

No. 20-_____

In the
Supreme Court of the United States

IN RE JOHN J. MASIZ,

Petitioner,

On Petition for an Extraordinary Writ to the
United States District Court for the District of Massachusetts
CA No. 12-12324-MLW

**PETITION FOR EXTRAORDINARY WRIT
OF PROHIBITION**

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QUESTIONS PRESENTED

This matter concerns the constitutional limits on the authority of the federal court to exercise, *sua sponte*, in the absence of a case or controversy between the parties, coercive inquisitorial power to determine whether a defendant has complied with the terms of a consent decree obtained by the Securities & Exchange Commission, including a general injunction against violating the securities laws and an equitable remedy to provide an agreed upon disclosure to prospective investors obtained by the SEC under 15 U.S.C. § 78u (d)(5). The question presented is:

1. Whether the issuance of an extraordinary writ of prohibition is required to remedy the district court's assertion of "inherent authority" to initiate and conduct, *sua sponte*, in the absence of a case or controversy, an investigation into whether Petitioner has complied with two Consent Decree injunctions obtained by the SEC, and whether this supposed authority allows the district court, as part of its supervision of the auction of receivership assets, to conduct its own investigation, if Petitioner participates in the sale process.
2. Whether the *sua sponte* exercise of such coercive inquisitorial power: exceeds the Article III limits on the federal court's jurisdiction; unconstitutionally usurps the Article II authority of the SEC; and, unduly interferes with Petitioner's Fifth Amendment right to freely participate in the marketplace without undue governmental interference and in the scheduled auction on the same terms as any other participant.

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant-Appellant Below

- John J. Masiz

Respondent and Party to Whom Writ of Prohibition is Sought

- United States District Court for the District of Massachusetts

Respondents and Plaintiff-Appellant Below

- Securities & Exchange Commission (SEC)

Respondents and Defendant Below

- BioChemics, represented by Mark G. DeGiacomo the BioChemics' receiver in the district court

Respondents and Interested Parties Below

- Inpellis, Inc. and John Aquino, Chapter 7 Trustee of Inpellis, Inc.
- ADEC Private Equity Investments, LLC (putative intervenor and interested party in the district court)
- BioStrategies, Inc. (interested party in the district court)

Non-Participating Defendants or Interested Parties Below

- Craig Medoff (defendant in the district court)
- Gregory S. Kroning (deceased defendant in the district court)
- Phoenix Capital Resources, LLC (putative intervenor in the district court)

LIST OF PROCEEDINGS

United States Court of Appeals for the First Circuit
Nos. 19-2206

Securities and Exchange Commission, *Plaintiff-Appellee*, v. John J. Masiz, *Defendant-Appellant*, Biochemics, Inc., *Defendant-Appellee*, Gregory S. Kroning; Craig Medoff, *Defendants*

Date of Final Order Dismissing: September 11, 2020

United States Court of Appeals for the First Circuit
No. 20-1177

John J. Masiz, *Defendant-Appellant*, Biochemics, Inc.; Craig Medoff; Gregory S. Kroning, *Defendants*

Date of Final Order Dismissing: September 11, 2020

United States Court of Appeals for the First Circuit
No. 20-1729

In Re: John Masiz, *Petitioner*

Date of Order Denying Writ of Prohibition:
September 11, 2020

United States Court of Appeals for the First Circuit
No. 20-1896

John J. Masiz, *Defendant-Appellant*, Biochemics, Inc.; Craig Medoff; Gregory S. Kroning, *Defendants*

Date of Order Denying FRAP Rule 8(a) stay motion:
September 21, 2020

Supreme Court of the United States

No. 20A48

John Masiz, *Applicant* v. Securities and Exchange
Commission

Application for Stay: Not yet decided

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PETITION FOR AN EXTRAORDINARY WRIT OF PROHIBITION

John J. Masiz, Petitioner, on behalf of himself, respectfully petitions for an extraordinary writ of prohibition directed against the United States district court for the District of Massachusetts. In the alternative, Petitioner respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the related matters presently before the United States Court of Appeals for the 1st Circuit.



OPINIONS BELOW

The *BioChemics*' decision that is the subject of this writ, is published in, *SEC v. BioChemics, Inc. et al*, 435 F.Supp.3d 281 (2020). App.60a. The district court's denial of Petitioner's federal rule of civil procedure Rule 59(e) and 60(b) motion to reconsider or alter or amend the *BioChemics*' decision is not reported.¹ The opinion of the 1st Circuit Court of Appeals denying Appeals #19-2206 and #20-1177 and petition #20-1729 which challenged the legal and factual integrity of the *BioChemics*' decision, is an unreported summary decision.²

¹ App.26a.

² App.2a.



JURISDICTION

The judgment of a three-judge panel of the Court of Appeals for the First Circuit denying appeals #19-2206 and #20-1177 and petition #20-1729 was entered on September 11, 2020. The jurisdiction of this Court is invoked under the All Writs Act, 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1) allowing, before and after judgment, for writs of certiorari to review matters, pending before the courts of appeals.



STATUTORY PROVISION INVOLVED

15 U.S.C. § 78u(d)(5), the statute under which the SEC obtained the 2017 Consent Decree at issue and its requirement that Petitioner provide prospective investors with an agreed upon regulatory history disclosure.



