USCA11 Case: 19-13722 Date Filed: 04/15/2021
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND H. PIERSON, III,
Plaintiff-Appellant

versus

BRUCE S. ROGOW, J.D.,
BRUCE S. ROGOW, PA,
CYNTHIA GUNTHER, J.D.,
DOES 1 THROUGH 5, INCLUSIVE,
CYNTIA GUNTHER, PA,
Defendants-Appellees.

Case No. 19-13722
Appeal from the United States District Court for the Southern District of Florida

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Before: WILSON, BRANCH and GRANT, Circuit Judges. BY THE COURT:

Appellant's March 8, 2021 motion for reconsideration of our December 7, 2020 order dismissing this appeal for lack of jurisdiction is DENIED.

Plaintiff-Appellant,

USCA11 Case: 19-13722 Date Filed: 12/07/2020
Page: 1 of 2

RAYMOND H. PIERSON, III,

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND H. PIERSON, III M.D.

Plaintiff-Appellant,

versus

BRUCE S. ROGOW, J.D.,
BRUCE S. ROGOW, PA,
CYNTHIA GUNTHER, J.D.,
DOES 1 THROUGH 5, INCLUSIVE,
CYNTIA GUNTHER, PA,

Defendants-Appellees. Defendant.

No. 19-13722-EE

Appeal from the United States District Court for the Southern District of Florida

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Before: WILSON, ROSENBAUM and BRANCH, Circuit Judges.

BY THE COURT:

This appeal is DISMISSED, *sua sponte*, for lack of jurisdiction because Raymond H. Pierson, III's September 19, 2019 notice of appeal is untimely to appeal from the August 19, 2019 judgment. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A) (stating that a party has 30 days from the judgment or order appealed to file a notice of appeal); *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 21 (2017) (explaining that the timely filing of a notice of appeal is jurisdictional); *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1300–02 (11th Cir. 2010); *see also* Fed. R. App. P. 4(a)(6)(B) (requiring a motion to reopen the time to file an appeal if the moving party did not receive notice of the judgment to be filed with 180 days of the judgment).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of Eleventh Circuit Rule 27-2 and all other applicable rules.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-61312-UU
RAYMOND H. PIERSON, III,
Plaintiff,

v.
BRUCE S. ROGOW, *et al.*,
Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Unopposed Motion to Request of this Court the Opportunity to Submit a Revised Motion in Opposition to Defendant's Motion (DE 93) to Dismiss the Third (Technically the Second) (Doc 85) at the Correct Length (the "Motion").[1] D.E. 101.

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise fully advised on the premises.

[1] The Court notes that Defendants informed Plaintiff that they did not oppose the present motion before the Court entered its order dismissing the third (technically second) amended complaint with prejudice (D.E. 99) and entered a final judgment in favor of Defendant (D.E. 100). D.E. 101.

On August 15, 2019, the Court entered its order striking *pro se* Plaintiff's response in opposition to Defendants' motion to dismiss, as he failed to seek leave and obtain prior permission of the Court before filing any opposing memoranda of law in excess of twenty pages. D.E. 98. On August 19, 2019, the Court granted Defendants' motion to dismiss, dismissed the third amended complaint with prejudice, and entered final judgment in favor of Defendants. D.E. 99 & 100. Plaintiff now moves for leave to file a revised motion in opposition to Defendants' motion to dismiss at the permissible length.[2] D.E. 101. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion (D.E. 101) is DENIED AS MOOT. DONE AND ORDERED in Chambers at Miami, Florida, this _22d_ day of August, 2019.

/s/Ursula Ungaro
UNITED STATES DISTRICT JUDGE

cc: counsel of record via cm/ecf *Pro se* Plaintiff

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[2] The Court notes that Plaintiff signed and dated the Motion as of August 16, 2019, but it was docketed on August 20, 2019. D.E. 101.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-61312-UU

RAYMOND H. PIERSON, III,

Plaintiff,

v.

BRUCE S. ROGOW, *et al.*,
Defendants.

_____/

JUDGMENT

THIS CAUSE comes before the Court upon Defendants Bruce S. Rogow, J.D., Bruce S. Rogow, P.A., and Cynthia Gunther, J.D.'s Motion to Dismiss Plaintiff's Third Amended Complaint (D.E. 93) and the Court's Order granting that motion concurrently with this Judgement. Pursuant to Federal Rules of Civil Procedure 54 and 58(a), the Court now enters this separate judgment. It is hereby,

ORDERED AND ADJUDGED that

Judgment is entered in favor of Defendants.

DONE AND ORDERED in Chambers at Miami, Florida, this _19th_ day of August, 2019.

/s/Ursula Ungaro
UNITED STATES DISTRICT JUDGE

cc:

counsel of record via cm/ecf

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-61312-UU

RAYMOND H. PIERSON, III,
Plaintiff,

v.
BRUCE S. ROGOW, *et al.*,
Defendants.
_____/

ORDER

THE COURT has considered the motion, the pertinent portions of the record and is otherwise fully advised in the premises.

I. Background

Pro se Plaintiff Raymond H. Pierson, III, a physician, filed this lawsuit against his appellate attorneys due to the attorneys' alleged mishandling of his appeal. D.E. 85 at 10. The case

[1] The Court finds that Plaintiff fails to state any claim against Defendants "Does 1–5, inclusive." And "[a]s a general matter, fictitious-party pleading is not permitted in federal court." *Richardson v. Johnson*, 598 F.3d 734, 738 (11th)

underlying the appeal stemmed from sanctions imposed on Plaintiff by his then-medical group. *Id.* at 25.

On February 25, 2014, Plaintiff filed the initial complaint against Bruce S. Rogow, Bruce S. Rogow, P.A., and Cynthia On February 25, 2014, Plaintiff filed the initial complaint against Bruce S. Rogow, Bruce S. Rogow, P.A., and Cynthia Gunther (collectively, "Defendants") and Does 1 through 5 (the

Cir. 2010); *see Guava, L.L.C. v. Doe*, No. CIV.A. 12-678-N, 2013 WL 105352, at *2 (S.D. Ala. Jan. 7, 2013) (listing cases where district courts in the Eleventh Circuit "have ruled against fictitious party practice on the basis of these cases, in situations in which identification of the Doe defendant through discovery appears to have been a straightforward matter."). The Court perceives no legal basis for allowing the practice in this case.

[2] In that order, the court also noted this is not Plaintiff's first failed attempt at pleading diversity of citizenship. D.E. 10 (citing *Raymond H. Pierson, III v. Bruce S. Rogow, et al.*, No. 14-60270 (Feb. 2, 2014)). Plaintiff set forth substantially the same claims in both cases. *Id.*

[3] Although titled the "second amended complaint," the Court notes it is in fact Plaintiff's first amended complaint.

[4] Plaintiff brought a constitutional challenge to the change of venue statute—1990 Revision of 28 U.S.C. §§ 1391 by Public Law 101–650 Section 311(1)—that allowed Defendants to bring the case in the Southern District of Florida, rather than the Eastern District of California, where Plaintiff lives and initially filed the case. D.E. 30 at 3, 24.

"Doe Defendants").[1] D.E. 1. Plaintiff brought four causes of action: (i) legal malpractice; (ii) breach of fiduciary duty; (iii) breach of contract; and (iv) fraud. *Id.* The court dismissed the initial complaint *sua sponte* for failing to sufficiently allege diversity of citizenship in order for the court to determine whether it has jurisdiction.[2] D.E. 10. Subsequently, the Eleventh Circuit issued a judgment and mandate, vacating that order and remanding the case for further proceedings. Judgment, No. 15-15475-BB (11th Cir. Oct. 12, 2016), D.E. 17. Thereafter, on February 20, 2018, Plaintiff filed the second amended complaint,[3] bringing the same four causes of action and requesting declaratory relief based on a constitutional challenge to the change of venue statute.[4] D.E. 30.

On April 17, 2018, Defendants moved to dismiss the second amended complaint for failure to comply with the pleading requirements and for failure to state a cause of action upon which relief can be granted. D.E. 32. Among other pleading deficiencies, Defendants noted that in the second amended complaint, Plaintiff: (i) impermissibly grouped all Defendants, including the Doe Defendants, together; (ii) failed to specify any action or omission particularly attributable to any one individual defendant; (iii) failed to demonstrate that any action or omission would have resulted in different outcome in the appeal; (iv) and contained a narration of irrelevant factual allegations and conclusory statements. *Id.* Subsequently, Plaintiff filed motions for leave to

amend the second amended complaint. D.E. 59 & 61. On January 1, 2019, United States Magistrate Judge Patrick M. Hunt issued a Report and Recommendation, recommending that the court grant the motion to dismiss on the basis that the second amended complaint was deficient where, *inter alia*, Plaintiff attempted to re-litigate the underlying case and failed to provide a short and plain statement with the requisite specificity as to which Defendant committed the alleged errors. D.E. 65 at 4. Magistrate Judge Hunt further recommended that the court grant Plaintiff's motion to amend "with the caveat that no further such motions would be entertained." *Id.* at 14.

Subsequently, Plaintiff filed a response to the Report and Recommendation, which the District Judge then assigned to the case construed as objections. D.E. 66 & 69. On March 25, 2019, the court overruled the objections and approved, adopted, and ratified the Report and Recommendation. D.E. 69. In so doing, the court dismissed the constitutional challenge with prejudice, but otherwise dismissed the complaint without prejudice and with leave to amend. *Id.* Thereafter, on May 31, 2019, Plaintiff filed the third amended complaint, bringing the same four causes of action.[5] D.E. 85. Specifically, Plaintiff alleged legal malpractice (Count I), breach of fiduciary duty (Count II), and fraudulent inducement (Count IV) against all Defendants and the Doe Defendants. Plaintiff also alleged breach of contract (Count III) against Defendants Bruce S. Rogow and Bruce S.

Rogow, P.A. *Id.* On June 27, 2019, this case was reassigned to this Court. D.E. 92.

On June 28, 2019, Defendants filed the present motion to dismiss, arguing that Plaintiff has failed to rewrite the third amended complaint to conform to the basic pleading requirements and has failed to state any cause of action. D.E. 93. Defendants point out that instead of a shorter, concise statement of his claims, Plaintiff added sixty pages and stopped using sequential paragraphs. *Id.* Defendants also contend that Plaintiff failed to (i) specify in the capacities in which they worked on the appeal; (ii) correct the blanket accusation that all Defendants, including the Doe Defendants, committed a series of legal errors; (iii) correct the impermissible grouping of all Defendants, including the Doe Defendants, in Counts I, II, and IV; and (iv) reasonably allege that any action or omission would have resulted in a different outcome in the appeal. *Id.*

On July 18, 2019, Plaintiff filed his response in opposition, arguing that Rule 8(a) is more consistent

[5] Although titled the "third amended complaint," the Court notes it is in fact Plaintiff's second amended complaint. In addition, the Court notes that while Plaintiff removed the constitutional challenge claim, he nonetheless "firmly maintains the position" that venue was proper in the Eastern District of California and that the case was "unlawfully transferred" to this district. D.E. 85 at 23–24.

with the previous pleading standards and, therefore, the standards set forth in *Twombly* and *Iqbal* do not apply to this case.[6] D.E. 97 at 22–26. Plaintiff further contends that district courts must liberally construe pleadings filed by *pro se* litigants and permit them the opportunity to fully develop potentially meritorious cases. *Id.* at 27–28. Moreover, in his fifty-three page response, Plaintiff purportedly provides this Court with "a full and encyclopedic discussion of the facts of the underlying Peer Review and related [proceedings] . . .

in order to provide a full and accurate understanding of the case to this Court." *Id.* at 7.

For the reasons discussed below, the Court grants the motion and dismisses the third amended complaint with prejudice.

II. Legal Standard

In order to state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff's complaint as true, this rule "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant- unlawfully-harmed-me accusation."

Id. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555

(2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id.* at 679

III. Analysis

A. Shotgun Pleading

[6] In a separate order, Plaintiff's response was stricken as an unauthorized overlength filing. D.E. 98.

Defendants move to dismiss the third amended complaint because contrary to the requirements of Rule 8, Fed. R. Civ. P., it contains 139 pages and over 132 paragraphs of repetitive, irrelevant, conclusory and vague allegations that are the hallmark of a shotgun pleading. D.E. 93. In response, Plaintiff argues that the third amended complaint complies with Rule 8. D.E. 97. The Eleventh Circuit has identified four common types of shotgun pleadings:

Shotgun pleadings are characterized by: (1) multiple counts that each adopt the allegations of all preceding counts; (2) conclusory, vague, and immaterial facts that do not clearly connect to a particular cause of action; (3) failing to separate each cause of action or claim for relief into distinct counts; or (4) combining multiple claims against multiple defendants without specifying which defendant is responsible for which act.

McDonough v. City of Homestead, No. 18-13263, 2019 WL 2004006, at *2 (11th Cir. May 7, 2019) (citing *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321–23 (11th Cir. 2015)). Shotgun pleadings violate Rule 8(a)(2)'s "short and plain statement" requirement by "failing . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* (alteration

in original) (quoting *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294–95 (11th Cir. 2018)).

Having carefully parsed through Plainiff's prolix pleading, the Court is left with the ineluctable conclusion that the third amended complaint is a shotgun pleading for three of the reasons articulated by the Eleventh Circuit. First, each count incorporates all of the general factual allegations by reference, including all preceding causes of action, into each subsequent claim for relief. Each cause of action "incorporates and alleges by reference as though fully set forth herein paragraphs 2-132 inclusive of [the preceding causes of action,]" such that the second cause of action incorporates the first, the third cause of action incorporates the first and second causes of action, and the fourth cause of action incorporates the first, second, and third causes of action.[7]

Consequently, "this Court must 'sift out 305 irrelevancies, a task that can be quite onerous.'" *Great Fla. Bank v. Countrywide Home Loans, Inc.*, No. 10-22124-CIV, 2011 WL 382588, at *2 (S.D. Fla. Feb. 3, 2011) (quoting *Strategic Income Fund, LLC.*

[7] Plaintiff does not incorporate paragraph 1, which is titled "introduction." The Court further notes that Plaintiff stopped using sequential paragraphs after paragraph 132—the last paragraph in the general factual allegations.

v. Speak, Leeds & Kellogg Corp., F.3d 1293, 1295 (11th Cir. 2002)); *see also United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1354 (11th Cir. 2006) ("Pleading claims in this fashion imposes a heavy burden on the trial court, for it must sift each count for the allegations that pertain to the cause of action purportedly stated and, in the process, disregard the allegations that only pertain to the incorporated counts."). Such a form is not only unhelpful and poorly drafted, but, as admonished by the Eleventh Circuit, should be avoided because "[e]xperience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice."

Paramo v. IMICO Brickell, LLC, No. 08-20458-CIV, 2008 WL 4360609, at *8 (S.D. Fla. Sept. 24, 2008) (quoting *Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. College*, 77 F.3d 364, 367 (11th Cir. 1996)).

Second, the third amended complaint contains conclusory, vague, and immaterial facts that do not clearly connect to a particular cause of action. For example, in one paragraph, Plaintiff provides a four-page "review" of the Federal Healthcare Quality Improvement Act of 1986, including legislative statements and comments made prior to its enactment. D.E. 97 ¶ 36. In another conclusory allegation, Plaintiff claims "the failure of the Appeal

resulted directly from the many exceptional deficiencies of legal representation provided by Attorney Rogow and his associates with material support by the Bruce S. Rogow, PA. As a result, that deficient legal representation was undeniably the proximate cause of the failure of the [appeal]." *Id.* ¶ 132 (emphasis omitted). Like the initial complaint and second amended complaint, much of the third amended complaint is a lengthy recitation of the events leading up to the present case, including Plaintiff's own history as well as that of the underlying case that gave rise to Plaintiff's appeal. *See, e.g.*, D.E. 85 at 34–45 (Plaintiff states his education, training, background, and early surgical practice then proceeds to discuss the peer review, the subject of the initial lawsuit). Indeed, the third amended complaint often appears to be more of an attempt to re-litigate the underlying case than a short and plain statement of the claims. Although the Magistrate Judge's Report and Recommendation explained these pleading deficiencies in the second amended complaint, Plaintiff failed to correct them in the third amended complaint.

