19-388

No. 19-____

In the Supreme Court of the United States

MIMI KORMAN,

Petitioner,

v.

JULIO IGLESIAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil plaintiff deprived of property without the due process of law guaranteed by the Fifth Amendment to the U.S. Constitution, where a district court dismisses the action on the basis of judicial estoppel at the pleading stage, *i.e.*, where the court makes the factual determination the party intended to make a mockery of the judicial system without an evidentiary hearing.

LIST OF PROCEEDINGS

U.S. District Court Southern District of Florida

Case No. 18-21028

Mimi Korman, Plaintiff, *v. Julio Iglesias,* Defendant

Decision Date: August 8, 2018

U.S. Court of Appeals for the Eleventh Circuit

No. 18-13772

Mimi Korman, Plaintiff-Appellant, *v. Julio Iglesias,* Defendant-Appellee.

Decision Date: June 20, 2019

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PETITION FOR WRIT OF CERTIORARI

Mimi Korman ("Korman") respectfully petitions this court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit court of appeals appears at Appendix ("App.1a")[1].

The opinion of the United States District Court for the Southern District of Florida appears at App.8a.

JURISDICTION

The Eleventh Circuit court of appeals denied Korman's appeal on June 20, 2019. Korman invokes this Court's jurisdiction under 28 U.S.C. § 1254(a) and 28 U.S.C. § 2101(c), having timely filed this petition for a writ of certiorari within ninety days of the appellate opinion.

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[1] Throughout this brief, the Appendix will be cited as "(App.XX)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. V:**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Preliminary Statement.

It matters to victims who want to testify that they are heard in court. Judges have the ability to give that to them, and they should.

— Judge Rosemary Aquilina who permitted 156 women sexually abused by former USA Gymnastics national team doctor Larry Nassar to address the court about their abuse.

In dismissing Korman's copyright infringement action and determining Korman intended to "make a mockery of the court" without allowing Korman to challenge that issue of fact at an evidentiary hearing, the courts below denied Korman the fundamental due process rights guaranteed by the Fifth Amendment of the United States Constitution, which states: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. Const., Amd. V.

When courts of law deprive citizens of their property without hearing, applying rules and making decisions that are arbitrary, these courts of law violate constitutional rights. Through the course of forty (40) years, the courts have failed to grant Korman her right to speak on behalf of herself. These improper decisions effectively ratify the indefensible conduct of the defendant while denying Korman the opportunity to present her case.

The most traumatic part of this painful process occurred when the court of the Southern District of Florida erased the significant aspect of fraud that existed in the case from its earliest phase, and still exists, and proceeded to hang the tag of liar from Korman's neck. All of this based on a piecemeal extraction from a deposition, that was part of the first legal action that Korman filed against Respondent Julio Iglesias ("Iglesias"), in 1990.

The trial court ignored the part, from the same deposition, where Korman explains that Iglesias was not, and is still not, a writer. In fact the first count against Iglesias, on the first case, in 1990, was #1 Fraud, #2 Civil Theft, #3 Constructive Trust (*Korman*

v. Iglesias, 736 F.Supp. 261 (S.D. Fla. 1990)), and "fraud" continues to be present in the second case. Had the trial court read the deposition in its proper light, it would have recognized that the fraud committed by Iglesias against Korman continues to pervade the second case with its ugly stench. The trial court also made a most unfortunate accusation against Korman when it charged her with "making a mockery of the court," without ever having laid eyes upon her. The appellate court affirmed. Korman is offended and harmed by this violation of her Constitutional rights.

II. The Petitioner Author Mimi Korman.

Petitioner Mimi Korman, an accomplished bi-lingual marketing and advertising professional, has lived in Miami, Florida, for the past 53 years. Her advertising career began in the early 1970's, as a creative consultant for WQBA radio—then known as *La Cubanísima*—where her recurrent promotions and bi-yearly identification campaigns, throughout seven years, became the active ingredient to the success and ratings dominance that the station enjoyed for the ensuing decade. "Yo LLevo a Cuba la Voz," performed by the famous Celia Cruz, was her last identification jingle for the station, in 1978, and it became the most celebrated promotional message piece in Miami and Cuba, where the station reached. WQBA radio aired this important identification piece, consecutively, for over thirty (30) years.