STATEMENT OF THE CASE

1.a. On January 17, 2020, the district court issued its decision in *SEC v. BioChemics, et al*, 435 F.Supp.3d 281 (2020) (“*BioChemics*’ decision”). In the *BioChemics*’ decision, the district court ruled that the federal court, in the absence of a case or controversy, has the “inherent authority” to initiate and conduct its own investigation of Masiz’s compliance with an SEC obtained consent decree, irrespective of the fact that

the SEC had found Masiz to be in compliance, and to require Masiz to place the “evidence of compliance” in the “public record”.³

1.b. The federal court’s claimed authority, pursuant to its ruling in the *BioChemics*’ decision, to subject Masiz to coercive inquisitorial power, in the absence of a case or controversy between the parties to the consent decree, is being used to justify continued investigation of Masiz, making him a “pariah” in the marketplace,⁴ and preventing him from participating in the September 22, 2020 receivership auction of BioChemics’ intellectual property, on the same terms as any other bidder.⁵

1.c. On September 11, 2020 the 1st Circuit denied Masiz’s appeal of the *BioChemics*’ decision (Appeals #19-2206, #20-1177) as “moot”; summarily denied his Petition for a Writ of Prohibition (petition #20-1729); and, denied his September 2, 2020 FRAP Rule 8(a) motion to stay the auction proceedings, as “moot.”⁶

1.d. On September 17, 2020, Petitioner John J. Masiz (Masiz),⁷ pursuant to U.S. Sup. Ct. Rule 22

³ See, *BioChemics*’ decision at App.77a-81a; SEC’s 9-19-19 Report at App.220a-222a.

⁴ App.211a-216a

⁵ App.16a-17a.

⁶ App.2a.

⁷ Masiz was the Petitioner seeking a Writ of Prohibition directed against the district court, in *In Re Masiz*, Petitioner 1st Circuit Appeal #20-1729, and was the Defendant-Appellant in *SEC v. BioChemics, Inc. et al.*, 435 F.Supp.3d 281 (2020) (“*BioChemics* decision”), 1st Circuit Appeal #20-1926 and #20-1177. The *BioChemics*’ decision is at App.60a-90a.

and 28 U.S.C. § 2101(f), applied for a stay from Justice Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the 1st Circuit.⁸ Masiz requested a stay of the enforcement of the *BioChemics*' decision generally, and in particular, as regards the September 22, 2020 auction; and, a stay of the auction tainted by Masiz's *de facto* exclusion. The application for a stay was to enable Masiz a reasonable period of time to obtain a petition for a Writ of Prohibition directed against the district court or, in the alternative, a Writ of Certiorari regarding the 1st Circuit's September 11, 2020 peremptory denial of relief in appeals #19-2206, #20-1177, and petition #20-1729.

2. Masiz is the founder and major shareholder, as well as a former officer and director, of BioChemics, Inc. (BioChemics) which went into receivership in 2018 at the same time that BioChemics' former subsidiary Inpellis, Inc. (Inpellis) went into bankruptcy.⁹ Masiz wishes to freely participate in the marketplace without being subjected to the district court's assertion of its coercive inquisitorial power.¹⁰ In addition, Masiz wished to freely participate, on the same terms as any other bidder, in the intended joint sale by auction of the intellectual property assets of BioChemics and Inpellis by the Receiver and Bankruptcy Trustee.¹¹ The auction was scheduled for September 22, 2020, and

⁸ Supreme Court No. 20A48.

⁹ App.140a, 150a, 62a.

¹⁰ App.215a-216a.

¹¹ App.194a, App.123a.

the deadline for interested bidders to have registered for the auction was September 15, 2020.¹²

3.a. The district court has used and continues to use the *BioChemics*'s decision to support its claim of "inherent authority," to conduct its own investigation of Masiz's compliance with two consent decrees obtained by the SEC in 2004¹³ and 2017^{14,15}

3.b. The lower court has taken this position in the absence of any allegation by the SEC that Masiz has violated any of the consent decrees' terms.¹⁶ On the contrary, the SEC, has, in fact, determined, by a report dated September 19, 2020,¹⁷ subsequent to a court ordered review,¹⁸ that Masiz had complied with the 2017 decree's requirement that Masiz provide potential investors with an agreed upon regulatory history disclosure.¹⁹

3.c. The disclosure requirement was imposed, - pursuant to 15 U.S.C. § 78u(d)(5), as a non-punitive equitable remedy, that the parties intended not "unduly interfere with Masiz's ability to work." In the Joint Motion of the parties for approval of the 2017 consent

12 App.35a-36a.

13 App.62a.

14 App.104a.

15 App.170a-171a, 175a-176a, 198a, 200a, 201a-202a, 203a-204a, 204a.

16 App.212a, 195a, 198a, 201a.

17 App.220a.

18 App.103a.

19 App.222a.

decree, the SEC made it clear that the disclosure remedy was not intended to be an “undue” restraint on Masiz’s ability to function as a businessman:²⁰

The Court has the authority to order this type of conduct-based injunction under Section 21(d)(5) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. § 78u(d)(5)] (“Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors”). This injunction provides meaningful protection to investors or potential investors who, in the future, receive information from Masiz about his companies or their technology without imposing an undue restraint on Masiz’s ability to work or to discuss the technical aspects of his companies’ technology.

8-15-17 Joint Motion For Entry Of Proposed Final Judgment Against Defendant John J. Masiz.²¹

4.a. Masiz has since November, 2019 challenged the court’s assertion of “inherent authority” in his previous appeals (#19-2206, #20-1177) and petition for writ of prohibition to the 1st Circuit (petition #20-1729).²² In addition, on September 2, 2020, Masiz filed a FRAP Rule 8(a) motion to stay the scheduled

20 App.227a.

21 App.227a (emphasis added).

22 App.211a-216a, 194a.

September 22, 2020 “sale” of *BioChemics*’ intellectual property assets pending resolution of the matters then before the appellate court. On September 11, 2020, a three-judge panel of the 1st Circuit peremptorily: “denied” the petition, and “denied” the two appeals and the stay motion, as “moot”.²³

