No. 20-1695

In The Supreme Court of the United States

TODD PHILLIPPI,

Petitioner,

v.

HUMBLE DESIGN, L.L.C.
AND WARREN DAVID HUMBLE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.) Whether the Fifth Circuit can refuse to review the denial of a FRCP 60(b)(4) (lack of jurisdiction) motion under the "de novo" standard of review, in light of its controlling precedent in *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003) mandating "De Novo" Review?

II.) Whether a judgment is necessary to establish jurisdiction for a Fed. R. Civ. P. Rule 54 motion for attorney fees in light of Fed. R. Civ. P. Rule 54 statutory requirement and the decisions of this court in "*Sears, Roebuck Co.* v. *Mackey*, 351 U.S. 427 (1956)" and *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1 (1980) requiring a Judgment?

III.) Whether the inherent powers of the Court allow the Court to modify the jurisdictional requirements of FRCP Rule 54 in light of *Cooter Gell v. Hartmarx Corp.* 496 U.S. 384 (1990) and Curtiss-Wright limits on those powers?

IV.) Whether the District Court has Jurisdiction to enter Orders after a Fed.R.Civ.P 41(a)(1)(a)(ii) dismissal without court order, in light of the Fifth Circuit's, holding in *Bechuck v. Home Depot U.S.A.*, Inc., 814 F.3d 287 (2016) that the District Court loses jurisdiction?

LIST OF PARTIES

The Petitioner is the TODD PHILLIPPI

The Appellees are HUMBLE DESIGN, L.L.C.; WARREN DAVID HUMBLE

LIST OF RELATED CASES

1.) Automation Support, Inc. v. Humble Design, L.L.C., No. 3:14-cv-04455-BK (Dallas Division Northern District of Texas Dismissed Aug 5, 2016)

2.) Automation Support, Inc. v. Humble Design, L.L.C., No. 17-10433 (5th Cir. Judgement entered Mar. 26, 2018)

3.) Automation Support, Inc. v. Humble Design, L.L.C., No. 17-10433 (5th Cir. Judgement entered May 9, 2018)

4.) In Re Todd Phillippi, Petition for Writ of Mandamus, No. 19-10141 (5th Cir. Judgement entered Apr. 24, 2019)

5.) Automation Support, Inc. v. Humble Design, L.L.C., No. 19-10769 (5th Cir. Judgement entered Mar. 3, 2020)

6.) Automation Support, Inc. v. Humble Design, L.L.C., No. 20-10386 (5th Cir. Judgement entered Dec. 8, 2020)

7.) Todd Phillippi v. Humble Design, L.L.C, Supreme Court of the Untied States,, 19-1337, Cert Denied

8.) Humble Design, L.L.C v. Automation Support, Inc. No. DC-17-07479, 101st District Court, Dallas County, Texas, filed 06/26/2017

9.) Humble Design, L.L.C v. Automation Support, Inc. No. DC- DC-17-08142, 101st District Court, Dallas County, Texas, filed 07/06/2017

10.) Humble Design, L.L.C v. Automation Support, Inc. No. DC- DC-19-00622, 101st District Court, Dallas County, Texas, filed 01/14/2019

Humble Design, L.L.C v. Automation Support, Inc. No. DC- DC-20-05185, 101st District Court, Dallas County, Texas, filed 04/02/2020

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APPENDIX:

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OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

The opinions below are attached To Petitioner Phillippi's Appendix.

Order of the United States Court of Appeals for the Fifth Circuit, filed 12/8/20 (Appendix 1) (Published Opinion)

Order of the United States District Court for the Northern District of Texas, Dallas Division, filed 2/14/17
(Appendix 5)

Order of the U.S. District Court for the Northern District of Texas, Dallas Division, filed June 11, 2020
(Appendix 11)

Order of the United States Court of Appeals for the Fifth Circuit, filed 4/6/21 (excerpt) 2020
(Appendix 15)

Order on Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit, filed 1/6/21
(Appendix 17)

Joint Stipulation of Voluntary Dismissal filed in the United States District Court for the Northern District of Texas, Dallas Division, filed 8/5/16
(Appendix 18)

JURISDICTION

The Fifth Circuit Court of Appeals issued its opinion and Judgment on December 8, 2020. Petitioner Phillippi has 150 days (150)[1] to file a petition for certiorari. The Petitioner Phillippi has timely filed on or before June 5, 2021. The Fifth Circuits decision is sufficiently final. Jurisdiction is proper under 28 U.S. Code § 1254 (1)

CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides: All persons born or naturalized in the United States, and subject to the jurisdiction Thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] (ORDER LIST: 589 U.S.) WEDNESDAY, APRIL 15,2020

STATEMENT OF THE CASE

On 8/5/16 a civil case[2] in the Northern District Dallas Division was dismissed by way of a FRCP Rule 41(a)(1)(A)(ii) agreed dismissal without a court order.(Appendix 18) There were no Orders or Judgments entered prior to the FRCP Rule 41(a)(1)(A)(ii) agreed dismissal. After the FRCP Rule 41 (a)(1)(A)(ii) agreed dismissal. The Appellee Humble (Defendants) sought Attorney Fees under FRCP Rule 54.