As an advertising copywriter/producer, she has been privileged to open doors for an impressive number of clients who hoped to conquer a place in the then emerging Hispanic marketplace, often perceived by the English-speaking population, as an unsolvable enigma;

and as a journalist, she has answered many questions, spanning from our complex political idiosyncrasies to the unexpected effects of the latest planetary conjunctions—since the study of Astrology has been one of her keen hobbies for most of her life.

In 1976, she became a member of the founding team for the first edition of the Spanish *Herald*—named *El Herald*, at the time—where she served, uniquely, in a dual capacity: senior copywriter and daily television columnist. She was the first journalist to cover the national and Caribbean Hispanic music industry for *Billboard* publications. In 1980, she created the identification campaign for *WLTV-Channel 23* ["El 23 es Lo Nuestro"]. Due to the appeal and successful impact of the concept, the *Univision Network* adopted it as its national slogan, and used uninterruptedly for thirty-three years. At present, it is used as the name for its popular yearly music award show: "Premio Lo Nuestro." The marketing firm of Yankelovitch, in its National Report on the U.S. Hispanic Markets (September 1984), described the *"Lo Nuestro"* campaign as "the single most significant advertising concept created within the U.S. Hispanic universe."

Petitioner also wrote the subject lyrics for Julio Iglesias' second largest selling song ["Me Olvidé de Vivir." 1978]; Barry White's only incursion into the Hispanic market ["Mi Nueva Canción," and "Ella es Todo Para Mi," 1980]; and other songs recorded by Vikki Carr, Basilio, José Vélez, Hugo Henríquez, Johnny Ventura and several other performers, as well as collaborating for years with maestro Armando Manzanero.

Consistent with the foregoing, Mimi Korman's work has been recognized with numerous professional awards.

III. Summary of the Case.

Respondent (Defendant/Appellee below) Julio Iglesias, a musical legend, has enjoyed a stellar four (4) decades long career amassing according to Forbes Magazine, a fortune surpassing a "billion dollars." In 1978, at Iglesias's request, Petitioner (Plaintiff/Appellant below) Mimi Korman, a well known lyricist at the time, wrote the Spanish lyrics for a song that would become the Respondent's iconic and most popular song. On March 19, 2018, Petitioner filed her district court action alleging causes of action for (1) copyright infringement pursuant to the Copyright Act (17 U.S.C. §§ 101, *et seq.*); and (2) violations of the Florida Deceptive and Unfair Trade Practices Act, § 501.201, *et seq.*, Fla. Stat. (2017). (App.23a) The district court had jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1338(a) (copyright infringement) and 28 U.S.C. § 1367 (supplemental jurisdiction). On August 7, 2018, the district court entered an order dismissing the copyright infringement count with prejudice. (App.8a, 10a). Korman appealed. The Eleventh Circuit had jurisdiction to consider the appeal of that final order pursuant to 28 U.S.C. § 1291.

On appeal Korman argued error because, without converting Korman's motion to dismiss into one for summary judgment, the district court dismissed Petitioner's copyright infringement claim with prejudice on the basis of judicial estoppel improperly taking judicial notice of pleadings, papers and orders from two prior closed litigations: (1) *Mimi Korman v. Julio*

Iglesias, Case No. 15-27188-CA-01, before the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (the "2015 State Action); and (2) *Grecia "Mimi" Korman v. Julio Iglesias*, Case No. 90-0119-Civ-Moreno before the United States District Court for the Southern District of Florida (the "1990 Federal Action") (App.42a).

The district court ruled that Korman's prior litigation factual allegation that she was a co-author with Iglesias, was fatally inconsistent with her instant allegation that she is the sole author. Korman's prior position of co-authorship, however, was a legal conclusion resulting from Respondent's fraudulent misrepresentations. At all times Korman alleged only she contributed copyrightable content to her lyrics, *i.e.*, that she is sole author of 80% of the lyrics of the song Iglesias ultimately recorded. Korman has a copyright certificate to that effect.