4.b. By its summary denial, the 1st Circuit left standing the district court’s *BioChemics*’ decision declaring it had the “inherent authority” to investigate, *sua sponte*, Masiz’s consent decree compliance, and left unaddressed, the continuing use by the district court of its purported authority to investigate Masiz’s compliance with the SEC obtained consent decrees.²⁴

5.a. Beginning in November, 2019, the federal court threatened Masiz with civil or criminal contempt if he did not file in the “public record” the extensive and sensitive compliance information Masiz submitted to the SEC for their review.²⁵

5.b. When the 1st Circuit, by order dated January 29, 2020 denied Masiz his January 28, 2020 request for a stay of the *BioChemics*’ decision pursuant to FRAP Rule 8(a), Masiz was compelled by the terms of the *BioChemics*’ decision to publicly file on January 30, 2020, under compulsion, the compliance documents previously submitted to the SEC.²⁶

23 App.2a.

24 App.215a-216a, 170a-171a, 175a-176a, 198a, 200a, 201a-202a, 203a-204a, 204a.

25 App.91a-101a.

26 App.198a-199a.

5.c. The district court found in its *BioChemics*' decision that its order forcing Masiz to "publicly" file the sensitive business information regarding his compliance would cause Masiz "harm" that is "irreversible."²⁷ Masiz testified that the district court's "public" investigation of Masiz has made him a "pariah" in the marketplace.²⁸

5.d. Despite the harm, the district court continues to subject Masiz to coercive inquisitorial power. Although the court has had the compliance information submitted to the SEC since Masiz was compelled to file the compliance documents in the "public record" on January 30, 2020, the court has indicated its investigation regarding Masiz's compliance with the 2017 disclosure requirement, has not closed, but is continuing. At the July 10, 2020 auction approval hearing when pressed, all the court would say is: ". . . I've got [the compliance documents], and so far . . . I haven't said that there's a failure of compliance."²⁹

5.e. At the July 10, 2020 auction approval hearing, the district court repeated several times its threat to expand the scope of its investigation into Masiz's consent decree compliance to include not only the 2017 disclosure requirement but both the 2004 and 2017 consent decree injunctions against violating the securities laws as well, if Masiz participated in the *BioChemics*' auction.³⁰ The district court stated:

27 App.88a.

28 App.215a-216a.

29 App.199a.

30 App.170a-171a, 175a-176a, 198a, 200a, 201a-202b, 203a-204a, 204a.

I have a now published decision with regard to the authority to require that he respond if I've got questions about whether he's obeying the injunction, and he's not barred from participating in the sale. But at a very fundamental level, he's not similarly situated to I hope the other potential bidders because he's under two injunctions not to violate the securities laws and to make – if he's raising money, to make certain disclosures. So if he makes – if he complies with the injunction, then he's not disqualified.

. . .

And just to explain it, if Mr. Masiz is a bidder – an organization and a company that Mr. Masiz is associated with is a bidder and it's not the highest bidder, doesn't win, prevail in the auction, then these issues may be moot. If he does prevail in the auction, at the moment – and Judge Panos tells me that this is familiar in bankruptcy proceedings – this would be essentially an affiliate or insider who might be required to make more disclosures. Some of those will come, if I understand it right, in the qualification phase even before the bidding, but it is foreseeable that I will want to see again, if Mr. Masiz raises money, whether the required disclosures were made. And if you showed that the injunction was obeyed and the required disclosures were made and people were given accurate, complete, not misleading information and they invested and Mr. Masiz has the money or one of his entities has the money, properly,

then if he's the winning bidder and everything else is in order, he will I guess get the property. But you're right, because he's subject to the [2004 and 2017] injunctions, including mine, there are questions that may need to be answered.

7-10-20 Hearing (Wolf, J.)³¹

5.f. At the July 10, 2020 auction approval hearing, the district court repeated its statements of mistrust of the SEC and Masiz that, it had expressed in its *BioChemics*' decision³² as a result of Inpellis' creditor ADEC's accusation that the SEC was granted its senior priority lien on BioChemics' and Inpellis' intellectual property by a court approved 2016 settlement as a result of "collusion" between the SEC and Masiz. At the hearing, it summarized why it did not "always agree" and did not "exclusively rely" on the SEC:

As you may have noticed going back to when I didn't just sign off on the consent judgment, I don't always agree with the SEC. . . And, just to be clear about this, ADEC charges that the SEC was complicit in a fraudulent conveyance, taking a lien, dropping – a different unit, dropping an investigation of the documents submitted for the proposed IPO. So I have – and I expect the SEC to analyze matters carefully, and that's why I had you submit the documents in the first instance to the SEC, but I'm not relying exclusively on the SEC's judgment.

³¹ App.198a, 200a.

³² App.62a, 79a, 81a.

7-10-20 Hearing (Wolf, J.)³³

5.g. The district court made it clear at the 8-27-20 evidentiary hearing regarding the proposed auction of the *BioChemics*' intellectual property assets that any investigation it conducts will require Masiz to produce the "evidence of [his] compliance and do that on the public record."³⁴

5.h. The district court's statements of mistrust of the SEC because of ADEC's accusations are in contrast to the lower court's statements made in its March 18, 2018 denial of ADEC's motion to intervene and/or to modify the *BioChemics*' judgment which were based on the same accusation that the SEC lien grant was a "fraudulent conveyance" obtained through "collusion":

[I]t is not inevitable that ADEC would prevail [on its "fraudulent conveyance" claim] . . . SEC's ending its investigation of the Inpellis [IPO] registration statements that the ADEC loan financed may have been valuable consideration to Inpellis . . . So in view of all these considerations, I find that permissive intervention is not appropriate. . . . ADEC argues that even if it's not allowed to intervene as a party, it should be granted relief from judgment. I find that is not appropriate. . . . In this case ADEC is not a judgment creditor. More importantly, ADEC made an unsecured loan to Inpellis. It agreed to a junior security interest in the intellectual property of Inpellis

33 App.201a-202a.

34 App.12a.

knowing that the SEC had a senior security interest. ADEC did not promptly seek relief from judgment. . . . The SEC judgment may at some point in the future jeopardize ADEC's right to recover, but it did not have a protectable security interest at the time of the modified judgment in this case, spring of 2016. Collusion would be challenging to prove. If the SEC and ADEC were each victimized by improper conduct by BioChemics, there's no good reason for this court in this case to elevate ADEC's interests over the SEC's, a government body mandated to protect shareholders from fraud.