Third, Plaintiff combines multiple claims against multiple defendants without specifying which defendant is responsible for which action or omission. Throughout the third amended complaint, Plaintiff fails to allege which claims are being asserted against which individual Defendants. In the Report and Recommendation, the Magistrate Judge stated "[i]t is unclear from the pleadings in what capacities

the Defendants worked on Plaintiff's case. A blanket accusation that all Defendants – including unknown individuals who may or may not be attorneys – committed a series of legal errors simply does not give rise a reasonable inference that the individuals accused are liable for the misconduct alleged." D.E. 65 at 5. Plaintiff failed to correct these pleading deficiencies in the third amended complaint. Specifically, Plaintiff's third amended complaint combines Defendants and the Doe Defendants as "Attorney Rogow and his associates," and impermissibly groups them in the legal malpractice, breach of fiduciary duty, and fraud in the inducement claims[8] without identifying any specific action or omission particularly attributable to any one individual defendant. Therefore, the third amended complaint constitutes an impermissible shotgun pleading for this reason as well.

[8] This is particularly problematic in the fraudulent inducement claim, which is subject to the pleading standards of Federal Rule of Civil Procedure 9(b). Rule 9(b) is satisfied if the plaintiff alleges "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (citation omitted). Furthermore, "Rule 9(b) requires more than conclusory allegations that certain statements were fraudulent; it requires that a complaint plead facts giving rise to an inference of fraud." *West Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x. 81, 86 (11th Cir. 2008).

Additionally, Plaintiff fails to comply with Rule 8(a)(2), which requires that the complaint include a "short and plain statement of the claim[s]." There is nothing short or plain about Plaintiff's behemoth pleading. Courts in this Circuit do not tolerate complaints that are verbose, convoluted, or rambling. *See, e.g.*, *Carvel v. Godley*, 404 F. App'x 359, 361 (11th Cir. 2010) (affirming dismissal with prejudice of complaint that contained "neither a 'short and plain' statement justifying relief nor allegations that are 'simple, concise, and direct.'"); *B.L.E. v. Georgia*, 335 F. App'x 962, 963 (11th Cir. 2009) (affirming dismissal with prejudice of "rambling, prolix" complaint); *Gordon v. Green*, 602 F.2d 743, 744–45 (5th Cir. 1979) (holding that district courts should be given great leeway in determining whether a party has complied with Rule 8 because they stand "on the firing line [as] the first victims of this paper mill."). As Plaintiff is *pro se*, some excess in the pleadings should be overlooked.

However, "although we are to give liberal construction to the pleadings of *pro se* litigants, 'we nevertheless have required them to conform to procedural rules.'" *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (quoting *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir. 2002). Furthermore, "even in the case of *pro se* litigants this leniency does not give a court license to serve as *de facto* counsel for a party, or to rewrite anotherwise deficient pleading in order to sustain an action." *Boles v. Riva*, 565 F. App'x 845, 846 (11th Cir. 2014) (citation omitted).

In this case, Plaintiff had an opportunity to amend his complaint after the Magistrate Judge described the pleading deficiencies in depth in the Report and Recommendation, which was fully adopted by the court. *See* D.E 65 & 69. Nonetheless, Plaintiff filed an utterly opaque shotgun pleading, which is about as far from the "short and plain statement" rule as a pleading can get. Plaintiff, again, failed to state, succinctly and clearly, the basis for each of his claims. As such, the Court finds that Plaintiff has failed to provide adequate notice of each claim against Defendants and the grounds upon which each claim rests. The Court is not required to give a plaintiff endless chances to correct Rule 8 violations. In fact, the Court is only required to give a plaintiff one chance. *See Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018) (holding that the district court is only required to give a plaintiff one opportunity to amend after dismissing for failure to meet the Rule 8 requirements). Mindful that it must avoid exposing litigants, the public, and its docket to the dangers set forth in *Anderson*, the Court will dismiss the third amended complaint with prejudice pursuant to Rule 41(b) for failure to comply with Rule 8 and the previous court orders. *See Anderson*, 77 F.3d at 367 (11th Cir. 1996) ("[U]nless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice.").

B. Leave to Amend

The Eleventh Circuit has held that Federal Rule of Civil Procedure 15(a)(2), which directs that leave to amend "shall be freely given when justice so requires," "severely restrict[s]" a district court's discretion to dismiss a complaint without leave to amend. *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988). To foreclose an amendment, the district court must find (1) undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) that allowing amendment would cause undue prejudice to the opposing party; or (3) that amendment would be futile. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

Here, the Court finds that a dismissal with prejudice is warranted. First, this legal dispute has been ongoing for a considerable length of time and Plaintiff has had an opportunity to address the defects in his claims. Plaintiff filed his initial complaint in this court on June 22, 2015 and was granted leave to file the third amended complaint. D.E. 1 & 69. In response to the second amended complaint, Defendants filed a motion to dismiss, which provided Plaintiff notice of the insufficiency of his allegations against them. D.E. 32; *see McDonough*, 2019 WL 2004006, at *3 (dismissing the complaint with prejudice in a refiled case, where the plaintiff received notice of the defects through the motions to dismiss in the first lawsuit and

acknowledged the defects by failing to oppose the motions). Following oral argument, the Magistrate Judge issued the Report and Recommendation thoroughly explaining the deficiencies in the second amended complaint and how to correct them, and warning Plaintiff that he would not be given another opportunity to amend. D.E. 63 & 65. The District Judge then assigned to the case adopted the Report and Recommendation in its entirety and dismissed the four re-pleaded counts without prejudice, giving Plaintiff a last chance to file a permissible complaint. D.E. 69.

Thus, when Plaintiff filed the third amended complaint, he had fair and adequate notice of the defects, a meaningful chance to fix them, and notice that this would be his last chance to demonstrate his ability to conform to the Court's requirements. *See Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1358 (11th Cir. 2018) ("What matters is function, not form: the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them. If that chance is afforded and the plaintiff fails to remedy the defects, the district court does not abuse its discretion in dismissing the case with prejudice on shotgun pleading grounds."); *see also Arrington v. Green*, 757 F. App'x 796, 798 (11th Cir. 2018) (concluding that the district court acted within its discretion in *sua sponte* dismissing the *pro se* plaintiff's amended complaint with prejudice, where the district court previously identified the pleading deficiencies and granted one opportunity to amend).

In the third amended complaint, Plaintiff still failed to correct defects of which he had notice. Instead of a shorter, concise statement of his claims, Plaintiff added sixty pages of allegations that fail to meet the pleading requirements. In addition, the Court finds that allowing an additional amendment would cause undue prejudice to Defendants, who have been defending this lawsuit against Plaintiff for over five years. Therefore, the Court will dismiss the third amended complaint with prejudice and without leave to amend.[9]

IV. Conclusion

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant Bruce S. Rogow, J.D., Bruce S. Rogow, P.A., and Cynthia Gunther, J.D.'s Motion to Dismiss Plaintiff's Third Amended Complaint (D.E. 93) is GRANTED. Plaintiff's Third Amended Complaint (Technically the Second) and Demand for Jury Trial (D.E. 85) is hereby DISMISSED WITH PREJUDICE. The Court will enter a separate judgment pursuant to Federal Rule of Civil Procedure 58. It is further

ORDERED AND ADJUDGED that the case is CLOSED for administrative purposes. All hearings

[9] Because the Court's conclusion on this issue is dispositive of the instant motion, it need not address any of Defendants' other arguments in favor of dismissal.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of August, 2019.

/s/Ursula Ungaro
UNITED STATES DISTRICT JUDGE

cc: counsel of record via cm/ecf *Pro se* Plaintiff

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAYMOND H. PIERSON, III, Plaintiff,

v.
BRUCE S. ROGOW, *et al.*,

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-cv-61312-UU

ORDER STRIKING UNAUTHORIZED OVERLENGTH FILING

THIS CAUSE is before the Court upon Plaintiff Raymond H. Pierson, III M.D.'s Opposition to Defendant's Motion to Dismiss Plaintiff's Third (Technically the Second) Amended Complaint (D.E. 85) (the "Response"). D.E. 97.

THE COURT has considered the Response, the pertinent portions of the record, and is otherwise fully advised in the premises.

Under Local Rule 7(c)(2), Plaintiff was required to seek leave and obtain prior permission of the Court before filing any opposing memoranda of law in excess of twenty pages. "[A]lthough we are to give liberal construction to the pleadings of *pro se* litigants, 'we nevertheless have required them to conform to procedural rules.'" *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (quoting *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir. 2002)). The Court has considered this filing and notes that it exceeds the page limits provided by the Local Rules and Plaintiff has not sought prior Court approval to file excess pages. The Response is fifty-three pages in total length, including eleven pages of various certificates and statements. D.E. 97. Like the second and third amended complaints, the Response contains a lengthy recitation of the to the present case, including Plaintiff's own history as well as that of the underlying case that gave rise to Plaintiff's appeal. *See* D.E. 30, 85 & 97. In the Response, Plaintiff also provides a "limited review" of the proceedings in this case "to ensure that this newly assigned Article III Court has a proper understanding of the extended duration (almost 5 1⁄2 years) of this case." D.E. 97 at 2–6. As stated above, the Court has considered the pertinent portions of the record and is otherwise fully advised in the premises. Since the Response far exceeds twenty pages and Plaintiff failed to seek prior Court approval to file excess pages, the Court will strike the Response. In addition, Plaintiff shall be advised that the Court expects the parties to follow the proper

procedures under the federal and local rules for the remainder of this case. Accordingly, it is hereby ORDERED AND ADJUDGED that Plaintiff's Response, D.E. 97, is STRICKEN.

DONE AND ORDERED in Chambers at Miami, Florida, this _14th__ day of August, 2019.

_/s/Ursula Ungaro
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record via cm/ecf

Case 0:15-cv-61312-UU Document 95 Entered on FLSD Docket 07/09/2019 Page 1 of 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAYMOND H. PIERSON, III,
Plaintiff,
v.
BRUCE S. ROGOW, *et al.*,
Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon the Unopposed Plaintiff Request of this Court for a Time Extension of Twenty-One (21) Days for the Submission of his Response in Opposition to the Defendant's Motion to Dismiss the Third (Technically the Second) Amended Complaint. D.E. 94.

THE COURT has considered the motion, the pertinent portions of the record and is otherwise fully advised on the premises.

Pro se Plaintiff moves for a twenty-one day extension of time to respond to Defendants' motion to dismiss because Plaintiff and his sole assistant will be unavailable from July 9 through July 21, 2019 due to their travel plans. D.E. 94. The Court finds that

Plaintiff has not demonstrated that good cause to extend the time. The Court recognizes that numerous extensions of time requested by Plaintiff have been granted. *See* D.E. 26, 35, 40, 45, 72, 75, 80, 82 & 84. The Court further notes that this lawsuit has been pending for over four years, and Plaintiff was on notice that Defendants' response to the third amended complaint was due by June 28, 2019. See D.E. 1, 85 & 90. In light of Plaintiff's claim that he did not receive Defendants' motion to dismiss until July 2, 2019, the Court will grant a brief extension of time. D.E. 94. However, Plaintiff shall be advised that the Court expects the parties to follow the proper procedures under the federal and local rules for the remainder of this case. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion (D.E. 94) is GRANTED IN PART AND DENIED IN PART. Plaintiff SHALL file a response to Defendants' motion to dismiss the third amended complaint no later than **Tuesday, July 16, 2019**.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of July, 2019.

/s/Ursula Ungaro
UNITED STATES DISTRICT JUDGE

cc: counsel of record via cm/ecf

Pro se Plaintiff

Case 0:15-cv-61312-UU Document 92 Entered on FLSD Docket 06/27/2019 Page 1 of 1

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61312-CIV-ZLOCH

RAYMOND H. PIERSON, 111,
Plaintiff,

VS.

BRUCE S. ROGOW, et a1.,
Defendants.

ORDER

THIS MATTER is before the Court sua sponte. The Court has carefully reviewed the entire court file and is otherwise fully advised in the premises.

Pursuant to 28 U.S.C. 5 371, on January 2017, the undersigned took senior status. In that 28 U.S.C. 5294(5) permits a senior judge to perform such duties as he is willing and able to undertake, the undersigned hereby recuses himself from the above- styled cause. Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that the above-styled cause be and the same is hereby REFRRRRD to the

Clerk of Courts for reassignment to another active judge in accordance with the random assignment system .

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of June 2019.

/s/ William J. Zloch

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished: Counsel of Record

PAPERLESS ORDER granting 89 Motion for Extension of Time to File. Defendants shall file a response to the Amended Complaint on or before June 28, 2019. Signed by Magistrate Judge Patrick M. Hunt on 6/21/2019. (hhr) (Entered: 06/21/2019)

Subject:Activity in Case 0:15-cv-61312-WJZ Pierson v. Rogow et al Order on Motion for Extension of Time to File Response/Reply/Answer

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U.S. District Court
Southern District of Florida

Notice of Electronic Filing

The following transaction was entered on 6/21/2019 2:12 PM EDT and filed on 6/21/2019

Case Name: Pierson v. Rogow et al

Case Number: 0:15-cv-61312-WJZ

Filer:

Document Number: 90

90(No document attached)

Docket Text:

PAPERLESS ORDER granting [89] Motion for Extension of Time to File. Defendants shall file a response to the Amended Complaint on or before June 28, 2019. Signed by Magistrate Judge Patrick M. Hunt on 6/21/2019. (hhr)

PAPERLESS ORDER denying 87 Plaintiff's Motion for Extension of Time. Signed by Magistrate Judge Patrick M. Hunt on 6/13/2019. (hhr) (Entered: 06/13/2019)

Subject:Activity in Case 0:15-cv-61312-WJZ Pierson v. Rogow et al Order on Motion for Miscellaneous Relief

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U.S. District Court
Southern District of Florida

Notice of Electronic Filing

The following transaction was entered on 6/13/2019 10:28 AM EDT and filed on 6/13/2019

Case Name: Pierson v. Rogow et al

Case Number: 0:15-cv-61312-WJZ

Filer:

Document Number: 88

Docket Text:

PAPERLESS ORDER denying [87] Plaintiff's Motion for Extension of Time.

Signed by Magistrate Judge Patrick M. Hunt on 6/13/2019. {hhr}

From: ecf_help@call.uscourts.gov

Sent: Friday, May 07, 2021 6:56 AM

To: rpiersonmd@sbcglobal.net

Subject: 19-13722-GG Raymond Pierson, Ill v. Bruce Rogow, et al "Public Communication" (0:15- cv-61312-UU)

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United States Court of Appeals for the Eleventh Circuit.

Notice of Docket Activity

The following transaction was filed on 05/07/2021
Case Name: Raymond Pierson, Ill v. Bruce Rogow, et al

Case Number: 19-13722

Docket Text:
Public Communication: No action will be taken on the appellant's petition for rehearing en banc. The

Court does not permit the filing of a petition for rehearing en banc of an order denying a motion for reconsideration of a dismissal order. This appeal is closed.

Notice will be electronically mailed to:

Tara A. Campion
Raymond H. Pierson, III

Rule 5.1. Constitutional Challenge to a Statute

Primary tabs

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:
(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:
(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or
(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and
(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.
(b) Certification by the Court. The court must, under 28 U.S.C. §2403, certify to the appropriate attorney general that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Notes

(As added Apr. 12, 2006, eff. Dec. 1, 2006; amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Committee Notes on Rules—2006

Rule 5.1 implements 28 U.S.C. §2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The

notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of §2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the §2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-[day] period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under §2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action—including a constitutional challenge—at any time, even before service of process.

Changes Made After Publication and Comment. Rule 5.1 as proposed for adoption incorporates several changes from the published draft. The changes were made in response to public comments and Advisory Committee discussion.

The Advisory Committee debated at length the question whether the party who files a notice of constitutional question should be required to serve the notice on the appropriate attorney general. The service requirement was retained, but the time for intervention was set to run from the earlier of the notice filing or the court's certification. The definition of the time to intervene was changed in tandem with this change. The published rule directed the court to set an intervention time not less than 60 days from the court's certification. This was changed to set a 60-day period in the rule "[u]nless the court sets a later time." The Committee Note points out that the court may extend the 60-day period on its own or on motion, and recognizes that an occasion for extension may arise if the 60-day period begins with the filing of the notice of constitutional question.

