

No. 20-980

IN THE
Supreme Court of the United States

VEENA SHARMA,

Petitioner,

v.

SANTANDER BANK,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented any compelling reasons to merit this Court's review on a writ of certiorari.
2. Whether the court of appeals committed reversible error in affirming the district court's dismissal of Petitioner's complaint for failure to state a claim under 28 U.S.C. § 1915(e)(2) without issuing a summons to Respondent.
3. Whether, as a matter of law, Petitioner's complaint stated claims against Respondent for which relief could be granted.
4. Whether dismissal of Petitioner's complaint may have been affirmed on the alternative ground that her action was frivolous and malicious.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Santander Bank, N.A. has the following parent corporation(s) and publicly held corporation(s) that own 10% or more of its stock: Santander Bank, N.A. f/k/a Sovereign Bank, N.A., a national bank, is a wholly owned subsidiary of Santander Holdings USA, Inc., a Virginia Corporation. Effective January 30, 2009, Banco Santander S.A. acquired all of the outstanding common stock of Sovereign Bancorp, Inc., n/k/a Santander Holdings USA, Inc. (corporate name change effective February 3, 2010).

RELATED PROCEEDINGS

1. United States District Court for the District of Massachusetts, *Veena Sharma v. Santander Bank*, No. 1:19-cv-12184-FDS, judgment entered February 25, 2020.
2. United States Court of Appeals for the First Circuit, *Veena Sharma v. Santander Bank*, No. 20-1317, judgment affirmed September 25, 2020.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the First Circuit entered judgment affirming the United States District Court's decision dismissing the case *sua sponte* in the underlying appellate matter, styled as *Veena Sharma v. Santander Bank*, No. 20-1317, on September 25, 2020. This Court docketed the Petition for Writ of Certiorari in this matter on January 25, 2021. The jurisdiction of this Court is presumably invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS AND RULES INVOLVED

1. Supreme Court Rule 10(a):

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings,

or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

...

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

2. 28 U.S.C. § 1915(e)(2):

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue;
or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

STATEMENT OF THE CASE

A. The State Court Action

As noted by the United States District Court for the District of Massachusetts in its Memorandum and Order, dated February 25, 2020 (“USDC Order”), this case originates from earlier litigation in the Superior Court of Massachusetts, Essex County (the “Essex Superior Court”) going back more than a decade. USDC Order, 1-2. On October 9, 2008, the Trustees of the Andover Gardens Condominium Trust (the “Trustees”) initiated an action against Petitioner Veena Sharma (“Sharma”) in the Essex Superior Court. They obtained a judgment against her for unpaid common expenses. *Id.* at 3.

In 2010, the Trustees commenced a second action against Sharma seeking the appointment of a receiver. *Id.* On February 10, 2011, the court appointed Michael B. Feinman, Esq. as a receiver. *Id.* On January 26, 2012, Attorney Feinman filed an Amended Final Account and Request for Dismissal, which the Essex Superior Court allowed the following day. *Id.* at 3-4.

On November 13, 2018, Sharma commenced an action against the Trustees in Essex Superior Court, styled as *Sharma v. Trustees of Andover Gardens Condo Trust*, 1877CV01631 (the “State Court Action”). *Id.* at 4. Sharma asserted claims based on the Trustees’ purportedly unlawful withdrawals of funds from her account located at Sovereign Bank, which is the name under which Santander operated at the time. See Complaint, USDC Case No. 1-19-cv-12184-FDS, Document 1. Her complaint alleged that she “came to know on June 3, 2011 that

Trustees of Andover Garden Condominium Trust has unlawfully managed to withdraw approximately \$192,000 dollars from my accounts at Sovereign Bank and Fidelity Investments for unpaid condominium fee of approximately \$18,059.33 without my permission.” *Id.* Sharma demanded \$1,000,000.00 in damages from the Trustees. *Id.*

On June 11, 2019, the Trustees, represented by attorney Domenic S. Terranova, moved to dismiss the State Court Action on the grounds that Sharma’s claims were time-barred under the applicable statute of limitations, Massachusetts General Laws chapter 260, §§ 2A and 4. USDC Order, 4. Since Sharma had alleged that she first learned of the purported account withdrawals in June 2011, yet she failed to bring an action based on those withdrawals for over seven (7) years until November 2018, the Essex Superior Court, applying the Massachusetts three-year tort statute of limitations, dismissed the State Court Action as time-barred. *Id.*