3-18-18 *BioChemics' Hearing* (Doc. #411) Tr. p. 173, 176-177 (emphasis added).

5.i. The district court's statements of mistrust of the SEC and Masiz are in contrast to the statements to the court made by its appointed Receiver in response to ADEC's August 13, 2019 Opposition to the Receiver's motion for approval of the sale by auction of the BioChemics' assets supported by a "stalking-horse" bid by Masiz's company BioPhysics. That proposed "stalking-horse" bid by BioPhysics committed Masiz's company to a multi-million dollar back-up bid.³⁵ ADEC's opposition again charged, as it had done in 2017 in support of its motion to intervene and modify the judgment, that the SEC and Masiz had "colluded" in the April 14, 2016 settlement in which Inpellis granted the SEC a senior interest in Inpellis' intellectual property

³⁵ ADEC August 13, 2020 Opposition to Receiver's proposed bidding procedures in connection with a sale of the assets (*BioChemics' Doc. #548*).

assets.³⁶ On August 29, 2019 the Receiver moved to strike ADEC’s opposition to the proposed sale.³⁷ The Receiver, in its motion to strike, stated ADEC’s opposition was a “bald attempt to improperly interfere with the Receiver’s proposed sale” of the property “in order to leverage” Biophysics “in the Inpellipsis [bankruptcy] proceeding,” “extortionate tactics” that the district court “should not condone.”³⁸ Despite these filings, the district court, based on the accusations by ADEC, declared the Receiver’s liquidation plan “moot” and directed the Receiver and Trustee, with ADEC’s assistance conduct an investigation of Masiz and his company regarding ADEC’s accusations.³⁹

6.a. Subsequent to the July 10, 2020 auction approval hearing, Masiz filed an “Objection” to the sale going forward without Masiz being assured of his right to freely participate in the bidding process on the same terms applicable to every other bidder.⁴⁰

6.b. Masiz filed an extensive Affidavit and evidence demonstrating that the reasons given by the district court in the *BioChemics*’ decision for exercising its purported “inherent authority,” were without factual justification.⁴¹

36 *Id.*

37 Receiver’s August 29, 2019 Motion to strike ADEC’s Opposition (*BioChemics*’ Doc. #553).

38 *Id* at p. 8.

39 App.102a-103a.

40 App.8a, 16a-17a.

41 App.9a-10a,12a, 18a, 71a, 78a-79a, 81a, 201a-203a: There were three factual assertions cited by the district court that caused it

6.c. The purported basis for the district court's ruling in its *BioChemics*' decision that it had "inherent" investigatory power over Masiz, centered around the court's belief that Masiz "may" have or "might" be violating the 2017 consent decree because the district court believed that it could not trust the SEC or Masiz in view of Masiz's regulatory history and the accusation by Inpellis creditor ADEC, that the SEC and Masiz had supposedly "colluded" in a 2016 court approved settlement that granted the SEC a senior priority lien in BioChemics and Inpellis intellectual property.⁴²

7.a. The district court's *BioChemics*' decision relied on the court's mis-statement of what the SEC had found in its report about Masiz's compliance. The dis-

not to trust the SEC and to suspect Masiz "may" have or "might" be violating the consent decree: (1) the assertion that the SEC had "seven" out of eighty unaddressed "concerns" regarding Masiz's compliance (App.72a-73a), when it identified only a "single instance" (App.222a) that was subsequently shown by Masiz to have been properly addressed (App.217a-218a); (2) the district court had "found" Masiz violated the 2004 consent decree (App.78a, 12a), when no such finding had ever been made (App.106a-107a); and, (3) non-party ADEC's accusation that the SEC and Masiz had "colluded" in the 2016 court approved settlement that granted the SEC a senior priority lien in the BioChemics and Inpellis intellectual property assets (App.78a, 79a, 81a, 201a-202a), when the record, known to all the respondents in this matter, removes all doubt that the settlement provided substantial consideration to Inpellis, including ending the existential threat of an ongoing SEC investigation concerning Inpellis' IPO registration statements and that the strategy to pursue the "global resolution" of the protracted dispute was enthusiastically endorsed by Inpellis' CEO and its highly experienced specially retained outside counsel (App.18a).

42 App.71a, 78a-79a, 81a, 201a-203a.

trict court in its decision mis-quoted the SEC’s report resulting in the suggestion that the SEC had unaddressed “concerns” about “seven instances” out of eighty solicitations by Masiz that the required disclosure was “buried” in a due diligence dropbox link.⁴³

7.b. Based on the district court’s mis-statement regarding what the SEC had found about Masiz’s compliance with the 2017 consent decree’s disclosure requirement, the lower court ruled it was necessary to compel Masiz to publicly file his compliance documentation because, according to the court, “there is reason to be concerned that at least some potential investors did not receive, in proper form, the information Masiz was required to disclose.”⁴⁴

7.c. The court believed, a “[p]ublic filing may rectify the purported problem [that “some” of the potential investors had not been provided the disclosure] and give any actual investors, particularly, information that may be material concerning how they wish to proceed.”⁴⁵