In the 1990 Federal Action, Korman sued for Respondent's fraudulent representation that he would record and commercialize the song and pay Korman royalties of 33% in exchange for her work. This would be guaranteed by a publishing contract that his recording label, "Alhambra," in Spain, would extend to Korman. To that end, Enrique Garea, President of Alhambra Records and Star Music Publishing came to Miami in September 1978, and brought the contract to Korman. Korman signed the contract for a third of the royalties that the song would generate, and told Garea to give her a copy. He alleged that the contract, in order to be legal, would have to be filed with Spanish Society of Composers and Authors. Korman had no reason to doubt this explanation because she

had previously written lyrics for Spanish singer Danny Daniel, and she was well aware that this explanation was feasible. Despite numerous letters and calls to Enrique Garea, in Madrid, Spain, requesting a copy of the contract, she never received it. According to Korman's first legal action, the contract was not in possession of Enrique Garea, or Julio Iglesias, or anyone related to the case. In reliance on Iglesias's representations of the existence of a publishing contract, Korman believed her copyright was protected; for this reason, Korman accepted at deposition in the first action that she was a "collaborator"—believing the contract existed and would surface. She was twice betrayed by lies, first when Iglesias requested her to write the lyrics, and second when Iglesias's attorneys concealed the fact there was no signed contract in anyone's possession. Korman alleged co-authorship only in reliance on Respondent's fraud. Because Respondent has disavowed that contract, no assignment follows and Korman remains the sole author.

In affirming the dismissal of Korman's action, the Appellate Court improperly allowed the district court's (1) premature factual finding that Korman's motive and intent was to make a mockery of the judicial system; (2) improper taking judicial notice of pleadings, papers and orders from the prior litigations; and (3) erroneous legal finding that Korman took inexcusable inconsistent factual positions in this action and in the prior actions. (App.1a). As a result Korman was again denied her day in court in violation of her Fifth Amendment Due Process rights. Accordingly, Korman files this Petition for Writ of Certiorari directed to the Appellate Court's affirmance of the dis-

trict court's order dismissing Korman's copyright infringement claim with prejudice. (App.1a)

REASONS FOR GRANTING THE WRIT

I. FACTS.

The following facts are set forth in Korman's 2018 Complaint. (App.23a at ¶¶ 8-24). In 1978 Iglesias asked Korman to write Spanish lyrics (the "Work") for an adaptation of the French song "J'ai Oublie' de Vivre" (the "Song"). To induce Petitioner to create the Work Iglesias offered to record, market and distribute the Song (*i.e.*, the adaptation with Petitioner's Spanish lyrics) and to pay her a percentage of the Song's sales and royalties. Petitioner would in turn assign Iglesias co-authorship credit, even though Iglesias did not actually contribute copyrightable content to the Work, *i.e.*, even though Petitioner was the sole author. Iglesias delivered a contract to Korman according to the foregoing which Korman signed but Iglesias did not. (*Id.* at ¶ 10-11). Iglesias first released the Song in 1979 and from that time it has been one of Iglesias's most iconic and popular songs. Despite the Song's commercial success Iglesias had not paid Respondent anything, and after years of unheeded reclamations, Petitioner filed the 1990 Federal Action. (App.42a).

In that action, Korman sued Iglesias for fraud (Count I) alleging "Korman wrote the Spanish version of "J'ai Oublie' de Vivre", "Me Olvide de Vivir", and provided it to Iglesias in justifiable reliance upon his

false representations." In addition, Korman sued Iglesias for civil theft (Count II) of the royalties Iglesias fraudulently represented he would pay but did not. Korman did not sue for breach of contract, but instead as damages for Iglesias's fraud, Korman elected the remedy of receiving the royalties he represented he would pay her. During the course of discovery Petitioner signed an Affidavit and Answers to Interrogatories stating the naked legal conclusion that she and Iglesias were co-authors. However, Petitioner did so only because she believed that as sole author she had assigned co-authorship to Iglesias, *i.e.*, in reliance on Iglesias's misrepresentations. In fact, Iglesias denied there was ever any such contract.