The method of serving the notice of constitutional question set by the published rule called for serving the United States Attorney General under Civil Rule 4, and for serving a state attorney general by certified or registered mail. This proposal has been changed to provide service in all cases either by certified or registered mail or by sending the Notice to an electronic address designated by the attorney general for this purpose.

The rule proposed for adoption brings into subdivision (c) matters that were stated in the

published Committee Note but not in the rule text. The court may reject a constitutional challenge at any time, but may not enter a final judgment holding a statute unconstitutional before the time set to intervene expires.

The published rule would have required notice and certification when an officer of the United States or a state brings suit in an official capacity. There is no need for notice in such circumstances. The words "is sued" were deleted to correct this oversight.

Several style changes were made at the Style Subcommittee's suggestion. One change that straddles the line between substance and style appears in Rule 5.1(d). The published version adopted the language of present Rule 24(c): failure to comply with the Notice or certification requirements does not forfeit a constitutional "right." This expression is changed to "claim or defense" from concern that reference to a "right" may invite confusion of the no-forfeiture provision with the merits of the claim or defense that is not forfeited.

Committee Notes on Rules—2007 Amendment

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

28 U.S. Code § 2403 - Intervention by United States or a State; constitutional question

(a)

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b)

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the

question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

USCA11 Case: 19-13722 Date Filed: 03/08/2021
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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO.: 19-13722-EE

RAYMOND H. PIERSON, III, M.D.
Plaintiff
v.
BRUCE S. ROGOW, J.D.; BRUCE S. ROGOW, PA; CYNTHIA GUNTHER, J.D.;
AND DOES 1 THROUGH 5, inclusive
Defendants

MOTION FOR RECONSIDERATION OF THIS ELEVENTH CIRCUIT APPELLATE COURT'S.DECEM.BER 7, 2020 ORDER OF DISMISSAL OFTHIS APPEAL FOR LACK OF JURISDICTION AS A RESULT OF THE PERCEIVED DEFECT OF UNTIMELY FILING OF THE NOTICE OF APPEAL

Raymond H. Pierson, III, M.D.
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95686
E : rpiersonmd@sbcglobal.net
T : 209-267-9118
F: 209-267-5360
Pro Se Appellant

STATEMENT OF ORAL ARGUMENT

Pro Se Appellant, Dr. Raymond H. Pierson, III has the correct understanding that motions of this type are typically resolved by the Court without the opportunity provided to the parties for oral argument. With that customary practice of the Courtrecognized, this self-represented party would like to take this opportunity to express his open availability to review the facts and unique circumstances of this case which involve so many complex areas of the law that involve significant controversy and persistent ambiguities. Those areas include:

- Existing controversies over the Congressional designation of jurisdictional restraints versus othe,r *"time prescriptions"*,more accurately considered statute of limitations or claims-processing rules.
- The divergent interpretation of what represents *timely filing* that exists between the U.S. Supreme Court as expressed in Supreme Court Rule 29.2 versus that interpretation by the multiple Appellate Circuits as expressed in FRAP 25(a)(l(A(i) vs (ii) as to *-J;hen* and *to whom* effective service of a notice of review (writ of certiorari vs. notice of appeal respectively) has been

delivered.

A review of the forty-five year history of the *unique circumstance doctrine* of *Harris Truck* alternatively referred to as the *Thompson Exception* which was abruptly eliminated by the *Bowles* Court (2007) as to the reasonable consideration that there is a valid basis for awakening that doctrine from the abrupt *"slumber"* induced by the narrow majority in *Bowles*. It is Appellant's view that such equitable reconsideration is at least reasonable under those circumstances of court error, as well as in the event that the Court or Court officer has misinformed or improperly and repeatedly provided false assurances to unsophisticated pro se litigants which resulted in the inadvertentdefault of the substantive right of appeal.

- To consider the potential for the equitable relief in the form of *overlong* time extensions under FRAP 4(a)(5)(C) in those cases with good cause or excusableneglect that are the result of Court error, misinformation or false assurances. The potential for such an *overlong time extensions* was referenced but not resolved by the *Hamer* Court (2017}.
- To review the effect of the Constitutional

Challenge to 28 USC§ 1391which has been advanced in this Appeal and the effect that it has had to result in the U.s. Government and/or U.S. Attorney General being designated a *"party"* tothis litigation. The affirmation of that participation has the effect to establish
the qualification for the 60-day time period for submission of the Notice of Appeal by *any* party *tb* the lawsuit as specified under the Statute 28 USC § 2107(b)(1-4) and FRAP 4(a)(l)(B)(i iv).

To consider the argument that the *Separation of Powers Doctrine* and the authority which it provides to all Federal Courts to have the result that those Courts have the inherent power to provide even through jurisdictional bounds the equitable relief that is necessary to correct for Court and Court Officer error, misinformation and/or improper assurances that have caused unsophisticated pro se litigants to commit inadvertent errors which result in the default of theright of appeal due to their reasonable reliance upon that erroneous or misleading information provided by a Court or Officer of the Court.

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TABLE OF AUTHORITIES

Due to Document Length Restraints, the full Table of Citations has been removed.

STATEMENT OF JURISDICTION

28 USC§ 1291

28 USC § 2106 This Eleventh Circuit Court has jurisdiction over this case which involves a Final Order of Dismissal (DE 99) and Judgment (DE 100) filed inthe U.S. District Court of South Florida on August 19, 2019.

28 USC § 201 & 2202 This Court has jurisdiction to review the Constitutional Challenge to the 1990 Revision of28 USC§ 1391 which Dr. Pierson has proper standing to advance and which the District Court dismissed (DE 65 & 69) with no opportunity to amend. That decision represented an error of law which deprived Dr. Pierson of his right designated by tμe U.S. Congress under FRCP 5.l(d) to

avoid forfeiture of the constitutional claim by correcting an inadvertent defect that resulted from his original failure to name the U.S. Attorney General as a *party*. Irrespective of the error of law by the District Court, under this properly advanced challenge to a United States Statute, the United States and the U.S. Attorney General separately and together are each considered a proper *"party"* to this litigation.

28 USC§ 2072 This Court has jurisdiction to review the lawful interpretation of FRCP Rule 8(a)(2}as instructed by the Congress at FRCP Rule 8(e) to construe pleadings *"to do justice"* as misapplied by the District Court.

28 USC§ 2107 This Court has jurisdiction as is fully authorized by the timely filed Notice of Appeal which was fully compliant with FRAP Rules 3 and 4:

a. **FRAP 4(a)4-The** timely filed post-judgment motion filed on September 19, 2019 (DE 101) must be construed to represent a qualifying FRAP 4(a)(4)(ii) or (iv) post-judgment motion which tolled the time for filing the Notice of Appeal until the date of denial of that motion by the District Court which did not occur until 8-22-19 (DE 103). As a result of that tolling, the

thirty (30) day time window permitted for the filing the Notice of Appeal that window opened on 8/22/19 and ran through 9/23/19 at the absolute minimum irrespective of the determination of the participation of the FederalGovernment or other Federal entity or individual.

b. **FRAP 4(a)(l)(B)** -A legitimate Constitutional Challenge to a federal statute which Dr. Pierson had proper standing to advance in the District Court as well as in this Appellate Court resulted in the irrefutable circumstances that the U.S. Government and U.S. Attorney General were and are proper *parties* to the litigation as well as to the Appeal. As a resultof that Federal *party* participation as authorized by 28 USC§ 2107(b) and FRAP 4(a)(l)(B) sixty (60) day time period properly existed in this case. Asa result of the final judgment (DE 100) on August 19, 2019, the earliest potential last day for filing the *Notice of Appeal* even should this Court fail to acknowledge the existence of the valid post-judgment motion (DE 101) would be October 21, 2019.

c. Multiple other bases exist which support

the pendency of Jurisdiction of this Eleventh Circuit in this Appeal.

STATEMENT OF THE ISSUES

On December 7, 2020, an *Order of Dismissal* of this Eleventh Circuit based upon a perceived lack of jurisdiction was handed down despite the Court's having demonstrated full adjudicatory authority over the case for the fourteen (14) monthsand eighteen (18) days up through the time of that decision.

Issue #1 The valid post-judgment motion (DE 101) is properly construed a tollingFRAP 4(a)(4) motion not disposed of until the Court's August 22, 2019 Order (DE 103). (Index Section IV, pages 9-10, 136-148).

Issue #2 The U.S. Supreme Court Rule 29(2) holds that a paper is timely filed if it *"is delivered on or before thelastday}orfiling:to a third-party commercial carrier for delivery to the Clerk within 3 calendar days".* Under FRAP 25(a)(ii) most appellate circuits agree with this standard in the case of a Brief or Appendix.

Issue #3 The constitutional challenge to the 1990 Revision of28 USC§ 1391 under28 USC§ 2107(b) confirm·s thata 60.,dayperiod existed to file the *Notice of Appeal.* (Index Section I & II, pgs. 1-6, pgs. 8-98) ·

Issue #4 It is the well-accepted tradition of the Federal Courts that when jurisdiction has been long established.thattlie Court's adjudicatory authority over the case should be maintained.

Issue #5 A denial of DE- 101 as a tolling FRAP Rule 4(a)(4) motion requires the

Appeal (DE 104) must be construed a timely FRAP 4(a)(5) time extension request.

Issue #6 The *Notice of Appeal* must be accepted as timely filed in equitable relieffor the many Court and Court officer errors, misinformation and false assurances which resulted in an effective forfeiture of Appellant' right to seek a FRAP 4(a)(5)time extension due to this Court's late determination the Appeal was untimely. (Index Sections III(a), (b), pgs. 6-9, pgs. 98-134)

Issue #7 This prose plaintiff sought e-filing rights before the District Court which he was denied. Confinement to a no e-file status from California resulted in exceptional delays in service by mail and further significant delays for filing. (Index Section V, pg. 10-11, pgs. 150-163).

Issue #8 On Notification of Appeal Dismissal both Plaintiff and Defense Counsel held the strong belief that the decision by the Court

represented manifest error. (Index Section VI, pgs. 11-12, pgs. '164-167)

STATEMENT OF THE CASE

Post-Judgment Proceedings - Following the termination of the case with the Order of Dismissal (DE 99) and Judgment (DE 100) on August 19, 2020 a Plaintiff Motion (DE 101}was docketed by the Clerk of Court and filed post-judgment. It was not denied until the Court Order (DE 103) on August 22, 2019. That unopposed motion requested the opportunity to submit a *Motion in Opposition to the Defendant Motion to Dismiss* (DE 93) at a non-extended length to replace Plaintiffs earlier Opposition (DE 97) that was *stricken* by the Court (DE 98). That motion filed as it was post- judgment maintained the intent to both"*amend ... factual findings"* in the judgment, as well as to *alter* or *amend* the Defendant findings and recommendations (DE 93)incorporated directly into the Order of Dismissal (DE 99) and Judgment (DE 100) due to the absence of the *stricken* opposition.

FACTS OF THE CASE

The Clerk of the District Court Provided Significant Misinformation and Repeated

False Assurances to this Unsophisticated Pro Se Litigant from the Time of Termination of the case forward.

The combined mailing from the Florida District Court Clerk for service of the August 19, 2019 Order (DE 99) and Judgment (DE 100) as evidenced by an envelope dated August 20, 2019 was not served *immediately* to Dr. Pierson by mail as required by FRCP 77(d) resulting in a delay in receipt of seven (7) days. (Index Section III(a), pg. 6, pgs. 99-105). That combined mailing was sent at the earliest on August 20, 2019 and possibly even later which provides confirmation that the Clerk did not follow the directives of FRCP Rule 77(d)(l) which instructs the Clerk to provide service *"immediately fter entering an order or judgment as well as to record that service on the docket"*. There is also no record of that required docket entry of service. That initial 7 day delay in receipt of service greatly narrowed the time period for the filing of a *Notice of Appeal* from the outset. Even more troublesome, the Clerk included an attached instruction which stated: (Index pg. 101)

> *IMPORTANT: ADDITIONAL TIME TO RESPOND FOR NON- ELECTRONIC SERVICE*

> *Additional days to respond may be available to parties serviced by non-electronic means. See Fed.R.Civ.P.6(d), FedR.Crim.P.45(c) and Local Rule 7.1(c)(l)(A)....*

This pro se Appellant with no prior experience in the case law concerning FRCP Rule 6(d) or FRAP 26(c) non-applicability to filing a Notice of Appeal relied upon and was greatly misinformed as a result. That misinformation gave Dr. Pierson the understanding the *Notice of Appeal* was due at the earliest on September 23, 2019.

The Substantial Evidence in the Case Record Provides Full Confirmation that the Clerks of both Courts Correctly Determined the *Notice of Appeal* was Timely Filed.

It is Plaintiff's strongly held position that the Clerks of both Courts were **correct** in their determinations the Appeal was timely filed as a result of the delivery of the signed Appeal to an independent third-party commercial carrier at 3:51 P.M. on the afternoon of September 18, 2019 (Index pg. 107) with overnight delivery to the Clerk in South Florida at 10:14 A.M. on September 19, 2019 (Index pg. 109). An Appellate Court position to deny timely filing would have the unintended consequence of

establishing that all actions by the Clerks of both Courts to wrongly accept the Notice of Appeal as timely filed and to continue to docket all subsequent filings and orders indicative of proper Appellate Court jurisdiction would represent repeated misinformation and false assurances which caused Dr. Pierson to forfeit his right to proceed with a timely FRAP 4(a)(5) time extension. (Index Section III (a) & (b), pg. 6-9, pgs. 99-134)

ARGUMENTS

Argument #1-The valid post-judgment motion (DE 101) is properly construed a tolling FRAP 4(a)(4) motion not disposed of until the Court's August 22, 2019 Order (DE 103). (Index Section IV, pages 9-10, 136-149).

A motion (DE 101) by pro se plaintiff, Dr. Pierson, though intended to be filed before disposition of the Defendant's Motion to Dismiss (DE 93) was docketed post-judgment. Positioned post-judgment, that motion had the full intent to *"alter or amend"* the judgment thus qualifying as a Rule 59(e) motion as well as to *"amend or make additional factual findings"* qualifying as a Rule 52(b) motion. Thus, under FRAP 4(a)(4)(A)(ii) or (iv) (DE 101) resulted in a tolling of the thirty (30) day period for the filling until the Order of Denial of (DE 103) on August 22, 2019. Thus, the time for filing of the Appeal extended until

Saturday, September 21, 2019 which under FRCP 6(a)(1)(C) became September 23, 2019. Delivery of the *Appeal* to a third-party commercial carrier on September 18, 2019 at 3:51 PM was thus fully consistent with timely filing.

Under FRAP 4(a)(4) the District Court Maintains Jurisdiction During the Pendency of a Qualifying Post-Trial Motion.

In the case *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58-60 (1982) the Supreme Court emphasized that the *"filing of a Notice of Appeal is an event of jurisdictional significance"* and emphasized that the Federal Rule revisions of 1979 eliminated any circumstances of simultaneous jurisdiction by the District and Appellate Courts.

The Appellate and District Courts liberally construe inartful post-judgment

filings to represent valid FRCP 59 filings.

Former Associate Justice Thurgood Marshall in his insightful dissent in *Griggs (Id*

p. 68) emphasized that lower courts almost uniformly construe inartful post- judgment motions irrespective of title to represent valid FRCP 59 motions.

In *Green* v. *DEA*, 606 F.3d, 1296, 1299 (11th Cir. 2010) this Court agreed:

> "The reports are filled with cases in which litigants filed post judgment motions to 'reconsider' ... The lower courts have almost without exception treated these as [Federal] Rule [of Civil Procedure] 59 motions, regardless of their label'. (citing *Griggs).*"

The Supreme Court in *Browder v. Director, Dep't of Corrections,* 434 U.S. 257,264 (1977) stated *"The running of time for filing a notice of appeal may be tolled, according to the terms of Rule 4(a), by a timely motion. .. "*

The Supreme Court further clarified this point in *Acosta v. Louisiana Dep't of Health and Human Resources,* 478 U.S. 251,252 (1986):

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... under Rule 59 to alter or amend the judgment .
>
> . . the time. for appeal for all parties shall run from the entry of the order ...granting or denying any ... such motion."

