a systematic bias against the petitioner requiring strict scrutiny of the law.

The attorneys in the North District of Texas are well aware of these biases by the courts and they don't care if the break the law, since the courts will always rule against *pro se* litigants in the Northern District.

The petitioner prays that the Court grants this writ or any other relief that the court may deem just and fair for the reasons above and reviews this case

on the merits with due process and equal application of the law.

Respectfully,

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