20-5009

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

CURTIS WIGGINS,
Pro Se-Petitioner

VS.

GOLDEN CORRAL CORPORATION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(No. 19-20374)

PETITION FOR WRIT OF CERTIORARI

Curtis Wiggins
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Pro-Se Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether those lower courts, decision are reversed if Defense Attorney for Respondent, perpetrated-professional misconduct to defeat Petitioner; supported, only by evidence of Fraud, and Fraud On The Court?

2. Whether, factually, there were, sufficient, evidence to support Petitioner's Defamation Claim and disregarded by the lower courts, partiality for the Respondent?

3. Whether, Petitioner's Failure To Promote Claim, administrative remedies were exhausted if Equitable Tolling applies, due to extenuating circumstances?

LIST OF PARTIES

All parties ***do not*** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RESPONDENT

GOLDEN CORRAL CORPORATION

David L. Woodard
POYNERSPRUILL LLP
NC State Bar No. 19343
P.O. Box 1801
Raleigh, NC 27602-1801
dwoodard@poynerspruill.com

ATTORNEY FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals, appears at Appendix A to the petition and is unpublished; found on the bottom of the first page.

JURISDICTION

Case from **federal court**:

The date on which the United States Court of Appeals decided my case was February 3, 2020.

- ❖ No petition for rehearing was timely filed in my case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Respondent failed to respond to Petitioner's EEOC Charge as a result Fraud was instituted

Judge Carlton recited the well-known Mississippi rule on establishing the elements of fraud:

> ¶18. The general rule is well settled that fraud will not be presumed but must be affirmatively proven. *Taft v. Taft*, 252 Miss. 204, 213, 172 So. 2d 403, 407 (Miss. 1965). The Mississippi Supreme Court has held that in order to establish fraud, the burden is on the proponent to prove the following elements:
>
> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

On November 18, 2016, David L Woodard (Respondent's Counsel), Defense Counsel for Golden Corral Corporation (Respondent), drafted and submitted a Position Statement to an administrative agency (EEOC) in the State of Texas, City of Houston. Woodard's office and place of business is Poyner Spruill, P.O. Box, 1801 Raleigh, NC 27602-1801; there, a resident attorney, only authorized to practice law in the State of North Carolina. Further when the Position Statement was submitted, Respondent's Counsel was *not retained, not-hire, not a resident attorney of the Texas Bar Association, not an employee of Respondent, no Texas, Sponsored Law Firm*, and absent a *pro hac vice admission*. Conclusively, Respondent's Counsel, claims that information for its conception of the Position Statement (submitted to EEOC), obtained from ***Texas employees*** of Respondent's Restaurant, during his investigation was "absolute-privilege!" In contrast, **Rule 503;** Texas Rules of Evidence: Article V. Privileges; *Lawyer–Client Privilege*, states:

> a. 2(B) A "client's representative" is: any other person who, to facilitate the rendition of professional legal services to the client, makes or ***receives a confidential communication while acting in the scope of employment for the client***; and (3) A "lawyer" is a person ***authorized***, or who the client reasonably believes is ***authorized***, to practice law in **any state or nation**.

Respondent's Counsel has committed, perjury in open court, throughout this case. According to Rule 503. The conception of the Position Statement is not "absolute-privilege!" Thus, Respondent's Counsel had ***no*** legal authorization to speak or represent, ***officially***, on Respondent's behalf (EEOC). **In part, Respondent's Counsel's dishonest act, his hyperbolic, fabricated, assertions, influenced EEOC's decision to terminate their investigation to Petitioner's claim.** ROA.317. *By default, Respondent failed to respond to Petitioner's EEOC*

Charge. Conclusively the information acquired, submitted by Respondent's Counsel, must be construed, illegally obtained, invalid, defamatory and/ or, therefore, void as it relates to Petitioner's claim; and non-privileged with no leniency or exceptions to its falsity, deception, fraud, and manipulation of the facts. Which should have been recognize by the lower court as inadmissible (the Position Statement). Then, dismissed when raised at the District Court, January 18, 2019, Hearing: Request for Entry of Default pursuant to Federal Rule of Civil Procedure 55, on Respondent for failing to appear, plead or otherwise defend the suit in a timely manner; by Petitioner.

Some 2 ½ years, removed from the EEOC filing, Respondent's Counsel, *colluded* with Texas, local, counsel; GERMER, PLLC, Senior Counselor: Elizabeth Anne "Lisa" Massey, and David L. Merkley, who had been the attorneys for Respondent since February 23, 2018; to then join the party. By applying for a *pro hac vice* admission; to build a defense, premised on the information, gathered by Respondent's Counsel. It was January 18, 2019 when Petitioner realized Respondent Counsel's Unauthorized Practice of Law, accordingly (Rule 19). ROA.949. The trial court Judge, Granted pro hac vice admission before HEARING, despite opposition to the admission, filed.ROA.210-ROA.219 and issue raised in court.ROA.954, or ascertaining any and all information pertinent to any, professional, misconduct of Respondent's Counsel, pursuant to the Requirements for Participation in Texas Proceedings by a Non-Resident Attorney; Rule 19(7);

> (d) The court may examine the non-resident attorney to determine that the non-resident attorney is aware of and will observe the ethical standards required of attorneys licensed in Texas and to determine whether the non-resident attorney is appearing in courts in Texas on a frequent basis. If the court determines that the non-resident attorney is not a reputable attorney who will observe the ethical standards required of Texas attorneys, that the non-resident attorney has been appearing in courts in Texas on a frequent basis, that ***the non-resident attorney has been engaging in the unauthorized practice of law in the state of Texas***, or that other good cause exists, the court or hearing officer may deny the motion.
> (e) If, after being granted permission to participate in the proceedings of any particular cause in Texas, the non-resident attorney engages in professional misconduct as that term is defined by the State Bar Act, the State Bar Rules, or the Texas Disciplinary Rules of Professional Conduct, ***the court may revoke the non-resident attorney's permission to participate in the Texas proceedings and may cite the non-resident attorney for contempt.*** In addition, the court may refer the matter to the Grievance Committee of the Bar District in which the court is located.

The COA decision in Finch v. Finch, handed down, October 2, 2012, says "Basically, all you have to do is bring it to the court's attention, and the judge can do the rest." Instead the District Judge had this to say;

> "Well, I don't know. That's probably -- it's probably a national office of the Respondent, probably. That happens a lot in cases. There is a local lawyer helping and a national counsel involved and that's not, by itself, out of the ordinary." ROA.954
>
> ...A federal judge is a federal judicial officer, paid by the federal government to act impartially and lawfully. State and federal attorneys fall into the same general category and must meet the same requirements. A judge is not the court. People v. Zajic, 88 Ill.App.3d 477, 410 N.E.2d 626 (1980). Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge ***but rather to promote public confidence in the impartiality of the judicial process.***").

Respondent created delays in discovery, and timely, filings and the District Judge appeared partial to its flawed reason.

On October 18, 2018, a Request for Entry of Default by Petitioner was filed; October 26, 2018, approximately two months after the First Amended Supplemental Claim (FASC); filed (August 28, 2018 w/Rule 11), Respondent's filed a MOTION for Leave to File Amended Answer. ***Noted***; throughout the proceedings, Respondent had shown ***habits to default on deadlines*** ROA.953, creating delays in discovery, and timely, filings for Petitioner. ROA.956. **Respondent had six months for discovery. Two months after deadline for Amendments, before Respondent created the delay and culpable for the late filing and denial of Petitioner's, Second Amended Claim (SAC).** Petitioner filed a RESPONSE in Opposition to the Leave.

> A "court may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). "When examining whether good cause exists, the ... court should weigh whether the conduct of the defaulting party was *blameworthy* or *culpable*, whether the defaulting party has a meritorious defense, and whether the other party would be prejudiced if the default were excused." *Stephenson v. El-Batrawi*,524 F.3d 907, 912 (8th Cir. 2008) (citation and internal quotations marks omitted).
>
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>
> I. Blameworthy or Culpable: The court "focus[es] heavily on the

> blameworthiness of the defaulting party," and "distinguish[es] between contumacious or intentional delay or disregard for deadlines and procedural rules, and a '*marginal failure*' to meet pleading or other deadlines." Johnson, 140 F.3d at 784. "'[E]xcusable neglect' includes 'late filings caused by inadvertence, mistake or carelessness.'" Id. (quoting *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380,388 (1993)).