The District Court using FRCP Rule 54, after the FRCP Rule 41(a)(1)(A)(ii) agreed dismissal, ordered that the Appellee Humble were "Prevailing Parties" and entered Judgment(s) on awards of Attorney Fees as "Prevailing Parties" .(Appendix 5) despite there being no preexisting "Judicial Imprimatur" Judgement for Jurisdiction under FRCP Rule 54 and after the FRCP Rule 41 (a)(1)(A)(ii) agreed dismissal which ended the District Court's Jurisdiction over the matter. In 2018, Petitioner Phillippi appeared in the suit under FRCP 60b as a "legal representative". There after the District Court allowed Petitioner to join the suit.

Petitioner Phillippi filed a timely FRCP Rule 60(b)(4) Motion establishing the lack of Jurisdiction of the District Court to make orders on "Prevailing Parties" and Attorney Fees after a FRCP Rule 41(a)(1)(A)(ii) agreed dismissal.

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[2] The facts of the case are not relevant. (The case involved the theft of Plaintiffs proprietary information by the Defendants)

The District Court, denied Petitioner Phillippi's FRCP Rule 60b(4) motion. (Appendix 11) The District Court contended that the Inherent Powers of the Court allowed it to award Attorney Fees and did not address the issue of the effect of a FRCP41Rule(a)(1)(A)(ii) agreed Dismissal on the jurisdiction of the Court.

A timely Appeal was filed. The Fifth Circuit:

Declined to review the Issue of "Prevailing Party"; (Appendix 1, Pages 2-4)

Declined to "De Novo" review the Denial of the FRCP Rule 60(b)(4) Motion; (Appendix 1, Pages 2-4)

Declined to review the issue of the effect of a FRCP Rule 41(a)(1)(A)(ii) agreed Dismissal on the Jurisdiction of the Court; (Appendix 1, Pages -4) and

Declined to review the issue of the jurisdictional necessity of a preexisting Judgment in a FRCP Rule 54. (Appendix 1, Pages -4)

The Fifth Circuit concluded that the "Inherent Powers" of the Court allowed it to award Attorney Fees at its discretion. (Appendix 1, Pages 3-4) The Fifth published this opinion, *Automation Support, Inc. v. Humble Design, L.L.C.,* 982 F.3d 392 (5th Cir. 2020)

The Fifth Circuit Denied Rehearing. (Appendix 17)

REASONS FOR GRANTING THE WRIT

1.) THE FIFTH CIRCUIT CAN NOT REFUSE TO REVIEW THE DENIAL OF A FRCP 60(B) MOTION UNDER THE DE NOVO STANDARD OF REVIEW

This Appeal/Writ is from the litigation of a FRCP Rule 60(b)(4) motion, involving a "Void Judgment" entered by the District Court after a FRCP 41(a)(1)(A)(ii) dismissal which ended the District Court's "Original Jurisdiction". (Appendix 18)

"The review of the denial of a Rule 60(b)(4) motion is de novo. *Callon Petroleum Co. v. Frontier Ins. Co.,* 351 F.3d 204, 208 (5th Cir. 2003)*;* Denial of a Rule 60(b)(4) motion is de novo." *Jackson v. FIE Corp.,* 302 F.3d 515, 521–22 (5th Cir.2002); De Novo Review of a denial of a Rule 60(b)(4) motion. *Carter v. Fenner,* 136 F.3d 1000, 1005 (5th Cir.1998*);* See Also *Brumfield v. La. State Bd. of Educ.,* 806 F.3d 289, 296 (5th Cir. 2015)*;* and *Recreational Properties, Inc. v. Southwest Mortgage Services Corp.,* 804 F.2d 311, 313-14 (5th Cir. 1986); (Regarding the denial of a Rule 60(b)(4) motion); "We review de novo. . . ." *Harper Macleod Solicitors v. Keaty Keaty*, 260 F.3d 389, 394 (5th Cir. 2001).