Green v. DEA, 606 F.3d, 1296, 1.299 (11th 2010) also emphasized that even inartfully pled *motions for reconsideration* are Rule 59 motions *"regardless of the label"* (citing *Griggs* at p. 68).

<u>Argument #2</u> - The U.S. Supreme Court Rule 29(2) holds that a paper is timely filed if it *"is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days"*. Under FRAP 25(a)(ii) most appellate circuits agree in the case of a Brief or Appendix.

The Notice of Appeal here was delivered into the control of FedEx agent Goin' Postal (Index p.107) at 3:51 PM on September 18, 2019 for overnight delivery to the Clerk of Court in South Florida, at 1.0:14 AM on September 19, 2019 (Index p.109). Timely service was also made to Appellee Counsel by U.S. Priority Mail on September 18, 2019 at 4:02 PM (Index p.108) as authorized by FRAP 25(b). It must be emphasized that Dr. Pierson, a citizen of California, was denied E-file rights by the Florida District Court despite his being over three thousand miles away in this diversity jurisdiction case. His location in California with no direct access to the courthouse in Florida (truly consistent with FRCP 26(a)(3)(B) inaccessibility) evenfurther supports a determination that timely filing occurred with delivery of the *Appeal* to the third-party commercial carrier on September 18, 2019. Even if this Court were to find that the final day for filing the *Appeal* was September 18, 2019, a

finding which goes against the substantial evidence, there was no jurisdictional bar to a determination that the Notice was *"timely filed"* as the Court has suggested. That conclusion is supported by the Supreme Court decision in *Houston* (1989) andfurther supported by Supreme Court Rule 29.2. The partial disagreement that exists between the Supreme Court and the Appellate Courts concerning the *"timely filing"* of an *Appeal* was recognized to exist by the Supreme Court over thirty-one (31) years ago *(Id,* p. 274). This case provides evidence that this divergent interpretation must be corrected. Such a conclusion is consistent with the instruction by Congress in the Rules Enabling Act 28 USC § 2072(b) which designated that power to the Supreme Court for development of *"general rules of practice and procedure"* which *"shall not abridge...any substantive right".*

The *Houston* Court reviewed the timely filing of an *Appeal.*

In the landmark Supreme Court decision in *Houston* v. *Lack,* 487 U.S. 266, 272 (1988) the Court emphasized the fact that the statute (28 USC § 2107) did not define nor restrict the circumstances for the actual filing of the Notice

of Appeal: *"The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, ... "*. The Court further stated *(Id* at p. 272-273):

> "Rules 3(a) and 4(a)(1) thus specify that the notice should be filed "with the clerk of the district court." There is, however, no dispute here that the notice must be directed to the clerk of the district court. . . . The question is one of timing, not destination: ... The Rules are not dispositive on this point, for neither Rule sets forth criteria for determining the moment at which the "filing" has occurred. See *Fallen v. US.,* 378 U.S. 139, 144-5 (S. Ct. 1968)"

Though recognizing and not disturbing *(Id.* at 274) the fact that the lower courts required *"receipt by the district court",* the Court did point to the example that the Court of Appeals for the Federal Circuit was open to considering a document *"filed on mailing".* This information certainly provides full confirmation that the question of the timing and the method of delivery are not *"jurisdictional"* and at most represent *claim-processing rules.*

The Fourth Circuit extended the ruling in *Houston* to civil cases involving 42 USC

§ 1983 claims [see *Lewis v. Richmond City Police Dept.,* 947, F.2d 733, 734 (4th Cir. 1991)]. This Eleventh Circuit expanded the *Houston* decision as applied by the *Lewis* Court in *Garvey v. Vaughn,* 993 F.2d 776, 782 (1993) even referencing the fact thata filing *"directed to"* the Clerk is considered filed. It must be emphasized that similar issues of inaccessibility to the courthouse effect non-incarcerated pro se litigants. It is a fact in this federal diversity jurisdiction case that inaccessibility ofthe Florida Court has existed for Dr. Pierson in California as a result of the denial of e-file rights. Such inequity in this time of mandatory e-filing by attorneys represents an unconstitutional restriction of access to the Courts for pro se litigants.

Argument #3 - The constitutional challenge to the 1990 Revision of 28 USC § 1391 under 28 USC§ 2107(b) confirms that a 60-day period existed to file the *Notice of Appeal.* (Index Sections I & II, pgs. 1-6, pgs. 8-98)

This case was originally filed in the U.S. District Court of the Eastern District of California on January 31, 2014. It was then immediately and unlawfully transferred by a U.S. Magistrate

Judge to South Florida on February 4, 2014 without notice orthe requisite opportunity for Dr. Pierson to file an objection with the Article III Court. That transfer was authorized under the 1990 revision to 28 USC § 1391. That unconstitutional taking of a 200 year old right was addressed in this case on February 20, 2018 with a constitutional challenge included in the Second Amended Complaint (a misnomer) (DE 30). That challenge was dismissed with prejudice and no opportunity to amend '(DE 65,69). Even prior to that dismissal the District Court failed to permit Dr. Pierson's Congressionally designated *"No Forfeiture"* right under FRCP 5.l(d) (DE 59, 61) advanced to correct the inadvertent defect to namethe U.S. Attorney General as a *"party"* to the suit. Both lower courts then repeatedly refused to even rule on the multiple filed unopposed motions (DE 70, 73, 78, 91, 96) to *stay* the case to seek interlocutory review under the *Cohen Doctrine.* There can be no question but that the inclusion of the constitutional challenge in the Amended Complaint (DE 30) established the fact that the U.S. Government with the U.S. Attorney General as advocate was a *"party"* to the suit.

28 USC§ 2107(b) and FRAP 4(a)(l)(B) requires that the time for submission of the Appeal is sixty (60) days post-judgment for any party.

In *US. ex rel. Eisenstein v. City of New York,* 556 U.S. 928, 934-935 (2009) the Supreme Court found that the phrase *"real party in interest"* is a term of art which refers to an actor with a substantive legal right that may be advanced as a matter oflaw, but which requires that the *"party"* exercise that right. The Court determined that the United States becomes *"a 'party' to a privately filed False Claims Act action only if it intervenes in accordance with the procedures established by federal law"(Id* at p. 933):

> "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress act's intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted). [See *Cf Barnhart v. Sigman Coal Co.,* 534 U.S. 438, 452 (S. Ct. 2002)].

This Eleventh Circuit in *US. ex. Rel. Postel Erection Group, L.L.C. v. Travelers Cas. and Sur. Co. of Am.,* 711 F. 3d 1274, 1276 (2010) relied on *Eisenstein* to make the determination that the United States was not a *"party": "The Court's decision in Eisenstein persuades us that the United States is not a party under Rule 4(a)(l)(B) for purposes of Postel 's Miller Act claim.* ".

In sharp contrast to the cases above, the constitutional challenge (DE 30) advanced to 28 USC § 1391 here mandates that the Federal

Government with the Attorney General acting in an official capacity as advocate must be a *"party"*.

Admittedly, due to a misunderstanding of the requirements of Federal Rule of Civil

Procedure at 5.1, Dr. Pierson made an error in failing to name the U.S. Attorney General. That occurred due to Dr. Pierson's then misunderstanding that the required notification to the Attorney General was that statutorily required notification by the Clerk of Court as stated under FRCP 5.1(b) and 28 USC § 2403. As soon as he became aware of that defect, Dr. Pierson repeatedly requested (DE 59, 61) the opportunity to proceed with limited amendment to correct that defect which was authorized under the FRCP Rule 5.1(d). Those requests were denied with prejudice with no opportunity to amend (DE 65, 69). Dr. Pierson's subsequent repeated unopposed requests for leave of Court (DE 70, 73, 78, 91 & 96) under the*"Collateral Order Doctrine"* of *Cohen v. Beneficial Industrial Loans,* 337 U.S, 541, 546 (1949) to permit interlocutory appeal to restore that constitutional challenge were repeatedly ignored and left unanswered by the two Article III Courts with oversight.

From the outset of this Appeal, this Court has been provided full Notice of the existence of the Constitutional Challenge both in the Notice of

Appeal (DE 104) (Index pgs. 70, 71) as well as in the Civil Appeal Statement (Index Pgs. 73-74). The Initial Appellant Brief and the subsequently filed Reply Brief referenced the constitutional challenge as well and requested Declaratory Relief under 28 USC § 2201 and 2202. In addition, a FRAP 44 Notice was filed (Index pg. 75, 76) on October 16, 2019 which required the Clerk to inform the U.S. Attorney General ofthat challenge which represented the second such notice. By law, the Clerk of the District Court under FRCP 5.l(b) as specified at 28 USC § 2403, had also been required to certify to the U.S. Attorney General that a federal statute had been challenged:

> "The United States shall, subject to the applicable provisions of law, have all the rights of a ***party*** and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Thus, 28 USC § 2403 quite clearly and specifically references the United States with the U.S. Attorney General acting in the official capacity as advocate as a *"party"* and not as a *"real party in interest"*.

Argument #4 - Jurisdiction had been accepted by this Court for 14 months and 18 days prior to Dismissal. That Adjudicatory authority is properly continued. It is a well-accepted tradition of the Federal Courts that when jurisdiction has been long established that Court's adjudicatory authority over the case should be continued.

It is a long-held principle of the Federal Courts to maintain jurisdiction where it has been long established *[Stone v. INS,* 514 U.S. 386, 412-413 (1995)].

> "While this observation is true enough, it does not justify the "self-destruct" rule, because it fails to take into account other important factors, namely (a) the principle that jurisdiction, once vested, is generally not divested, and (b)the fact that in some cases (say, when briefing and argument already have been completed in the court of appeals) judicial economy may actually weigh against stripping the court of jurisdiction."

Argument #5-A denial of DE-101 as a tolling FRAP Rule 4(a)(4) motion would require that the Appeal (DE'104) must be construed to be a timely FRAP 4(a)(5) time extension request.

If the Appeal (DE 104) is denied as untimely it must then be properly construed asa FRAP 4(a)(5) time extension request. To consider such a request under the quite late conditions here would require the consideration of an *"overlong"* time extension. The

Eleventh Circuit in *Cavaliere v. Allstate Ins. Co.,* 996 F.2d 1111, 1114-1115 (1993) considered such an overlong time extension request:

> "Cavaliere cites no cases that even hint that a court may entertain a Rule 4(a)(5) motion filed beyond the expiration of the consecutive thirty-day periods discussed in Rule 4, and we have found no such cases. "

In *Hamer v. Neighborhood Haus. Serv.* 138 U.S. 13, 22 (2017) the Supreme Courtconsidered but did not resolve this issue:

> For the reasons stated, the court of Appeals erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal. We therefore vacate that court's judgment and remand the case for further proceedings consistent with this opinion. We note, in this regard, that our decision does not reach issues raised by *Hamer,* but left unaddressed by the Court of Appeals, including: ... and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint, see *id.,* at 29-43."

This issue of the consideration of such an overlong request under FRAP 4(a)(5)(C)warrants review.

The Practice of this Eleventh Circuit is to remand late filings of Notices of Appeal for consideration of FRAP 4(a)(5) and 4(a)(6) time extension requests. *Lashleyv. Ford Motor Co.,* 518 F.2d 749, 750 (5th 1975) represents an early example of this practice:

> "The notice of appeal not being timely filed, this court has no jurisdiction over the appeal. However, we remand the case to the district court to allow appellant 30 days in which to move for a determination whether under Fed.R.App.P. 4(a) excusable neglect entitles appellant to an extension of time for filing the notice of appeal. *See Cramer v. Wise, 5 Cir., 1974, 494 F.2d 1185; Evans v. Jones, 4 Cir, 1966, 366 F.2d 772."*

In a February 2019 decision, this Eleventh Circuit construed such a late filed motion titled *"Appeals Request"* as an extension of time to file the appeal [*Christine Banks v. News Group (TNG),* 2019 U.S. App. Lexis 4927]. As to the standard for excusabl neglect which applies to such a request, the Supreme Court decision in *Pioneer Inv. Servs. v. BrunswickAssocs. Ltd. P'ship,* 507 U.S. 380. 388 (1993) found:

> "Hence, by empowering the courts to accept late filings 'where the failure toact was the result of excusable neglect,' *Rule 9006(b)(J),* Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence,

> mistake, or carelessness, as well as by intervening circumstances beyond the party's control."

This Eleventh Circuit subsequently applied this more *"flexible"* approach in *Advanced Estimating Systems v. Riney,* 77 F.3 1322, 1324 (1996): *"to the extent that our past decisions interpreting excusable neglect apply an unduly strict standard inconflict with Pioneer, they are no longer controlling precedent." (Id* at p. 1325). This position by the Eleventh Circuit was recently affirmed in *Valley v. Jones,* 2017
U.S. Dis. Lexis 93931:

> "the phrase 'excusable neglect' may include, when appropriate, late filings caused by inadvertence, mistake, or carelessness under certain circumstances. *Locke v. SunTrustBank, Inc., 484 F.3d 1343, 1346 (1Jlh Cir. 2007)* (quoting *Advanced Estimating Sys., 77 f.3dat 1324)"*

Thus, this flexible approach to excusable neglect would provide opportunity to such relief here.

<u>Argument #6</u> - The many instances of court officer error, misinformation, and false assurances which resulted in the perceived forfeiture of the right to appeal must be corrected through the re-awakening of the *"Unique Circumstances Doctrine"* or under

the inherent power of the Courts. (Index Section III (a) & (b), pgs. 6-9, pg. 99-135).
There has been a plethora of Court and Court officer (i.e., Clerk) errors, misinformation, and false assurances provided which have falsely assured Appellant that the *Notice of Appeal* was timely filed. As a result, Dr. Pierson did not file a time extension request due to the high level of *reliance* placed on those false assurances. It is well recognized in the Courts that it is not the sophisticated appellate attorneys that fall into these inadvertent traps of misinformation provided by Court officials, but rather *"prose and other unsophisticated litigants"*. Associate Justice Marshall in *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 68 (1982) voiced these very such concerns where a right to appeal had been lost due to the misinformationprovided by the Courts in that case.

Equitable Relief for such injury was formerly available under the *unique circumstances doctrine* and should be made available again.
In *Inglese v. Warden, US Penitentiary,* 687, F. 2d 362, 363 (11th, 1982) this Circuit found that the district court error to grant an untimely time extension to file a Rule59(e) motion had resulted in a late filing of the Appeal. In that case, the Court agreed that the *doctrine* did apply, but affirmed on other grounds. In a later Eleventh Circuit decision *[Willis v. Newsome,*

747 F. 2d 605, 606 (1984)] the *unique circumstances doctrine* was again applied:

> "courts will permit an appellant to maintain an otherwise untimely appeal inunique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion ofhis right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity."

In contrast to *Willis,* the Circuit chose not to apply the *unique circumstances doctrine, Osterneck v. Ernst & Whinney,* 489 U.S. 169, 179 (1989), a decision affirmed by the Supreme Court. That decision in *Osterneck* stressed the importance of evidence of the specific *assurance* that the act was properly done. In the subsequent 11th Circuit decision in *Pinion v. Dow Chemical, USA,* 928 F. 2d 1522(1991) the Court referenced that earlier decision by the Supreme Court in *Osterneck* and predicted the *doctrine's* future demise:

> "Since the Supreme Court in *Osterneck* was able to deny jurisdiction by simply affirming the rationale of our Circuit's panel, the fact that the Court did not reach out explicitly to overrule the "unique circumstances" doctrine is hardly a ringing re-affirmance of it. We

> cannot say that a majority of the Court will not in the future repudiate the Harris Truck/Thompson/Wolfsohn trilogy in an appropriate case."

The Third Circuit in *Kraus v. Consolidated Rail Corp.,* 899 F. 2d 1360, 1362, 1364(3rd Cir. 1990) also found that the *doctrine* had a *"murky"* future. Of significance is the fact that the *Pinion* Court expressed the view (pg. 1534) that the *unique circumstances doctrine* would be more applicable in the circumstances of the pro se appellant less experienced in the law:

> "If we were dealing with the mistakes of a prose litigant, such as in *Fairley, Derks v. Dugger,* 835 F.2d 778 (11th Cir.1987), or *Inglese,* the justification for applying the "unique circumstances" exception would become at least more compelling because pro se litigants are arguably not charged with as much responsibility in following the'filing rules."