In an affidavit, Respondent admitted they were too busy, preparing for a different case/trial in Upshur County. The Judge appeared partial to the Respondent's explanation by blaming Petitioner (a Pro Se with no court room or background experience of law) for the negligence of the Respondent's failure to timely respond (from a law firm of professional lawyers), despite his attempts: The District Judge:

> "Well, and -- if the other side hadn't entered an appearance in the case and the client, Respondent, had just ignored the pleading, I might be tempted to file or to grant default judgment. ***But here, you knew who the lawyers for the Respondent were, and you could have contacted them just to say, Your time for response is up. Don't you intend to file something? You could have avoided the need to file a motion for default judgment.***" ROA.957.

The Judge concluded that I had not tried without, first *asking* if I did. Petitioner stated he sent an e-mail, along with certified mail, and it was verified by one of the law firm's associate, Kelly Rains. ROA.955. Mr. Merkley blame the default to a calendaring oversight and neglect of a weekly, roundtable discussion about calendaring. ROA.952. Senior Counselor: Ms. Massey stated, ***she was aware that the Amended Petition had come in on the 28th of August 2019*** (Note: ***two months*** had passed before responding). However, instead of delegating an internal follow-up to file an answer, "she put it off to wait on a "calendar," reminder to come up and then, file prior to the deadline".ROA.956:957.

> ...Section 455(a) "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989). In *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972), the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice." The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", *Levine v. United States*, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).
>
> In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. *Liteky v. U.S.*, 114 S.Ct. 1147, 1162 (1994).

Petitioner was Prejudice from the Judge's partiality for the Respondent's disregard for deadlines and procedural rules. "[P]rejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits." *Johnson*, 140 F.3d at 785 (citation omitted). The court considers factors such as "loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion." Id. (citation omitted). January 18, 2019 the Motion for Default Judgment was also, DENIED and Respondent was permitted to file a responds on the merits that would be constructed on fraud. Retrospectively, from Petitioner this lawsuit arises: Libel (Defamation Per Se) and/or, Slander, statements towards Petitioner to the effects of his termination, concurrently, Respondent created a hostile work environment the defamation of Petitioner's character and (2) violation of Title VII; Civil Rights Act of 1964: Prima Face: Failure to Hire/Promote.

> Should a judge not disqualify himself, then the judge is in violation of the Due Process *Clause of the U.S. Constitution. United States v. Sciuto*, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause.").

Respondent persecuted Petitioner with its amassed, Defamation, Intentional Perversion of Truth, Depositions (Oral Examination), Discovery Misconduct and Spoliation Doctrine

> "...The meaning of fraud should be noted: An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. *A false representation of a matter of fact...* which deceives and is intended to deceive another so that he shall act upon it to his legal injury... It consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or *in some manner to do him injury...* (Emphasis added) *Norman v. Zieber*, 3 Or at 202-03"

Defamation

The position statement EEOC received, should have been submitted by an ***officer***, ***agent*** or ***representative*** of Respondent; authorized to speak ***OFFICIALLY*** on its behalf. The first page, second paragraph of it, states "...they thoroughly investigated the allegations (He and his Law Firm) into Petitioner's Charge, also disputes all the evidence in it, claiming, discrimination and concludes "they are baseless." Respondent's Counsel, asserts that the termination was based on uncontroverted evidence of misconduct, including Petitioner's **persistent, insubordination refusal to perform his job duties** .ROA.829. Respondent has produced no admissible or valid evidence to support its allegation.

Respondent's Counsel submitted a document to the courts, without any concern of its genuineness, written by Mr. Kriegesmann (Manager in Training (MIT)), a document that

provided basis for internal publication/communication of unsubstantiated, defamation per se, false facts concerning allegations of Petitioner; multiple sexual harassment issues, work performance, professionalism, accusations of taking salacious pictures of a minor and conduct of sexual deviancies toward a 12 year old minor and restaurant guest; smelling her while her parents watched! Further stated, "Petitioner terminated a female employees for saying get the "F" out of here after grabbing her but"). ROA.1031:1032. Kriegesmann, alluded in his document that Mr. Fulk was aware of this document and content also shared his discussion with other non-African Americans (kitchen employees) the "Smear Campaign" tainted Petitioner' image and respectable reputation. ROA.1031:1032.

Petitioner learned of it after circulation and was repulsed. Reportedly, no witnesses and no corroboration to any of the allegations, just bald assertions. To validate and strengthen his efforts, Respondent's Counsel submitted a document to the courts, without any concern of its falsity or trustworthiness, written by Mr. Kriegesmann; a Performance Counseling Form that he was Petitioner's Direct Supervisor; alleging his title as an **AGM** on a **June 5, 2016** document.ROA.121:122. *When in fact he was not.* On the second page, first paragraph, .ROA.830. Respondent's Counsel acknowledges three of Petitioner's, divisions of hierarchies: his Direct Supervisor: Melissa Pena (Store GM), District Manager: Dale Fulk and Kim Davis: Division President over Div. IV, which includes the Houston restaurant where Petitioner, worked .ROA.830. Kriegesmann wrote;

> "Petitioner use profanity in front of guess, consistent, insubordinate and disrespectful behavior, habitual tardiness, and substandard performance in many of his job functions. Alleging that he counseled Petitioner on his deficiencies because of his insubordinate behavior."

In paragraph two and three, Respondent's Counsel, incorporates commentary, without corroborating evidences, declarations, affidavits, or reference from any of these names aforementioned to support the allegations in his Position Statement to suggest that any of them would be witnesses, down the line. Petitioner was a Certified Hospitality Manager: an Associate in charge of Restaurant operations in the absence of the GM and Associate Kitchen Manager. In the third paragraph of the second page (Position Statement), Respondent's Counsel stated, "AGM" meant: Acting General Manager.ROA.294. ***The title does Not exist*** in Respondent Restaurant 's Operation Manual or Website (Dkt # 20) (Only Melissa Pena: GM had the authority to document Associates, Managers In Training (**MIT**) do not. Further, Kriegesmann

position at the time was **acting kitchen manager** (as Kriegesmann, states it). The inconsistency of the two titles are established on documents, dated: **2/11/2016** and **6/18/2016**.

At the bottom of the second page and top of the third page, third paragraph of the Position Statement, Respondent's Counsel copied, edited, and republished for publication. Then, submitted his version of both, PCF's, originally, *written* by Kriegesmann; and the other, said to have been written by Ms. Pena (**neither timestamped, dated or a required signature as requested on the form to validate whether or not it was written by, Ms. Pena**) to the EEOC with intent, malice, willfulness, and defamation to cast a negative light on Petitioner's character that allegedly, Petitioner called her an Idiot, (which he did not) without witnesses corroboration .ROA.123-125, .ROA.777. (the original, .ROA.830-831.) The requirements to prove defamation according to the tort of defamation, requires:

> (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) that has a natural tendency to injure or that causes special damage. [*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.] These elements vary depending on whether the Petitioner is a ***private*** or public figure, and whether the defamatory statement is of ***private*** or public concern. A ***private*** Petitioner accused of something of private concern will have a much easier time proving defamation than would a Petitioner who is a public figure. Generally, most employee Petitioners are not public figures and the subject matter of the statement is not a matter of public concern.

The tort of defamation applies to Petitioner.

Deposition

After being Admitted, Pro Hac Vice, January 18, 2019 to the United States District Court, Southern District Of Texas, Houston Division, during discovery, *January 24, 2019*, Petitioner received and confirmed a deposition notice via email from **Germer PLLC. Houston's local law firm,** scheduled to start at 9:30am at their office, February 6, 2019. After completing the deposition, Respondent's Counsel did not review changes, Pursuant to Fed. R. Civ. P. 32(a)(3)(B)(i) (The Rule), by Petitioner or reference them in his fact finding, before filing his Motion for Summary Judgment. Changes, Indicated in the Officer's Certificate: ROA.802:803.

> "The officer must note in the certificate prescribed by The Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period."