Moreover, all other United States Circuit Courts use De Novo review regarding a Rule 60(b)(4) motion. See, e.g., See *Grun v. Pneumo Abex Corp.,* 163 F.3d 411, 423 (7th Cir. 1998) *("*We review denial of a Rule 60(b)(4) motion de novo.*"); See also United States v. Boch Oldsmobile, Inc.,* 909 F.2d 657, 661 (1st Cir. 1990)*; See (Jalapeno Prop. Mgt., LLC v. Dukas,* 265 F.3d 506, 515 (6th Cir. 2001); *See Chambers v. Armontrout,* 16 F.3d 257, 260 (8th Cir. 1994) "relief from void judgments is not discretionary"); See *Orner v. Shalala,* 30 F.3d 1307, 1310 (10th Cir. 1994) ("Furthermore, when Rule 60(b)(4) is applicable, relief is not a discretionary matter; it is mandatory."); *See Burke v. Smith,* 252 F.3d 1260, 1263 (11th Cir. 2001) (finding that Rule 60(b)(4) motions "leave no margin for consideration of the district court's discretion as the judgments ... are by definition either legal nullities or not"); See *Combs v. Nick Garin Trucking,* 825 F.2d 437, 441-42 (D.C. Cir. 1987) (finding that "under Rule 60(b)(4), if the judgment is void, relief is mandatory. . . . he is entitled to have the judgment treated for what it is, a legal nullity").

"A void judgment is a legality. See Black's Law Dictionary 1822 (3d ed.1933); see also *id.,* at 1709 (9th ed.2009)" *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 270 (2010)[3]

[3] Thank you Justice THOMAS.

The unanimous consensus of all Circuit Courts is that "De Novo" review is the Standard because a District Court has no discretion with regard to a denial of a Rule 60(b)(4) motion, as it must grant the motion if jurisdiction is lacking.

The Fifth Circuit acknowledged that this Appeal arose from the denial of a Fed.R.Civ.P. Rule 60 (b) (4) (void Judgment) motion based on the District Court's lack of Jurisdiction to enter (any) Order or Judgment after a Fed.R.Civ.P. 41(a)(1)(A)(ii) dismissal. (The issue presented is) "...under Rule 60 (b) ...that the magistrate did not have jurisdiction to award attorney fees" (Appendix 1, Page 2, Paragraph 3). Petitioner Phillippi agrees that is the issue raised by Petitioner Phillippi in the Appeal.

A review of Fifth Circuit precedent, reveals historically, after the Fifth Circuit acknowledges that the issue before it is Denial of a Fed.R.Civ.P. Rule 60 (b) (4), the Fifth Circuit announces:

"A. Standard of Review" In this matter the Fifth Circuit did not reference a "Standard of Review".

The Fifth Circuit, all but says that it did not review the Denial of the Fed.R.Civ.P. Rule 60 (b) (4) at all.

In (Appendix 1, Page 2) of the Panel's Published Opinion "To the extent Automation Support argues that the defendants were not prevailing parties, we

have already rejected that argument". This is a statement that issues were not reviewed De Novo or under any standard. Directly conflicting with ""[O]ur review of the meaning of the term 'prevailing party' is de novo." *Inland Steel Co. v. LTV Steel Co.* , 364 F.3d 1318, 1320 (Fed. Cir. 2004)" *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 955 F.3d 990, 992 (Fed. Cir. 2020)

The Fifth provides no precedent or citation as to authority/ability to refuse to review this matter. The only reference is to the noted legal authority *Dr. Seuss, Horton Hatches The Egg (1940)* "We meant what we said and We said what we meant"[4]

More importantly, that isn't the core issue being presented to the Fifth Circuit. The issue, that is being presented, is the Jurisdiction of the District Court, to make ANY Orders or Judgments on any issue on the merits of the case, after the FRCP 41(a)(1)(A)(ii) Dismissal.[5] The District Court made two Orders or Judgments, after the FRCP 41(a)(1)(A)(ii) Dismissal, the first declaring Appellee Humble a "Prevailing Party" and then issuing an award of Attorney Fees based upon Appellee Humble being the "Prevailing Party".

Making an order that a Party is the "Prevailing Party" is fundamentally a merit based determination. It is the ultimate goal of every Party. The District

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[4] Petitioner Phillippi was unable to shepardize the citation

[5] The type of Orders or Judgments have no effect on the "Standard of Review" of a denial of a Fed.R.Civ.P. Rule 60 (b) (4) Motion.

