ORIGINAL

21-1033

No. 21-____

In the Supreme Court of the United States

EDWARD MANDEL,

Petitioner,

v.

WHITE NILE SOFTWARE, INC., ET AL.

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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JANUARY 18, 2022

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QUESTIONS PRESENTED

This appeal involves questions of exceptional importance, involving a dischargeability of the Petitioner, which is known as the "ultimate Bankruptcy capital punishment". Contrary to statutory right guaranteed by the Congress to substantively review any claim, including the Settlement Agreement releasing claims deemed non-dischargeable under the Bankruptcy Code, and contrary to decisions of the U.S. Supreme Court, its own circuit and others and long-standing precedent of Texas Supreme Court, the reviewing panel declined to substantively review any dates, facts and rulings on the Settlement Agreement that impacts Claims pertaining to Petitioner's discharge, contrary to preserving strong public policy of just due process, respecting private settlements, encouraging litigant parties to settle matters, preserving judicial economy.

Accordingly, the questions presented are the following:

1. Where the court of appeals did not allow evidence, witness and expert testimony at trial on the Settlement Agreement, should this Court summarily grant, vacate, and remand with instructions to the trial court to allow it at trial?

2. Where the court of appeals declined to substantively review various dates, facts and rulings in determination of release of Petitioner's Claims impacting his discharge by the Settlement Agreement, should this Court summarily grant, vacate, and remand with instructions to perform a full review of that evidence?

PARTIES TO THE PROCEEDINGS

Petitioner

- Edward Mandel

Respondents

- White Nile Software, Inc.
- Rosa Orenstein
- Mastrogiovanni, Schorsch and Mersky, LLC
- Steven Thrasher
- Jason Scott Coleman
- Law Offices of Mitchell Madden
- Maddensewell L.L.P.
- Milo H. Segner, Jr. (bankruptcy trustee)

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 20-40026

In the Matter of: Edward Mandel, *Debtor*, Edward Mandel, *Appellant* v. White Nile Software, Incorporated; Rosa R. Orenstein; Mastrogiovanni, Schorsch and Mersky, *Appellees*,

— CONSOLIDATED WITH —

No. 20-40340

In the Matter of: Edward Mandel, *Debtor*, Edward Mandel, *Appellant* v. Steven Thrasher, Individually; White Nile Software, Incorporated; Jason Coleman; Maddenswell, L.L.P.; Law Offices of Mitchell Madden, *Appellees.*

Date of Final Opinion: August 17, 2021

Date of Rehearing Denial: October 19, 2021

United States District Court,
Eastern District of Texas, Sherman Division

Case No. 4:17-CV-261

Edward Mandel, *Appellant* v. White Nile Software, Inc., Rosa R. Ornstein, Receiver, and Mastrogiovanni, Schorsch and Mersky, *Appellees.*

Date of Final Opinion: December 19, 2021

United States District Court,
Eastern District of Texas, Sherman Division

Case No. 4:17-CV-262

Edward Mandel, *Appellant* v. Steven Thrasher, Individually and for White Nile Software, Inc., Jason Coleman, Maddensewell, LLP, *Appellees.*

Date of Final Opinion: December 19, 2021

United States Bankruptcy Court for the
Eastern District of Texas Sherman Division

Case No. 10-40219 (Chapter 7)

In Re: Edward Mandel, *Debtor;*

Adv. Proc. No. 12-4127

White Nile Software, Inc., Rosa R. Orenstein, Receiver, and Mastrogiovanni, Schorsch and Mersky, *Plaintiffs,* v. Edward Mandel, *Defendant.*

Adv. Proc. No. 12-4128

Steven Thrasher, Individually and for White Nile Software, Inc., Jason Coleman, Maddenswell, L.L.P.; Law Offices of Mitchell Madden, *Plaintiffs,* v. Edward Mandel, *Defendant.*

Judgment date: April 17, 2017

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OPINIONS BELOW

This Petition involves an affirmance of Petitioner's Dischargeability Findings of Facts and Conclusion of Law issued by the trial Bankruptcy Court.