ROA.839. Respondent's Counsel filed the Summary Judgment on March 15, 2019, Petitioner received a copy the deposition on the 16th and deadline to submit on March 18, 2019. ROA.802:803, In his Summary Judgment, Respondent's Counsel distorted the truth of the

deposition to deceive the court; and impair Petitioner's ability to develop its case; and the Court's ability to review a complete record on its merits in a timely manner. Not presenting all context that must be considered in holistic relationship with one another, within the whole-record environment for patterns that emerged. Below are a few excerpt from the deposition of Respondent Counsel's Summary Judgment, stating:

1) Petitioner testified under oath that he is not aware of a single statement that any current or former employee of Respondent has ever spoke to anyone about him, his former employment, or his termination. (Pl.'s Dep. 82:21-84:10.). ROA.438. Petitioner instead testified that he grounds his Defamation Claim in a theory of compelled self-defamation because "[he] ha[s] to reply to [potential employers] when they ask [him] questions about why [he] was terminated." ROA.438. (*Id.* 78:14-16.) also see (Pl.'s Dep. 152:14-19). ROA.548. **This is *inaccurate "(Pl.'s Dep. 82:21-84:10.)." In a holistic view* this subject matter, actually, began at 74:3-84:10!**
    a. Respondent Counsel's reference "(*Id.* 78:14-16.), (Pl.'s Dep. 152:14-19)" relied, mostly, on Slander (defamation ***spoken)***, which Petitioner could not prove with certainty, at the time. However, his defamation claim was grounded on Libelous (which was proven with undisputed evidence) and or Slanderous (if the position statement is found inadmissibly, fraudulent)," starts and end at 78:4-78:24. ROA.421. At 152:6-13,.ROA.548, Petitioner responded, "I'm not sure if I understand that question. In the Summary Judgment, Respondent's Counsel asserted a conclusion to fit its intentional perversion of truth.ROA.439.

➢ Throughout, Respondent Counsel's, Summary Judgment, referenced false truths pertaining to Petitioner' deposition, " *Petitioner instead testified that he grounds his Defamation Claim in a theory of compelled self-defamation,*" at 151:1-152:18... Petitioner was confirming Respondent's Counsel reading of a statement under "Cause of Action," Paragraph III in the Original Complaint. The theory of compelled self-defamation is not listed.ROA.872. In his Summary Judgment Respondent's Counsel, submitted, only, context-free, line-by-line isolation, information to support his false, truths.

Discover Misconduct

> ..."Black's Law Dictionary Fifth Edition, page 594. Then take into account the case of *McNally v. U.S.*, 483 U.S. 350, 371-372, *Quoting U.S. v Holzer*, 816 F.2d. 304, 307 Fraud in its elementary common law sense of deceit... includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public,... and if he deliberately conceals material information from them he is guilty of fraud."

Petitioner, in good faith, conferred with the Respondent's Counsel in an effort to secure *disclosure* or *discovery* without court action. Respondent's Counsel agree to produce the discovery. However, produced, only, some of it; allowing Petitioner to review two of the four confidential personnel files requested; Melissa Peña and Fernando Armendariz. Respondent's

complete response was then, approximately, six months late. Petitioner's, Request for Production of Documents for the First Amended and Supplemental Complaint on September 27, 2018 and received incomplete responses on October 29, 2018. The deadline for discovery was vacated by the courts. However, the deadline for Summary Judgement was March 27, 2019. Nevertheless, Respondent's Counsel, informed Petitioner that "...**they are standing by their position. Mr. Sanders' and Mr. Kriegesmann's personnel files are not relevant to Petitioner's failure to promote claim"** (see attachment; "Email").

In fact, they were! Moreover, Respondent's Counsel, asserted that they are *not* planning to produce them. Despite Petitioner's repeated attempts to obtain discovery regarding any non-privileged matter that was relevant in resolving the issues of Petitioner's claim, Respondent's Counsel had steadfastly, resisted Petitioner's efforts. Additionally, Respondent's Counsel, on March 15, 2019, approximately, six days after telling Petitioner's, their "Standing Position," on the production of Joe Kriegesmann and Mike Sanders, files; *In Bad-Faith*, introduced them along with three, unfair surprise, witnesses; **Kim Davis**: Vice President, **Dale Fulk**: District Manager, and **Scott Schaberg**: Director of Company Relations, which were also, not disclosed, prior to its Summary Judgement, filing; not allowing Petitioner an opportunity to depose the witnesses. The requests, regarding production, were relevant and necessary to develop the merits in Petitioner's case.

> The federal approach has been described as merging principles of equitable tolling and equitable estoppel...see, e.g., *Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir. 1991), reversed on other grounds, 503 U.S. 429 (1992) (holding that equitable tolling may be applied when Petitioners are "prevented from asserting their claims by some kind of wrongful conduct on the part of the Respondent.") Under standard application of those principles, equitable tolling does not require any misconduct by the Respondent, while equitable estoppel requires wrongful conduct on the part of the Respondent, such as fraud or misrepresentation...see, *Abbott v. State*, 979 P.2d 994, 997-998 (Alaska 1999) (footnotes omitted).

Spoliation Doctrine

The witnesses testimony's are improper and fail under the Federal Rules of Evidence; 403, 602, and 801 ("The Rules"). Each asserts numerous conclusory allegations without pleading any information sufficient to support any personal knowledge of the matter. Each testimony in this case is devoid of factual support nor allege any corroborant witness. However, exposing themselves to perjury. Further, each declaration is similar to the Position Statement; submitted to

EEOC, Houston District Office on November 18, 2016, by Respondent's Counsel who was not hired, employed, or retained, by Respondent; appear to have, all been written or prepared by the same person. The following are a few excerpt...

MR. DAVIS TESTIMONY

(Exhibit A of Respondent's Summary Judgment(Dkt. #34))

...Page 2 ***of*** 60 (#2), declares Personal Knowledge of the facts under the penalty of perjury. However, his Oath, mirror's Dale Fulk and Scott Schaberg Oath, see... page 2 and 3 of 6, (#2)and 2 of 63 of Scott Schaberg's Declaration.
...Page 3 ***of*** 60 (#3), mirror's Dale Fulk and Scott Schaberg page 3 of 63 (3#), see...page 3 of 6 (#3)
...Page 8 ***of*** 60 (#20), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the second page, ***third*** paragraph of a Position Statement.
...Page 8 ***of*** 60 (#20), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the second page, ***second*** paragraph of a Position Statement.
...Page 8 and 9 ***of*** 60 (#21 and #22), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the second page, third paragraph of a Position Statement.
...Page 9 ***of*** 60 (#23), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the second page, third ***and*** fourth paragraph of a Position Statement.
...Page 9 and 10 ***of*** 60 (#25), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the second page, fourth paragraph of a Position Statement (Exhibit C) page 10, taken from Joe Kriegesmann "Performance Counseling form".).
...Page 10 and 11***of*** 60 (#26, #27, and #28), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony, ***plagiarizes*** the Performance Counseling form [Melissa Pena].)

Rule 602. Need for Personal Knowledge: A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. (Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1934; Mar. 2, 1987, eff. Oct. 1, 1987;Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 26, 2011, eff. Dec. 1, 2011.).

MR. FULK TESTIMONY

(Exhibit B of Respondent's Summary Judgment(Dkt. #34))

...Page 2 ***of*** 6 (#2), declares Personal Knowledge of the facts under the penalty of perjury. However, his Oath, mirror's Scott Schaberg Oath, see... page 2 of 63 of Scott Schaberg's Declaration.
...Page 3 ***of*** 6 (#3), mirror's Scott Schaberg page 3 of 63 (3#)
...Page 3, 4, 5, ***of*** 6 (#5, #6, and #7), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony ***plagiarizes*** the second page, the second third and fourth paragraph of a Position Statement.

...Page 4 ***of*** 6 (#8 and #9), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony ***plagiarizes*** the third page, third paragraph of a Position Statement.
...Page 4, of 6 (#10), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony slightly, deviates from the original from which the previous ***plagiarized*** statements: the third page, sixth paragraph of a Position Statement (compare to Scott Schaberg page 7 of 63 (#17)).
...Page 5 ***of*** 6 (#12), declares Personal Knowledge of the facts under the penalty of perjury. However, his testimony slightly, deviates from the original from which the previous ***plagiarized*** statements: the third page, sixth paragraph of a Position Statement (compare to Scott Schaberg page 7 of 63 (#17)).

[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and, must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." *McCormick* §10, p.19. *Spoliation Doctrine* § 29.1 "Spoliation is the destruction or significant alteration, fabricating (Witness Affidavit), of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), *accord, Cache La Poudre Feeds v. Land O'Lakes Farmland Feed, Inc.*, 244 F.R.D. 614, 620 (D.Colo. 2007),

> Additionally, the Rules prohibit a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent.