Court must have Jurisdiction to make that finding. The Fifth Circuit must use the appropriate Standard of Review on the Denial of a Fed.R.Civ.P. Rule 60 (b) (4) Motion. "De Novo". The Fifth Circuit chose not to review.

Moreover, the Fifth Circuit Acknowledged that the issues being brought, in this Appeal, were not previously reviewed: "Automation Support's new attack" (Appendix 1, Page 3, Second Paragraph) and (There) "were different arguments in this Appeal" (Appendix15, last sentence)[6]

Yet in the Fifth Circuit's Published Opinion it does not address the issue of the Jurisdiction of the District Court, to make ANY Orders or Judgments on any issue on the merits of the case, after the FRCP 41(a)(1)(A)(ii) Dismissal

The Fifth Circuit's refusal to conduct the "De Novo" review or any review at all directly contradicts every other Circuit Court of Appeals and its own precedent. (see above citations) This Published Opinion, because of the noted errors of the District and Circuit creates conflict in the Circuit Courts on these issues and violates Petitioner Phillippi's Due Process rights.

[6] The Fifth Circuit makes a brief reference to "Law of the Case". The Fifth acknowledged that there were new issues/ arguments and did not dispute that these issues/arguments had never before been heard. The law of the case does not apply to issues that have not been heard. *U.S. v. Lee*, 358 F.3d 315 (5th Cir. 2004)

2.) A JUDGMENT IS NECESSARY TO ESTABLISH JURISDICTION FOR A FED. R. CIV. P. RULE 54 MOTION

On August 5, 2016 the Parties signed and filed a Joint Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal (without Court Order) (Appendix 18). At that time there were no Court Orders, Judgments, or decisions of any kind on any issue by the District Court. The matter was dismissed as of that day.

Thereafter, Appellee Humble filed a Fed. R. Civ. P. Rule 54(d)(2) Motion seeking Attorney fees. The Rule 54 Motion was based solely upon the Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal (without Court Order) but briefed and argued under FRCP Rule 41(a) (2) "Dismissal by Court Order" cases and on the fact that the Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal (without Court Order) had been agreed to be "with Prejudice"[7]

A Motion for Attorney fees under Fed. R. Civ. P. Rule 54(d) (2) requires:

"(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:...[8]

(ii) specify the **JUDGMENT** and the statute, rule, or other grounds entitling the movant to the award;" Fed. R. Civ. P. Rule54 (d) (2) (B) (ii) (emphasis added)

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[7] Which had the sole effect of making it a FRCP 41(a)(1)(B) dismissal (Without a Court Order)

[8] There are no Statutes or Court Orders providing otherwise

The definition of the appropriate "Judgment" is found in Fed. R. Civ. P. Rule 54(a) which provides:

"DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include **recitals of pleadings**, a master's report, or **a record of prior proceedings**." (emphasis added)

The *Black's Law* definition of "Judgment" is "The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination." *Black's Law Dictionary* 2nd Ed, "Judgment".

Moreover the Supreme Court, when addressing the issue of "Prevailing Party" status in a fee shifting statute, held "*Black's Law Dictionary* 1145 (7th ed. 1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered,... Also termed *successful party*." This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases. *Buckhannon Board Care Home v. West Va. D.H.H.R*, 532 U.S. 598, 603 (2001)

This would exclude a Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal (without Court Order) as the jurisdictional basis for a Fed. R. Civ. P. Rule 54 Motion for Attorney Fees. As does the definition of Judgment in Fed. R. Civ. P.

Rule 54(a) which specifically EXCLUDES "recitals of pleadings, … or a record of prior proceedings."

Appellee Humble specified no Judgment in his Motion. (Because there was no Judgment in this case prior to the Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal) Appellee Humble specified the Joint Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal (without Court Order. Appellee Humble produced and relied upon a "recitals of pleadings" and / or "a record of prior proceedings".

Fed. R. Civ. P. Rule 54(d) (2) (B) (ii) requires that a "Judgment" exist at the moment the Fed. R. Civ. P. Rule 54(d) (2) (B) (ii) Motion for Attorney fees is submitted. The Parties jointly dismissed this matter without any Court Order(s) under Fed. R. Civ. P. Rule 41(a)(1)(A)(ii). It is undisputed that the District Court disposed of no claims in this matter and made no Orders or Judgments prior to the Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal.