First Southern District of Florida Judge Lawrence King, denied Iglesias's motion to dismiss. However, successor Judge Federico Moreno (adopting Magistrate Garber's Report and Recommendation), dismissed the action on summary judgment, not on the basis of any factual finding other than that the legal theories were barred by the applicable statutes of limitations, *i.e.*, that Korman knew or should have known of the fraud when she failed to receive payment and made inquiry. *Korman v. Iglesias*, 825 F.Supp. 1010, 1017 (1993).

Never having accepted Iglesias's theft, and with Iglesias continuing to this day to reap enormous profits from the Work, in 2015 Korman again attempted legal recourse by filing a 2015 State Action (Miami-Dade County, Florida Circuit Court Case No. 15-27188 CA 01). The unverified Complaint in that action is not a triumph of clarity. It sought a declaration that Korman "created and is the owner of the copyright" to the Work (Count I) and an accounting (Count II) of Iglesias's

profits by virtue of his copyright infringement. In apparent confusion, in the body of the Complaint Korman's counsel repeats the 1990 allegation of co-authorship (which resulted from Korman's reliance on, and election of remedy for, Iglesias's fraud) but asserts "copyright claims [are] alleged in this lawsuit." Again, this Complaint was not verified by Korman and Korman dismissed it voluntarily before the state court ruled on Iglesias's motion to dismiss.

Still seeking her day in court, Korman filed her district court action on March 19, 2018 (App.23a). In that action, Korman explained the process of Korman's sole creation of the Work, the failure of Iglesias's co-authorship assignment to vest because he disavowed the contract, and Iglesias's copyright infringement. (App.26a at ¶ 13). Iglesias has released "Me Olvide de Vivir" as a recording at least one hundred (100) times and the Work is widely considered to be his signature song. Iglesias performs the Song at the beginning or end of most shows. (App.27a at ¶ 100). Without converting Iglesias's motion to dismiss into one for summary judgment, the district court took judicial notice of pleadings, papers and orders from the prior litigations and dismissed the copyright infringement action (1) making the legal finding that Korman took inexcusable inconsistent positions in this action and in the prior actions and (2) making the factual finding that Korman's motive and intent was to make a mockery of the judicial system. (App.8a, 10a).

II. THE FIFTH AMENDMENT PROCEDURAL DUE PROCESS CLAUSE GUARANTEE.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. Const., amd. V.

This Due Process Clause has been interpreted to guarantee basic rights to a fair adjudication of property rights including: (a) the opportunity to present reasons why the proposed action should not be taken; (b) the right to present evidence, including the right to call witnesses; (c) the right to know opposing evidence; and (d) the right to cross-examine adverse witnesses. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires an adequate hearing-including notice and the opportunity to confront and cross-examine adverse witnesses, to present oral arguments, and to obtain counsel-before welfare benefits can be terminated even for a brief interval); *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); *see also id.*, at 266, 98 S.Ct. 1042 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions").

The appellate court and the district court violated Korman's Due Process rights in rejecting Korman's lawsuit to protect her copyright (*i.e.*, her property), prematurely making the finding of fact that Korman intended to make a mockery of the judicial system (*i.e.*, applying judicial estoppel) without ever granting Korman an opportunity to challenge at an evidentiary hearing or trial.

III. THE LAW ON JUDICIAL ESTOPPEL.

The United States Supreme Court has recognized that judicial estoppel is not reducible to a rigid test. *See Allen v. Senior Home Care, Inc.*, 2015 WL 1097408, *2 (S.D. Fla. 2015) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). However, the Supreme Court considers three flexible factors when applying the doctrine: (1) a party's later position must be "clearly inconsistent" with its earlier position; (2) a court must have accepted the party's earlier position so that acceptance of the second position would create the perception that one court or the other was misled and (3) a party will derive an unfair advantage from the opposing party if not estopped. *Id.* (citing *New Hampshire*, 532 U.S. at 750–51).

