

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 19-2531

[Filed April 28, 2020]

UNITED STATES OF AMERICA)
)
)
v.)
)
MICHAEL LIEBERMAN,)
Appellant)
)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:15-cr-00161-001)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on April 20, 2020

Before: JORDAN, BIBAS, and PHIPPS,
Circuit Judges

(Opinion filed: April 28, 2020)

OPINION*

PER CURIAM

Michael Lieberman appeals from the District Court’s order denying what the District Court construed as a motion for reconsideration of its earlier order substituting an entity as the victim and primary payee of a restitution award. We will affirm.

I.

In 2015, Lieberman pleaded guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. In doing so, he admitted that he embezzled over \$1.5 million from his former employer, Credit Agricole Corporate and Investment Bank. The District Court sentenced Lieberman to 37 months of imprisonment and two years of supervised release. The District Court also ordered Lieberman to pay approximately \$1.6 million in restitution to the U.S. Treasury for distribution to Credit Agricole. Lieberman did not appeal or otherwise challenge his conviction or sentence.

In 2017, the National Union Fire Insurance Company of Pittsburgh, Pennsylvania, informed the District Court that due to its insurance payment to and an accompanying assignment agreement with Credit Agricole, it was the proper beneficiary of \$1.4 million of the restitution. Thus, National Union asked the

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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District Court to substitute it for Credit Agricole as the victim and primary payee of that amount. By order entered April 27, 2017, the District Court granted National Union’s request and substituted National Union for Credit Agricole as the victim and primary payee.

About nine months later, Lieberman filed the motion at issue here pro se. He purported to file it pursuant to the All Writs Act, 28 U.S.C. § 1651, but the District Court treated it as a motion for reconsideration of its April 27, 2017 substitution order. In his motion, Lieberman did not challenge any of the terms of the District Court’s initial restitution order. Instead, his sole argument was that there is no statutory basis under the Mandatory Victim Restitution Act (MVRA) or otherwise for the District Court’s substitution of National Union as the victim and primary payee. For relief, he asked the District Court to “withdraw” its substitution order.

The District Court denied Lieberman’s motion for two reasons. First, the District Court concluded that Lieberman’s motion was untimely under its local rules governing motions to reconsider in criminal cases. Second, the District Court concluded that Lieberman’s motion also lacked merit because the substitution of National Union was permitted and required by the

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MVRA.¹ Lieberman appeals; we have jurisdiction under 28 U.S.C. § 1291.

II.

In his filings below, Lieberman argued that the District Court lacked statutory authority to substitute National Union for Credit Agricole as the primary restitution payee. But that is not the issue that he presents on appeal; in fact, he expressly disavows any challenge to the merits of the District Court's decision.

The sole argument Lieberman raises on appeal is that the District Court erred by treating his motion as a motion for reconsideration rather than a petition under the All Writs Act. In making that argument, Lieberman asserts that the District Court's characterization of his motion as one for reconsideration led the District Court to deny it on the sole ground that it was untimely and that the District Court did not reach the merits. Thus, Lieberman argues only that we should remand for the District Court to address the merits in the first instance.

The premise of this argument is incorrect because, as noted above, the District Court expressly denied Lieberman's motion on the alternative ground that his

¹ In particular, the District Court relied on the provision of the MVRA requiring that “[i]f a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation.” 18 U.S.C. § 3664(j)(1) (emphasis added). As the District Court recognized, however, the MVRA itself does not provide a postjudgment mechanism for effectuating that requirement.

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motion lacked merit. Lieberman, however, has expressly declined to raise any issue on the merits on appeal. Indeed, despite making some passing references to the merits, Lieberman ultimately asserts in his reply brief that “Lieberman’s Appeal is limited to the district court’s treatment of his motion” as one for reconsideration and “is not aimed at the merits,” Reply Br. 1; that “the issue on this Appeal is not the attack Lieberman raised below, but the erroneous reclassification of his motion by the district court,” Reply Br. 2; that “any argument about th[e] merits is superfluous here,” *id.*; and that “Lieberman’s Appeal does not address this issue,” Reply Br. 3. Lieberman makes these assertions by way of arguing that we should not even address the Government’s defense of the District Court’s ruling on the merits. Thus, we decline to review that ruling and will affirm on the ground that Lieberman has waived any challenge to the District Court’s denial of his motion on the merits. In light of our disposition, we need not reach the Government’s alternative argument that this appeal is barred by the appellate and collateral-challenge waivers contained in Lieberman’s plea agreement.