MR. SCHABERG TESTIMONY

(Exhibit D of Respondent's Summary Judgment (Dkt. #34))

...Page 2 and 3 ***of*** 63 (#2, #3, #4, and #5), declares Personal Knowledge of the facts under the penalty of perjury. However, on page 3 of 63, his testimony, ***plagiarizes*** the first page, third paragraph of a Position Statement.
...on page 4 ***of*** 63 (#6 and #7), his testimony is hearsay, based on an alleged phone call to Respondent's Ethics and Compliance Hotline. **Respondent's Counsel submitted no declarations or recordings of anyone who may or may not have received a phone call to corroborate its assertion.** Furthermore, it was ***not*** alleged that he received the call.
...on page 5 ***of*** 63, (#8) his testimony, ***plagiarizes*** the second page, fourth paragraph of a Position Statement.
...on page 5, 6, and 7 of 63 (#10, #11, #12, and #13), his testimony is hearsay, based on what he said someone told him. Further, number #14 is a bald assertion. There's no corroboration to validate his allegation.
... on page 6 and 7 of 63, (#15 and #16) his testimony, ***plagiarizes*** the third page, third, and fifth paragraph of a Position Statement.

> "Trying improperly to fabricate a witness affidavit is fraud on the court and on Petitioner pro-se." *Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 498 (7th Cir. 2008).

> Witness tampering interferes with the Court's ability to function properly. *Ramsey v. Broy, No.* 08-CV-0290-MJR-Case 1:12-cv-00619-TWP-TAB Document 171 Filed 03/18/14 Page 6 of 14 Page ID #: 15687 DGW, 2010 WL 1251199, *4 (S.D. Ill. Mar. 24, 2010) (citing 18 U.S.C. § 1512(b)). Section 1512(b) defines witness tampering as corruptly persuading (or attempting to persuade), or engaging in misleading conduction toward another person," with intent to cause or induce any person to ... withhold a record, document, or other object, from an official proceeding." 18 U.S.C. § 1512(b)(2)(A).

Respondent Contradict its "legitimate, non-discriminatory", business reasons for not promoting Petitioner

Respondent's Answer and Objections to Petitioner's Second Set of Interrogatories, dated October 29, 2018, contradicts Respondent's Counsel intentional perversion of truth as a matter of record; at

INTERROGATORY NO. 2:

During the Plaintiff's (Petitioner's) employment with Defendant, at the time the General Manager position became available, was the promotion and/or hiring process,

a) informal or formal, and required candidates to file an application?
b) If information what is the promotion process?
c) Did the Defendant have normal, promotion procedures available, during Plaintiff's employment with Defendant? List a copy of originated, date, published.
d) If formal, list the website, and/or media source where the General Manager position was posted.

> ANSWER: Defendant (Respondent) objects to this Interrogatory on the basis that it is overly broad, vague as to "informal or formal" and "normal" and it is compound. Defendant further objects that subsection b is vague and confusing. Defendant further objects that subsection c is unduly burdensome. Subject to the asserted objections, ***the process for someone already working for Defendant was informal and an application was not necessary. The promotion process is merit, experience and progress based.*** The GM position was posted for the metro area of Houston on Trovit U.S.; AboutJobs.com; America's Job Exchange; Oodle.com; JuJu.com; Monster; Indeed; job.com; Simply hired; Flexjobs.com; Craigs List; and Golden Corral Corporation Career Site.

The interrogatories doesn't mention anything about the subjective reasoning," the Respondent's Counsel, falsely and strongly presents to the Courts; in an attempt to sabotage Petitioner ability to establish a genuine issue of material fact as to one of the criteria comprising his prima facie case. If successful in establishing the absence of a material fact with regard to Petitioner's inability to establish his prima facie case, summary judgment is proper for the Respondent. In this regard, summary judgment centered around **whether the Petitioner was qualified for the position sought** as the other prongs of the prima facie case were undisputed

(*whether Petitioner is a member of the protected class, whether Petitioner suffered adverse employment action and whether someone outside the protected class received different treatment*).

If the Petitioner is able to establish his prima facie case (or at least a genuine issue of material fact as to each element), the burden shifts to the Respondent to articulate ***a legitimate, non-discriminatory reason for its actions***. **At this stage, the Supreme Court has held that the Respondent's burden, being only one of "production," is relatively light**...see, *Hicks*, 509 U.S. at 509. Given the relative ease of satisfying this burden, summary judgment in favor of the Petitioner is unusual at this stage.

> **Note**: Mr. Armendariz was an external, management candidate before Respondent, working for a competitive, restaurant. Ms. Pena was also, an external, management candidate, not working for five months, prior to working at Petitioner's location, according Respondent's proffered documents of her records. Neither were ***internal*** management candidates nor already working for Respondent for the purpose of internal promotion or transfer from another location of Respondent as a transition. Respondent has provided no documentation that either Mr. Armendariz or Ms. Pena, ***completed*** the GM/Restaurant Manager most important objectives before being hired for GM's.

1) In reply to Respondent's, response; claim that Petitioner cites what appears to be a job advertisement for ***external candidates*** and argues that these are the "most important objectives, criterion for selecting a GM," and that Respondent's requirement that a Hospitality Manager must work as a Kitchen Manager before being considered for a General Manager position, which is not included in those "criterion," is therefore "subjective." ROA.4-6,(52).

> Here, Respondent's Counsel attempts a play on words "job advertisement for ***external candidates***" to fit his intentional perversion or truth (in **bold**). The job advertisement is "non-exclusive" (all management candidates is what it states) .ROA.904-908. Additionally, Petitioner complained to Mr. Fulk about not being promoted, after the termination of Mr. Armendariz and the hiring of Ms. Pena (***whose names, Respondent's Counsel use as a smoke screen, comparison, to divert the attention from concealing the files of Joe Kriegesmann and Mike Sanders; to sabotage Petitioner from establishing his prima facie case***.). Mr. Fulk *subjective reasoning* was, ***Petitioner, not*** **Hospitality Manager[s]**, had to first manage the BOH (Kitchen) but for no certain amount of time, given.ROA.285.

2) Petitioner produced no evidence that the job advertisement he cites applies to internal Hospitality Managers seeking a General Manager promotion .ROA.4-6,(52).

> Until now, Respondent has not disputed that the "job advertisement Petitioner cited does or does not apply to internal Hospitality Managers seeking a General Manager promotion." However when Petitioner, challenged the Respondent to

produce admissible evidence to support their *subjective reasoning* for internal, GM promotion, questionable, declarations of non-disclosed witnesses, statements, were produced and submitted at Summary Judgment (see Pl. Pr. Br., (pp. 31-35). Further, Respondent has not produced any evidence to support its contentions that the job advertisement applies only to external applicants seeking a General Manager position.

3. In addition, Petitioner has **conceded** that, during his time in Houston, "[Dale Fulk] said that it was necessary for [him] to work as a Kitchen Manager and open the restaurant, before advancing to a GM position" .ROA.285, and that he is not aware of any employee promoted from Hospitality Manager directly to General Manager, ROA. 542:22-543:1.

Petitioner did not ***concede*** to what Dale Fulk said at Respondent's point of reference. Petitioner repeated Dale Fulk requirement of the *subjective reasoning* to be promoted, which was stated to Petitioner, without documents to support the requirement (see Pl. Pr. Br., (p. 6).

4. As a result, nothing in the job advertisement contradicts Respondent's undisputed evidence of the objective requirement that Hospitality Managers must work as a Kitchen Manager before being considered for a General Manager promotion .ROA.458.

Quite the contrary. There is nothing in the objective requirements that supports Respondent's subjective requirements .ROA.780-781, see, .ROA.190-198. Moreover, Respondent's Answer and Objections to Petitioner's Second Set of Interrogatories.

5. Petitioner also contends the job advertisement's preference for a candidate with "[e]ducation and training normally associated with college coursework in business or hospitality" made him more qualified than Sanders for a General Manager position because Sanders had allegedly completed no such coursework. (Pl. Br. 50.)