"The Eleventh Circuit requires courts to apply two additional factors: [(4)] . . . the allegedly inconsistent positions must have been made under oath; and [(5)] . . . the inconsistencies must have been made with the intent to '"make a mockery of the judicial system."' *Id.* (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002); *see also Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001)).

These factors are not "inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." *Burnes*, 291 F.3d at 1286. "Given these factors, the Court must make a factual inquiry into Korman's motive and intent" regarding the alleged inconsistent position. *Id.* (citing *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010) for proposition that "a finding as to a party's intent to take inconsistent positions with respect to judicial estoppel is a factual finding").

IV. THE APPELLATE COURT VIOLATED KORMAN'S FIFTH AMENDMENT DUE PROCESS RIGHTS TO HER DAY IN COURT BY ERRONEOUSLY AFFIRMING THE DISTRICT COURT'S IMPROPER FACTUAL FINDING OF PETITIONER'S INTENT TO MAKE A MOCKERY OF THE JUDICIAL SYSTEM PREMATURELY ON A MOTION TO DISMISS AND IMPROPER TAKING JUDICIAL NOTICE OF THE PRIOR LITIGATIONS.

A. Judicial Estoppel Turns on Petitioner's Intent to "Make a Mockery of the Judicial System," a Determination the District Court Could Not Make on a Motion to Dismiss.

As set forth above, because judicial estoppel turns on a party's factual motive and intent to "make a mockery of the judicial system," a district court cannot make the determination on a motion to dismiss and instead judicial estoppel should be asserted as an affirmative defense to be resolved on the evidence either at summary judgment or at trial. *See, e.g., In re Carbide Industries, LLC*, 2016 WL 3571295, *5 (M.D. Fla. 2016) (judicial estoppel raises factual

disputes which should be asserted as an affirmative defense and is "not properly considered on [a Motion to Dismiss."); *see also Smith v. Werner Enterprises, Inc.*, 2015 WL 4512318, *1 FN 1 (S.D. Ala. 2015) ("Judicial estoppel is an affirmative defense.") (citing *e.g.*, *Mirando v. United States Department of Treasury*, 766 F.3d 540, 544 (6th Cir. 2014); *Nature Conservancy v. Wilder Corp.*, 656 F.3d 646, 650 (7th Cir. 2011); *Reed v. City of Arlington*, 650 F.3d 571, 576 (5th Cir. 2011); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011)); *Schreiber v. Ocwen Loan Servicing, LLC*, No. 5:11-cv-211-32TBS, 2011 WL 6055425, at *2 (M.D. Fla. Oct. 17, 2011) (judicial estoppel is a factual finding); *In re Southeast Banking Corp. Securities and Loan Loss Reserves Litigation*, 147 F.Supp.2d 1348, 1353 (S.D. Fla. 2001) (declining to rule on judicial estoppel at the motion to dismiss stage in favor of resolving issue at the summary judgment stage).

For this reason, and citing the above case, the Southern District court in Allen likewise denied defendant's judicial estoppel motion to dismiss in favor of resolving the issue on summary judgment. *Allen v. Senior Home Care, Inc.*, 2015 WL 1097408, *2 (S.D. Fla. 2015) ("Simply put, the Court cannot make these findings or consider such evidence at the motion to dismiss stage[; Defendants may, however, raise judicial estoppel as an affirmative defense and move for summary judgment, once an adequate factual record has been developed.") (*also citing Ventrassist Pty Ltd. v. Heartware, Inc.*, 377 F.Supp.2d 1278, 1286 (S.D. Fla. 2005) (plaintiffs are not required to negate an affirmative defense in the complaint); *Court-Appointed Receiver of Lancer Management Group LLC v. Lauer*,

No. 05–60584–CTV, 2010 WL 1372442, at *3 (S.D. Fla. 2010) (affirmative defenses are not appropriate subjects for motions to dismiss).

The appellate court improperly rejected the foregoing cases merely because they were not binding precedent. (App.4a). This is an important conflict this Court should resolve, inasmuch as these cases recognize a party's right to a day in court and the appellate court violated Korman's Due Process rights in refusing to also so rule.