III.

For these reasons, we will affirm the judgment of the District Court.

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No. 3:15-cr-161 (PGS)

[Filed June 21, 2019]

United States of America,)
)
Plaintiff,)
)
v.)
)
Michael Lieberman,)
)
Defendant.)
)

MEMORANDUM AND ORDER

SHERIDAN, U.S.D.J.

This matter comes before the Court on a motion filed by Defendant Michael Lieberman for reconsideration of a prior order which amended a judgment of conviction to substitute National Union Fire Insurance Company of Pittsburgh (“National Union”) as the victim and primary payee of restitution for Credit Agricole Securities (“Credit Agricole”).

On April 26, 2017, Judge Cooper entered an order substituting in National Union as the primary payee of

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restitution. (ECF No. 26). On January 24, 2018, Lieberman filed a motion to reconsider that order. (ECF No. 29).

LEGAL ANALYSIS

Lieberman contends that “[t]he only ways to amend a final order of restitution” are set forth in 18 U.S.C. 3664(o). (Brief of Lieberman, ECF No. 29 at 3). The Government contends that subsection (o) applies only “to substantive changes (i.e., the elimination or reduction of restitution),” and cites three sources of legal authority that, it argues, justified the Court’s order: Federal Rule of Criminal Procedure 36; the Mandatory Victim Restitution Act of 1996 (MVRA); and the All Writs Act. (Government’s Brief, ECF No. 39 at 2-5).¹

Reconsideration

Although the Federal Rules of Criminal Procedure do not specifically authorize motions for reconsideration, “the New Jersey Local Rules of Criminal Procedure specifically incorporate Local Civil Rule 7.1(i), which governs such motions.” *United States*

¹ Federal Rule of Criminal Procedure 36, which applies to “clerical error[s] in a judgment . . . arising from oversight or omission,” does not apply here. The judgment was entered on September 16, 2015. The assignment which prompted Judge Cooper’s order was executed on January 11, 2016. Therefore, there was no error. Similarly, the Court declines to act pursuant to the All Writs Act because there is no indication that Judge Cooper’s order was issued pursuant to that act and no extraordinary circumstances were present. *See Davis v. Glanton*, 107 F.3d 1044, 1047 n.4 (3d Cir. 1997)

v. Demuro, 2010 WL 2696105 at *2 (D.N.J. July 2, 2010); *see also* L. Crim. R. 1.1. Motions for reconsideration must “be served and filed within 14 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge.” L. Civ. R. 7.1(i).

At the outset, the Court notes that Defendant’s motion for reconsideration was extraordinarily late, having been filed on January 24, 2018; almost nine months after Judge Cooper’s order. There being no apparent ground for excusable neglect, the motion is denied on that ground.

Mandatory Victim Restitution Act

Substantively, the Court also agrees that Judge Cooper’s order was proper. This motion concerns a conflict between two federal statutes. As a general rule, the Third Circuit “look[s] with disfavor upon changes to a judgment after the fact.” *United States v. Bennett*, 423, F.3d 271, 276-77 (3d Cir. 2005). However, in some circumstances, such amendments are permitted by court rule or by statute. Under 18 U.S.C. § 3664(o), which governs orders of restitution:

A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

- (1) such a sentence can subsequently be--
 - a. corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;
 - b. appealed and modified under section 3742;
 - c. amended under subsection 3664(k), 3572, or 3613A; or

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- (2) the defendant may be resentenced under section 3565 or 3614.

18 U.S.C. § 3664(o). None of subsection o’s provisions permitting modification apply to Judge Cooper’s order substituting the victim.

However, the Mandatory Victim Restitution Act (MVRA) requires the court to order that restitution be paid to a person who “provided or is obligated to provide compensation” to a victim, including “insurance or any other source,” except that “the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.” 18 U.S.C. § 3664(j)(1).

Thus, the restitution statute and the MVRA appear to be in conflict. Under the specificity canon of statutory construction, “a ‘narrow, precise, and specific’ statutory provision is not overridden by another provision ‘covering a more generalized spectrum.’” *Cazun v. Attorney General of the United States*, 856 F.3d 249, 264 (3d Cir. 2017) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012).

National Union’s original written submission requesting substitution (ECF No. 24) included an attached “Assignment and Release,” whereby National Union, Credit Agricole’s insurer, made a payment of \$1,390,823 (the full amount less the deductible of \$250,000). (ECF No. 24 at Ex. B). Judge Cooper’s order therefore brought the restitution order in compliance

with the MVRA, which imposed a more narrow, precise, and specific requirement. As such, reconsideration of the Court's prior order is not warranted here.