As predicted, the Supreme Court in a narrow majority in *Bowles v. Russell,* 551 U.S. 205 (2007) repudiated the *doctrine;* however, the dissenting members of the *Bowles* Court, argued strongly that the very time limits articulated in 28 USC §2107 that the majority designated *jurisdictional* were, in fact, not jurisdictional at all, but more typical of a statute of limitations amenable to equitable relief:

> The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v. McDonough,* 547 U.S. 198, 205 (2006). Statutes of limitations may thus be waived, id., at 207-208, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96, **111** S. Ct. 453, 112 L. Ed. 2d 435 (1990)."

The dissenting Court proceeded to opine:

> "Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh, Eberhart,* and *Kontrick,* an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217, (1962) (per curiam), and *Thompson v. INS,* 375 U.S. 384, 387, (1964) (per curiam), we found that "unique circumstances" excused failures to comply with the time limit."

The demise of the *unique circumstances* doctrine by the Supreme Court in *Bowles(supra)* is, in fact, even incongruous with Congress's own instruction in the Rules Enabling Act, 28 USC §2072(b) which has prohibitedthe interpretation of rules that *"abridge, enlarge or modify any substantive right"*. That same Congressional intent can be found in the Federal Rules of Civil Procedure at Rule 8(e) which requires that *"pleadings must be construed to do justice"*. Certainly, there is absolutely no evidence that a Congress which seeks justice and demands that the courts not *"abridge ... any substantive right"* would require the courts to deny relief to a litigant under the circumstances that the litigant made an inadvertent error as a result of misinformation and false assurances provided by the very courts themselves. Furthermore, there can be no question that the Judiciary under the *Separation Powers doctrine* retains the inherent power to equitability correct the errors of law and misinformation propagated by the Federal Courts.

Argument #7 -Denial of e-file rights to Dr. Pierson, a resident of California in this case in diversity represented an unconstitutional deprivation of access to the Court. (Index Section V, pgs. 10-11, pgs. 150-163).

The denial ofE-Filing rights not only resulted in exceptional financial costs, but also dramatically reduced Dr. Pierson's access to the Court. Such a

deprivation of access to the Florida Court also infringed upon Appellant's fundamental rights of *due process* and *equal protection.* In this case the direct result was to cause a dramaticreduction in the time available to Dr. Pierson from the time of receipt of service ofthe terminating Orders (DE 99, 100) by regular mail (a 7 days delay) which combined with the additional time consumed by delivery of the completed *Appeal*(DE 104) to a third -party commercial carrier for next day delivery totaled a minimum eight days and 8 hours of lost time. That is, Dr. Pierson had available only 21 days and 16 hours as compared to the availability of the full thirty (30) days fora represented party whose Attorney had e..:file service and filing rights. There canbe no question that the U.S. Congress never intended for the Federal Statutes or Rules to result in such inequities. Certainly, the powers granted to the Courts by the Rules Enabling Act 28 USC § 2072 which require that *"rules shall not abridge...any substantive right"* should not permit such inequities.

In the landmark decision by the U.S. Supreme Court in *Houston v. Lack* (S. Ct.
1988) the Court sought to achieve equal treatment under the law for pro se imprisoned litigants.

In *Houston,* the Court found:

> "Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to

> establish the date onwhich the court received the notice. "

The multiple appellate circuits subsequently extended the *Houston* standard to other civil actions. The Second Circuit Appellate Court in *Ortiz v. Cornetta,* 867 F. 2d 146, 1481 (1989) observed:

> "but it has only been in the past year that courts have extended this principleto form a general standard. Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might
>
> otherwise apply ifhe were represented by counsel. *See* *Houston v. Lack, 487 us. 266, 272 (1988)."*

The Fourth Appellate Circuit in *Lewis v. Richmond City Police Dep't.* 947 F.2d 733, 736 (4th Cir. 1991) determined that *Houston* represented a *rule of equal treatment:*

> "Fundamentally, the rule in *Houston* is a rule of equal treatment; it seeks to ensure that imprisoned litigants are not disadvantaged by delays which otherlitigants might readily overcome. It sets forth a bright line rule."

That decision emphasized that the *Houston* decision *"interpreted the Appellate Rules to require only that the pleading be 'directed to' the Clerk of the District Court ..."(Id* at p. 736). This Eleventh Circuit in

Garvey v. Vaughn, 993 F.2d 776, 781 (11th Cir. 1993) also concluded:

> "Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel. *Ortiz v. Cornetta,* 867 F. 2d 146, 1481 (1989)."

Many such inequities including significant limits to direct access to the courthouse exist for non-incarcerated prose litigants as this case so clearly demonstrated.

Argument #8 - At the Time of Notification to the Parties to this Appeal of theCourt's Order of Dismissal Both Plaintiff as well as Defense Counsel with Broad Exposure to the Case Held the Position that Dismissal Represented Frank Error. (See email exchange at Index Section VI, pg. 11-12, 164-167)

On December 8, 2020, the day following receipt of the notice of the Court's *Dismissal* of the Appeal for untimely filing, Defense Counsel contacted the Court to inform the Court that this was an apparent error.

CONCLUSION

For all of the multiple reasons presented above well supported in the case law, the*Notice of Appeal* in this case has been filed timely and jurisdiction indisputably exists for this Eleventh Circuit Appellate Court.

- In the alternative, this Court must proceed

with remand for consideration ofan *"overlong"* time extension under FRAP Rule 4(a)(5)(C).

- In addition, the substantial evidence of Court Official error as well the repeated instances of misinformation and false reassurances provided by the Clerks of Court to Dr. Pierson requires equitable relief either through the resurrection of the *Unique Circumstances Doctrine* or through the utilization of the inherent powers of the Federal Courts protected by the *separation of powers doctrine.*

Respectfully submitted,

/s/Raymond H. Pierson, III, M.D.

Raymond H. Pierson, III, M.D.

Pro Se Appellant

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 19-13722-EE

RAYMOND H. PIERSON, III, M.D.

Plaintiff

v.

BRUCE S. ROGOW, J.D.; BRUCE S. ROGOW, PA; CYNTHIA GUNTHER, J.D.; AND DOES 1 THROUGH 5, inclusive

Defendants

_____/

APPELLANT'S REPLY BRIEF

Raymond H. Pierson, III, M.D.
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95686
E : rpiersonmd@sbcglobal.net
T : 209-267-9118
F: 209-267-5360
Pro Se Appellant

Pursuant to Eleventh Circuit Rule 26.1-1 and FRAP 26.1 Pro Se Appellant, Raymond H. Pierson, III, M.D. hereby certifies that the following is a list of persons and entities who may have an interest in the outcome of this Appeal:

INTERESTED PERSONS (THREE RELATED CASES)

Due to Document Length Restraints, the full CIP has been removed.

Statement Regarding Oral Argument

Due to Document Length Restraints, the Statement Regarding Oral Argument has been removed.

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TABLE OF AUTHORITIES

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Statement of Jurisdiction

Appellee's, for reasons that are fully evident, attempt to wrongly focus and narrow the dimension of review in this Appeal which has been advanced before this esteemed Court to a single issue despite the absolute fact that multiple other appropriately developed and properly lawfully advanced issues require this Court's deliberations.

1. **28 USC § 2106** This reviewing Court has the authority to review the decision for Dismissal of this case (DE 99, p. 12) under F.R.C.P 12(b)(6) as requested by Appellees in their second Motion to Dismiss (DE 93, p. 1). That decision to immediately proceed to dismissal by that Article III District Court newly reassigned to this over six (6) year case in the final two months was the result of that Court's exceptional prejudice. That Court's onerous conduct through the entirety of the Court's limited assignment to the case (less than 2 months) demonstrates the inherent prejudice of the Court toward Dr. Pierson from the outset which was directed at depriving this pro se Plaintiff in this Federal Diversity Jurisdiction case his U.S. Constitutional Seventh (7th) Amendment right of a *trial by jury* to seek redress for the exceptional injuries sustained due to the legal malpractice, misdeeds and fraud of the Defendant/Appellees.

2. **28 USC § 2201 & 28 USC § 2202** A constitutional challenge to the 1990 Revision of 28 USC § 1391 which has denied to all Plaintiffs in civil cases with Federal Jurisdiction their right to choice of venue in their district of residence and domicile has been advanced in this case. Dr. Pierson has the requisite proper standing for this challenge which was incorporated in the Second Amended Complaint (truly an original complaint). This constitutional challenge has been advanced to contest the elimination of this right which had existed from the time of the (first) Judiciary Act of 1789. That challenge was terminated with prejudice by the original South Florida Article III Court (DE 65,69) because of the single correctable error by Dr. Pierson of not having informed the U.S. Attorney General of that constitutional challenge. That error resulted from Dr. Pierson's initial misinterpretation of F.RC.P. Rule 5.1 in which he believed that the Clerk of Court would provide that notice to the Attorney General. It is a fact in the law that the U.S. Congress has provided a simple solution for correction of such an inadvertent error within the Federal Rules at F.R.C.P. Rule 5.1(d). That opportunity found at Fed. R.C.P. Rule 5.1(d) *(No Forfeiture)* was denied to Dr. Pierson by that (DE 65, 69) original Article III Court which dismissed that constitutional challenge with prejudice in that Court's review of Defendants' initial Motion to Dismiss (DE-32) to Plaintiff's Second

Amended Complaint (DE 30). This Court has proper jurisdiction to review that decision as it represents an interpretation of law as it relates to the specific Congressional intent behind Federal Rule 5.1 (d). That authority has been designated to the Courts under the Declaratory Judgment Act (28 USC § 2201 – 2202).

3. **28 USC § 2072** Under this statute commonly referenced as the Rules Enabling Act the U.S. Congress has granted to the judicial branch the power which authorizes the Federal Courts to create rules of procedure for the Courts in the form of the Federal Rules of Civil Procedure. That Congressional authorization was provided with the one *"caveat"* that those rules must not deprive a citizen of a *"substantive right"*. In this Appeal Dr. Pierson has properly advanced the position, as supported by a review of the Lexis/Nexis databases which provides quite significant evidence that the District Courts of Florida misinterpret and misapply F.R.C.P Rule 12(b)(6) and F.R.C.P. Rule 8(a)(2) to improperly deny to many self-represented pro se plaintiffs, inclusive of Dr. Pierson in this litigation, their U.S. Constitutional Seventh Amendment right to a *trial by jury*. Such a broad based taking of *"substantive right(s)"* is fully adverse to the Congressional intent as demonstrated by F.R.C.P. Rule 8(e) which instructs the Courts to *"do justice"*. Under 28 USC § 2072 this Court has jurisdiction and

is required under the statute to review this claim by Appellant that the District Courts of Florida (especially the Middle and Southern Districts) have broadly denied to pro se plaintiffs their *substantive* rights in this regard. Furthermore, this Court must review the record of this newly reassigned District Court in this case which Dr. Pierson holds the position has again improperly applied these restrictive interpretations of the rules to this case involving a self-represented party. In so doing the Court has deprived Dr. Pierson of a fundamental *"substantive right"* by terminating the case in a manner that improperly applied that misrepresentation of the Federal Rules in the Court's designation of Dr. Pierson's pleadings as a *"shotgun pleading"* in a manner consistent with the regional maldistribution of justice cited above which has been proven to be a common practice of the Florida District Courts.

- It has been demonstrated in the preliminary Lexis/Nexis data review provided that the Southern and Middle District Courts of Florida have exceptionally misrepresented and misapplied FRCP Rule 8(a)(2) and FRCP Rule 12(b)(6) in such a manner as to facilitate their improper termination of plaintiff pleadings in civil litigation. That improper method of termination of plaintiff litigation rights has disproportionately effected pro se filings such as

has occurred in this case under review. The result of that effect has been reflected in the dramatic disparity and disproportionate increase in termination of pro se plaintiff filed litigations under the designation as *shotgun pleadings* that has been found in the Florida District Courts. Such case designations represent a full 53% of all such case designations in Federal district courts nationwide. Incidentally, it should be mentioned that even when the underlying case was initially filed by attorneys in the Middle District of Florida, Tampa Division it was also similarly immediately dismissed under the designation as a *shotgun pleading*. The data presented in the *Initial Appellant Brief* demonstrates that there is an exceptional overuse of the designation of a case as a *shotgun pleadings* by the Florida District Courts as compared to all other Federal District Courts nationwide. The net effect is that the Florida District Courts have created a dramatic maldistribution of justice in the form of those many case terminations. This Court has the authority and even requirement under this statute to review and correct that disproportionate taking of a *"substantive"* right that has occurred in this case as well as in the many other similarly situated cases advanced by pro se litigants. That review is appropriately authorized and fully necessary under this

rulemaking authority. Furthermore, due to the substantial evidence for this regional maldistribution of justice, the standard of review for that trial Court's designation that the Complaint represents a *shotgun pleading* demands a heightened standard of review to the *de novo* level.

4. **28 USC § 1651** Pro Se Appellant has demonstrated that due to the indisputable evidence that the U.S. Constitution at Article III, Section 2 commands the courts in diversity to provide *fair* and *just* consideration of the grievances of a citizen of California such as Dr. Pierson when advanced against the citizens of an alternative state such as the Defendants/Appellees here who are citizens of the State of Florida. The evidence of this case demonstrates that those rights in diversity have been woefully and indisputably denied to Dr. Pierson by the two independent South Florida District Courts that have been assigned to the case. The constitutional deprivation which has occurred in this case is due to the great disparity in the interpretation of the Federal Rules which currently exists between the District Courts of Florida and the District Courts of all other regions of this country. Despite the fact that this case has been remanded twice by this esteemed Court, it has again been denied just consideration by this newly reassigned Article III Court on the *merits* in order to achieve a

fair resolution on the merits. After six years it is reasonably concluded that there can be no justice achieved for Dr. Pierson in the South Florida District Courts. To resolve this injustice, the powers have been designated to this Court under the *All Writs Act* to permit the consideration of the return of this case to the Eastern District of California from which it was an improperly transferred at the outset. That improper transfer occurred due to the failure of the assigned U.S. Magistrate Judge to follow the requirements of both 28 USC § 636 and F.R.C.P. Rule 72. In that regard, the Magistrate proceeded with an unauthorized transfer without the opportunity provided to Dr. Pierson to file an objection for review by the assigned Article III District Court. That is, contrary to the statute and the Federal Rules the Magistrate immediately transferred the originally filed case to the South Florida District Court, Fort Lauderdale division which was just a short two-block distance from Defendant's then office location. As Dr. Pierson has suggested in his *Initial Appellant Brief,* one reasonable solution to eliminate this persistent prejudice to a diverse litigant such as himself by the South Florida District Courts would be to return the case to the Eastern District of California where it originated and where jurisdiction of the Court was proper from the outset under 28 USC § 1391(b)(2).

Statement of the Issues

The Appellee's brief greatly misrepresents the consideration of this Appeal now before this esteemed Court concerning four causes of action advanced against Appellate/Trial Attorney, Bruce S. Rogow, his law firm associates (some of whom may remain unknown, i.e. Does) as well as the Bruce S. Rogow, Professional Corporation. That effort expended by Appellees in the Answer Brief to over-simplify this appeal and to improperly narrow the issues for this Court to consider is easily understood. Certainly, a full disclosure to this Court of the facts of Attorney Rogow and his associates' serial mismanagement and exceptionally deficient and fraudulent legal malpractice is not at all beneficial to their defense. Those facts also fully confirm the breaches of contract and breaches of fiduciary duty which occurred in their handling of the Appeal. Furthermore, Attorney Rogow and his associates' fraudulent misrepresentations and outrageous mistruths in their multiple intentional efforts directed to not disclose and even intentionally hide that evidence of deficient legal mismanagement from the client, Dr. Pierson, is not only fully confirmatory of their liability, but also represents conduct that is extremely hard to acknowledge occurred even from the professional perspective. There can be no question that it would be exceptionally damaging for their law practice especially with respect to future appellate work should knowledge of those legal deficiencies, misconduct and fraud in Dr.