The Respondent, inaccurately, reference Petitioner's Brief...see (Pl. Br. 50) Michael Sanders: Kitchen Manager ("non-African American"), similarly situated as Petitioner .ROA.445., was transferred and promoted to General Manager of Respondent's Restaurant in Lafayette, Louisiana, while Petitioner was still employed there. "...He had no education and training, associated with college coursework in ***business*** or ***hospitality*** (uncontested) .ROA.446." Additionally the Respondent has produced no evidence showing a successful completion or start of Respondent's comprehensive management training program for Sanders as required and presented for Petitioner; evidence indicating that employees outside of the protected class are treated more favorably in the selection of hiring and promotion process (addressed in Pl. Pr. Br.).

6. However, the undisputed evidence proves Petitioner never sought the General Manager assignment Sanders received;

As Petitioner stated in his Pl. Pr. Br. (50), he was not aware of the available position in Lafayette, LA. But Mr. Fulk was considering he and Petitioner

discussed it. See...*Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (11th Cir. 1984), which "involved a system where there was no formal notice of jobs, and the company relied on word of mouth and ***informal review procedures***," and thus the Petitioner "had no way of knowing about [a specific job's] availability." Smith, 352 F.3d at 1346. Moreover, Respondent has not produced any "undisputed evidence" of any kind that shows, Sanders sought the General Manager assignment or was ever interested in the position before receiving it. Further, Respondent claimed, Sanders files were not relevant to Petitioner's claim when requested.ROA.785.

7. Sanders possessed a two-year degree in culinary arts for sous chef de cuisine and worked as a Kitchen Manager for more than nine months before being promoted to General Manager. ROA. 460-61, 492-95. He possessed more than nine years of prior, consistent work experience as an ***assistant general manager***, meat and seafood manager, and food service director for **other large, high volume companies.**

The Respondent's proffered information is exaggerated and questionably, *false*. Sanders worked for **1)** Aramark: an outsourcing company that competes primarily through bids to provide services to specific clients. It is generally engaged through long-term contracts that are renewed periodically (common knowledge); 6550 Bertner ave Houston (location: Texas Medical Center) as a Food Service Director? (at what restaurant? Not proffered by Respondent) **2)** Kroger's (not a restaurant); meat and seafood manager (**recruited by Aramark** was Sanders reason for leaving) and **3)** Taco Bueno; title AGM? (ambiguous and argued that the restaurants that Petitioner worked did not compare to Respondents [***prejudice***]) .ROA.492.

a. In the third paragraph of the second page (Position Statement), Respondent's Counsel identified "AGM" as ***Acting*** GM.ROA.294. Here he concluded, AGM refers to **Assistant General Manager** (inconsistency).

The Culinary Arts degree for sous chef de cuisine could be construed as hearsay with no college transcripts to support this claim. Further, it does not comply with the **objective requirements** for the General Manager or Restaurant Manager position .ROA.780-781, .ROA.190-198. According to Respondent's proffer, Sanders was Certified two months after Petitioner; **October 8, 2015** with no "Traces" ("**TRA**ing **C**enter **E**ducational **S**cheduler") to prove Sanders was certified .ROA.495.

b. Petitioner was Certified and completed training **August 15, 2015** no further training was required...see Traces .ROA.475. Then traveled to the Respondent's Restaurant in Baton Rouge, LA., for six weeks, opening and closing the entire restaurant; managing Hospitality (FOH) and Kitchen (BOH) .ROA.428. Moreover, Respondent, failing to mention Petitioner's restaurant experience totaling over 20 years Pl. Dep. 64:12-65:24.

8. Simply put, nothing about Sanders's promotion supports Petitioner's claim of discriminatory failure to promote.

None of Sanders, previous, places of employment "compare to Respondent's Restaurant" (see Res. R. Br. p. 7, for Petitioner's places of employment,

comparison to Respondent's Restaurant by Respondent). Moreover, Taco Bueno is the only restaurant of Sanders, three employment references .ROA.492. The Respondent's proffered, "undisputed evidence," has been and currently, disputed! It proves or, at the least infer, pretext to its non-discriminatory explanation that Petitioner was not qualified to receive the General Manager position; and that Respondent's decisions to promote others instead of Petitioner were ***not*** based on legitimate, nondiscriminatory business reasons. "As noted herein, Petitioner's employment discrimination cases often utilize evidence indicating that employees outside of the protected class are treated more favorably. If these employees are similarly situated, such evidence may well be probative of discrimination.

> In *Kenworthy and in MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115 (10th Cir.1991), upon which Kenworthy relied, "we were concerned with subjective qualifications. Such ***subjective criteria*** "are particularly easy for an employer to invent in an effort to sabotage a Petitioner's prima facie case and mask discrimination." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005 n. 8 (10th Cir.), cert. denied, 517 U.S. 1245, 116 S. Ct. 2500, 135 L.Ed.2d 191 (1996). To avoid this result, we held, in agreement with other courts addressing the issue, that the employer's subjective reasons are ***not*** properly considered at the prima facie stage and should instead be "considered in addressing whether those articulated reasons are legitimate or merely a pretext for discrimination." Id.[Id omitted.] At this point, "a Petitioner's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 148, 120 S.Ct. 2097; see also *Anderson*, 406 F.3d at 269.

There can be no doubt in this case that Petitioner has established at least a prima facie inference of discrimination, and that Respondent has successfully rebutted it by responding that it selected Sanders over Petitioner because "Sanders possessed a two-year degree in culinary arts for sous chef de cuisine and worked as a Kitchen Manager for more than nine months before being promoted to General Manager. ROA. 460-61, .ROA.492-95." See *Evans v. Techs. Applications* & Serv. Co., 80 F.3d 954, 960 (4th Cir.1996) ("[R]elative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision.") A Petitioner alleging a failure to promote can prove pretext by showing that he was better qualified, or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons...see Anderson, 406 F.3d at 269; *Dennis v. Columbia* Colleton Med. Ctr., Inc., 290 F.3d 639, 648-49 & n. 4 (4th Cir.2002).

When analyzing this case, this court must be mindful to assess ***relative job qualifications*** based on the criteria that Respondent has established as relevant to the position in question. See *Anderson, 406 F.3d at 269* (citing Beall v. Abbott Labs., 130 F.3d 614, 620 (4th Cir.1997) and

Jiminez v. Mary Washington Coll., 57 F.3d 369, 383 (4th Cir.1995)). For Sanders, Respondent's Counsel focused primarily on Kitchen Management and consistent work experience (alleged, assistant general manager) as criterions for the GM position. In contrast, Respondent listed as the objective requirements for General Manager:

> "a strong, stable work history along with management experience in a high-volume, casual dining or family-style restaurant. Education and training normally associated with college coursework in business or hospitality. Successful completion Respondent's comprehensive management training program" .ROA.780-781, see, .ROA.190-198.

Respondent's Counsel, without any admissible documentation to support his claim; "Respondent requires its Hospitality Managers to work as Kitchen Managers before considering them for General Manager promotions." If construing the facts in favor of Petitioner the court must conclude that a reasonable factfinder could determine that Respondent's explanation for its promotion decision is "unworthy of credence." See, *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. Despite Petitioner qualifications (see Pl. Pr. Br.) for a General Manager position he was denied a promotion. Petitioner has satisfied his burden under McDonnell Douglas because in light of Respondent's proffered job criteria, a reasonable jury could conclude-on the basis of Petitioner greater familiarity with managing Respondent's Restaurant in its entirety as he did for approximately nine months in the absence of the General Manager and Kitchen Manager, previous at Respondent's employments (see Pl. Pr. Br.). Contentions that Petitioner was less qualified than Sanders is not to be believed.

The Respondent has *not* proffered that Sanders had managed Respondent's Restaurant, entirely, on his own, as Petitioner has; in the absence of the GM. A reasonable factfinder could determine that by the time of Sanders promotion, Petitioner had comparatively greater experience with both; Hospitality (FOH) and Kitchen (BOH). Experience in both departments are needed to manage an entire restaurant. **Sanders had no hospitality experience, education and training normally associated with college coursework in business as the GM position required**; Petitioner did. Sanders, by contrast, had worked in Respondent's Restaurant, kitchen for nine months before being promoted to GM. Petitioner, worked 12 to 14 hour shifts, five days a week for six months, prior to the hiring of Ms. Pena, which consisted of controlling the entire restaurant in the absence of the GM and the Kitchen Manager.ROA.287. Additionally, three months after Pena's hiring, for a total of nine months.