The opinion of the United States Court of Appeals for the Fifth Circuit is included at App.1a. The memorandum opinions of the United States District Court, Eastern District of Texas, Sherman Division are included at App.21a and App.48a. The findings of fact and conclusions of law of the United States Bankruptcy Court for the Eastern District of Texas and the final judgment of this court are included at App.79a and App.76a. These opinions were not designated for publication.

JURISDICTION

The bankruptcy court had jurisdiction to consider the bankruptcy petition, including the resulting claim against Mr. Mandel, and the U.S. District Court for the Eastern District of Texas had jurisdiction to review the bankruptcy court's judgment. 28 U.S.C. §§ 151, 158, 1334.

The U.S. Court of Appeals for the Fifth Circuit had jurisdiction to decide the appeal below. 28 U.S.C. § 158.

The U.S. Court of appeals entered its order denying rehearing and rehearing en banc on October 19, 2021. (App.162a) This Court has jurisdiction to review the circuit court judgment per 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This Petition arises out Edward Mandel's bankruptcy in the Eastern District of Texas.

Failed business relationship between and among the Petitioner Edward Mandel and Steven Thrasher, Jason Coleman, and White Nile Software, Inc. later caused significant Claim judgments against the Petitioner.

District Court affirmed Bankruptcy Court's decision denying discharge of any of Mr. Mandel's debts under 11 U.S.C. § 727 and 11 U.S.C. § 523.

During the Bankruptcy Proceedings, Settlement Agreement was negotiated, which should have released all claims against the Petitioner by Respondents Thrasher, White Nile and their assignees.

The Bankruptcy Court erred when it refused to make an indicative ruling to enforce the Settlement Agreement during the Omnibus evidentiary hearing ("Omnibus Hearing"), which presented witness testimony and considerable evidence supporting enforcement of the Settlement and release of Petitioner's claims. And later at trial, Bankruptcy Court declined to allow evidence, witness and expert testimony pertaining to the Settlement Agreement, while summarily rejecting enforcement of the Settlement Agreement with one sentence on its Finding of Facts and Conclusions of Law.

Fifth Circuit Court of Appeals granted consolidation of these vastly identical ultimate Bankruptcy "capital punishment" cases, as this court has the power to consider the circumstances that led to untimely notice and apply the discretion and deciding identical Issues of both consolidated cases at once, providing judicial economy and finality to all parties.

Parties filed their respective briefs. Settlement Agreement is entirely identical Issue for both consolidated cases. And each case has cross-assignees and even identical parties, such as White Nile.

This panel declined to engage in the substantive review and consideration of various dates, facts and rulings in determination of most other facts, specifically the identical issue of Settlement Agreement in these consolidated cases, crucial to Petitioner's discharge, and affirmed District Court decision on Claims this Settlement Agreement effectively released.

I. Settlement Agreement Should Have Released All Claims Against the Petitioner by Appellees Thrasher, White Nile and Their Assignees.

The Bankruptcy Court erred when it did not enforce the Settlement Agreement during the Omnibus Settlement evidentiary hearing, presenting witness testimony and considerable other evidence and case law supporting enforcement of the Settlement and release of Petitioner's claims.

Michael Shore, one of the many witnesses at the Omnibus Hearing, made it predominantly clear presenting voluminous email evidence and other documents to support it, while Thrasher, a "Star" witness chose not to contradict Shore's credible testimony, leaving

Shore's and others testimonies completely undisputed, with support of credible factual email evidence.

However, the Bankruptcy Court refused to exercise its exclusive jurisdiction and sent the Petitioner to the "Wild Goose Chase" at the State court to enforce the Settlement agreement, knowing that Bankruptcy Court retained exclusive jurisdiction and there was a standing issue pending at that time and that State Court would decline to rule due to both jurisdictional and standing grounds.

Petitioner understands that Judge can manage its docket, but it greatly prejudiced Petitioner, by (a) depriving him from the State Courts decisions, (b) his appeal rights in the State Courts and (c) incurring significant additional costs and time effort by Appellant and various judicial forums. If Bankruptcy Court wanted to give up its exclusive jurisdiction and have this issue decided by the State Court it could have abated this issue until resolution of the standing issue, instead of sending Appellant to the "wild-goose chase" to get any declaratory relief from the State court.