Pierson's case become widely known. Despite Attorney Rogow and his associates' efforts to convince this Court that the Appeal concerns just one *"sole issue"* the indisputable facts are that such a conclusion is woefully incorrect. In fact, a full listing of the seventeen (17) issues that have been advanced in this case can be found on pages 1 through 8 of the Initial Appellant Brief. As was required in the Standard of Review section of that brief, a detailed analysis of the multiple standards of review which apply to those other issues on Appeal have been well reviewed (see pages xxxix - xli of the Appellant Initial Brief). A cursory review of that section of the Initial Appellant Brief will confirm that the vast majority of those issues require the **de novo** standard of review. In each of those instances the de novo (*"from the new"*) standard cited requires this Court to analyze those multiple issues advanced from the completely *"new"* perspective with no preference or prejudice attributed to the decisions of those two Article III South Florida Courts below. From this factual perspective it should be fully evident that Appellees greatly misstate the role of this reviewing Court by incorrectly suggesting that the Court may properly review the singular issue of failure to comply with pleading standards under the standard of review of *abuse of discretion*. Remarkably, that was not even the grounds primarily utilized by the Court in that Dismissal (DE 99). That is, the basis for the dismissal was under F.R.C.P. Rule 12 (b)(6), as was requested by Appellees in both of their motions to

dismiss (DE 32, 93). The de novo standard which properly applies to this case under the true F.R.C.P. Rule 12(b)(6) dismissal requires that this Court must review the facts of the case fully independent of the lower Court's determination with no bias or preference attached to that Court's decision.

One additional point that is appropriately discussed in this section concerns the nomenclature applied to the Complaint ruled on by the newly reassigned Article III Court where it is even stated by that Court in the Order of Dismissal (DE 99 at p.3, n. 5) that *"Although titled the Third Amended Complaint the Court notes it is in fact Plaintiff's second amended complaint"*. It is critically important for this reviewing Court to recognize the fact that the case at the time of dismissal was most accurately considered a *First Amended Complaint.* This issue was addressed at an early point in the *Initial Appellant Brief* (see p. 13) where it was plainly stated that the title of *Third Amended Complaint* was a *misnomer.* Unfortunately, the page limitations for that *Appellant Brief* even with the additional length granted did not permit the necessary review of a timeline of events from the multiple case dockets involved along the course of this over six (6) year old case within the brief proper. As a result, that content was provided in the Exhibit Section at Tab Section 2. That exhibit simply consisted of a review of the timeline of those relevant docketed events which have occurred along the complex path this case

has taken through the District Courts of the Eastern District of California and South Florida inclusive of the two successful appeals of the case out of the District Court of South Florida to this esteemed Eleventh Circuit Appellate Court. As is well known to this Court, in that Court's ruling of June 8, 2020 all forty-two (42) tabbed sections to the *Initial Appellant Brief* have been excluded from any consideration during the Court's review of the case. That elimination of Tab Section 2 has resulted in the circumstances where the Court has been deprived of full knowledge of the case's complex path which has eliminated that factual basis which fully supports the accuracy of Dr. Pierson's claim that the complaint as dismissed on August 19, 2020 (DE 99) was correctly considered a First Amended Complaint. That information provides full proof to that conclusion because it is a fact that the only one prior substantive review of the Complaint had been performed up to that point of Dismissal (DE 99). That singular early substantive review was performed by the original South Florida Article III Court (DE 65,69). It is well recognized that the number of times a pleading has been amended reasonably may effect a reviewing court's perspective on whether or not a further opportunity to amend should be permitted to correct the stated defects. For these reasons, it is fully appropriate to provide a review of the relevant docketed filings and rulings (Exhibit C) in order to inform the Court of those critical events which have occurred along the case's complex path through the

Courts. That timeline provides full confirmation that the case at the time of Dismissal on August 19, 2019 (DE 99) truly represented a First Amended Complaint. Dr. Pierson would emphasize the fact that any discussions other than to review the facts of each of those events have been removed from that exhibit. As a result, it is Dr. Pierson's hope that this revised format for that exhibit (Exhibit C) will be found to be an acceptable form by the Court.

Statement of the Case and Facts

In their introductory paragraph to this section of their *Answer Brief*, Appellees misstate the basis for the Dismissal of the case to be due to of *"Appellant's failure to comply with Federal R. Civ. P. 8 and previous orders."* In fact, the Defendants/Appellees Second Motion to Dismiss advanced as the primary grounds for dismissal to be under *"Rule 12(b)(6) Fed. R. Civ. P. for failure to comply with pleading requirements and failure to state any cause of action upon which relief can be granted"* (DE 93, p.1). In response to that Defendant request, the newly reassigned Article III Court's Dismissal Order (DE 99, p. 12) states: *"Defendant Bruce S. Rogow, J.D., Bruce S. Rogow, P.A. and Cynthia Gunther, J.D.'s Motion to Dismiss Plaintiff's Third Amended Complaint (DE 93) is granted."* Though the Court did object to Dr. Pierson's pleadings under Rule 8 it is a fact that the

Dismissal was primarily granted under Defendant's Fed. R. Civ. P. 12(b)(6) for *"failure to state a claim upon which relief can be granted"*. Such a dismissal under Fed. R. Civ. P. Rule 12(b)(6) requires that the standard of review by this Appellate Court must be *de novo* and not *abuse of discretion* which would be the applicable standard for a dismissal under determination that the compliant was a *shotgun pleading* or in the alternative for non-compliance with the Court's instruction concerning F.R.C.P. Rule 8 pleading requirements. Incidentally, *abuse of discretion* would also be the applicable standard under a Fed. R. Civ. P. Rule 41(b) for willful misconduct which certainly cannot be reasonably applied to this case. Furthermore, it is Dr. Pierson's well supported position that there are multiple issues which have been advanced in the *Initial Appellant Brief* that require review by this Court of which most require the more rigorous *de novo* standard of review (see xxxix - xli).

The next issue that requires discussion concerns the fact that Appellee's *Answer Brief* relies quite heavily on an extensive three (3) page verbatim excerpt from the dismissing Court's Order (DE 99). It is important to emphasize the fact that this new Article III Court had been assigned to this case for only a period of less than two (2) months at the time of that Court's termination of the case. At that point in time the case was over 5.5 years from the time of

initial filing and had been successfully appealed twice to this esteemed Eleventh Circuit. It will be important to demonstrate for this reviewing Court the manifest evidence contained within the late stage docketed filings of the case the evidence of that Court's extreme adverse prejudice directed toward Dr. Pierson. A review of that evidence provides confirmation that it was the indisputable intent of that Court from the outset of reassignment to pursue immediate termination of the case. Remarkably, that Court's adverse rulings were even routinely contrary to Defendant/Appellees consistent non-opposition to the motions advanced by Dr. Pierson. The page limitations of that *Initial Appellant Brief* did not permit a full review of the evidence on this issue. As a result, only a limited general reference to this issue was provided in the body of the brief at p. 19-20 with a detailed timeline of that Court's involvement which demonstrates that exceptional bias included as an Exhibit Section at Tab 10. This Court is fully aware the Court's Order of June 8, 2020 which fully eliminated that critical information.

A Review of the Limited and Exceptionally Adverse Involvement of the Newly Reassigned Article III Court from the Time of Case Reassignment on June 27, 2019 (DE 92) Through to the Date of that Court's Termination of this Almost Six (6) Year Old Twice Remanded Case

Less than Two Months Later (DE 99). (A Timeline of Those Docket Filings and Orders Can Be Found at Exhibit D)

The case was reassigned to Judge Ungaro on June 27, 2019 (DE 99) just one day prior to the filing of Defendant's (second) Motion to Dismiss to Plaintiff's Third Amended Complaint (DE 93). Prior to that filing Defendants had been granted a two-week unopposed extension for that filing by the Original Court.

The new Court's original July 8, 2019 order (DE 95) denied in large measure Dr. Pierson's unopposed 21 day time extension (DE 94) for submission of the *Plaintiff Motion in Opposition to the Defendants Motion to Dismiss.* That ruling was made with no acknowledgment by the Court whatsoever of the fact that Dr. Pierson had provided notice to the Court well in advance (2 months earlier) on May 9, 2019, (DE 77) that he and his staff would be unavailable for three time periods: May 16-31, 2019, June 21-30, 2019 and July 9-21, 2019. Two weeks prior to that Notice opposing counsel had also provided a *Notice of Unavailability* (DE 76) on April 26, 2019 which informed the Court of that party's extended period of unavailability from May 17, 2019 through June 17, 2019. The original Court subsequently respected Defense Counsel's period of unavailability and permitted that two week extension which resulted in

the Defendant's Motion to Dismiss being filed on June 28, 2019. As a result of that filing, Plaintiff's opposition was then required by July 12, 2019 which occurred during the last time period of Dr. Pierson and his staff's unavailability. Dr. Pierson then filed a July 8, 2019 unopposed time extension request (DE 94). In that Motion Dr. Pierson emphasized to the Court that in addition to his own unavailability that his critical and only office assistant would also be out of town in Alaska managing and participating in the wedding of an immediate family member during that time period. The Court's subsequent almost complete denial of that time extension request (DE 95) completely disregarded those exceptionally adverse circumstances which resulted for Dr. Pierson. On receiving late notice of that order by mail on Monday, July 15, 2019, Dr. Pierson was left in the position of having only the 24 hour time period from July 15th through July 16th, the revised due date, for submission of that opposition to complete that response with his assistant in Alaska with quite limited availability. Due to those exceptionally adverse circumstances Dr. Pierson was forced to submit the opposition (DE 97) in a *"crude and undeveloped draft form"* at excess length. The Court was alerted to the impossibility of those circumstances by the inclusion of the following "**Notice**" on the last page of that Motion (DE 97):

"**Notice to the Court**

> The Court's denial to permit Dr. Pierson's Unopposed Motion for a Time Extension of 21 days to file his Opposition to the Defendants Motion to Dismiss (DE 93) while Dr. Pierson and his only assistant were out of area on preplanned vacations ... is of particular concern given the fact that Dr. Pierson had formally informed the Court of his unavailability during the periods of June 20 through June 30 and July 9 through July 16 (DE 77) two months in advance. As a result of these adverse circumstances, Dr. Pierson has been forced to file this Opposition ... a crude and undeveloped draft form."

The excessive length of that *"draft"* opposition document (DE 97) was the singular factor cited by the Court almost one month later when on August 15, 2019 the Order (DE 98) "*Striking the Unauthorized Overlength Filing DE 97 Opposition to Defendant's Motion to Dismiss*" was filed. Dr. Pierson, a non-efiler, immediately on August 16, 2019 sent via Fedex an *Unopposed Request for the Opportunity to Submit a Revised Response in Opposition to the Motion to Dismiss* (DE 101). That Motion arrived at Court on Monday, August 18, 2019 at 10:13 AM. Despite that early arrival, the *Motion* was remarkably not docketed until immediately following the Court's Order that same day to grant

dismissal of the case (DE 99). Even defense counsel found the timing of those circumstances highly irregular and sufficiently disturbing to proceed with the unprompted filing of their own spontaneous motion (DE 102) informing the Court that Dr. Pierson's *Unopposed Motion to Revise his Opposition* had been agreed to and mailed on Friday, August 16, 2019 well before the date of termination of the case.

In summary, all of the adversity created by the newly reassigned Court for this pro se litigant during the Court's brief tenure on the case was extremely prejudicial and destructive to Dr. Pierson's case.

One final point which must be addressed concerns the unlawful conduct by that Court which then improperly and extensively referenced that *"stricken"* (which ceased to exist) document in the Court's Order of Dismissal (DE 99). That reference has now found its way into the Appellee *Answer Brief* as reflected by the entire last paragraph of the excerpt (DE 99) found on page 3 of the *Answer Brief* which directly references that *"stricken"* motion.

Several Additional Last Points Should be Made with Regard to this Extended Excerpt from the Court's Order of Dismissal (DE 99) Which has been so Extensively Referenced in the Appellee Answer.

The first point concerns the initial paragraph

of that reference which provides absolute confirmation that the newly reassigned dismissing Court had an completely deficient understanding of the underlying Middle District of Florida case that had been appealed by Attorney Rogow and his associates. It is beyond question that a fundamental understanding of the exceptional defects in the legal advocacy provided in that underlying proceeding was essential to the fair administration of justice in this subsequent case:

> "*The case underlying the Appeal stemmed from sanctions imposed on Plaintiff by his then medical group.*" (see *Answer Brief*, p. 1).

Even this simple sentence demonstrates the fact that the Court had a completely deficient understanding of the fact that Dr. Pierson was the top performing orthopedic surgeon at the institution where he had been subjected to the sham peer review which represented an absolute fraud. It also demonstrates a lack of understanding by that Court that a primary motivation of Dr. Pierson in initiating that Middle District of Florida litigation was to advance the health interests of the citizens and visitors to Central Florida who when acutely injured were receiving unnecessarily delayed and substandard surgical care at the only Central Florida level one trauma center available. That Court had no understanding that Dr. Pierson who was the one

surgeon with the most outstanding patient outcomes which were far superior to the outcomes of all of his peers, had his practice and career destroyed under the fraudulent, anti-competitive agenda of those peer review participants. The Court even held the completely false belief that the peer review was initiated by Dr. Pierson's former *"medical group"* which is flat out wrong.

The most damning evidence which proves beyond any doubt that the newly reassigned Court's exceptionally deficient review of the complaint can be found in the evidence that the Court performed no assessment whatsoever of the sufficiency of a single fact on a single cause of action throughout the entirety of the Court's *Order of Dismissal* (DE 99). That failure is quite telling of the Court's abject failure to properly consider the *Complaint* in the manner instructed by the U.S. Supreme Court in the precedential decisions of *Twombly* and *Iqbal*. Those decisions demonstrate the fundamental necessity of analysis of the *factual matter* presented in order to permit the determination of whether that evidence was sufficient *"enough"* to meet the *"plausibility standard"* as established by *Twombly [Ashcroft v. Iqbal,* 556 US 622, 678, 129 S. Ct. (2009)]. There can be no question that the Court's failure to review the sufficiency of even a single fact on a single count falls well below that requisite standard of review.

Standard of Review

In this section of their *Answer Brief* Appellees continue to emphasize the fact that the standard of review for a District Court's determination that a case is a *shotgun pleading* is *abuse of discretion* based upon references to *Vibe Micro v. Shabanets* p. 1294 and *McDonough v. City of Homestead* p. 954. In response, Dr. Pierson would direct the attention of this reviewing Court to an earlier decision by this esteemed Eleventh Circuit in *Newell V. Prudential Ins. Co.,* 904 F.2d 644, 649 (11th Cir.) in which Senior Circuit Judge Tuttle participated which found that *"we subject district court's legal conclusions to de novo review"*. Though Appellant certainly is not intending to be argumentative, that decision thus offers an alternative view on the requisite standard of review in this regard. The determination that a pleading represents a *shotgun pleading* is the very type of *"legal conclusion[s]"* which should require such *de novo* review.

The next point to be made in this regard concerns the substantial evidence which has been presented in the *Appellate Initial Brief* (p. 22-35) which concerns the fact that there is exceptional evidence of the misinterpretation and misapplication of the Federal Rules, especially F.R.C.P. Rule 8, broadly across the District Courts of Florida which have resulted in the finding that well over 50% of the Federal District Court

decisions nationally which designate a pleading to be a *shotgun pleading* are found in the State of Florida. The Supreme Court has long expressed the concern that *"chaos"* would result from this very type of regional variance in the interpretation of the Federal Rules [see *Sibbach v. Wilson & Co.* 312 U.S., at 13-14, 61 S. Ct. 422, 856 Ed. 479 (1941)]. Such a regional variance is also fully contrary to the Congressional intent behind empowering the Courts to promulgate rules of procedure for the Courts as authorized under the Rules Enabling Act [28 USC § 2072]. That act incorporated at 2072(b) the *"caveat"* that those powers delegated to the Courts were not permissibly utilized to take *"any substantive right."* Such a *"substantive'* taking has now occurred in this case. For the above stated reasons, it is Dr. Pierson's firm position that the review of all *shotgun pleading* case dismissals in the District Courts of Florida must require elevation to the *de novo* standard.