Speaking on the necessity of a "Judgment" being mandatory under Fed. R. Civ. P. Rule 54, the Fifth Circuit held:

"That requirement is jurisdictional, is reviewed de novo, and may be raised by this court even though the parties may not have challenged it. See *Samaad v. City of Dallas*, 940 F.2d 925, 930 (5th Cir. 1991)." See *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000)

The Supreme Court of the United States has weighed in on the issue of the necessity of a Judgment when proceeding:

"... under Rule 54(b). A district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim..." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980)

The Fifth Circuit has created a conflict with the Supreme Court of the United States which requires a "Court Ordered Final Decision, or Judgment" to have been entered prior to the filing of the Fed.R.Civ.P. 54 Motion. As well as with the requirement of a "Judicially sanctioned act "Judicial Imprimatur" in *Buckhannon Board Care Home v. West Va. D.H.H.R,* 532 U.S. 598 (2001)

The Fifth Circuit has created a conflict with other Circuit Courts which require a "Court Ordered Final Decision or Judgment" to have been entered prior to the filing of the Fed. R. Civ. P. Rule 54. *In re Southeast Banking Corp.,* 69 F.3d 1539 (11th Cir. 1995)

The Fifth Circuit[9] has created a conflict with the Fifth Circuit which requires a "Court Ordered Final Decision, or Judgment" having been entered prior to the filing of the Fed.R.Civ.P. Rule 54 (*Samaad v. City of Dallas*, 940 F.2d 925, 930 (5th Cir. 1991); *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000)

The Fifth Circuit, in this case, has determined that a "Court Ordered Final Decision, or Judgment" is not necessary prior to filing a Fed.R.Civ.P. 54 Motion and may be substituted by a Fed. R. Civ. P. Rule 41(a)(1)(A), dismissal without a Court Order.

The refusal of the Fifth Circuit to review this issue has created an exception which conflicts with the plain language of FRCP Rule 54, rejects the precedent of Circuit Courts of Appeals (including the Fifth Circuit) and rejects the Supreme Court of the United States' case law interpreting Fed. R. Civ. P. Rule 54 as well as *Buckhannon*.

[9] And the District Court for Northern Texas, Dallas Division, which used FRCP 54 as the tool to enter the Judgment (of Prevailing Party) in order to enter a Judgment on the merits after a Fed. R. Civ. P. Rule 41(a)(1)(A)(ii) dismissal .

3.) THE INHERENT POWERS OF THE DISTRICT COURT DO NOT ALLOW THE DISTRICT COURT TO MODIFY THE JURISDICTIONAL REQUIREMENTS OF FRCP RULE 54

There were not any pleadings invoking the "Inherent Power" of the Court to enter an award of attorney fees. The Defendant used the basis of his FRCP Rule 54 motion, (An Award of Attorney fees based upon "Prevailing Party" status), for the argument that the "Inherent Powers" of the Court allowed the Court to award Attorney Fees for unspecified reasons, after the Fed. R. Civ. P. Rule 41(a)(1)(A), dismissal without a Court Order.

The Fifth Circuit, in its main opinion on (Appendix 1, Page 3, Paragraph 2), states "Automation Support's new attack[10] – that the Rule 41 joint dismissal deprived the district court of jurisdiction to later award fees – is wrong." To Support this contention the Fifth Circuit references "Inherent Powers" case law that are distinguishable from this matter:

Qureshi v. U.S., 600 F.3d 523 (5th Cir. 2010), Plaintiff was issued a "pre-filing injunction" for "persistent abuse of the judicial process; (Sanctions, Not Applicable)

[10] The Circuit Court acknowledges that this is a "new attack" ie "new issue"

Cooter Gell v. Hartmarx Corp., 496 U.S. 384 (1990), a FRCP Rule 11 sanctions case; (Sanctions, Not Applicable)

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), a Modification of a Court Ordered "Final Judgment" (Court Ordered Judgment, Not Applicable)

Zimmerman v. City of Austin, 969 F.3d 564 (5th Cir. 2020, the party seeking attorney fees prevailed and obtained a Court Ordered Judgment. (Court Ordered Judgment, Not Applicable)

All of the cases referenced by the Fifth Circuit are "Sanctions" or "Post Judgment" based Inherent Power awards of Attorney fees. This is not a "Sanctions" or "Post Judgment" based matter. There was no Judgment. There was a Fed. R. Civ. P. Rule 41(a)(1)(A)(ii), dismissal without a Court Order.

The confusion of the Fifth Circuit is based on the facts that there are two types of Inherent Powers.