B. The District Court Erred in Dismissing Petitioner's Action at the Pleading Stage.

Here, Petitioner argued to the district court that the record was incomplete for it to make the factual determination that Petitioner's motive and intent was to make a mockery of the judicial system. The district court nonetheless dismissed the action without converting the motion to dismiss to a motion for summary judgment, (App.8a, 10a). The district court did so by taking judicial notice of three (3) documents Iglesias filed in support of his motion to dismiss: (i) Korman's 2015 State Action complaint; (ii) Korman's deposition from the 1990 Federal Action (attaching Korman's Answers to Interrogatories); and (iii) Korman's affidavit from the 1990 Federal Action. The district court also took judicial notice of (iv) court orders from the 1990 Federal Action. The district court erred; and so too the appellate court in affirming.

First, the 2015 State Action complaint was not signed by Petitioner under oath and could not be considered Petitioner's prior position. *See Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d

1326, 1335 (11th Cir. 2005) (allegedly inconsistent positions must be made under oath).

Second, the remaining three (3) documents were not submitted into evidence and the district court could not take judicial notice of them. *See Browns v. Brock*, 169 F. App'x 579, 582 (11th Cir. 2006) (also involving a judicial estoppel defense) (citing *Concordia v. Bendekovic*, 693 F.2d 1073, 1076 (11th Cir.1982)) ("As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced into evidence.").

Finally, the court took judicial notice of an order from the 1990 Federal Action but that order was not Korman's statement under oath.

Therefore, the Appellate Court erred in affirming the district court's erroneous dismissal of Petitioner's action at the pleading stage and in so doing violated Korman's Due Process right to her day in court.

V. THE COURTS BELOW ERRED BECAUSE PETITIONER'S POSITIONS WERE LEGALLY CONSISTENT OR EXCUSABLY INCONSISTENT AS A RESULT OF RESPONDENT'S FRAUD

The courts below denied Korman her Due Process rights because Petitioner's position was not legally inconsistent, was excusably inconsistent as a result of Respondent's fraud, and, again, the record was insufficient to establish that Petitioner intended to make a mockery of the judicial system. Though Petitioner's positions may be interpreted to be facially inconsistent, understood correctly, they are not materially inconsistent as to justify dismissal.

In the 1990 Federal Action Petitioner alleged she was a co-author in reliance on Respondent's fraud that the parties had contracted and as an election of her fraud remedy pursuant to the inchoate contract Respondent fraudulently presented to her.

Specifically, Petitioner alleged in her Complaint:

> 7. To induce *Korman* to write Spanish lyrics for the song, Iglesias represented to Korman . . . that as compensation for her efforts she would receive a version contract entitling her to 2 1/2% of the sales of sheet music for the song, 15% of the mechanical or phonographic royalties from the song and the song's performance royalties."
>
> 8. In reliance upon Iglesias' representations, Korman undertook to and did write Spanish lyrics for the French song "J' ai Oublie' de Vivre", entitling it "Me Olvide' de Vivir". In or about June of 1978, Korman delivered the completed lyrics to Ramon Arcusa, Iglesias' music director, in Dade County, Florida.
>
> 9. In or about October of 1978, Enrique M. *Garea*, known to Korman to be the General Director of Iglesias' Spanish recording company, Alhambra Records, a division of Fabrica de Discos Columbia, S.A., appeared in Dade County, Florida, and presented Korman with a contract securing her royalties for writing the Spanish lyrics to "J'ai Oublie' de Vivre".
>
> 10. The contract, which purported to be between Korman and a Spanish entity called Star

> Music, provided that Korman assigned all of her rights to the Spanish lyrics to "J' ai Oublie de Vivre" in return for 3.3% of the song's sheet music sales, 16.66% of the mechanical and phonographic royalties from the song, and 50% of the song/s performance royalties.
>
> [* * *]
>
> 13. The song as released includes Plaintiff Korman's original title and a substantial portion of her original lyrics, with the remaining lyrics being substantially similarly to Plaintiff Korman is accurately listed as one of the authors of "Me Olvide' de Vivir" in most of its releases, including albums and the motion picture "Todos Los Dias Un Dia".
>
> 15. From 1980 through 1987, Plaintiff Korman, believing she was contractually entitled to royalties from the exploitation of "Me OIvide' de Vivir", diligently attempted to determine when she would begin to receive her and for the French song "J'ai Oublie' de Vivre" were, as more fully set forth above, knowingly and maliciously false.