At the Omnibus Hearing, Appellant's counsel even warned the court: "I can say that to the extent that this Court has exclusive jurisdiction, this Court is not going to exercise exclusive jurisdiction . . . In other words, I don't want them to go to [state court] . . . but the Bankruptcy Court has exclusive jurisdiction." But Court replied: " . . . the State Court gets to decide what's not discharged and what the scope of the claims are. That can be done all the time, every day . . . So you all go figure it out."

As predicted by Petitioner's Counsel, Texas State Court of Appeals declined to enforce the Settlement

Agreement due to the lack of jurisdiction and standing grounds. Only three months later, Fifth Circuit Court of Appeals ruled granting Appellant standing on dischearageability grounds.

If there was no delay in Fifth Circuit ruling on Appellant's standing, State Court and Texas Court of Appeals would not have declined to rule on jurisdictional grounds and would review the evidence and would likely have followed Texas Supreme Court precedent and "give effect to all the provisions of the contract so that none will be rendered meaningless," *See Seagull Energy E & P Inc. v. Eland Energy Inc.*, 207 S.W.3d 342, 345 (Tex. 2006) (emphasis in original); *Accord Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983), especially controlling handwritten provision, after lengthy mediation by experienced mediator. *See In re Estate of Halbert*, 172 S.W.3d 194, 202 n. 15 (Tex. App. – Texarkana 2005, *pet. denied*); *Martin v. Southern Engine & Pump Co.*, 130 S.W.2d 1065, 1066 (Tex. Civ. App. – Galveston 1939, *no writ*).

II. The Bankruptcy Court Declined to Allow Evidence, Witnesses, Expert Testimony at Trial on Settlement Agreement, While Missing Omnibus Hearing Debtor's Exhibits and Hearing Transcript on the Docket.

And later at 5 days trial, after refusing to retain exclusive jurisdiction during the Omnibus Hearing as to the Settlement Agreement, Bankruptcy Court decided to "assume" exclusive jurisdiction on the matter, but entirely denied the Petitioner to present evidence, witness and expert testimony on this matter, while most critical Petitioner's affirmative defenses evidence, such as Debtor's witness exhibits and hearing

transcripts from the Omnibus Hearing did not even exist on the docket.

When Shore (witness) started to testify, court objected sue sponte on any questioning about the Settlement Agreement, which was clear abuse of power barring Petitioner from his affirmative defenses.

Petitioner made significant effort during this appeal, working with clerks of the Appellate Court to locate crucial missing documents and eventually had to seek help from his trial counsel, Mr. Rukavina to prove its existence. It is puzzling, why only Debtor's witness exhibits and transcript hearing was missing on the bankruptcy docket, and why Bankruptcy Court could not locate them? And how the Court could consider this evidence at trial, while it was missing?

Mr. Rukavina, was able to locate the Hearing Transcript directly from the outside court reporter CSR and had to retrieve a copy of the binder from his law firm's archive and FedEx it to Petitioner. Fifth Circuit Court of Appeals granted Petitioner Supplementation of these critical documents after review of Appellant's Motion to Supplement [5COA Court's Case Docket 9400029-2 and 5COA Docket Order on October 20, 2020].

Lacking any witness and expert testimony and documents, in its Findings of Facts and Conclusions of Law, Bankruptcy Court simply stated one sentence —court "heard the Motion on September 4, 2013 and in conclusion of the hearing denied the motion." App.92a. This statement by the Bankruptcy Court is misleading at best. At the conclusion of the Omnibus Hearing, Bankruptcy Court denied the motion in part and granted it in part, stating "The issue before this