A.) **Inherent Power "Sanctions"**

This is the power of the Court to control the activities and Litigants in its Court. For Example, FRCP Rule 11, Rule 13, and contempt sanctions, etc., for bad faith behavior done in the course of the litigation by a party or attorney. *Cooter Gell v. Hartmarx Corp.* 496 U.S. 384 (1990).

The use of the "Sanctions" Inherent Power requires a motion, an opportunity to be heard, a finding of bad faith, and a detailed order setting out the findings and basis for sanctions. *Chambers v. Nasco, Inc.,* 501 U.S. 32 (1991) *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990)[11]

The Order of the District Court on Appellee Humble's FRCP Rule 54 motion reveals that the "Sanctions" Inherent Power of the Court was not the basis for the award of attorney fees. Sanctions or Bad Faith actions in the course of the litigation, prior to the FRCP 41(a)(1)(A)(ii) dismissal, were not invoked, mentioned, plead, heard or in existence.

The Attorney Fees were awarded, after the Fed.R.Civ.P 41(a)(1)(A)(ii) dismissal, by the District Court making a Judgment/finding that Appellee Humble was a "Prevailing Party" under FRCP Rule 54. The District Court then utilized that "Prevailing Party" finding/Judgment to enter a Judgment of Attorney Fees. "Sanctions" Inherent Power was not referenced.

Moreover, FRCP Rule 54 (E) disallows its use for obtaining Attorney fees based upon Sanctions.

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[11] The Fifth Circuit does make a reference to "bad faith". However the "bad faith" they are referring to is Petitioner Phillippi's persistence in requesting that the District Court and the Fifth Circuit address the actual law that controls this matter. Petitioner Phillippi's "frivolous filings" are all based on the decades of Supreme Court cases and Fifth Circuit cases that support Petitioner Phillippi's filings as submitted herein.

"(E) Exceptions. Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. §1927."

The "Sanctions" Inherent Power of the Court has no relevance to this case.

The second type of "Inherent Power"[12] of the Court is:

B.) **Inherent Power "Administrative"**

"Administrative" Inherent Power is the "benign" Inherent Power of the Court to tidy up the proceedings, in the District Court for the Parties, after judgment or dismissal. It is the power to correct, enforce, or modify the Judgment the District Court has **previously** granted to a party in the "Final Judgment".

FRCP Rule 54 is an excellent example of the potential use of "Administrative" Inherent Power. The District Court maintains Inherent Power to rule on a Rule 54 Motion.

IF ALL THE REQUIREMENTS OF FRCP RULE 54 ARE MET

The first mandatory Jurisdictional requirement of a FRCP Rule 54 Motion is that a judgment exists at the time the rule 54 motion is filed (*Samaad v. City of Dallas,* 940 F.2d 925, 930 (5th Cir. 1991); *Eldredge v. Martin Marietta Corp.,* 207

[12] There does not appear to be more than two types of "Inherent Power"

F.3d 737, 740 (5th Cir. 2000); *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 7 (1980)

As set forth above this is a jurisdictional requirement.

Rather than regurgitate Section 2 above I will briefly summarize.

Appellee Humble used the FRCP Rule 54 Motion to create a "prevailing party" judgment. Then used that "prevailing party" judgment to get an Attorney Fees Judgment. This all occurred after the Fed.R.Civ.P 41(a)(1)(A)(ii) dismissal without Court Order and in the absence of any pre-existing Judgment..

Technically, the Fifth Circuit is correct the District Court did utilize its "Administrative" Inherent Power. However, the District Court did not have the jurisdiction to use that power to award Attorney Fees under Rule 54. (See above Section 2)

There is no "Judgment" to confer "Jurisdiction" in this matter. Without Jurisdiction the Court has no Jurisdiction.

In this matter the Fifth Circuit has rejected the statutory language of FRCP Rule 54; rejected the precedent of the Supreme Court of the United States; rejected the precedent of every Circuit Court of Appeals; and has rejected the precedent of the Fifth Circuit's existing precedent and created an untethered "Inherent Power". That is _ Wrong.

This is not an Inherent powers case. Inherent Powers cannot be used as the Fifth Circuit contends.

4.) **THE DISTRICT COURT HAS NO JURISDICTION TO ENTER ORDERS AFTER A FED.R.CIV.P 41(A)(1)(A)(II) DISMISSAL WITHOUT COURT ORDER.**

The District Court had no jurisdiction after the Fed.R.Civ.P 41(a)(1)(A)(ii) dismissal without Court Order.