B. Procedural History of the Present Action

In October 2019, Sharma commenced the current action by filing a complaint against Santander in the United States District Court for the District of Massachusetts, styled as *Veena Sharma v. Santander Bank*, No. 19012184-FDS. USDC Order, 4. Sharma additionally filed two related proceedings, styled as *Veena Sharma v. Fidelity Investments*, No. 19-12186-FDS (the “Fidelity Case”), and *Veena Sharma v. Attorney Domenic S. Terranova et al.*, No. 19-12220-FDS (the “Terranova Case”). *Id.* at 1-2. In all three actions, Sharma requested to proceed *in forma pauperis*. *Id.* Although neither the Fidelity Case nor the Terranova Case are part of this

appeal, the district court’s Memorandum and Order addressed the Fidelity and Terranova Cases together with the present action, dismissing all three for the reasons stated therein. *Id.* at 10.

Sharma’s case against Santander, the Fidelity Case, and the Terranova Case all originated from the same alleged transactions and occurrences that were the subject of the State Court Action. According to Sharma, in 2011, she attempted to withdraw funds from her checking account at Sovereign Bank and discovered a depleted checking account containing no funds. *Id.* at 4. Sharma stated that she contacted the police and brought the matter to Sovereign Bank’s attention, but the bank took no action to investigate the purported theft. Complaint, USDC Case No. 1-19-cv-12184-FDS, Document 1 (“USDC Complaint”), at 6. In 2017, Sharma obtained certain documents from Attorney Feinman, the receiver appointed by the Essex Superior Court in 2011, that included a copy of a check issued by Sovereign Bank in the amount of \$28,069.09, payable to Attorney Feinman, presumably relating to the Trustees’ favorable judgment for unpaid common expenses and the associated receivership matter in Essex Superior Court. *Id.* Additionally, Sharma purportedly obtained a letter from Attorney Feinman to Sovereign Bank that she alleges contained “falsified information and false pretense.” *Id.* Sharma alleged that Attorney Feinman and Santander “committed wire and mail fraud by intercepting my mail to obtain information on my bank accounts and identity theft.” *Id.* at 8. She contended that she is a victim of a criminal act by Santander and sought relief under 18 U.S.C. § 656, a statute which provides criminal penalties for theft, embezzlement, or misapplication of assets by a bank officer or employee. *Id.*

at 3, 8. Sharma sought \$10,500,000.00 in damages from Santander in her district court suit, where she alleged mail, wire, and bank fraud. *Id.* at 8.

The district court did not issue a summons to Santander, yet Santander nevertheless appeared in the case and filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on November 26, 2019. USDC Order, 5. Despite receiving the appropriate notice and copies of Santander's motion to dismiss, Sharma did not reply to Santander's motion. Because Sharma moved to proceed *in forma pauperis*, the district court exercised its authority under 28 U.S.C. § 1915(e)(2) to review the Complaint and determine if the action was malicious, frivolous, sought damages against a party immune from such relief, or failed to state a claim upon which relief can be granted. *Id.* at 2. For the reasons set forth in the Memorandum and Order, the district court concluded that Sharma had failed to state any claims on which relief could be granted. *Id.* at 10. It dismissed the action along with the Fidelity and Terranova Cases. *Id.*

C. The District Court's Memorandum and Order

Sharma's Complaint relied on a federal criminal statute to support her demand for a money judgment against Santander. Nevertheless, the district court concluded that Sharma's civil claims, however they were derived from criminal laws, "are sufficiently colorable to confer federal-question jurisdiction, even if only barely so." USDC Order, 9-10.

The district court identified two separate grounds for dismissing the action. *Id.* at 9. First, by Sharma's own

admission, she became aware of the alleged theft and/or missing funds from her Sovereign Bank checking account at least seven years before bringing the lawsuit. *Id.* This fact time barred Sharma's claims against Santander under three separate statutory limitations periods: Mass. Gen. Laws ch. 260, §§ 2A (three-year statute of limitations for tort claims), 5A (four-year statute of limitations for consumer protection claims under chapter 93A), and 2 (six-year statute of limitations for breach of contract claims). *Id.*

Second, the district court concluded that the doctrine of claim preclusion, or *res judicata*, precluded Sharma's claims against Santander. *Id.* Specifically, the court found that Sharma's claims against Santander arose from the allegation that the Trustees stole money from her account. *Id.* at 10. These claims were or should have been raised as part of the State Court Action, which the state court dismissed by a final judgment on the merits. *Id.* Accordingly, the district court dismissed Sharma's Complaint for failure to state a claim upon which relief may be granted. *Id.*