Court is whether this Court should give some form of indicative or advisory ruling egarding the status of the claims before the Court . . . the Court declines to make an indicative ruling. The Court's ruling today is without prejudice to the ability of the parties to return to the originating court, to the state court, if they so choose, about enforcement of the settlement agreement. But the Court is not going to issue an indicative ruling to this Circuit . . . " And when counsel asked to clarify, court replied, "I guess it's denied in part and granted in part. To the extent it relates at all to the subject matter of the state court litigation, it is granted. But to the extent it does not relate to the subject matter of the state court litigation, it is denied." And when Petitioner's counsel asked for a final indicative ruling Court replied, "How is it a final ruling? I'm not dismissing the case. We're going to have to decide it, right? So how's it a final ruling? What am I missing?", continuing "And, again, it's the Court's intent that the ruling is interlocutory, because it does not finally dispose of the litigation. And if the parties wish to get final rulings from the State Court who issued the order, or who is intimately familiar with the issues regarding the negotiations . . . And it's not intended that the Court's ruling today be preclusive as to those issues, because it's interlocutory. Okay? . . . On the dismissal issue, this Court has the exclusive jurisdiction on the discharge. Okay. It's before this Court." The Bankruptcy Court actually granted the motion as it relates to the subject matter of the state court litigation [effectively sending parties to interpret the Settlement Agreement in the State Court], knowing it would decline to rule due to lack of jurisdiction and standing issues [and it is exactly what happened there], but declined to make an indicative ruling on

how this Settlement Agreement affects Petitioner's discharge on his claims, which was supposed to be argued at the discharge trial for final ruling. Instead, the above stated misleading conclusory statement in its Finding of Facts and Conclusions of Law is the only weight the Court placed on this evidence at trial [court declining to make an indicative ruling at the Omnibus Hearing], while at the same trial not allowing evidence and witnesses, and while all Debtor's witness exhibits and even two years old hearing transcript of September 4, 2013 were missing on the docket.

Failing to enforce the Settlement Agreement and failing to even allow evidence at trial caused all parties and judicial system significant litigation burden. Bankruptcy Court clearly abused its power, as Petitioner was prejudiced and denied due process at the trial, and bluntly denied his affirmative defenses as to the Settlement Agreement.

III. The Fifth Circuit Court of Appeal Reviewing Panel Declined to Substantively Review Considerable Supportive Evidence from the Omnibus Bankruptcy Hearing, Which It Granted to Be Supplemented During the Appeal and Declined to Substantively Review Any Evidence from the Trial on the Subject Matter of the Settlement Agreement.

At the Fifth Circuit appeal, the reviewing panel declined to substantively review the evidence on the Settlement Agreement, letting a conclusory one sentence finding of the Bankruptcy Court void the settlement between parties, contradicting the Texas Supreme Court and its own circuit precedent, which would not have affirmed an award—on the present record—based solely on an incomplete portion of the

"limited release" clause, and instead would review the broad aspects of the Settlement Agreement, especially controlling handwritten provision, placed by experienced mediator after lengthy mediation and signed by Thrasher, an experienced lawyer, expert in contract law who understood the meaning of the release and settlement, who received a large monetary consideration.

Reviewing Panel should have found the basis to reject Bankruptcy Court's assessment on this issue and substantively review considerable supportive evidence from the Omnibus bankruptcy hearing and the trial, which it granted to be supplemented during the appeal and engage in the consideration of various dates, facts and rulings in determination of release of Petitioner's Claims affecting his discharge—the right given to Petitioner by the US Congress.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD SUMMARILY VACATE THE JUDGMENT BELOW AND REMAND WITH INSTRUCTIONS TO PERFORM A FULL REVIEW OF ALL EVIDENCE ON THE SETTLEMENT AGREEMENT IMPACTING PETITIONER'S CLAIMS DEEMED NON-DISCHARGEABLE.

This Court should intervene when a court of appeals deprives the Appellant a right Statutorily Guaranteed by the U.S. Congress, to conduct a claim-by-claim analysis, including the Settlement Agreement substantive review, to determine whether the claims are statutorily ineligible for discharge, as the bank-

ruptcy court alternatively found. *See* 11 U.S.C. § 523 and 11 U.S.C. § 727.

As per *Kokkonen*, 114 S. Ct. at 1677, Court took pains to explain that ancillary jurisdiction to enforce the agreement does exist where the court has expressly retained jurisdiction over the settlement agreement [even after dismissal], which is applicable in this case where the Bankruptcy Court has exclusive jurisdiction over the Settlement Agreement.