The Fifth Circuit has considered the jurisdiction of the District Court after a Rule 41(a)(1)(A)(ii), *Bechuck v. Home Depot U.S.A., Inc.,* 814 F.3d 287 (2016) *Bechuck* filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A). The Fifth found:

"Rule 41(a)(1) is the shortest and surest route to abort a complaint when it is applicable. ...That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its **alpha and omega** was the doing of the plaintiff alone. He suffers no impairment beyond his fee for filing" (emphasis added) *Am. Cyanamid*

Co. v. McGhee, 317 F.2d 295, 297 (5th Cir.1963); see also *Amerijet Int'l, Inc. v. Zero Gravity Corp. (In re Amerijet Int'l, Inc.),* 785 F.3d 967 (5th Cir. 2015)

"Accordingly, the district court may not attach any conditions to the dismissal". *Williams v. Ezell,* 531 F.2d 1261, 1264 (5th Cir.1976). After the notice of voluntary dismissal is filed, the district court **loses jurisdiction** over the case. *Qureshi,* 600 F.3d at 525." *Amerijet Int'l, Inc. v. Zero Gravity Corp. (In re Amerijet Int'l, Inc.)*, 785 F.3d 967, 973 (5th Cir. 2015) (emphasis added)

The Fifth Circuit has further held that:

""[T]he effect of a Rule 41(a)(1) dismissal is to put the plaintiff in a legal position as if he had never brought the … suit." *Yesh Music v. Lakewood Church*, 727 F.3d 356, 359 (5th Cir.2013) (alteration in original) *Harvey Specialty v. Anson Flowline Equip*, 434 F.3d 320 (5th Cir. 2005)

Then the Fifth Circuit has applied its analysis directly to a FRCP 41(a)(1)(A)(ii) Dismissal finding:

(a dismissal) "under Rule 41(a)(1)(A)(ii), … would be the same as the analysis …outlined in Part II above. Once the parties agreed to a voluntary dismissal, the court was deprived of jurisdiction…" *Bechuck v. Home Depot U.S., Inc.*, 814 F.3d 287, 295 (5th Cir. 2016)

All Circuit Courts have held that jurisdiction ends upon the filing of the FRCP 41(a)(1)(A)(ii) dismissal. This case was closed on August 5, 2016. The Court's jurisdiction over this case ended on August 5, 2016.

"the district court lacks jurisdiction to do anything about it." *Commercial Space Management Co. v. Boeing Co.*, 193 F.3d 1074, 1078 (9th Cir. 1999) Acts by the District Court after a Rule 41(a)(1) are "superfluous, a nullity, and without procedural effect for purposes of appeal or otherwise." " *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003); Orders by a District Court after a "Rule 41(a)(1)(A)" have no legal effect *O.F. Mossberg & Sons, Inc. v. Timney Triggers, LLC*, 955 F.3d 990, 993 (Fed. Cir. 2020)

Furthermore in a footnote (Appendix 1, Page 3) the Fifth Circuit places the responsibility for allowing the imposition of non – sanction based attorney fees orders after a Fed.R.Civ.P 41(a)(1)(A)(ii) dismissal without Court Order squarely on the shoulders of the Supreme Court. The Fifth Circuit stated:

"An old Fifth Circuit decision holds that a district court lacks jurisdiction to enter a fee award once the plaintiff files a self-executing dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i) *See Williams v. Ezell*, 531 F.2d 1261, 1264 (5th Cir. 1976)[13]. Although the Supreme Court rejected

[13] As shown in Bechuck the Fifth has reaffirmed Williams time and again

that view in *Cooter*, 496 U.S. 395, Williams continues to cause confusion about a district court's ability to consider fee motions after a Rule 41 dismissal"

The "confusion" the Fifth Circuit refers to is:

After a "F.R.Civ.P. 41(a)(1)" dismissal "the subsequent orders granting attorneys fees were a nullity." *Williams v. Ezell*, 531 F.2d 1261, 1264 (5th Cir. 1976)

Cooter did/does no such thing. Cooter addressed the jurisdiction to seek Rule 11 sanctions. "In our view, nothing in the language of Rule 41 (a)(1)(i), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose **sanctions** after such a dismissal." *Cooter Gell v. Hartmarx Corp.,* 496 U.S. 384, 395 (1990) (emphasis added);

Williams v. Ezell, 531 F.2d 1261, 1264 (5th Cir. 1976) is not a sanctions case.