D. The Court of Appeals' Judgment

Upon reviewing Sharma's appeal from the judgment of the district court, the court of appeals affirmed the dismissal of her claims against Santander, specifically on statute of limitations grounds. Judgment, U.S. Court of Appeals for the First Circuit, Case No. 20-1317, Document 00117647782 ("1st Cir. Judgment"), at 1. It found that Sharma's reliance on 18 U.S.C. § 656 was unavailing, since it is a criminal provision and Sharma "failed to explain how that provision might create a right of action for a private

civil litigant.” *Id.* Moreover, the court of appeals held that there was “no error and no abuse of discretion in the district court’s decision to grant [Santander’s] motion to dismiss without first sua sponte providing [Sharma] leave to amend her complaint,” noting that Sharma “did not seek such leave, despite having been placed on notice of the purported deficiencies in her complaint via [Santander’s] motion to dismiss,” and, “[i]n any event, as the claims were clearly time-barred based on [Sharma’s] own factual allegations, amendment would have been futile.” *Id.* at 2.

REASONS FOR DENYING CERTIORARI

A. There Are No Compelling Reasons to Grant A Petition for Writ of Certiorari

Sharma’s Petition for Writ of Certiorari does not identify “the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question,” as required under Supreme Court Rule 14(e). Presumably, she seeks to invoke jurisdiction under 28 U.S.C. § 1254, which provides that “[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” However, Supreme Court Rule 10 is unambiguous in that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion,” and that “[a] petition for a writ of certiorari will be granted only for compelling reasons.” No such compelling reasons are present here.

As reflected by Supreme Court Rule 10(a), the Court will only exercise its discretion to review a decision of a court of appeals in limited circumstances, such as when:

a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Additionally, certiorari has been granted where the questions presented were deemed important or substantial, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 68, 110 S. Ct. 2729, 2733, 111 L. Ed. 2d 52 (1990); *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S. Ct. 2495, 2499, 101 L. Ed. 2d 420 (1988), or where the ruling of the court of appeals was fundamental to the further conduct of the case, *see U.S. v. Gen. Motors Corp.*, 323 U.S. 373, 377, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945).

Sharma has not identified any valid grounds for issuance of a writ of certiorari, but rather asserts jurisdiction based on the exact same arguments she presented to the court of appeals. Specifically, Sharma argues in her Jurisdictional Statement that the court of appeals improperly affirmed the district court's dismissal of her Complaint "without issuing any summons to [Santander]," without affording Sharma the opportunity to provide "additional information," and prior to scheduling a hearing or jury trial on the merits of her claims. *See* Petition, at 3. Supreme Court Rule 10 plainly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or

the misapplication of a properly stated rule of law.” That is precisely the case here. The issues of which Sharma complains do not evince important, novel issues of law, nor do they involve recent factual developments. Indeed, by her own admission, the circumstances underpinning her claims occurred in and before 2011. *See* Petition, at 3. She has persistently engaged in litigation related to those same claims ever since, to no avail, with both state and federal courts decisively concluding that her claims are not viable under any theory of law. In the absence of any compelling, important, or substantial issues that require this Court’s review, Sharma is simply not entitled to a writ of certiorari.

B. The Court of Appeals Did Not Err in Affirming the District Court’s Dismissal of The Action Without Issuing A Summons to Santander

Aside from Sharma’s failure to present any sufficient grounds to invoke this Court’s jurisdiction, the rulings of the courts below are legally incontrovertible. Sharma argues that the court of appeals committed reversible error in affirming the district court’s dismissal of her case without first: (1) issuing a summons to Santander, (2) holding a hearing, (3) asking her to “clarify” her allegations, and (4) submitting her case to a jury. *See* Petition, at 1 and 5. Sharma does not cite any legal support for this position. Other than filing a complaint and seeking to proceed *in forma pauperis*, Santander is not aware of any other conditions that must be met before a district court can dismiss an action under the *in forma pauperis* statute, 28 U.S.C. § 1915(e)(2) (the “IFP Statute”).