Recognizing the benefits that flow from the private settlement of disputes, the Supreme Court has repeatedly endorsed the policy favoring settlement. Indeed, at the turn of the century, the Court declared that "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."' Shortly thereafter, the Court reiterated that "compromises of disputed claims are favored by the courts."' *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910).

Many other cases also emphasized the strength and importance of the policy. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."), *cert. denied,* 464 U.S. 818 (1983); *Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 426, 428 (5th Cir. 1977) ("Settlement agreements are 'highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits."') (*quoting Pearson v. Ecological Science Corp.,* 522 F.2d 171, 176 (5th Cir. 1975), *cert denied,* 425 U.S. 912 (1976)); *Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc.,* 489 F.2d 974, 978 (7th Cir. 1973) ("It cannot be gainsaid that in general settlements are judicially

encouraged and favored as a matter of sound public policy."); *See, e.g., E. Allan Farnsworth,* CONTRACTS § 2.12, at 71 (2d ed. 1990) ("The law favors settlement by the parties of disputed claims in the interests of alleviating discord and promoting certainty."); *Arthur L. Corbin,* CORBIN ON CONTRACTS § 1268, at 72-73 (1962) ("Compromises are known to be favored by the law.").

The Supreme Court's own endorsement of the policy also had remained consistent in its more recent decisions. In 1985, for instance, the Court gave an expansive construction to Federal Rule of Civil Procedure 68, which allows for offers of judgment, in order to further the rule's purpose of encouraging settlements. In its analysis of Rule 68, the Court reiterated the policy favoring settlement, emphasizing that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants." And following this lead, the lower courts have continued consistently to articulate their support for the public policy favoring the private settlement of disputes. *See Marek v. Chesny,* 473 U.S. 1, 5-10 (1985); *Evans v. Jeff D.*, 475 U.S. 717, 736-38 (1986); *Id.* at 737-38; *See also United States v. Mezzanato*, 115 S. Ct. 797, 804 (1995) (recognizing that the policy favoring settlement in criminal cases is a "substantial 'public policy' interest[]"); *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1467 (1994) (rejecting a rule of *pro tanto* setoff with right of contribution against the settling defendant in admiralty cases, "because it discourages settlement and leads to ancillary litigation"); *Carson v. American Brands, Inc.*, 450 U.S. 79, 87-90 (1981) (allowing immediate appeal of a district court's order refusing to approve the parties' negotiated settlement, where that settlement contained injunctive relief).

This Court should also intervene when a court of appeals "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." U.S. Sup. Ct. R. 10(a). This case presents such a need for this Court's supervisory power. A summary disposition is appropriate. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.")

Where, as here, a federal court adjudicates a state-law cause of action, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The Fifth Circuit normally adheres to that rule. *E.g.*, *Bear Ranch, L.L.C. v. Heartbrand Beef, Inc.*, 885 F.3d 794, 804 (5th Cir. 2018) ("Our effort is an attempt to predict state law, not to create or modify it." (quotation omitted)); *Mem'l Hermann Healthcare Sys. v. Eurocopter Deutschland*, 524 F.3d 676, 678 (5th Cir. 2008) ("Appellants carry a heavy burden to assure us that we would not be making law because the Texas Supreme Court would likely recognize their proposed exception."). But not so here.

After declining to exercise its exclusive jurisdiction and make an indicative ruling at the Omnibus Hearing, and later at trial declining to allow any evidence and witnesses, Bankruptcy Court decided to rule on the Settlement Agreement matter in its opinion through a conclusory sentence based solely on an incomplete

portion of the "limited release" clause, contrary to a well set precedent of the Texas Supreme Court.

Had the reviewing panel performed a substantive review of the evidence presented at the Omnibus Hearing and factored the denial of witnesses and evidence at the trial, reviewing panel would firmly realize that the Texas Supreme Court would not have affirmed any type of award—on the present record—based solely on an incomplete portion of the "limited release" clause, and instead would review the broad aspects of the Settlement Agreement, especially controlling handwritten provision, placed by experienced mediator after lengthy mediation and signed by Thrasher, an experienced lawyer, expert in contract law who understood the meaning of the release and settlement, who received a large consideration.