ORDER

This matter comes before the Court on a motion filed by Defendant Lieberman for reconsideration of the Court's prior order "substitut[ing] National Union as victim and primary payee of restitution with respect to \$1,390,823.00 of the total restitution obligation." (ECF No. 26). The Court has considered the arguments set forth in the parties' written submissions. Accordingly, for the reasons stated herein and for good cause shown;

IT IS on this 20 day of June, 2019;

ORDERED that Mr. Lieberman's motion for reconsideration, (ECF No. 29), is denied.

/s/ Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal Action No. 15-161 (MLC)

HON. MARY L. COOPER

[Filed April 26, 2017]

ORDER

AND NOW, this 26th day of April, 2017, upon consideration of National Union Fire Insurance Company of Pittsburgh, PA's ("National Union") letter request to amend restitution payee information, and any and all responses thereto, it is **HEREBY ORDERED AND DECREED** that National Union's letter request is **GRANTED** and that National Union is substituted as a victim and the primary payee of restitution with respect to \$1,390,823.00 of the total restitution obligation entered against Defendant

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Michael Lieberman. Restitution should be distributed to National Union at the following address:

National Union Fire Insurance Company of
Pittsburgh, Pa.
c/o Matthew A. Lipman, Esquire
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1617 John F. Kennedy Boulevard, Suite 1500
Philadelphia, PA 19103

IT IS FURTHER ORDERED that Credit Agricole will remain a victim in the above-captioned action with respect to all restitution recovered in excess of \$1,390,823.00.

/s/ Mary L. Cooper
MARY L. COOPER
UNITED STATES DISTRICT JUDGE

APPENDIX D

AO 245B (Mod. D/NJ 12/06) Sheet 1 - Judgment in a
Criminal Case

UNITED STATES DISTRICT COURT
District of New Jersey

Case Number 3:15-cr-161(MLC)

[Filed September 18, 2015]

UNITED STATES OF AMERICA)
)
)
v.)
)
)
MICHAEL LIEBERMAN)
)
)
Defendant.)
)
)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

The defendant, MICHAEL LIEBERMAN, was represented by Linda Pellegrino, Esq.

The defendant pled guilty to count 1 of the INFORMATION on APRIL 15, 2015. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

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<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18:1343 & 18:2	WIRE FRAUD	JUNE 2012- MAY 2014	1

As pronounced on SEPTEMBER 3, 2015, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$100, for count 1, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 16th day of September, 2015.

/s/ Mary L. Cooper
Mary L. Cooper
Senior United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 37 Months.

The Court makes the following recommendations to the Bureau of Prisons:

- Designation close to family in North Carolina.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons - not before January 4, 2016.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 2 years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth below.

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of

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supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

MENTAL HEALTH TREATMENT

You shall undergo treatment in a mental health program approved by the United States Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, as approved by the United States Probation Office, until discharged by the Court. The Probation Officer shall supervise your compliance with this condition.

GAMBLING RESTRICTIONS AND REGISTRATION ON EXCLUSION LISTS

You shall refrain from all gambling activities, legal or otherwise, to include the purchase or receipt of lottery tickets. You shall register on the self-exclusion lists maintained by the New Jersey Casino Control Commission and Racetrack Commission within 60 days of the commencement of supervision and remain on these lists for the duration of supervision. The Probation Officer shall supervise your compliance with this condition.

**RESTRICTIONS FROM ENTERING GAMBLING
ESTABLISHMENTS**

You shall not enter any gambling establishment without the permission of the U.S. Probation Office and/or the Court.

**STANDARD CONDITIONS OF SUPERVISED
RELEASE**

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another federal, state, or local crime during the term of supervision.
- 2) The defendant shall not illegally possess a controlled substance.
- 3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.
- 4) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 5) The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation officer.
- 6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

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- 7) The defendant shall support his or her dependents and meet other family responsibilities.
- 8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

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- 14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- (17) You shall cooperate in the collection of DNA as directed by the Probation Officer.