In this case, because Sharma was proceeding *in forma pauperis*, she was not entitled to receive a summons and serve Santander herself. *See* 28 U.S.C. § 1915(d) (where the plaintiff proceeds *in forma pauperis*, “[t]he officers of the [district] court shall issue and serve all process, and perform all duties in such cases.”); Fed. R. Civ. P. 4(c)(3) (providing that only persons appointed by the district court can effectuate service if the plaintiff is authorized to proceed *in forma pauperis*). Furthermore, the IFP Statute authorizes the district court to review a complaint prior to ordering service on a defendant in order to determine whether the action is fit to proceed. *See* 28 U.S.C. § 1915(e)(2); *Green v. McKaskle*, 788 F.2d 1116, 1119 (5th Cir. 1986) (“A district court may dismiss an IFP proceeding for frivolousness or maliciousness at any time, before or after service of process and before or after the defendant’s answer.”).

A civil action is commenced by filing a complaint with the district court, not issuing a summons to the defendant. *See* Fed. R. Civ. P. 3. Once Sharma filed her Complaint and moved to proceed *in forma pauperis*, the district court was empowered to dismiss the Complaint for failure to state a claim without further process, and the court of appeals was justified in affirming this final judgment.¹

1. As to Sharma’s arguments for a hearing and trial on her claims, a district court can dismiss an action without a hearing, *see* L.R., D. Mass. 7.1(f), and it is axiomatic that claims which do not pass muster under Federal Rules 8 and 9 cannot proceed to trial.

C. The District Court Properly Dismissed the Action for Failure to State A Claim

The IFP Statute allows any court of the United States to authorize the commencement of a civil action without prepayment of fees. *See* 28 U.S.C. § 1915(a). It also authorizes the court to dismiss an action that the court finds “frivolous or malicious.” *See* 28 U.S.C. § 1915(e)(2) (B)(i). In 1996, Congress amended the law to additionally allow the court to dismiss the action “at any time” if it determines that the action: (1) fails to state a claim on which relief may be granted; or (2) seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) and (iii). As this Court has recognized, the IFP Statute’s dismissal power:

is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.

Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989).

The language of the IFP Statute at section 1915(e)(2)(B)(ii) tracks the language of Federal Rule 12(b)(6) and district courts apply the same standard when evaluating a complaint for failure to state a claim under the IFP Statute. *See Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997); *Kersey v. Prudential Ins. Agency, LLC*, No. CV 15-14186-GAO, 2017 WL 5162006, at *9 (D. Mass. Feb. 3, 2017). Federal Rule 8(a)(2) requires the complaint to comprise “a short and plain statement of the claim showing that the pleader is entitled to relief.” In order to “show” an entitlement to relief, a complaint must contain enough factual material “to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *See Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

1. The Statute of Limitations Bars Sharma’s Claims

As the district court correctly noted, affirmative defenses, such as the statute of limitations, may be raised in a motion to dismiss under Federal Rule 12(b)(6) if the facts establishing the defense are clear on the face of the complaint. *See Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 320 (1st Cir. 2008).

In this case, even if Sharma could derive common law claims from Santander’s purported violation of 18 U.S.C. § 656, those claims would be necessarily barred by the statute of limitations. In her Complaint, Sharma stated that she first discovered the alleged theft of her funds in 2011: eight years before filing her lawsuit in 2019.

USDC Complaint, 1. As the district court and court of appeals both concluded, all applicable limitations periods for any tort expired well before she filed her Complaint. *See* Mass. Gen. Laws ch. 260, §§ 2 (providing a six-year period for actions of contract), 2A (providing a three-year period after the cause of action accrues for actions of tort), 5 (providing a two-year period for actions to recover penalties or forfeitures under penal statutes), and 5A (providing a four-year period for consumer protection actions). Moreover, having alleged knowledge of her injury in 2011, the statute of limitations did not toll. *See Abdallah v. Bain Capital LLC*, 752 F.3d 114, 120 (1st Cir. 2014) (“[T]he statute of limitations . . . is not tolled if the plaintiff has actual knowledge of the facts giving rise to his cause of action.”); *RTR Techs., Inc. v. Helming*, 815 F. Supp. 2d 411, 423-24 (D. Mass. 2011) (quoting *Vinci v. Byers*, 65 Mass. App. Ct. 135, 837 N.E.2d 1140, 1145 (2005) (“Although the question when the cause of action accrued typically presents a question of fact, when the facts regarding discovery of harm are undisputed, the question may be decided as a matter of law.”)).