7.d. The court concluded that “If, as Masiz suggests, the information in the public filings causes others to be wary of doing business with Masiz, the judgment will have served its intended purpose . . . ”.⁴⁶

7.e. The court’s material mis-statement about the supposed existence of “seven instances” of potential investors who were supposedly not properly provided

43 App.72a-73a.

44 App.83a.

45 *Id.*

46 *Id.*

the required disclosure was rendered that much more problematic by the district court completely omitting the SEC's finding that Masiz had complied with the disclosure requirement.⁴⁷

7.f. In contrast with the district court's mis-statement that the SEC had "concerns" about "seven" instances, the SEC in its September 19, 2019 report determined that there was only a "single instance" out of eighty where the SEC was concerned that a potential investor was not directed to the disclosure as the other investors had been but only received the dropbox link to due diligence material that contained the disclosure.⁴⁸

7.g. The "single instance" that the SEC expressed a concern was immediately addressed by Masiz by his submitting the documentation to the SEC demonstrating that that one investor was directed to the disclosure in the same manner as the other potential investors that the SEC had determined was sufficient.⁴⁹

8.a. Masiz made a number of attempts to have the district court acknowledge and correct its material mis-statement regarding the SEC's compliance finding, as well as acknowledge the lack of factual justification regarding the two other asserted reasons at the core of its decision.⁵⁰

47 App.72a-73a.

48 App.222a.

49 App.217a-218a.

50 App.28a, 202a-203a.

8.b. The district court has exhibited indifference to the factual underpinnings of its ruling that it has the “inherent authority” to investigate Masiz irrespective of what the SEC has determined.⁵¹

8.c. At the August 27, 2020 joint “evidentiary hearing” held by the district and bankruptcy courts regarding the Receiver and the Bankruptcy Trustee’s motions to approve the sale and related motions, and the Objections filed by Masiz and a BioChemics’ creditor BioStrategies, both court’s allowed BioStrategies the opportunity to conduct an extensive examination of the Trustee and Receiver.⁵² However, unlike the latitude granted BioStrategies, and contrary to the plain words of the courts’ 8-20-20 Joint Order scheduling the evidentiary hearing that directed “any party” “will have such an opportunity”,⁵³ both court’s barred Masiz from conducting any examination or presenting any evidence in support of his Objection.⁵⁴

8.d. The district court ruled that any examination or evidence presented by Masiz was, in the words of the district court, “not relevant” and a “waste of time.”⁵⁵

8.e. Citing its *BioChemics*’ decision, the district court denied Masiz’s Objection to the auction going forward without Masiz being assured that he could

⁵¹ App.201a-204a, 17a-20a.

⁵² App.115a-116a.

⁵³ App.24a.

⁵⁴ App.115a-116a, 119a-128a, 132a-135a, 136a-138a.

⁵⁵ App.5a, 19a.

participate on the same terms as every other bidder and not be singled out for an investigation.⁵⁶

8.f. After barring Masiz from examining witnesses or presenting evidence at the August 27, 2020 evidentiary hearing, the two courts then closed the hearing, and issued orders on August 27, 2020 that was memorialized by the district court on September 3, 2020, approving the scheduled September 22, 2020 auction sale.⁵⁷

8.g. On September 16, 2020 Masiz filed a notice of appeal of the order approving the auction (Appeal #20-1896). On September 18, 2020, Masiz filed a FRAP Rule 8(a) stay motion to the Single Judge requesting a stay of the September 22, 2020 auction pending resolution of Appeal #20-1896 or, in the alternative, pending Masiz obtaining relief in the Supreme Court in the form of a Writ of Prohibition or Certiorari. On September 21, 2020, a three-judge panel of the First Circuit peremptorily denied Masiz's FRAP Rule 8(a) stay motion.



REASONS FOR GRANTING THE PETITION

The district court's use of its *BioChemics*' decision to: target Masiz and subject him to an ongoing coercive "public" investigation; single him out for special treatment, if he participated in the bidding process – treatment that is outside the terms and conditions

⁵⁶ App.4a-5a, 8a-10a, 12a-13a, 16a-17a.

⁵⁷ App.115a-116a.

applicable to every other bidder; and barring him from examining witnesses or presenting evidence in support of his Objection, constitutes a fundamental deprivation of Masiz’s rights of citizenship. The assertion of coercive investigatory power against Masiz regarding compliance with the SEC obtained consent decrees, in the absence of a case or controversy between Masiz and the SEC, violates the Article III limits on judicial adjudicatory authority laid out by this Court in *United States Parole Comm., Inc. v. Geraghty*, 445 U.S. 388 (1980) and the “party presentation principle” recently re-affirmed in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020); and, the limits on federal court jurisdiction over consent decrees annunciated in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994). The assertion of such inquisitorial power by a federal court over SEC obtained consent decrees unconstitutionally usurps the Article II authority of the SEC – a usurpation of a co-equal’s authority famously decried in *Young v. U.S. ex rel Vuitton Et Fils SA*, 481 U.S. 787, 816-824 (1987) (Scalia, concurring) and an anathema to the fundamental organizing principles of our republic re-affirmed by the Justices in *Patchak v. Zinke*, 138 S.Ct. 897, 904-905 (2018). The usurpation of the SEC’s authority regarding the disclosure requirement in the 2017 consent decree obtained by the SEC pursuant to its authorizing statute, 15 U.S.C. § 78u(d)(5) also directly contravenes this Court’s recent decision in *Liu v. SEC*, 140 S.Ct. 1936 (2020) prohibiting the use of the equitable remedies, authorized by the statute for the protection of investors, as an “instrument of punishment” against the defendant. In addition, preventing Masiz from participating in the evidentiary hearing, denied him his right as a citizen under the 5th Amendment not

to have his liberty and property taken without substantive and procedural due process.