(App.43a-45a, at ¶¶ 7-15). (emphasis added).

The district court should have read Petitioner's deposition testimony and responses to discovery in relation to Petitioner's factual and legal claims set forth in her Complaint, to wit, that Petitioner wrote the Spanish lyrics but assigned co-authorship rights pursuant to Respondent's fraudulent representations of contract. Nowhere did Petitioner state under oath

that Respondent was co-author solely by virtue of any contributions to the Spanish lyrics. Petitioner advised the district court that subsequently Petitioner was informed of the further legal analysis that yields the conclusion Respondent was not co-author because he never contributed copyrightable material to the work.

Further, Petitioner argued co-authorship is a legal conclusion arising from facts. Petitioner submitted a chart replete with deposition testimony showing that Petitioner's factual testimony established she was, in fact, the sole author. Petitioner clearly testified: "No, Julio is not a writer, it's as simple as that." The testimony of a writer ignorant that she had been defrauded, cherry-picked from two (2) days of convoluted deposition questioning, and then quoted out of context, did not provide the requisite record support for the district court to conclude Petitioner intended to mislead the district court. *See Slater*, 871 F.3d at 1177 ("the court may consider such factors as the plaintiff's level of sophistication").

Further, the district court erred in attributing Petitioner an admission that whether a contribution is independently copyrightable is a question of fact. (App.17a). "Co-authorship" and "independent copyrightability" are legal conclusions yielding from the facts established by the evidence. Understood in context, the facts that yield these legal conclusions cannot be resolved at the pleading stage. The district court improperly failed to distinguish between these issues of fact and law in applying judicial estoppel, *i.e.*, a litigant's assertion of divergent legal conclusions arising from consistently alleged facts do not support

judicial estoppel. Generally, for example, parties are permitted to plead alternative, inconsistent, legal theories based on the same facts. *See* Fed. R. Civ. P. Rule 8(e)(2), Moreover, contrary to the district court's finding, Petitioner did not admit she was the secondary author to Respondent. (App.8a, 10a). Read in context, Korman meant the French authors were the original authors and *Korman* was the secondary author. Petitioner misspoke at a grueling deposition.

Likewise in the 2015 State Action Petitioner alleged she was co-author as a result of the inchoate contract Respondent induced her to sign. However, because Respondent never signed and indeed disavowed the contract, there was no contract formation and Petitioner registered her sole copyright on May 1, 1989 (App.27a at ¶ 22). (copy of Petitioner's copyright registration).

The Eleventh Circuit has held that, in equity, to determine whether a litigant intends to make a mockery of the judicial system by wrongfully taking inconsistent positions in different proceedings, a district court "should consider all the facts and circumstances of the case." *See Slater v. United States Steel Corporation*, 871 F.3d 1174, 76 (11th Cir. 2017). *Slater* directs the district courts to openly consider all the circumstances from which the alleged inconsistency arises. Therefore, the Florida Supreme Court's explanation of the doctrine is instructive:

> In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be

> the same and the same questions must be involved. So, the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it to act in reliance upon it unjust to him to allow that first party to subsequently change his position. There can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel [emphasis in original; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law.

Blumberg v. USAA Casualty Insurance Co., 790 So.2d 1061, 1066 (Fla. 2001).