While, Respondent's Counsel, appears to suggest that hospitality experience, education and training normally associated with college coursework in business was not a relevant criterion for selecting a General Manager, a jury could certainly conclude otherwise in light of the fact that it was listed as the objective requirements for the position...see Dennis, 290 F.3d at 646-47 (pretext may be inferred from employer's reliance on criteria that are different from those contained in written job qualifications). Also, see... *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1469 (10th Cir.1992), "To show that he was qualified, Petitioner must show that he possessed the necessary requirements for the position he sought. You should consider evidence concerning the education, training or experience necessary to perform the job," which Petitioner, did. However, the district court abuses its discretion in weighing equitable considerations "by not meaningfully addressing the positive equities . . . and by improperly characterizing the negative equities." *See Rodriguez-Gutierrez v. INS*, 59 F.3d 504, 509 (5th Cir. 1995).

The District Judge Continued to show Bias for Respondent, during Summary Judgment

May 6, 2019, Respondent filed to Strike, Mr. Wiggins Surreply #52 ROA.911., see, May 8, 2019, Minute Entry for proceedings held before Judge Keith P Ellison. Mr. Wiggins was not notified of the filing until the day of the MOTION HEARING. On a set of motions; Petitioner's Motion to Amend its Complaint, Petitioner's Motion to File a Response, the Respondent's Motion for Summary Judgment, Petitioner's Motion for Spoliation Doctrine and Discovery Misconduct Sanctions, and Respondent's Motion to Strike. ROA.979. However, the court was ***not*** clear as to what Motion. There were three Motions on the Docket, an Amended Motion was ***not*** one of them...see Minute Entry.

ROA.979. Nonetheless His Honor thought it was best to deny the Amended Motion overall because he didn't think it changes the complaint substantially, and it would be an undue expense for a Respondent to have to again respond to another complaint. However the court granted both, Petitioner's Motion to File a Response and Respondent's Motion to Strike the surreply, #52 ROA.911., before the reading was done because it was filed without leave of Court. Again, he wanted the parties to *assume* the papers were read. ROA.981. The court presumed that the Respondent's Motion for Summary Judgment was the main event and thought starting with it first would be best. When clearly, on its face the Spoliation Doctrine and Discovery Misconduct Sanctions should have warranted more pressing concerns. It was not discussed or clarity as to why, however, Denied.

> "the court is under a duty to examine the complaint to determine if the allegations provide for relief on *any* possible theory." (emphasis added) See, e.g., *Bonner v. Circuit Court* of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)), and etc."

Even So, Respondent was asked to approach the rostrum, first. From here, ROA.981:982-984., Respondent's Counsel spoke, uninterrupted by the Judge, on areas essential, against Petitioner's claim. At the same time, distorting facts of it. Respondent's Counsel did not think, qualified privilege was a concern to elaborate when raised by Petitioner the Judge did not disagree, despite previous alertness. At ROA.984., the fifth line, Petitioner spoke maybe ten, fifteen seconds and the Judge interrupted and started arguing at the 12th line; in the transcript, ROA.984:985-991., disputing any and everything, spoken, interpreted/ construed *not* in the light most favorable to the Petitioner.

Further, when Petitioner spoke about the Respondent's only focus, being the slander aspect of the Defamation claim and not the true facts of the libel, Respondent Counsel, avoided and downplayed the subject to make his point. The Judge did not interrupt or instruct him to elaborate. ROA.981:982. When the Petitioner spoke about the communications to the EEOC *not* being "absolutely privileged" because **Respondent's Counsel wasn't employed by Respondent when he submitted the position statement; and someone had to have told him about the issues of the claim, before submission**. The Judge said nothing.

> Employees should remember that this "*common interest*" privilege is "conditional," meaning **it can be lost if the employee establishes that the employer made the statement with malice, which means knowledge of the statement's falsity or reckless disregard as to whether the statement is true or false**.[*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1368 – 1369.] ***Malice*** may overcome the privilege if the employee can show that the publication was motivated by hatred or ill will, evidencing a willingness to vex, annoy, or injure another person [*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723], or that the employer purposely avoided the truth or made a deliberate decision not to acquire knowledge of the facts that might confirm the probable falsity of the charges. [*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1048.] (*See Pl. Pr. Br. in reference to this issue.* ,(p. 7))

Without common interest, Respondent's Counsel's commentary within that position statement was malicious and ill will with intent to injure; he cut, pasted and republished, information before submitting it to EEOC. His deceitful, practice influenced EEOC's decision to terminate their investigation to Petitioner's claim. ROA.317. Afterwards, Judge Ellison says..."Well, I don't see any malice here" ROA.988. The Judge appeared to be concerned about

"who wins the dispute," between he and the Petitioner. The Respondent was GRANTED Summary Judgment without the court hearing or discussing Petitioner's 12(d) Motion for Spoliation Doctrine and Discovery Misconduct Sanctions. However, DENIED a FINAL JUDGEMENT, pursuant to Federal Rule of Civil Procedure 58(a) to Respondent (Respondent's Restaurant Corporation).

The Appellant Court applied Respondent's intentional perversion of truth in its conclusion, without weighing, Petitioner's material facts

In the Appeal from the United States District Court (USDC) for the Southern District of Texas, Petitioner brought a state-law defamation claim and a failure-to-promote claim under Title VII against the Respondent. The Appeal from the USDC, affirmed the decision, stating "Wiggins (Petitioner) fails to point to any evidence of publication by Respondent's Restaurant (Respondent) of any allegedly defamatory statements. He testified that he was unaware of anyone-other than attorneys he was looking to potentially hire-who had seen the internal forms he claims contain defamatory material...." Appendix A. The Appellant Court applied an erroneous view of discretion in its conclusion. Showing bias, affirmation to Respondent Counsel's, [purported] facts; which has the potential to affect the outcome of the issue in dispute if presented at trial. The conclusion exerted was isolated, and ***not*** in-Context — All issues must be considered in holistic relationship with one another, within the whole-record environment (not "context-free line-by-line isolation"); patterns may emerge.

Some rules express a preference for resolution of every case on the merits, even if resolution requires excusing inadvertence by a pro se litigant that would otherwise result in a dismissal. The Judicial Council justifies this position based on the idea that "Judges are charged with ascertaining the truth, not just playing referee... A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. "*Ibid (quoting Gamet v. Blanchard)*. It suggests "the court should take whatever measures may be reasonable and necessary to ensure a fair trial" and says. During deposition, Respondent Counsel's intention were in bad-faith. Attempts to compel Petitioner to hearsay; and when discussing the defamation claim; contradict the undisputed, material facts on record of such. Further, refuse to show documentation when requested, from whence its questions referenced (78:24) and thereof.

> "Due to sloth, in attention or desire to seize tactical advantage, lawyers have long engaged in dilatory practices... the glacial pace of much litigation breeds

frustration with the Federal Courts and ultimately, disrespect for the law." *Roadway Express v. Pipe*, 447 U.S. 752 at 757 (1982)

In the deposition (77:1-84:10). ROA.421. Petitioner defamation was purported on the following: both Performance counseling forms, the termination letter, the self-compelled publication; referred to the Negligent Interference with Prospective Economic Advantage (NWIPEA) from Appellant's (Petitioner's) SAC and that was not everything but what Petitioner could remember at that time (is what was told to the Respondent's Counsel). Additionally, Mr. Kriegesmann's document that provided basis for internal publication/communication of unsubstantiated, defamation per se, false facts, concerning allegations of Petitioner's misconduct. Respondent Counsel's, published, unprivileged, Position Statement to the EEOC with the intent of bias, intolerance of the alleged acts of Petitioner, and contempt from the reader. Specifically, unsubstantiated allegations of "Petitioner's Insubordination, Mistreatment Of Co-Workers And Guests, And Failure To Fulfill His Job Duties (Appellee's Brief, 12-15 pp.)"