Another significant defect in the argument advanced by Appellees concerns their abject failure to consider in their review of the Supreme Court decisions in *Twombly* and *Iqbal* the specific instruction provided by the Supreme Court to *liberally construe* pro se filed pleadings which has been promulgated in the Court's post-*Twombly* decision in *Erickson v. Pardus* 56 U.S. 89, 93 127 (S. Ct. 2007).

Lastly, the Court is reminded that Dr. Pierson's

Initial Brief has provided a full review of the applicable standards of review for the multiple other issues properly advanced in this Appeal, but ignored by Defendants in their Answer (see xxxix – xl).

Summary of the Argument

Introduction

The Appellees again reference the dismissal of a *Third Amended Complaint* even despite the fact that they have included the excerpt from the dismissing Court which has acknowledged that the Complaint was not a *Third Amended Complaint.* As discussed previously (p. xxxii – xxxiii and Exhibit C) the Complaint at the time of dismissal was truly a *First Amended Complaint* as only one prior *substantive* review had been performed by the originally assigned South Florida Article III Court (DE 65,69).

Appellees proceed to reference the following comments by the dismissing Court that Dr. Pierson "*had an opportunity to amend his complaint after the Magistrate Judge described the deficiencies in depth*" (DE 99, p.9). That inaccurate statement absolutely misguides this Court by failing to acknowledge the fact that Appellees in both of their Motions to Dismiss (DE 32, 93) as well as the Magistrate Judge in that one prior substantive review (DE 65, 69) made **no** mention

whatsoever that they had identified any version of the earlier complaint to be a *shotgun pleading*. It is a fact that the incorrect determination that the Complaint represented a *shotgun pleading* was only made by the newly reassigned Court in the *Order of Dismissal* (DE 99 p. 5-10). As a result, there can be no question that Dr. Pierson was denied any opportunity to amend the Complaint following that *legal conclusion.* The precedential case law of this Eleventh Circuit absolutely requires a District Court to provide such an opportunity to amend after the litigant has been thoroughly informed and given "*fair notice*" of the pleading defects. [See *Jackson v. Bank of Am., N.A.* 895 F.3d 1348, 1358 (11th 2018), *Vibe Micro, Inc., v. Shabanets,* 873 F.3d 1291, 1296 (11th 2018) and *Muhammad v. Muhammad,* 654 Fed. Appx. 455, 457 (11th 2016)].

It has been well recognized by this 11th Circuit and long instructed by the U.S. Supreme Court that F.R.C.P. Rule 15(a) requires that leave to amend must be freely given [see *Foman v. Davis,* 371 U.S., 1781 p.181-182 (S. Ct. 1962)]:

> "Outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

In addition, this Court in *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Commission,* 337 F.3d

682, 687 (2004) has emphasized that due to the focus of the Federal Court policy to decide cases on the *merits* and *substantive rights* rather than *technicalities* requires that the opportunity to amend must be given freely:

> "The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities required that plaintiff be given every opportunity to cure a formal defect in his pleading."

The Appellee *Answer* Brief Emphasizes the Fact that the Dismissing Court Made the Determination that the Amended Complaint was the "*Hallmark of a Shotgun Pleading*".

Interestingly, despite the fact that the Appellees place emphasis on this fact that the Complaint was a *shotgun pleading* as advanced by the dismissing Court, Appellees made no reference to such a determination in either of their two Motions to Dismiss (DE 32, 93) nor was there any such reference in the only prior substantive review by the former Court (DE 65, 69). It must be stated with emphasis that the designation the Complaint was a *shotgun pleading* can only be found in the *Order of Dismissal* by the newly reassigned Article III Court (DE 99 p. 5-10). The new Court's determination that the Complaint was a *shotgun pleading* included a dedicated five page discussion (DE

99, p. 5-10) which monopolized that twelve (12) page Order. Remarkably, the Court focused all of that attention on this determination despite abjectly failing to assess the sufficiency of even a single fact on a single cause of action. This exclusive focus on labeling the Complaint a *shotgun pleading* quite strongly supports the conclusion that the Court's primary focus from the outset was the rapid termination of the case. Furthermore, the fact that the Florida District Courts have been responsible for over 53% of such case designations nationally represents absolute proof of the strategy by the Florida District Courts to designate cases as *shotgun pleadings* to facilitate case dismissal. Proceeding in such an unjust manner represents the exceptional taking of "*substantive*" rights which cannot be tolerated nor permitted to continue. This misinterpretation and misapplication of the Federal Rules to have the effect to "*abridge ... or modify any substantive right*" is unlawful and truly prohibited by statute (28 USC § 2072(b) of the Rules Enabling Act). The Supreme Court has strongly emphasized this requirement that such a taking of a *"substantive right"* must not occur in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* 559, U.S. 393 (S. Ct. 2010):

> In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 USC § 2072(a), but with the limitation that those rules "shall not abridge,

enlarge or modify any substantive right," § 2072(b).

Furthermore, that Court has long stated that regional divergence and misapplication of the Federal Rules would result in "*chaos*" within the Courts [see *Sibbach v. Wilson & Co.,* 312 U.S. at 1214, 61 S. Ct.422, 85 L.Ed 479].

Federal Rule of Civil Procedure Rule 8 Compliance is Repeatedly and Incorrectly Stated to Prohibitively Require a "*Short and Plain Statement*".

Appellees have repeatedly advanced the opinion in their Answer Brief (p. 5, 7, 10) as well as their two prior Motions to Dismiss (DE 32, p. 45 & DE 93, p. 4-5) that a mandatory requirement under F.R.C.P. Rule 8(a)(2) is that a pleading must provide a "*short and concise statement*". The Magistrate Judge in the original Article III Court decision makes this reference at DE 65, p. 4-5 (later confirmed by the Article III Court, DE 69). The dismissing Court advances the same point at DE 99, p. 4-5. This narrow interpretation of Rule 8 requirements, however, is not in alignment with the authoritative position of the Supreme Court nor is it consistent with the Congressional intent as Rule 8(e) requires that *"pleadings must be construed to do justice"*. Likewise, such an approach is inconsistent with the long held tradition and "*spirit*" of the Federal Courts to apply

the Rules to resolve cases on the "*merits*" and not "*mere technicalities*" or missteps of litigants [see *Foman v. Davis,* 371 U.S., 1781 p.181-182 (S. Ct. 1962)].

The point that must be emphasized is that one size of a pleading does not fit all cases. It is well recognized that such a rigid approach rarely works within any area of human endeavor. Certainly, complex cases which involve multi-year underlying proceedings and events inclusive of areas of untested State and Federal law, which in this case the peer review statutes represented, require that more of the history and *"factual matter"* of the case must be presented. In this case advanced against Attorney Rogow, his associates, his PA and possibly other as yet unknown individuals (the reason for the Does) the Complaint has had to present not only extensive *"factual matter"*, but also provide a full review of the Federal and State peer review statutes. It is patently obvious that such complexity cannot be distilled into a few "*short*" statements. Certainly, the opinions of Appellees as well as the two assigned South Florida Article III Courts that anything other than a prohibitively *short* format of the pleading will suffice represents the typical *boilerplate* response. The facts are that such an interpretation not only deviates from the intent of Congress, but also from the clear instruction of the Supreme Court. Furthermore, to the degree that such a narrow interpretation unlawfully sanctions the taking of the *"substantive rights"* of plaintiffs, it represents an

unconstitutional infringement of the rights to due process and equal protection provided by the Fifth and Fourteenth Amendments.

It has long been held in Western jurisprudence that there is a fundamental right to seek redress for ones' injuries. That right has been traced by Lord Coke to Chapter 29 of the Magna Carta which guaranteed: *"every subject may take remedy by the course of law, and have justice, and right for the injury done to him ..."* [Edward Coke, The Second Part of the Institutes of the Laws of England 55(under E. & R. Brooke 1797)]. This principal was restated by Chief Justice Marshall in *Marbury v. Madison*, 4 U.S. (1 Cranch) 137, 163 (1803):

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

This effort by Appellees and the assigned South Florida District Courts to improperly interpret F.R.C.P. Rule 8 in order to efficiently eradicate Dr. Pierson's fundamental *"substantive"* rights to accomplish injustice is fully in conflict with the instruction at Rule 8(e) which requires that *"pleadings must be construed to do justice"*.

The Supreme Court as reviewed in the Initial Appellate Brief at p. 21-25 has provided exceptional

clarity and instruction concerning the interpretation of F.R.C.P. Rule 8(a)(2). The insistence by Appellees and the South Florida District Courts that pleading statements must be "*short*" is not at all consistent with the precedential case law advanced by this highest Court nor is it consistent with Congressional intent. In fact, it is more correctly stated that at a **minimum** the Federal Rules require "*a short and plain statement of the claim showing that the pleader is entitled to relief*". The Supreme Court's position on this issue of the length of a pleading has been well resolved in *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 319 citing *Dura Pharma, Inc.*, 544 U.S. at 346:

> "In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough . . ."

Obviously, the position of the Supreme Court is that though "*brevity*" is encouraged, the facts in support of the claims must be "*enough*" to meet the *"plausibility standard"*. Thus, through the lens of *Tellabs* it is indisputable that the Supreme Court has instructed that the length of the pleading must take the back seat to the more significant factor which is whether the *"factual matter"* presented is "*enough*" to be sufficient to

provide the defendant *"fair notice"* and to meet the *"plausibility standard"* of *Twombly* (*Iqbal* at 678).

Thus, a true conflict exists between this restrictive interpretation of Rule 8(a)(2) that the pleading must be *"short"* and the even more important requirement established by *Twombly* and confirmed by *Ashcroft v. Iqbal,* 556 US 662, 678 (S. Ct. 2009) that *"sufficient factual matter"* must be provided to meet the *Twombly "plausibility standard"*:

> 'The need at the pleading stage for allegation plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2) threshold requirement that the "plain statement" possess enough heft to "show that the pleader is entitled to relief" (*Twombly* at 557)

In the above instruction by the Supreme Court it is important to note that there is no mention of length (or *"short"*) only the reference that the *"plain statement"* must have sufficient *"heft"*. From this analysis, there can be no question that the current pleading standard as instructed by the Supreme Court in *Ashcroft v. Iqbal* 556, US 662, 678 (2009) is:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." (*Twombly* at 570)

The Supreme Court in *Erickson* has Instructed that Pro Se Filed Pleadings Must be Liberally Construed with a Less Heightened Pleading Standard Applied.

The Supreme Court provided clear instruction on the pleading standard applicable to self-represented parties in the post *Twombly* decision (by 2 weeks) of *Erickson v. Pardus* 551 US 89, 94 172 (2007) that *"less stringent"* standards are applicable:

> "[a] document filed pro se is "to be liberally construed" (citation omitted) and "a pro se complaint, however in-artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

In *Erickson* the Court also expressed the view that pro se filings required a lower level of sufficiency of the "*factual matter*" presented:

> [s]pecific facts are not necessary; the [short and plain] statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" (*Twombly* at 570)

Despite this instruction for a less heightened pleading standard in pro se filings, Dr. Pierson has met and far exceeded the *Twombly* and *Iqbal* standards. A *prima facie* case has been advanced on all four counts.

Appellees Inaccurately State that Dr. Pierson has been "*Offered Opportunities to Amend His Pleading*" (pg. 6) which Suggests that Multiple Opportunities have been Provided.

As has been reviewed, Dr. Pierson has had only one opportunity to amend the complaint following the singular substantive review which was performed by the original Article III Court (DE 65, 69). This effort by Appellees to suggest that multiple "*opportunities*" have been provided represents a clear effort to misinform this Court. The facts which have contributed to this inaccurate naming of the Complaint have been well reviewed above.

Appellees in Their Answer Completely Fail to Address the Primary Justification Cited by the Newly Reassigned District Court for Granting the Dismissal which was Under Appellee's F.R.C.P. Rule 12(b)(6) Request.

Due to the abject failure of Appellees to address this primary basis for dismissal, Appellees have abandoned their defense on this issue with the necessary result being the conclusion that no F.R.C.P. Rule 12(b)(6) justification exists for dismissal. The corollary to that conclusion is necessarily that Dr. Pierson has advanced "*claim[s] upon which relief can be granted*".

Appellees Advance the Premise that the Duration of this Case (Over Six (6) Years) Should be a Significant Factor which Encourages Dismissal.

In response to that charge, Dr. Pierson can quite accurately state that the prolonged history of this case has been the direct result of the improper decisions by the District Courts of Eastern District of California as well as the Southern District of Florida which required two successful appeals to this esteemed Appellate Court. Furthermore, this Appellate Circuit has long held that the extended duration of a case does not justify dismissal (*Bryant v. Dupree* 252 F.3d 1161, 1165, an authority cited by Appellees in their Answer):

> "The lengthy nature of litigation, without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend their complaint."

Argument

The Appellee's Reference the Fact that the Dismissing Court has Identified the Repetition of Factual Allegations in Multiple Causes of Action to be the "*Hallmark of a Shotgun Pleading*" (p. 5).

In this regard the dismissing Court stated (DE 99, p. 6):

> "First, each count incorporates all of the general factual allegations by reference, including all preceding causes of action, into each subsequent claim for relief."

In response, Dr. Pierson responds as he did in the *Initial Appellant Brief* with the conclusions of the original Article III Court (see p. 16 & 25 of the *Initial Appellant Brief*) which cited that Court's finding that such sharing was appropriate for the interrelated causes of action advanced in this case (DE 65, p. 12-13, DE 69):

> "Although a breach of fiduciary duty claim could seem duplicative of a legal malpractice claim, the Federal Rules and Florida law allow both claims to go forward in the alternative" (citations omitted).
>
> "Courts have recognized 'some overlap' in the facts relevant to legal malpractice, breach of fiduciary duty, and breach of contract claims. (*Brenner, 2009*). Still, Florida courts have recognized that all three can be brought together."

Thus, the dismissing Court's position in this regard is in direct conflict with the findings of the original South Florida Article III Court.

The Appellees Direct Attention to the Fact that the Dismissing Court Found the Complaint to be

"Replete with the Same Conclusory, Vague, and Immaterial Facts as its Predecessor Complaints" (p. 9).

Appellees cite as an example the dismissing Court's reference to the *"four (4) page review of the Federal Healthcare Quality Improvement Act of 1986"* (DE 99 at p. 7) to support this conclusion. As to this particular set of facts the exact opposite conclusion is true. That is, an understanding of the immunity provisions of those statutes had exceptional implications in the event that the peer review defendants in the underlying case were determined to have lost immunity due to their **fraud** and unlawful anti-competitive conduct in the sham peer review. A review of the evidence and true facts of the case results in the only reasonable conclusion being that peer review defendant's immunity had been forfeited due to their multiple unlawful acts.

Appellees Advance the Recurrent Theme Found in Their Two Motions to Dismiss (DE 32, p.5 & DE 93, p. 5) that the Defendants are "*Impermissibly*" Grouped without the "*Requisite Specificity*" which is an Issue Adopted in the Orders of both South Florida Courts (DE 65, p. 5 & DE 99, p. 8).

This issue has been extensively and fully addressed in the *Initial Appellant Brief* (pages 16, 25-26) as well as within Argument #3 of that brief (page 39).

The essential facts are that during the entirety of Attorney Rogow and his associates handling of the Appeal in that underlying case the legal advocacy was represented as a singular collective effort by all participants at the firm. At no point was any information provided as to the specific roles and responsibilities of the Rogow Law Firm associates or even Attorney Rogow himself. Furthermore, no opportunity has been provided thus far in this litigation to inquire as to the specific roles of the individuals involved. It is not even known to Dr. Pierson as to whether or not his Appellate case was contracted outside the Rogow Firm. There can be no doubt in retrospect that this non-disclosure of information on the specific roles and responsibilities of the individuals involved was almost certainly an intentional strategy on the part of the Rogow Firm to be able to later deflect meritorious complaints with this *nonsense* defense. Despite these facts both South Florida District Courts have fallen for this *ruse* by Appellees to utilize this *non-issue* as justification for dismissal. Remarkably, the misuse of this issue does not end there given the fact that the dismissing Court has even attempted to use this issue to support the conclusion that the Complaint is a *shotgun pleading* (DE 93, at p. 8). This sophisticated group of attorney defendants cannot be permitted to escape culpability for their misdeeds utilizing this nonsense defense especially at this pre-discovery stage.