In the face of such a bald assertion of extra-judicial power by the federal court and the failure by the 1st Circuit to exercise any oversight responsibility in the face of such an unadorned abuse of power, Masiz has only one alternative. He must petition the Supreme Court for extraordinary relief, under 28 U.S.C. § 1651, for a Writ of Prohibition directed against the district court or, in the alternative, a Writ of Certiorari under 28 U.S.C. § 1254(1) directed to the 1st Circuit, and seek interim relief from the Single Justice in the form of a stay of the relevant proceedings below, under 28 U.S.C. § 2101(f) and S.Ct. Rule 22.

I. WRIT REMEDIES CLEAR ABUSES OF POWER OTHERWISE UNADDRESSABLE

The extraordinary writ of prohibition is necessitated by the district court's bald assertion of coercive inquisitorial power against Masiz, which it wields as a cudgel against Mr. Masiz's free participation in the marketplace as well as the intended auction process. The exercise of such extra-judicial power, regardless of whether the district court's questions about Masiz's compliance have a reasonable basis, exceeds Article III limits and unconstitutionally usurps the authority of the SEC. The extraordinary relief requested is the only practical means available to confine the district court to the lawful exercise of its prescribed jurisdiction and allow Masiz to exercise his Fifth Amendment right to liberty and property i.e. pursue his business interests without undue governmental interference, and to freely participate in the auction of the BioChemics' assets on the same terms as other participants.

This Court in *Cheney v. U.S. Dist. Ct. For Dist. of Columbia*, 542 U.S. 367 (2004) discussed the nature and purpose of the writs and summarized the factors that should be taken into account in considering a petition requesting such extraordinary relief.⁵⁸ This Court noted that the historic use of the writs was to confine the lower court within its jurisdiction and remedy a usurpation of authority. *Id.* at 390 (“judicial usurpation of power” is an “exceptional circumstance[]” allowing the Court of Appeals to “exercise its power to issue the writ” – “Court of Appeals must . . . ask, as part of its inquiry, whether the district court’s actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties”). *See also, United States v. Tsarnaev*, 780 F.3d 14, 17-18 (1st Cir. 2015) (“It is reserved for the immediate correction of acts or omissions by the district court amounting to a usurpation of power”); *In Re Providence Journal Co., Inc.*, 293 F.3d 1, 9 (1st Cir. 2002) (“[T]he historic use of mandamus [is] as a means to check ostensible judicial usurpations of power”); and, *In Re Pearson, et al, Petitioners*, 990 F.2d 653, 656 (1st Cir. 1993) (“a traditional use of prerogative writs has been to confine inferior courts to the lawful exercise of their prescribed jurisdiction . . . This use is customarily accomplished by means of mandamus or prohibition . . . Such writs afford a mechanism for immediate correction of acts or omissions amounting to an usurpation of power”).

This Court in *Cheney* described the three conditions that a petition should satisfy: no adequate remedy

⁵⁸ The common-law writs are codified at 28 U.S.C. § 1651(a).

through the appeals process; entitlement is clear; and the equities favor issuance:

As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue. First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires, a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney, supra at 380-381. *See also, In Re Bulger, Petitioner*, 710 F.3d 42, 45 (1st Cir. 2013) (“A petitioner for mandamus relief must . . . demonstrate that he has no other adequate source of relief; that is, he must show irreparable harm . . . A petitioner must demonstrate that, on balance, the equities favor issuance of the writ”); *United States v. Tsarnaev, supra* at 16 (“To compel the district court to change course, a petitioner must show not only that the district court was manifestly wrong, but also that the petitioner’s right to relief is clear and indisputable, irreparable harm will result, and the equities favor such drastic relief”); and, *In Re Pearson, supra* at 656 (“To ensure that the writ’s use is appropriately rationed, we have, for the most part, insisted that a writ-seeker limn some special risk of irreparable harm, together with clear entitlement to the relief requested”). Irreparable harm

can be demonstrated if an “end of the case appeal” would be “ineffectual or leave legitimate interests unduly at risk”.⁵⁹ Clear entitlement can be shown by demonstrating that the “challenged order is palpably erroneous.”⁶⁰

This Court pointed out that “[t]hese hurdles, however demanding, are not insuperable.”⁶¹ It explained that “[t]his Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by embarrass[ing] the executive arm of the Government, or result in the intrusion by the federal judiciary on a delicate area of federal-state relations.”⁶²

Under these standards, it cannot be gainsaid that the need for relief is well established. The district court’s exercise of coercive inquisitorial power clearly exceeds the Article III limits imposed on the Judicial branch and directly co-opts the Article II authority of the SEC. In addition, the court’s use of its extra-judicial authority irreparably injures Mr. Masiz’s right to freely participate in the marketplace and participate in the upcoming auction without being subjected to an unconstitutional inquisition by the court – an abuse of judicial power that cannot be remedied through the normal appeals process.

59 *In Re Pearson*, *supra* at 656.

60 *Id.*

61 *Cheney*, *supra* at 380-381.

62 *Id.*

II. DISTRICT COURT'S EXERCISE OF COERCIVE INQUISTORIAL POWER CLEARLY EXCEEDS ARTICLE III LIMITS & USURPS SEC'S ARTICLE II AUTHORITY

Any analysis of the exercise of judicial power must start with the fundamental recognition that “Federal courts are courts of limited jurisdiction” and “possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994). Any exercise of the coercive authority of the federal court that does not come within this constitutionally mandated limit to its jurisdiction is extra-judicial, capable of inflicting substantial harm, and must be addressed.