1) **The defamatory statements were published by Respondent**
Publication is the communication of the defamatory statement to a third person who understands its defamatory meaning as applied to the Petitioner. [*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242.] This means that the defamatory statement does not need to be made to the public or to a large crowd; communication to a single individual other than the Petitioner is sufficient. [*Ringler Assocs. Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1179.] (*See Pl. Pr. Br.,(*p. 7) *in reference to this issue.*)
2) **The Respondent defamatory statements cannot be proven true**
Fortunately, a statement concerning a private individual, such as an employee Petitioner, is likely to be one of private concern. **If this is the case, the Petitioner employee does not carry the burden of proving the defamatory statement false. Instead, the Respondent employer carries the burden of proving the defamatory statement is true.** [*Ringler Assocs. Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1180.] (*See Pl. Pr. Br. in reference to this issue*...see also .ROA.160-161.)
3) **The statements Respondent made are really defamatory**
Only false statements of fact, not opinion, are actionable as defamation. Whether the statement is one of fact or opinion is a question of law to be decided by the court. [*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.] The dispositive question is whether a reasonable person could conclude that the published statements imply a provably false factual assertion. [*Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724 – 725.] The court examines the statement in light of the context in which it was published and considers its meaning in reference to relevant factors, such as the occasion of the utterance, the persons addressed, the purpose to be served, and "all of the circumstances attending the publication." [*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 – 261.]

i. The court in *Jensen v. Hewlett-Packard Co.* held that unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior, it cannot support a cause of action for libel. [*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965.] This is true even if the employer's perceptions about the employee's efforts, attitude, performance, potential, or worth to the company are objectively wrong and cannot be supported by concrete facts. [*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965.] In order to be actionable as defamatory, statements need to be capable of being proved true or false.

4) **The defamatory statements are not privileged**
A privileged communication includes one made, without malice, to persons who have a "common interest" in the subject matter of the communication, 1) by someone who is also interested in the statement, 2) by someone in such relation to the recipient so as to reasonably imply that the motive for the communication was innocent, or 3) by someone who was requested by the interested person to give the information. [Civ. Code § 47(c).]
   i. Employees should remember that this "common interest" privilege is "conditional," meaning **it can be lost if the employee establishes that the employer made the statement with malice, which means knowledge of the statement's falsity *or* reckless disregard as to whether the statement is true or false**. [*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1368 – 1369.] Malice may overcome the privilege if the employee can show that the publication was motivated by hatred or ill will, evidencing a willingness to vex, annoy, or ***injure another person*** [*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723], or that the employer purposely avoided the truth or made a deliberate decision not to acquire knowledge of the facts that might confirm the probable falsity of the charges. [*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1048.] (*See Pl. Pr. Br. in reference to this issue.* ,(p. 7))

Petitioner's Failure To Promote Claim, due to Extenuating Circumstances, does not fail pursuant to Fed. R. Civ. P. 15 and Equitable Tolling

The Appellant Court, "for the purpose of their analysis, assumed, without deciding, that Petitioner satisfied his prima facia burden." However, the Appellant Court applied an erroneous view of discretion in its conclusion of Petitioner's Claim; showing bias, affirmation to Respondent's Counsel, and lack of detail analysis to Petitioner's material [purported] facts; which has the potential to affect the outcome of the issue in dispute if presented at trial. The conclusions in its decision are excerpt, verbatim, from Respondent, Appellee's Brief. Stating that "Petitioner filed a charge with the EEOC shortly after his termination. But the charge does not assert any claim based on a failure to promote" (Appendix A). This conclusion is *preferential* of Respondent's intentional perversion of truth. On April 25, 2017, within the 180 days of the EEOC filing, Petitioner submitted a rebuttal to Respondent Counsel's, Position Statement to

EEOC. (.ROA:302) (Appendix C). Which would serve as an attachment to Petitioner's filed, charge of discrimination. It doesn't receive a lot of attention because Respondent's Counsel has downplayed its existence to null and void.

Nonetheless, ***it was filed with the EEOC***; it did exist before deadline and proffered in the lower courts. This amassing contention that Petitioner did not exhaust administrative remedies is false. The extenuating circumstances, pleaded in the lower courts, explains the attempts to contact his EO Investigator at the time; Ryan Mays, who could not be reached after the initial meeting ROA.313:314.; or by his Supervisor, Mr. Crosby; to supplement and amend his claim after the Position Statement was submitted, and the rest is a matter of "ROA"... In contrast, Respondent Counsel continue to deceive the courts with more, intentional perversion of truth stating that "Petitioner argues that "extenuating circumstances" ***should*** excuse his failure to exhaust his administrative remedies with the EEOC with regard to his Failure to Promote Claim, and so on..." (Def. Br. 2, 39.). Petitioner never said "***should***" (Pl. Br. 2, 48-49). Respondent Counsel also, proposes "extenuating circumstances" listed do not overcome the multiple barriers that defeat Petitioner's Failure to Promote Claim as a matter of law (Def. Br. 2, 39.). Importantly, Respondent Counsel adds; Petitioner does not explain ***how*** any to the "extenuating circumstances" prevented him from alleging failure to promote in the Charge and concludes, time-barred because Petitioner ***did not file*** it within 90 days of receiving the Right to Sue Letter (Def. Br. 3, 40, 1-41.). Let's explorer these *allegations* with Respondent Counsel's proposal; application of equitable tolling.

> *Equitable Tolling*: is a common principle of law stating that a statute of limitations ***shall not bar a claim*** in cases where **the Petitioner, despite use of due diligence, could not or did not discover the injury until after the expiration of the limitations period.** For example, when pursuing one of several legal remedies, the statute of limitations on the remedies not being pursued will be equitably tolled if the Petitioner can show:
>
> (1) Timely notice to the adverse party is given within applicable statute of limitations of filing first claim, (2) Lack of prejudice to the Respondent, and (3) Reasonable, good faith conduct on part of the Petitioner.
>
> **Subject Matter**: Extenuating Circumstances (**good faith conduct** also, Explained, Pl. Br. 2, 48-49), investigator refusing to confer with Petitioner to discuss his Charge, long, before Dismissal, which violated his rights to review and discuss their findings and to add a complaint ("amend" a complaint) if needed, after the Position Statement filing. Petitioner's, rights to "due process" were not protected. Clearly, EEOC did not touch all the bases when their decision was reached.

Issue: Administrative Remedies were attempted by Petitioner with the timely notice. EEOC did not assert the notice in the formal Charge.
Petitioner/Petitioner: Curtis Wiggins (Self-explanatory)
Respondent: EEOC because the circumstances of the issue happened there.
Timely Notice/Deadline: On April 25, 2017, ***within 90 days of receiving the Right to Sue Letter*** and ***within the 180 days of the EEOC filing*** (Deadline: May 1, 2017 (Appendix D) in a timely manner caused the Respondent ***no*** prejudice.
Expiration Date: Right to Sue Letter Issued; 10/24/2017. In the Dismissal of Charge Letter, first page "...it informed Petitioner that EEOC has concluded its investigation of "Petitioner's" charge of employment discrimination. After reviewing the information in the file including the information you submitted, the EEOC does not believe that additional investigation would result in our finding a violation..." (Appendix E). Moreover, on page two of Appendix E the reason for their decision [X]"...This does not certify that the respondent is in compliance with the statues. ***No*** finding is made as to any other issues that ***Might*** be construed as having been ***Raised*** by this charge."

With that said, Petitioner was actively misled by the EEOC to believe that the Defamation and Failure to Promote claim, alleged, and filed, April 25, 2017 as a Rebuttal to the Position Statement, was asserted to the Charge and yet, dismissed (Petitioner, thought filing the claim was enough to have the Rebuttal Letter asserted. He was not informed, otherwise.). Further that and other information would not help or matter. Petitioner did not learn of the deception until after the limitations period or expiration date. The EEOC prevented Petitioner from asserting his right to amend by "fixing" his pleading and adding new claims, accordingly; upon such terms as may be just to resolve his case on its merits when refusing to meet and discuss his complaint...(see? Confusing! Explained, Pl. Br. 2, 48-49)

Historically, the federal judiciary of the United States had "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."...see, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (footnotes omitted). Petitioner is not, well, versed in Employment Law and Civil Procedures to the level of a professional attorney. For approximately seven months he could not contact his EEOC Investigator Ryan Mays. Petitioner was reassigned to EO Investigator Janet Saindon. She would not take an interview with him to discuss his complaint. Six months later he received a write-to-sue letter and other instructions. Further, he could not find an Attorney to take his case.