(This standard condition would apply when the current offense or a prior federal offense is either a felony, any offense under Chapter 109A of Title 18 (i.e., §§ 2241-2248, any crime of violence [as defined in 18 U.S.C. § 16], any attempt or conspiracy to commit the above, an offense under the Uniform Code of Military Justice for which a sentence of confinement of more than one year may be imposed, or any other offense under the Uniform Code that is comparable to a qualifying federal offense);

- (18) Upon request, you shall provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly

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income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You shall cooperate with the Probation Officer in the investigation of your financial dealings and shall provide truthful monthly statements of your income. You shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to your financial information and records;

- (19) As directed by the U.S. Probation Office, you shall participate in and complete any educational, vocational, cognitive or any other enrichment program offered by the U.S. Probation Office or any outside agency or establishment while under supervision;
- (20) You shall not operate any motor vehicle without a valid drivers license issued by the State of New Jersey, or in the state in which you are supervised. You shall comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office;

* * *

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of \$1,640,822. The Court will waive the interest requirement in this case. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for distribution to:

Credit Agricole Corporate and Investment Bank
c/o Sandeep Savla
1301 Avenue of the Americas
New York, NY 10019.

The restitution is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the restitution shall be paid from those funds at a rate equivalent to \$25 every 3 months. In the event the entire restitution is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than \$100, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19-2531
3:15-cr-00161-001

[Filed August 19, 2019]

UNITED STATES OF AMERICA)
)
)
)
v.)
)
)
MICHAEL LIEBERMAN,)
)
)

INFORMAL BRIEF

1. **Jurisdiction:** What order(s) of the district court are you appealing?

I am appealing the district court's Order (Dkt. No. 64), denying my Motion to reconsider the amendment of a final judgment.

What is the date of the order(s)? June 20, 2019

When did you file your notice of appeal or petition for review? June 28, 2019

2. **Statement of the case:** Explain the proceedings in the district court or before the agency (i.e. what the district court did in deciding your case).

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In January of 2018, Lieberman moved to correct an order dated April 24, 2017, which Lieberman did not receive notice of until he investigated his case due to forfeiture correspondence he received concerning his house in North Carolina. Lieberman's Motion was filed on the ground that the Order was improperly granted and there was no statutory basis for issuance of the Order. Because of the odd procedural history, Lieberman noted that he was filing his Motion for Relief pursuant to 28 U.S.C. § 1651, the "All Writs Act". The district court ordered briefing from the parties, including the United States. The district court then ruled that Lieberman's Motion was a motion for reconsideration, which must be filed within 14 days of an order's issuance, and denied as untimely filed.

3. Statement of the facts: Explain the facts and events that led to the complaint in the district court or the action before the agency.

Lieberman was indicted and pled guilty to violating 18 U.S.C. § 1343 (wire fraud). In addition to a term of 37 months, the Court ordered restitution in the amount of \$1,640,822.00 to Lieberman's victim, Credit Agricole Corporate and Investment Bank. The Sentence and Restitution Judgment was filed in the district court on September 18, 2015.

In April of 2017, an attorney representing National Union Fire Insurance Company of Pittsburgh, PA ("National Fire"), notified the Court that in January of 2016, his client paid an insurance claim made by Credit Agricole and received an Assignment and Release Agreement. Based on the documents filed by National Fire, the victim filed a claim with National Fire prior

to Lieberman's sentencing that was not resolved until after Lieberman was sentenced and the time to file an appeal from his order had run. National Fire requested that the Court substitute it "as the primary payee of restitution up to \$1,390,823.00." (DCD #24.) The Court granted National Fire's request by Order dated April 24, 2017.

The court did not send Lieberman notice of the Order and he was not aware of it until January of 2018.

4. **Statement of related cases:** Have you filed an appeal or petition for review in this case before? No

5. Did the district court incorrectly decide the facts of your case? No

6. Did the district court apply the wrong law (either cases or statutes)? Yes. If so, what law do you want applied? Lieberman's Motion for Relief was filed under 28 U.S.C. § 1651, the "All Writs Act", which allows for relief in situations such as this. The district court ignored Lieberman's Motion and decided that the Motion was a Motion for Reconsideration.

7. Are there any other reasons why the district court's judgment was wrong? Yes
If so, briefly state these reasons.

The Court's original restitution order, entered September 18, 2015, can only be amended in a specific set of circumstances, none of which apply here. There is no legal basis for the amendment as entered.

8. What action do you want the Court of appeals to take in this case? Remand the case back to the district court

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for determination of my Motion as a request for relief
under the All Writs Act.

s/_____
Michael Lieberman

CERTIFICATE OF SERVICE

I certify that on August 16, 2019, I served a copy of this
Informal Brief on all parties to this case and mailed
this Final Brief to the Court of Appeals.

s/_____
Michael Lieberman