A. Judicial Power Limited to Adjudicating Party Disputes

“Article III of the Constitution limits federal ‘Judicial Power’, that is, federal-court jurisdiction, to ‘Cases’ and ‘Controversies.’” *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 395 (1980). This Court explained, this limitation restricts the role of the Judge to adjudicating disputes between parties in an adversarial context:

Th[e] case-or-controversy limitation . . . limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process, and it defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

U.S. Parole Comm. v. Geraghty, supra at 395-396 (emphasis added).

In short, Federal Courts are courts of limited jurisdiction restricted to adjudicating cases or controversies between parties.

B. Judges are Supposed to Be Adjudicators – Not Inquisitors

In *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (May 7, 2020) this Court affirmed that under our system Judicial power is limited to adjudicating disputes between parties where the courts “wait for cases to come to them” and “decide only questions presented by the parties” (“Party Presentation Principle”) – Judges are adjudicators, not inquisitors who “sally forth each day looking for wrongs to right”:

In our adversarial system of adjudication, we follow the principle of party presentation.

... [I]n both civil and criminal cases, in the first instance and on appeal . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

[. . .]

Courts are essentially passive instruments of government. . . . They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.

United States v. Sineneng-Smith, supra at 1579 (emphasis added).

C. Constitution Prohibits Judicial Usurpation of Art. II Authority

Montesquieu's concept that the governmental functions of law making; law enforcing; and the adjudication of disputes must be separate and distinct resulted in the founder's decision to divide power between the Article I (Legislative), Article II (Executive), and Article III (Judicial) Branches of Government. This essential separation of Governmental power requires that each Branch not acquiesce in the usurpation of its power by any of the other Branches – a limiting principle of fundamental significance to our Constitutional framework in general, and, in particular, to the exercise of judicial power.⁶³ *Young v. U.S. ex rel. Vuitton Et Fils SA*, 481 U.S. 787, 816-824 (1987) (Scalia, concurring) (“The Judicial power is the power to decide . . . who should prevail in a case or controversy . . . [it] does not include the power to seek out law violators in order to punish them – which would be quite incompatible with the task of neutral adjudication . . . [This principle] is a carefully designed and critical element of our system of Government . . . since there is no liberty if the power of judging be not separated from the legislative and executive powers”) (citing “1 Montesquieu, *Spirit of the Laws* 181, as quoted in The Federalist No. 78, p. 523 (J. Cooke ed. 1961)”).

⁶³ *McCulloch v. State of Maryland*, 17 U.S. 316, 336 (1819) (“[I]f the powers derived from [the Constitution] are assignable by the Branches than “we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers”).

D. District Court Constitutionally Barred from Investigating Masiz’s Compliance with Consent Judgments & Securities Laws

In accordance with the constitutional limitations on the federal court’s power over cases or controversies and the prohibition against judicial usurpation of Article II authority, the federal court does not have any “inherent” authority to police the SEC-obtained Consent Decrees or investigate *sua sponte* whether Masiz is in compliance with either the injunction against violating the securities laws or the disclosure requirement obtained pursuant to 28 U.S.C. § 78u(d)(5).

The retained jurisdiction regarding the enforcement of the consent decree is limited to the judge’s adjudicatory function to resolve disputes between the parties concerning compliance with the consent decree’s terms. “*Kokkonen* . . . stands for the proposition that district courts enjoy no free-ranging ancillary jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order.” *Ricci v. Patrick*, 544 F.3d 8, 22 (1st Cir. 2008). The court can retain jurisdiction over the settlement with the consent of the parties only “by incorporating the terms of the settlement agreement in the order” and “in that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.” *Kokkonen*, *supra* at 381. “[A] district court may possess inherent authority to address violations of an order where it retains jurisdiction in a separate provision but only when the order itself is violated.” *Ricci v. Patrick*, *supra* at 22. It cannot reopen the decree and issue orders “absent a

[“sustainable”] showing . . . that the terms of the . . . [decree] itself had been violated.” *Ricci v. Patrick*, *supra* at 22. The judicial power under such retained jurisdiction is solely limited to the resolution of any disputes that may arise between the parties concerning a breach of settlement obligations. *See, F.A.C., Inc. v. Cooperativa De Seguros De Vida De Puerto Rico*, 449 F.3d 185, 190 (1st Cir. 2006)(emphasis added)(Court ruled that an amended consent judgment satisfied the *Kokkonen* standards because: it “incorporate[d] the terms of the settlement and, even more plainly, express[ed] by its very action in adjudicating a dispute about those terms an intention to retain jurisdiction to resolve disputes about the settlement”).

Kokkonen and its progeny therefore make clear that any expression of the district court’s judicial power pursuant to its retained jurisdiction to enforce the terms of the 2017 injunction was solely restricted to the adjudication of any disputes between the parties regarding Masiz’s compliance. This is in keeping with the basic tenets of our constitutional system, the role “assigned the judiciary in [our] tripartite allocation of power,” and the central role parties occupy in our adversary system.

E. District Court Has No Authority to Do What the SEC Is Barred from Doing Under 15 U.S.C. § 78u(d)(5)

In *Liu v. SEC*, 140 S.Ct. 1936 (2020) this Court affirmed that the authorizing statute at issue here, 15 U.S.C. § 78u(d)(5),⁶⁴ allows the SEC to “seek” from

⁶⁴ 15 U.S.C. § 78u(d)(5) provides that “in any . . . proceeding brought . . . by the SEC, the SEC “may seek, and any Federal

the federal court (not the court to seek in the first instance) only equitable remedies for the protection of investors – remedial powers that should not be “convert[ed]” “into an instrument for [] punishment” of the defendant:

In interpreting statutes like § 78u(d)(5) that provide for equitable relief, this Court analyzes whether a particular remedy falls into those categories of relief that were typically available in equity.