Anticipating her statute of limitations problem, as she did in her submission to the court of appeals, Sharma’s Petition relies on 18 U.S.C. § 3293, which provides: “No person shall be prosecuted, tried, or punished for a violation of, or conspiracy to violate . . . section . . . 656 . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense.” *See* 18 U.S.C. § 3293. As the court of appeals correctly concluded, this statute imposes a 10-year limitations period on criminal prosecutions and Sharma “failed to explain how that provision might create a right of action for a private civil litigant.” 1st Cir. Judgment, 1. Accordingly, Sharma’s

claims, however construed, are barred by the applicable statutes of limitation.

2. The Doctrine of *Res Judicata* Bars Sharma's Claims

The doctrine of *res judicata* provided separate grounds for the district court's decision to dismiss Sharma's Complaint. An affirmative defense such as *res judicata* may support dismissal for failure to state a claim when the facts establishing the defense are clear on the face of the plaintiff's pleadings. *See Medina-Padilla v. U.S. Aviation Underwriters, Inc.*, 815 F.3d 83, 85 (1st Cir. 2016).

There are two kinds of *res judicata*: claim preclusion and issue preclusion:

As the names suggest, claim preclusion operates on the level of the claim, and issue preclusion operates on the level of the issue. Claim preclusion is based on the idea that the precluded litigant had the opportunity and incentive to fully litigate the claim in an earlier action, so that all matters that were or could have been adjudicated in the earlier action on the claim are considered to have been finally settled by the first judgment. In contrast, issue preclusion does not reach issues unless they were actually litigated and decided in the first litigation; however, it bars relitigation of those issues even in the context of a suit based on an entirely different claim.

In re Sonus Networks, Inc, S'holder Derivative Litig., 499 F.3d 47, 56 (1st Cir. 2007) (internal citations omitted). Claim preclusion exists where there is (1) a final judgment on the merits in an earlier proceeding, (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two actions. *See Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1165 (1st Cir. 1991). The parties need not be identical so long as the precluded party had a full and fair opportunity for judicial resolution of the same issue. *See Rodriguez-Garcia v. Miranda-Marin*, 610 F.3d 756, 771 (1st Cir. 2010).

In this case, the Essex Superior Court's dismissal of the State Court Action constituted a final judgment on the merits based on the applicable statute of limitations. The causes of action articulated or implied in the State Court Action are sufficiently identical to Sharma's claims in this case for the purposes of claim preclusion because they "derive . . . from the same transaction or series of connected transactions." *See McDonough v. City of Quincy*, 452 F.3d 8, 16 (1st Cir. 2006). Both Sharma's lawsuit against the Trustees and the present action against Santander center on the allegedly unlawful and unauthorized withdrawal of funds from her bank account. *See Herman v. Meiselman*, 541 F.3d 59, 62 (1st Cir. 2008) ("Although a set of facts may give rise to multiple counts based on different legal theories, if the facts form a common nucleus that is identifiable as a transaction or series of related transactions, then those facts represent one cause of action.").

As the plaintiff in the State Court Action, Sharma had a full and fair opportunity for judicial resolution such that

she should not be permitted to relitigate identical issues by “switching adversaries.” *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979). Sharma filed the State Court Action some seven years after she first learned of the withdrawal of funds from her account at Sovereign Bank and one year after she obtained a copy of the check Santander allegedly issued to Attorney Feinman, which form the basis of her claim in this case. Accordingly, the district court validly dismissed this case because the Essex Superior Court’s final judgment in the State Court Action precluded Sharma from relitigating identical claims.

3. Sharma Failed to Establish a Private Right of Action Under 18 U.S.C. § 656

As reflected by the court of appeals’ judgment, the undisputed record supports dismissal on the alternative ground that Sharma failed to establish a private right of action against Santander. Sharma argues that Santander participated in a federal crime to defraud her and steal her money. *See* Petition, 3-4. She has sought more than \$10 million in damages from Santander for this alleged crime. *See id.* at 4-5. Section 656 is a criminal statute that punishes bank employees who steal their customers’ funds. 18 U.S.C. § 656. “Generally, a private citizen has no authority to initiate a federal criminal prosecution.” *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989). Sharma had the burden of showing that this criminal statute creates either an explicit or implied private right of action. *See Nasuti v. U.S. Sec’y of State John Forbes Kerry*, 137 F. Supp. 3d 132, 139 (D. Mass. 2016). The court of appeals held that Sharma failed to satisfy this burden, as she made no attempt “to explain how [Section 656] might create a right of action for a private civil litigant.” 1st Cir. Judgment, 1.