Accordingly, in equity, judicial estoppel does not apply where (as here) the claimant's prior position resulted from the litigant's prior mistake, or from fraud. *See generally* Douglas W. Henkin, *Judicial Estoppel-Beating Shields Into Swords And Back Again*, 139 U. Pa. L. Rev. 1711, 1713 (1991) ("The first use of the doctrine, in Tennessee in 1857, held that the assertion of any position in a judicial proceeding could work an estoppel on a later attempt to contradict that position in the same or a different proceeding, unless the first assertion was caused by a mistake, inadvertence, or fraud."). Therefore, judicial estoppel does not apply where (as here) the claimant's prior position was taken in reliance on the opposing party's

prior conduct, *e.g.*, fraud. *Blumberg*, 790 So.2d at 1066. In that instance, the opposing party is himself equitably estopped from holding the claimant to a position the opposing party engineered by his wrongful conduct.

Here, Respondent represented to Petitioner that they had a contract that created co-authorship. When Respondent denied the existence of that contract, Respondent could no longer claim co-authorship. Therefore, while yesterday Petitioner's fraud claim was not filed within the statute of limitations; today, Petitioner's copyright infringement claim faces no such proscription as to infringement that occurred within three (3) years of the filing of Korman's action, *see Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (2014). Moreover, Respondent never changed any position by virtue of Petitioner's claim of co-authorship —Respondent has always denied the contract.

As to the 2015 Complaint, (1) Petitioner did not verify the pleading; (2) Petitioner presented nothing under oath[2]; and (3) the state court never relied on any Petitioner allegation or legal position since the action was dismissed voluntarily prior to hearing on Respondent's motion to dismiss. Accordingly, the district court should not have relied on the unsworn 2015 State Action as Korman's statement.

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2 *Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1335 (11th Cir. 2005) (allegedly inconsistent positions must be made under oath).

A. Because Petitioner's Prior Position Was Not Materially Inconsistent, Petitioner Did Not Cause the Prior Federal Court to Rely on Any Position Improperly.

As set forth above, Petitioner asserted co-authorship before the prior federal court because Respondent induced her to believe she had contractually assigned co-authorship rights to Respondent. In denying dismissal, the prior federal court relied on Petitioner's election to seek co-author damages and not on Petitioner's statement of fact that she was a co-author, *i.e.*, she only claimed co-authorship because she was fraudulently induced to assign those rights to Respondent.

Petitioner filed a different action for copyright infringement which occurred decades after the 1990 Federal Action (*i.e.*, within three (3) years of that filing). Petitioner's prior election to hold Respondent to damages that resulted from his fraudulent misrepresentations, is not legally inconsistent with Petitioner now suing for copyright infringement that occurred decades later. Viewed accurately, there is no valid perception that any court was misled.

B. Because Petitioner's Prior Position Was Not Materially Inconsistent, Petitioner Would Have Received No Unfair Advantage Nor Would Iglesias Be Unfairly Prejudiced.

Finally, Petitioner brought new claims for wrongs that occurred decades after the prior federal action. Petitioner's positions were not legally inconsistent. Therefore, Petitioner received no unfair advantage, nor was Respondent unfairly prejudiced.

CONCLUSION

Judicial estoppel is an equitable doctrine. The incorrect application of this doctrine undermines the equity it seeks to protect. Though Korman argued her due process rights below, the Appellate Court did not address those rights in its Order. This Court should resolve these important issues to the benefit of Korman and of myriad similarly situated parties deprived of property without due process.

No court has ever ruled on whether the facts in Korman's action support Petitioner's legal claims (1) that she was co-author in 1990 (which Petitioner alleged only because of Iglesias's fraud); or (2) today, that because Respondent disavows any contract, Petitioner never assigned co-author rights to Respondent and she holds sole copyright. Respondent has been successful thus far in unfairly denying Petitioner any remedy where Respondent has never paid Petitioner a cent for her work, where Respondent disavowed the contract, and where Respondent continues to profit to this day, continually publishing and licensing Petitioner's Work.

Below, the trial court (Magistrate Torres) wrote the Court "will not turn a blind eye" to Plaintiff's allegedly inconsistent statements. Yet the court turned its eyes blind to the forty (40) years of Iglesias's repeated, and continuing, copyright infringement. Korman seeks her day in Court, as is her right under the Due Process Clause. This Court should grant Petitioner Writ of Certiorari.

Respectfully submitted,

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