[. . .]

[E]quity courts . . . did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers.

[. . .]

[R]emedy [should be fashioned] to avoid converting a court of equity into an instrument for [] punishment . . .

Liu v. SEC, supra at 1942, 1944, 1945 (emphasis added). *Liu* is a clear proscription against the SEC using its power to seek “equitable remedies” under the authorizing statute as a guise to impose punishing burdens on a defendant. In the face of that, it would be anomalous indeed, for the lower court to be allowed to usurp the SEC’s authority so the court can engage in conduct the SEC cannot.

Under our system of justice, the SEC, as the Article II federal agency charged with enforcement of the securities laws and the party to the consent

court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors” (emphasis added).

decree authorized by statute to seek certain “equitable remedies” for the redress of violations is the proper party to assert an alleged breach by Masiz. In the absence of any such assertion by the party adverse to Masiz, the district court has no retained authority to police the settlement on its own volition, check out its own whims or suspicions, or institute its own investigation regarding compliance. In the absence of any case or controversy between the parties and in the face of the SEC’s finding (resulting from a court ordered review) that Masiz was, in fact, in compliance, the court’s claimed authority to investigate Masiz’s compliance with not only the disclosure requirement, but with the securities laws in general, is devoid of even the pretense of constitutional authority. The court’s naked expression of extra-judicial power in derogation of the constitutional restrictions to judicial authority mandates extraordinary relief.

III. THE *BIOCHEMICS*’ DECISION HAS NO PRECEDENTIAL SUPPORT

The district court based its ruling that it possessed “inherent authority” to initiate and conduct its own investigation of consent decree compliance by a defendant on three cases: The Supreme Court’s opinion in *Peacock v. Thomas*, 516 U.S. 349, 356 (1996); and, two Second Circuit cases, *Berger v. Heckler*, 771 F.2d 1556 (1985) and *EEOC v. Local 580 Intern. Ass’n of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588 (1991).⁶⁵ The three cited cases do not support the district court’s proposition.

⁶⁵ App.79a-80a.

What the district court misapprehends, as detailed above in Section II(A)-(E) is that the cases it cites do not, and cannot, support the district court's legal proposition that federal courts have "inherent authority" to conduct their own consent decree investigations. To do so would change judges from adjudicators to inquisitors in violation of fundamental Constitutional principles limiting the federal court's jurisdiction to "cases or controversies" between parties. Each of the cases cited by the district court make the point that federal court jurisdiction, ancillary or otherwise, is constitutionally limited to "claims" involving "cases or controversies" between parties.

In *Peacock v. Thomas, supra*, the Supreme Court in ruling that a federal court does not have ancillary jurisdiction over an additional action to enforce a money judgment against a new party, made it clear that ancillary jurisdiction applies only to "claims" that have "factual and logical dependence on the primary lawsuit." *Id.* at 355 (emphasis added). "The court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims." *Id.* (emphasis added). "The basis of the doctrine of ancillary jurisdiction is the practical need to protect legal rights or effectively to resolve an entire logically entwined lawsuit." *Id.* (emphasis added).

The 2nd Circuit cases cited by the district court which arose out of disputes between the parties to consent decrees, also make the point that ancillary jurisdiction only applies to "cases or controversies" regarding the "claims" of the parties. Both *Berger v. Heckler, supra*, and *EEOC v. Local 580, supra* dealt with the district court's adjudication of contempt actions where the plaintiff parties to the consent decree

claimed that the defendants were not in compliance with the decrees.

The court does not cite any other cases for its proposition because none exist. The only case that stands for the proposition that a federal court has the “inherent authority” to police a consent decree and follow up on its suspicions through the assertion of coercive inquisitorial power, is the *BioChemics*’ decision at issue in this matter.

IV. EXTRAORDINARY RELIEF NECESSITATED BY EXIGENCY OF ABUSE

The only means available to Masiz to protect himself from the district court’s use of the *BioChemics*’ decision as the basis for its abuse of its power is the extraordinary writ of prohibition. In light of the extensive record documenting the unjustified and unconstitutional targeting of Masiz by the district court that continues to brand him a “pariah” in the marketplace and wrongly strips him of his right to bid on the estates’ assets, the equities, without question, favor issuance of the writ. It should also be taken into account that the exercise of extra-judicial power at issue here goes to the core principles of our adjudicatory system and the separation of powers among the three co-ordinate branches of government. Therefore this Court has an “institutional interest” in “employ[ing]” the issuance of a writ “to resolve issues which are both novel and of great public importance.” *In Re Providence Journal Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002).

A review of the Constitutional principles and Supreme Court precedent laid waste by the *BioChemics*’ decision should give rise to an overarching concern:

the *BioChemics*' decision and its constitutionally noxious view of judicial power untethered to our republic's foundational principles is now circulating in the American legal blood stream – a circumstance that threatens the liberty and property of all of our citizens and compels remedial action by this Court.

It is of paramount importance to the maintenance of the integrity of our system, to affirm that our judicial system, unlike others, achieves justice by adjudicating disputes between parties, and our judges do not "sally forth each day looking for wrongs to right."



CONCLUSION

For these reasons, Petitioner respectfully requests this Court grant its Petition for a Writ of Prohibition directed against the district court prohibiting the federal court from initiating and conducting its own investigation of whether Masiz has complied with the terms of the 2004 or 2017 injunctions obtained by the SEC. Such extraordinary relief is compelled so that Masiz may freely participate in the marketplace, and the auction of the BioChemics' assets, without being subjected to the unconstitutional application of coercive extra-judicial power. In the alternative, Petitioner respectfully requests that this Court treat this Petition as a Petition for a Writ of Certiorari so this Court can review and adjudicate the related matters before the 1st Circuit.

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