And essentially, Texas Court of Appeals stated exactly their position when they declined to rule due to the standing and jurisdictional grounds: "Settlement Agreement and Mutual Release attached to this Motion [Settlement Agreement signed at the Mediation] is a final, binding and fully enforceable settlement agreement as to all persons or entities described, regardless weather their signatures actually appear on the document."

By not allowing substantive review of the evidence on the Settlement Agreement, this panel essentially allowed the trial court to take the Settlement Provision out of the Settlement Agreement, resulting in writing out of the contract the most important provision in the contract the parties inserted by handwriting by the professional mediator after the lengthy mediation.

And following its own precedent, Fifth Circuit should have substantively review the matters and should not have innovated. *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985) ("[W]e remain mindful of our role in the system; it is not for us to adopt innovative theories . . . but simply to apply that law as it currently exists."); *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980) ("Even in the rare case where a course of Texas decisions permits us to extrapolate or predict with assurance where that law would be had it been declared, we should—perhaps being out of the mainstream of Texas jurisprudential development—be more chary of doing so than should an inferior state tribunal.").

Under the Texas law, when discerning the intent of contracting parties, the Court must "give effect to all the provisions of the contract so that none will be rendered meaningless." *Seagull Energy E & P Inc. v. Eland Energy Inc.*, 207 S.W.3d 342, 345 (Tex. 2006) (emphasis in original); *Accord Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). However, when there is objective evidence from which more certainty can be gleaned, it is incumbent on the plaintiff to produce that evidence." *Sw. Energy Prod. Co. v. BerryHelfand*, 491 S.W.3d 699, 720 (Tex. 2016) (remanding for new trial where plaintiff failed to adduce "readily ascertainable" evidence).

Especially, when parties make handwritten changes to a preprinted form, the handwritten provision controls. *In re Estate of Halbert*, 172 S.W.3d 194, 202 n. 15 (Tex. App. – Texarkana 2005, pet. denied); *Martin v. Southern Engine & Pump Co.*, 130 S.W.2d 1065, 1066 (Tex. Civ. App. – Galveston 1939, no writ) ("the written or type-written words in a contract will

prevail over the printed ones"). If Court writes the Settlement Provision out of the Settlement Agreement, then it is writing out of the contract the most important provision in the contract the parties inserted by handwriting.

Restatement confirms, "in cases of inconsistency a handwritten or typewritten term inserted in connection with the particular transaction ordinarily prevails." RESTATEMENT (SECOND) CONTRACTS § 203 *cmt. f.* The Settlement Provision is handwritten in material part, while the Release Provision is preprinted boilerplate except for one immaterial insertion: the Settlement Provision controls. In the event of any ambiguity between the two, the Settlement Provision, due to its heavy handwritten and material changes, prevails.

Respondent Thrasher even filed the motion for alternative Settlement and release, but the State Court declined it. Petitioner was a witness at that State Court hearing, as one of the parties to the agreement. Court issued a Final Judgment stating and adopting all provisions of the mediated settlement agreement, stating that "Settlement Agreement and Mutual Release attached to this Motion [Settlement Agreement signed at the Mediation] is a final, binding and fully enforceable settlement agreement as to all persons or entities described, regardless weather their signatures actually appear on the document." Texas Court of Appeal restated the same language in its opinion.

Here, the evidence presented at trial was insufficient at best, as witnesses and expert testimony was entirely declined by the trial court to even be presented at trial. And the reviewing panel declined to substantially review any evidence pertaining to the Settlement Agreement, even massive amount of evidence and

witness testimony from the Omnibus hearing on the Settlement at the bankruptcy proceedings, which was missing on the Bankruptcy docket and had to be recovered during the Appeal (5COA granted supplementation).

A full review of all evidence, witnesses and experts at trial on the Settlement Agreement following the precedent of the Supreme Court of Texas would not have caused all parties and judicial system significant litigation burden.