In determining whether a private right of action is implied in a federal statute, the court must focus on the intent of Congress. *See Arroyo-Torres v. Ponce Fed. Bank, F.B.S.*, 918 F.2d 276, 278 (1st Cir. 1990). In her Petition, Sharma relies exclusively on a criminal statute and has failed to show how the language of the statute, the statutory structure, or some other congressional purpose implies a private remedy. *See Hill v. Didio*, 191 F. App'x 13, 14 (2d Cir. 2006) (“As a general matter, we have long recognized that crimes are prosecuted by the government, not by private parties.”). Moreover, even if case law were to recognize a civil analogue to Section 656, the criminal statute punishes the conduct of individuals who exploit their position to steal customer funds. Sharma does not explain in her Petition how these claims would extend to an institution like Santander, despite the court of appeals’ instruction that the absence of such an explanation was fatal to her claims. Accordingly, Sharma failed to establish a private right of action under 18 U.S.C. § 656 and, therefore, she failed to state a claim on which relief may be granted. *See Lillacalenia v. Kit Fed. Credit Union*, No. 3:14CV-151-H, 2014 WL 3940289, at *2 (W.D. Ky. Aug. 12, 2014) (citing cases holding that there is no private right of action under 18 U.S.C. § 656).

D. Sharma Failed to Plead Fraud with Particularity

Even if Sharma had an avenue for pursuing claims against Santander based on events that occurred in 2011, her Complaint failed to satisfy the pleading standard of Federal Rule 9(b). Sharma contended that Santander conspired with Attorney Feinman to defraud her of money on deposit at the bank. Federal Rule 9(b) requires the plaintiff to state allegations of fraud with particularity.

Rule 9(b)'s heightened pleading requirements exist to place the defendant on notice and enable it to prepare a meaningful response, and to safeguard the defendant from frivolous charges. The circumstances to be stated with particularity include "the who, what, where, and when of the allegedly misleading representation." *See Kaufman v. CVS Caremark Corp.*, 836 F.3d 88, 91 (1st Cir. 2016). Sharma's Complaint contained no such particulars.

In fact, her allegations suggested that Santander (then doing business as Sovereign Bank) was ignorant of any wrongdoing. USDC Complaint, 6. According to Sharma, when she reported the missing funds to a bank manager, "[t]he manager suggested that I should report the matter to the police as this was a grand larceny." *Id.* Sharma allegedly discovered a copy of a check that Santander had issued to Attorney Feinman in the amount of \$28,069.09 and a letter "which he [] submitted to Sovereign Bank with falsified information and false pretense." *Id.* These allegations do not suggest a conspiracy. To the contrary, they imply that the letter misled Santander into disbursing funds to Attorney Feinman. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 127 S. Ct. 2499, 2505, 168 L. Ed. 2d 179 (2007) (stating that an adequately pled allegation of fraudulent intent "must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."). Sharma's failure to state a claim against Santander with particularity as required by Federal Rule 9(b) provided an alternative ground for affirming the district court's dismissal.

E. The Court of Appeals Could Have Affirmed the Dismissal of the Action Because It Was Frivolous

Finally, on de novo review, the court of appeals was permitted to consider the record, including the allegations set forth in Sharma's Complaint, and affirm dismissal because the action was frivolous and malicious. The term "frivolous," when applied to a complaint, includes both inarguable legal conclusions and "fanciful factual allegation[s]." *See Neitzke*, 490 U.S. at 325. In this case, Sharma has sought a money judgment against Santander based upon a federal criminal law that provides a statutory fine and imprisonment for individuals who break that law. Santander is a financial institution and, even if the district court or the court of appeals had found a civil analogue to 18 U.S.C. § 656, there is no basis for extending liability to an institution for an individual's purported crimes. Furthermore, the Complaint's conclusory allegations and the patently unreasonable demand of over \$10 million in damages provided ample support for dismissal on the additional grounds that Sharma filed a frivolous and malicious lawsuit against Santander while proceeding *in forma pauperis*. *See* 28 U.S.C. § 1915(e)(2)(B)(i).

CONCLUSION

Because Petitioner has failed to present any compelling reasons for this Court to grant Petitioner's Petition for Writ of Certiorari, and the decisions of the courts below were supported and legally justified, the Petition should be denied.

Respectfully submitted,

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