This published case *Automation Support, Inc. v. Humble Design, L.L.C.,* 982 F.3d 392 (5th Cir. 2020) is not a sanctions case.[14]

The Fifth Circuit is correct about "confusion". The "confusion" has been caused by the Fifth Circuit's published opinion in *Automation Support, Inc. v. Humble Design, L.L.C.*, 982 F.3d 392 (5th Cir. 2020) The Fifth Circuit has made

[14] The citation for the published opinion in this matter.

incorrect assertions about the Supreme Court's Cooter opinion and undermines, rejects, and overturns a bedrock Fifth Circuit case in *Williams* that is a lynchpin in all of the Fifth Circuit's precedent on the issue of Federal Rule of Civil Procedure 41(a)(1) See *Bechuck* above.

The Fifth Circuit has created an unfettered power to Order Attorney Fees after a Federal Rule of Civil Procedure 41(a)(1). The Fifth Circuit has dispensed with:

The need to follow the terms of Federal Rule of Civil Procedure 54 which requires a Judgment.

The need to follow the explicit statement of the Supreme Court: … "prevailing party" as "[a] party in whose favor a judgment is rendered… This view (is) that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases" *Buckhannon Board Care Home v. West Va. D.H.H.R*, 532 U.S. 598, 603 (2001)

"A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon Board Care Home v. West Va. D.H.H.R*, 532 U.S. 598 (2001)

The Fifth Circuit has embraced the position that Attorney Fees can be awarded in a "case" that has never been filed "...is to put the plaintiff in a legal position as if he had never brought the ... suit." *Yesh Music v. Lakewood Church*, 727 F.3d 356, 359 (5th Cir.2013)

Automation Support, Inc. v. Humble Design, L.L.C., 982 F.3d 392 (5th Cir. 2020) contradicts every opinion of the Fifth Circuit and every other Circuit Court's precedent on the issues of Federal Rule of Civil Procedure 41(a)(1).

Municipality of San Juan v. Rullan, 318 F.3d 26 (1st Cir. 2003) Court lacks jurisdiction after 41(a)(1); *Ilaw v. United States*, 632 F. App'x 614 (Fed. Cir. 2015) Court lacks jurisdiction after 41(a)(1); *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272 (11th Cir. 2012); action by Court after a 41(a)(1) is superfluous; *Smith v. Phillips,* 881 F.2d 902 (10th Cir. 1989) A District Court is powerless after a 41(a)(1) dismissal and

Smallbizpros, Inc. v. MacDonald, 618 F.3d 458, 463 (5th Cir. 2010) "Because filing a voluntary stipulation of dismissal under Rule 41(a)(1)(A) (ii) is effective immediately, any action by the district court after the filing of such a stipulation can have no force or effect because the matter has already been dismissed by the parties themselves without any court action. Any dismissal order

entered by a district court after the filing of a voluntary dismissal is "superfluous." *Meinecke v. H R Block of Houston*, 66 F.3d 77, 82 (5th Cir. 1995)[15]

The Published Opinion rejects and creates a conflict with the Fifth Circuits own precedent, as well as every other Circuit Court. It creates an untethered Inherent Power to impose Attorney Fees on a case that "has never been filed". It rejects the Supreme Court's *Buckhannon* "Judicial Imprimatur"

CONCLUSION

For the aforementioned reasons, The Supreme Court should grant Petitioner Phillippi's Petition and determine whether;

1.) The Standard of review for reviewing a Denial of a FRCP Rule 60(B)(4) is "Denovo";

2.) Whether a FRCP Rule 54 Motion for Attorney Fees requires the existence of a Judgment entered prior to the Motion;

3.) Whether the Inherent Powers of the Federal Courts have any limitations;

4.) Whether the District Courts have any Jurisdiction after a Fed. R. Civ. Pro. Rule 41(a)(1)(A) (ii);

5.) Whether the Supreme Court's precedent controls on the issues the Supreme Court has provided opinions; and

[15] Every Circuit Court has held this unanimously.

6.) Resolve the conflicts between the Fifth Circuit, in Automation Support, Inc. v. Humble Design, L.L.C., 982 F.3d 392 (5th Cir. 2020), and every other Circuit Court on these issues.

These are critically important issues of national import. The Fifth Circuit's *Automation Support, Inc. v. Humble Design, L.L.C.*, 982 F.3d 392 (5th Cir. 2020) conflicts with The Supreme Court of the United States, every other Circuit Court and the Fifth Circuit itself. It also effectively alters and disembowels the effectiveness of Fed. R. Civ. Pro. Rule 41 (a) (1) (A) (ii)

Allowing *Automation Support, Inc. v. Humble Design, L.L.C.*, 982 F.3d 392 (5th Cir. 2020) to exist will cause confusion as to the controlling principles of law.

Respectfully submitted,

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