This Court should not tolerate a practice of ignoring the private settlements by the parties or denying the right for substantive review guaranteed by the U.S. Congress or ignoring the precedent of the Texas Supreme Court and appellate circuits in interpreting the contracts. Such practice caused litigants in this case and judicial system an expensive and lengthy burden. Instead, this Court should summarily vacate the judgment below and remand with instructions that the bankruptcy court allow presenting of all evidence, witness and expert testimony on the Settlement Agreement at trial and reviewing panel should substantively review all evidence affecting Petitioner's discharge claims andfollow the precedent of the Supreme Court of Texas and Fifth Circuit Court of Appeals and other circuits.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO DIRECT THE FIFTH CIRCUIT TO AFFORD MR. MANDEL THE APPEAL THAT CONGRESS STATUTORILY GUARANTEED.

Because "this is a court of final review and not first view," *Holland v. Florida*, 560 U.S. 631, 654 (2010) (quotation omitted), this Court will grant *certiorari*,

vacate a judgment of the court of appeals, and remand ("GVR") with instructions where the court of appeals below has not yet reached an issue but should have. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that a GVR order is an important tool that this Court has because it "assists the court below by flagging a particular issue that it does not appear to have fully considered, [and] assists this Court by procuring the benefit of the lower court's insight before we rule on the merits. . . ." (citation omitted)).

While the bankruptcy court denied the Petitioner any bankruptcy discharge, Fifth Circuit court of Appeals should have conducted a claim-by-claim analysis, including the Settlement Agreement substantive review, to determine whether the claims are statutorily ineligible for discharge, as the bankruptcy court alternatively found. *See* 11 U.S.C. § 523 and 11 U.S.C. § 727. Unless this Court directs the Fifth Circuit to substantively review the Settlement Agreement, which affects his claims, Mr. Mandel potentially faces non-dischargeable debt on claims that are released by the Settlement Agreement, that Fifth Circuit declined to substantively review.

Congress has decided that litigants have an appeal as of right to the courts of appeal from final orders from the bankruptcy court. Here, however, the Fifth Circuit did not give Mr. Mandel that statutory benefit. This Court should, therefore, vacate the Fifth Circuit's judgment below and remand with instructions to substantively and fully review of all evidence, witness and expert testimony on the Settlement Agreement following the precedent of the Supreme Court of Texas, Fifth Circuit Court of Appeals and other circuits.

CONCLUSION

The proceedings below call out for the Court to exercise its supervisory power. Given that this appeal is impacting dischargeability of the Petitioner, which is known as the "ultimate Bankruptcy capital punishment", this Honorable Court should not tolerate a practice of ignoring the private settlements by the parties and not following the precedent of the Texas Supreme Court and case law of Fifth Circuit Court of Appeals and other circuits in interpreting the contracts and causing litigants and judicial system in expensive and lengthy burden.

Consideration by this Honorable highest court of the land is necessary in these vastly identical consolidated cases to Grant, Vacate and Remand ("GVR") the judgments below in respect to the questions presented herein, provide Petitioner his guaranteed right by U.S. Congress for substantive review of his claims affecting his discharge under the Bankruptcy Code, and maintain uniformity of the law on state court causes of auctions, policy of encouraging private settlements and preserve appellate rights to allow substantive review guaranteed by Congress under the Bankruptcy code.

Instead, this Court should summarily vacate the judgment below and remand with instructions that the Bankruptcy Court should allow presenting of that evidence, witness and expert testimony on the Settlement Agreement at trial following the precedent of the Supreme Court of Texas and its own Circuit.

This Court should also grant, vacate and remand with instructions for the Fifth Circuit Court of Appeals to allow the Petitioner his rights guaranteed by the US Congress and substantively review all evidence, including the documents and witness testimony from the recovered Omnibus Hearing docket and the trial and engage in the consideration of various dates, facts and rulings in determination of release of Petitioner's Claims affecting his discharge with instructions to follow the precedent of the Supreme Court of Texas and the case law of its own circuit.

Respectfully submitted,

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JANUARY 18, 2022