On January 24, 2018, Petitioner filed a single cause of action for "statutory slander and/ or libel (Defamation per se) as a Pro-Se Petitioner. (Pro-Se pleadings are to be considered without regard to technicality; Jenkins v. McKeithen, 395 U.S. 411, 421 (1959.). Defamation was a natural, not limited to, response to the allegations stated in the Position Statement; illegally, submitted to EEOC and the EEOC's Dismissal Letter. If the application of equitable tolling for Petitioner's claim to exhausting his administrative remedies, prior to filing the Claim and the Challenged Promotions is consider, pursuant to 15(c)(1)(B), arises out of the same conduct, transaction, and/or occurrence set out in the original pleading. There is a causal link. Did the district court when denying Petitioner's Failure to Promote Claim for not exhausting his administrative remedies, abuse its discretion in weighing equitable considerations; "by not, meaningfully, addressing the positive equities . . . and by improperly characterizing the negative equities?...*See Rodriguez-Gutierrez v. INS, 59 F.3d 504, 509 (5th Cir. 1995).*

Respondent's Counsel committed Fraud and Perjury without sanction.

Throughout the course of this case Petitioner has proffered facts about Respondent's Counsel fraud and misrepresentation. Yet, here we are without any sanctions to rectify these issues. Specifically, he was not" employed by Respondent when he produce the Position Statement, submitted to EEOC. Moreover, by default someone told him about the issues/ elements of Petitioner's claim. Respondent's Counsel contends that the information was "absolute privilege communication" and "are not actionable and may not form the basis for civil liability (citation excluded)," without explaining how, under the circumstances. If a fact finder, performed due diligence, Respondent's Counsel, explanation would be found, buried (hiding) in a footnote-(6) of its Summary Judgment (DKT#34-1, p. 21) it reads...

> Significantly, Respondent did ***not hire*** its employment counsel, David L. Woodard (see Dkt. #23 at 9), who defended the EEOC Charge of Discrimination (see Dkt. #32-1 at 1, 9-10, 14, 15 (Respondent's position statement prepared by David L. Woodard)), at the outset of this case because, at that time, this lawsuit contained only the Defamation Claim and did not touch on an employment matter or any issued raised in the Charge of Discrimination (see Dkt. #23 at 9; see also Dkt. #1-2 at 8-12 (Original Complaint)). This additional fact further verifies that the Original Complaint did not provide Respondent with fair notice of any facts that could give rise to a failure to promote claim.

While engaging in his moment of closure, Respondent's Counsel admits to violating the following:

1) Texas Disciplinary Rules of Professional Conduct, Rule 5.05: Unauthorized Practice Of Law (The Rule).

2) Texas Board Of Law Examiners **does not provide an exemption for appearances before administrative agencies in Texas; Rule 19**(7)(d)(e), Requirements for Participation in Texas Proceedings by a Non-Resident Attorney. Moreover,
3) **Texas Pro Hac Vice; Rule 19** of the Governing Admission to the Bar of Texas, provides the rule regarding admission for attorneys licensed in other jurisdictions who are *seeking pro hac vice admission*;
    a. **Eligibility**: attorneys are not licensed in Texas but are licensed in another state and reside outside of Texas .ROA.206-207, but,
    b. **Texas Practice**; attorneys ***must*** associate with an active, Texas Bar member (Respondent's Counsel did not, EEOC: **Charge NO.** # 460-2017-00034) .ROA.829.
    c. **Application**: After the Board acknowledges the receipt of payment, attorneys must file a written, sworn motion requesting permission to appear for a particular case. The motion must include the Board's Acknowledgement Letter and a motion from local counsel (Respondent's Counsel provided no such application before being permitted to practice law in Texas (Position Statement). ROA.829-832.

In fact the Original Complaint did provide Respondent with fair notice of the fact that could give rise to a failure to promote claim (Appendix C). As aforementioned the rebuttal to the Position Statement was filed to be added to the claim. Respondent Counsel either ignored it or hid the knowledge of it; just like its footnote. Respondent's Counsel engaged in a pattern of misconduct designed to, *first*, conceal the existence of his non-official status, discoverable documents and Witnesses. *Second*, fabricating Witnesses declaration's by plagiarizing the Position Statement, submitted to EEOC, Houston District Office on November 18, 2016, for the purpose of deception; producing witnesses where none existed, throughout these proceedings. Respondent's Counsel, failed to comply with Judge Keith P. Ellison Court procedural rules for referencing witnesses:

> List the names and addresses of witnesses who will or may be called and include a brief statement of the subject matter and substance of their testimony. Each counsel will also attach to the joint pretrial order two copies of a list of witnesses' names only for use by Court personnel. Include in this section the following:
>
> > In the event that there are any other witnesses to be called at the trial, their names, addresses, and the subject matter of their testimony shall be reported to opposing counsel as soon as they are known. This restriction shall not apply to rebuttal or impeaching witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial.

Instead, without taking any responsibility, Respondent's Counsel, replied in its Appellee's Brief: "*Plaintiff (Petitioner) never served a discovery request seeking witness information and that the parties did not exchange initial disclosures.*" Respondent's Counsel,

without acknowledging that when Petitioner asked about witnesses during discovery; "Request for Production," Petitioner was informed that there weren't any. Further, Petitioner had no witnesses to disclose; only material facts.

REASONS FOR GRANTING THE PETITION

The civil action by Petitioner was the victim of Respondent's misrepresentation of the facts. Specifically, and not limited to; the Position Statement, unsubstantiated allegations of Insubordination, multiple sexual harassment issues, Mistreatment of Co-Workers and Guests, and Failure To Fulfill His Job Duties. Knowledge on the part of the Respondent that they were misrepresenting the facts, having no corroboration to validate its allegations; Discovery Misconduct, Spoliation Doctrine: the documents Respondent submitted are improper under the Federal Rules of Evidence; 602, and 801 ("The Rules"). They are offered for the truth of [a] statement[s] made by a third person who were not in court, and asserts numerous conclusory allegations without pleading any information, sufficient to support findings that they have any personal knowledge of the matter ("The Rules"). Further, those documents, allegedly, submitted by employees are not declarations or affidavits.

> "...a private individual, such as an employee Petitioner, is likely to be one of private concern. If this is the case, the Petitioner employee does not carry the burden of proving the defamatory statement false. Instead, the Respondent employer carries the burden of proving the defamatory statement is true. [Ringler Assocs. Inc. v. Maryland Cas. Co. (2000) 80 Cal.App.4th 1165, 1180.] (See Pl. Pr. Br. in reference to this issue...see also .ROA.160-161.)

The Respondent did not. There is *no* signature on any of the individual documents to validate any allegation .ROA.657-661, .ROA.664-667, .ROA.672-675. In Petitioner's Response Brief, referencing the alleged, "Respondent's Ethics and Compliance Hotline reports;" proffer's that there are no recordings of the alleged call-in complaints, no declarations or affidavits from anyone receiving the call[s]-in. Conclusively it is all, hearsay, based .ROA.639-646. The Respondent made the misrepresentation of facts with malice: having knowledge of the statement's falsity or reckless; disregard as to whether the statement is true or false. The misrepresentation was made purposefully with the intent of misleading the Petitioner. To the point that Petitioner believed the misrepresentation and relied upon it as shown in Appendix C with a rebuttal to the Position Statement. Petitioner suffered Termination and Special Damages as a result of the misrepresentation.

The Rules of Professional Conduct prohibit a lawyer from offering evidence that the lawyer knows to be false and instruct lawyers against unlawfully obstructing another party's access to evidence, or unlawfully altering, destroying, or concealing documents or "other material having potential evidentiary value. Respondent's Counsel's, submitted, entire composition of information was and is sourced from his initial investigation; Unauthorized Practice of Law at the Position Statement, conception, would be considered inadmissible, null and void. Lawyers, as officers of the court, have an additional duty to preserve potential evidence and to be forthcoming in the disclosure and presentation of evidence during litigation.

> Tampering with the administration of justice in the manner indisputably shown here [referring to FUTC] involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. ***The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.*** — *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

CONCLUSION

Pro Se-Petitioner is destitute in his quest for justice, admonished to walk uprightly in several stations, before God and man; squaring his actions by the square of Virtue. Remembering that virtue is not only consistent with Divine and human laws, also, the very cement and support of civil society. It is most appreciated that this court is duty-bound to do substantial justice in deciding the appeals before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. For these reasons and those set forth above, Pro Se-Petitioner, respectfully, requests that this petition for writ of certiorari be granted and reverse the lower court decision in the *light* that would relieve Pro Se-Petitioner, destitute status to his favor.

So mote it be

Respectfully submitted,

Date: June 27, 2020

CURTIS WIGGINS
Pro Se-Petitioner