Conclusion

A. Appellees allege that the Amended Complaint represented a "*non-confirming pleading*":
   - Dr. Pierson refutes their allegation that he has continued "*to do things his way*". Substantial evidence has been provided that the pleadings are fully compliant with the clear instructions of *Twombly, Iqbal,* and *Erickson*:
     - *"sufficient factual matter"* has been presented (*Iqbal* p. 678)
     - *"Enough"* factual matter has been presented (*Iqbal* p. 678) sufficient to "*show that the pleader is entitled to relief*". (*Twombly* p. 557)
     - The *"Twombly plausibility standard"* has been far exceeded. (Iqbal p. 678)
     - The substantial factual evidence presented has indisputably provided "*fair notice*" of the claims advanced.
     - The level of evidence presented achieves a *prima facie* case on all four counts.

B. The amended complaint (DE 85) (a true *First Amended Complaint*) was not a *"shotgun pleading"*:

- To the contrary, it represents a complaint in an exceedingly complex case built over an even more complex underlying case involving relatively untested Federal (HCQIA) and Florida State Peer Review law inclusive of their peer review immunity protections. Those immunity protections were never intended to be absolute.
- The complexity of this case required a sufficiently complete presentation and review of the factual evidence inclusive of the issue of whether Defendants should have been stripped of their peer review immunity protections due to their fraud and anti-trust violations in the sham peer review.
- The original District Court (DE 65) has provided full confirmation that the sharing of facts and allegations among the particular subset of related causes of action advanced was fully permissible under Florida and Federal Law and not the *"Hallmark of a shotgun pleading* (p. 5)." Incidentally, F.R.C.P. Rule 10(b) and 10(c) also provides authorization to share allegations and facts between counts.
- The alleged *"impermissible grouping"* of defendants and lack of *"requisite*

specificity" represent an absolute ***ruse*** and trap advanced by Appellees into which both South Florida Courts have fallen.

- The information of specific roles and responsibilities has been intentionally denied to Dr. Pierson with original intent.
- It is entirely improper at a ***pre-discovery*** phase to utilize such a factor for dismissal.
- The dismissing Court's claims that *"fictitious party pleading is not permitted in Federal Court"* (DE 99, p. 1, footnote) at the pre-discovery phase of litigation represents frank error.

- Even if this reviewing Court should determine that the Amended Complaint (DE 85) is a *shotgun pleading* it is a fact that Dr. Pierson was denied *"fair notice"* and at least one opportunity to amend given the fact that the determination by the new Court that the complaint was a shotgun pleading was made **only** in the Order of Dismissal (DE 99, p. 5-10). No prior determination or reference was made either by Appellees in their *Motions to Dismiss* (DE 32, 93) or by the original Court (DE 65, 69).

- As a result, there was no *"fair notice"*.
- There was not at least one opportunity to amend provided after the determination the Complaint was a shotgun pleading.
- Substantial evidence has been presented that the Florida District Courts have regionally and egregiously misrepresented and misapplied the Federal Rules to designate pro se filed complaints as *shotgun pleadings* with the full intent of depriving plaintiffs of their *"substantive right[s]"* which represents a violation of the Rules Enabling Act 28 § 2072(b) and F.R.C.P. Rule 8(e).

C. Appellee's abjectly fail to address the primary basis of the newly reassigned Court's granting of their Motion to Dismiss (DE 93, p. 1) which was under Appellee's F.R.C.P. Rule 12(b)(6) Motion to Dismiss (DE 99, p. 12).
    - This failure by Appellees to defend the primary grounds advanced in their *Motion[s] to Dismiss* (DE 32, 93) necessarily requires that their *Motion* must fail.

- The only conclusion possible is that Dr. Pierson has *"plausibly"* advanced four (4) causes of action upon which relief may be granted.

D. The last point that Dr. Pierson would make is to emphasize the instruction of the U.S. Supreme Court in *Swierkiewicz v. Sorema,* N.A., 534 US 506, 513-515 (S. Ct. 2002):

> *"We concede that ordinary pleading rules are not meant to impose a great burden upon a Plaintiff."*

- Through to this stage of the proceedings in this over six (6) year case the "*burden*" which has been placed upon this Pro Se Plaintiff, Dr. Pierson has been absolutely **unbearable and truly unconstitutional**!

Relief Sought

Dr. Pierson requests that the Court consider all forms of relief properly advanced in the *Initial Appellant Brief.*

In Closing

Dr. Pierson respectfully concludes this Reply with the words of Chief Justice John Marshall, the fourth and longest serving Chief Justice of the Supreme Court:

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. ... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."

Respectfully submitted,
/s/Raymond H. Pierson, III M.D.
Raymond H. Pierson, III, M.D.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO. 19-13722-EE

RAYMOND H. PIERSON, III, M.D.,

Appellant, v.

BRUCE S. ROGOW, J.D., BRUCE S. ROGOW, P.A., CYNTHIA GUNTHER, J.D., and DOES 1 THROUGH 5,

Appellees.

On Appeals from a Judgment and Order [of Dismissal] from the United States District Court for the Southern District of Florida Case No. 15-cv-61312-UU

ANSWER BRIEF OF APPELLEES BRUCE S. ROGOW, J.D., BRUCE S. ROGOW, P.A., and CYNTHIA GUNTHER, J.D.

TARA A. CAMPION
BRUCE S. ROGOW, P.A. 100 N.E. 3rd Ave., Ste. 1000 Fort Lauderdale, FL 33301 Ph: (954) 767-8909

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-2(b), undersigned counsel hereby certifies that the following is a complete list of all persons and entities know to have an interest in the outcome of this particular appeal:

Due to Document Length Restraints, the full CIP has been removed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary. The issue on appeal is simple: Did the trial court err in dismissing the third amended complaint with prejudice after Dr. Pierson failed to comply with Rule 8, Federal Rules of Civil Procedure, and previous court orders? The answer is "No." Dismissal with prejudice was proper. No new law or unusual circumstances require oral argument.

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TABLE OF CITATIONS

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review final decisions of the district court pursuant to 28 U.S.C. §1291. This is an appeal from a final order and judgment of the district court entered on August 19, 2019. D.E. 99, D.E. 100. The notice of appeal was timely filed on September 19, 2019. D.E. 104.

STATEMENT OF THE ISSUE

The sole issue on appeal is whether the district court properly dismissed the "Third Amended Complaint (Technically the Second)" with prejudice for failure to comply with Rule 8, Federal Rules of Civil Procedure, and previous court orders. It did. None of the other matters presented in the Initial Brief are relevant to this appeal. Plaintiff's second amended complaint." D.E. 99, p. 3, n.5.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the dismissal with prejudice of a 141-page third amended complaint based on the Appellant's failure to comply with Fed R. Civ. P. 8 and previous court orders. D.E. 99 and D.E. 100. The court below provided a succinct abridgment of this case's prolonged history and the facts relevant to address the issue on appeal:

Pro se Plaintiff Raymond H. Pierson, III, a physician, filed this lawsuit against his appellate attorneys due to the attorneys' alleged mishandling of his appeal. D.E. 85 at 10. The case underlying the appeal stemmed from sanctions imposed on Plaintiff by his then-medical group. *Id.* at 25.

On February 25, 2014, Plaintiff filed the initial complaint against Bruce S. Rogow, Bruce S. Rogow, P.A., and Cynthia Gunther (collectively, "Defendants") and Does 1 through 5 (the "Doe Defendants"). D.E. 1. Plaintiff brought four causes of action: (i) legal malpractice; (ii) breach of fiduciary duty; (iii) breach of contract; and (iv) fraud. *Id.* The court dismissed the initial complaint *sua sponte* for failing to sufficiently allege diversity of citizenship in order for the court to determine whether it has jurisdiction. D.E. 10. Subsequently, the Eleventh Circuit issued a judgment and mandate, vacating that order and remanding the case for further proceedings. Judgment, No. 15-15475-BB (11th Cir. Oct. 12, 2016), D.E. 17. Thereafter, on February 20, 2018, Plaintiff filed the second amended complaint, bringing the same four causes of action and requesting declaratory relief based on a constitutional challenge to the change of venue statute. D.E. 30.

On April 17, 2018, Defendants moved to dismiss the second amended complaint for failure to comply with the pleading requirements and for failure to state a cause of action upon which relief can be granted. D.E. 32. Among other pleading deficiencies, Defendants noted that in the second amended complaint, Plaintiff: (i) impermissibly grouped all Defendants, including the Doe Defendants,

together; (ii) failed to specify any action or omission particularly attributable to any one individual defendant; (iii) failed to demonstrate that any action or omission would have resulted in different outcome in the appeal; (iv) and contained a narration of irrelevant factual allegations and conclusory statements. *Id.*

Subsequently, Plaintiff filed motions for leave to amend the second amended complaint. D.E. 59 & 61. On January [23], 2019, United States Magistrate Judge Patrick M. Hunt issued a Report and Recommendation, recommending that the court grant the motion to dismiss on the basis that the second amended complaint was deficient where, *inter alia*, Plaintiff attempted to re-litigate the underlying case and failed to provide a short and plain statement with the requisite specificity as to which Defendant committed the alleged errors. D.E. 65 at 4. Magistrate Judge Hunt further recommended that the court grant Plaintiff's motion to amend "***with the caveat that no further such motions would be entertained.***" *Id.* at 14. Subsequently, Plaintiff filed a response to the Report and Recommendation, which the District Judge then assigned to the case construed as objections. D.E. 66 & 69. On March 25, 2019, the court overruled the objections and approved, adopted, and ratified the Report and Recommendation. D.E. 69. In so doing, the court dismissed the constitutional challenge with prejudice, but otherwise dismissed the complaint without prejudice and with leave to amend. *Id.* Thereafter, on May 31, 2019, Plaintiff filed the third amended complaint, bringing the same four causes of action. D.E. 85. Specifically, Plaintiff alleged legal malpractice (Count I), breach of fiduciary duty (Count

II), and fraudulent inducement (Count IV) against all Defendants and the Doe Defendants. Plaintiff also alleged breach of contract (Count III) against Defendants Bruce S. Rogow and Bruce S. Rogow, P.A. *Id.* On June 27, 2019, this case was reassigned to this Court. D.E. 92.

On June 28, 2019, Defendants filed the present motion to dismiss, arguing that Plaintiff has failed to rewrite the third amended complaint to conform to the basic pleading requirements and has failed to state any cause of action. D.E. 93. Defendants point out that instead of a shorter, concise statement of his claims, Plaintiff added sixty pages and stopped using sequential paragraphs. *Id.* Defendants also contend that Plaintiff failed to (i) specify in the capacities in which they worked on the appeal; (ii) correct the blanket accusation that all Defendants, including the Doe Defendants, committed a series of legal errors; (iii) correct the impermissible grouping of all Defendants, including the Doe Defendants, in Counts I, II, and IV; and (iv) reasonably allege that any action or omission would have resulted in a different outcome in the appeal. *Id.*

On July 18, 2019, Plaintiff filed his response in opposition, arguing that Rule 8(a) is more consistent with the previous pleading standards and, therefore, the standards set forth in *Twombly* and *Iqbal* do not apply to this case. D.E. 97 at 22–26. Plaintiff further contends that district courts must liberally construe pleadings filed by *pro se* litigants and permit them the opportunity to fully develop potentially meritorious cases. *Id.* at 27–28. Moreover, in his fifty-three page response, Plaintiff

purportedly provides this Court with "a full and encyclopedic discussion of the facts of the underlying Peer Review and related [proceedings] . . . in order to provide a full and accurate understanding of the case to this Court." *Id.* at 7.

For the reasons discussed below, the Court grants the motion and dismisses the third amended complaint with prejudice.

D.E. 99, pp 1-4 (emphasis supplied; internal footnotes omitted).

STANDARD OF REVIEW

The dismissal of a complaint on the grounds of a shotgun pleading is reviewed for abuse of discretion. *McDonough v. City of Homestead*, 2019 WL 2004006, at *2 (11th Cir. May 7, 2019) (citing *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294 (11th Cir. 2018). "An abuse of discretion review requires this Court to affirm unless it determine[s] that the district court has made a clear error of judgment, or has applied an incorrect legal standard. *Moorer v. Demopolis Waterworks & Sewer Bd.*, 374 F.3d 994, 996–97 (11th Cir. 2004) (per curiam) (quotation marks omitted)." *Id.*

The dismissal of a complaint with prejudice for failure to state a claim is reviewed *de novo*. *Quality Auto Painting Center of Roselle, Inc. v. State Farm Indemnity Co.*, 917 F.3d 1249, 1260 (11th Cir. 2019).

"While we accept the factual allegations in the complaint as true, construing them in the light most favorable to the plaintiff, the allegations must state a claim for relief that is plausible, not merely possible. [*Bell Atlantic Corp. v.*] *Twombly*, 550 U.S. [544] at 570, 127 S.Ct. at 1974 [(2007)] ... Under this standard, '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.' [*Ashcroft v.*] *Iqbal*, 556 U.S. [662] at 678, 129 S.Ct. at 1949 [(2009)]." *Id*; see also *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (discussing *Twombly* and *Iqbal* in light of concerns that motivated the Supreme Court to adopt new pleading standards).

SUMMARY OF THE ARGUMENT

Dr. Pierson's Third Amended Complaint was properly dismissed with prejudice and the decision below should be affirmed.

The trial court correctly concluded that the third amended complaint failed to conform to the basic pleading requirements of Rule 8, Federal Rules of Civil Procedure. Even after the Appellant "had an opportunity to amend his complaint after the Magistrate Judge described the pleading deficiencies in depth" [D.E. 99, p.9], he failed to correct those deficiencies. And despite being forewarned that his previous motion to amend was being granted "with the caveat that no further such motions would be entertained" [D.E. 65, p. 14], the third amended complaint was repetitive, irrelevant, conclusory and vague.

Aside from filing the hallmark of a shotgun pleading, Appellant failed to rewrite his complaint to comply with the "short and plain statement" requirements of Fed. R. Civ. P. 8. Instead of the 82 pages and 70 paragraphs of the second amended complaint [D.E. 30], the third amended complaint had 141 pages and over 132 paragraphs. D.E. 85. In fact, Appellant stopped using sequential paragraphs on page 113, almost thirty pages before the end of the complaint. Rather than a shorter, concise statement of his claims against the Appellees, Dr. Pierson actually added 60 pages to the length of his amended complaint.

The dismissal with prejudice was appropriate because despite being put on notice of his pleading defects and being afforded opportunities to amend his pleading, Appellant repeatedly failed to cure the noted deficiencies. Allowing another amendment would cause undue prejudice to the Appellees who have been defending themselves in two States, and in three jurisdictions, since 2014. Furthermore, additional opportunities to amend would be futile.

Finally, Dr. Pierson has chosen to include in his 108-page Initial Brief matters which are beyond the issue on appeal and without merit. There is no need for the Court to address the myriad matters complained of. Therefore, the Answer Brief addresses only the singular issue appropriate on appeal: the propriety of dismissing the third amended complaint with prejudice.

ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE THIRD AMENDED COMPLAINT WITH PREJUDICE FOR FAILING TO COMPLY WITH BASIC PLEADING REQUIREMENTS

A. Appellant Failed to Correct Any Identified Pleading Deficiencies

To withstand a motion to dismiss, the complaint's factual allegations "must be enough to raise a right to relief above the speculative level . . . with enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Bare legal conclusions "are not entitled to the assumption of truth" and are insufficient to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This pleading standard does not require "detailed factual allegations" but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Twombly*, 550 U.S. at 555.

"The standard for notice pleading set forth in Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief. *Osahar v. U.S. Postal Serv.*, 297 F. App'x 863, 864 (11th Cir. 2008)." D.E. 65, p. 3. The Motion to Dismiss the Second Amended Complaint [D.E. 32], argued, *inter alia*, that the complaint did not comply with Fed. R. Civ. P. 8(a)(2). D.E. 32, pp. 4- 5. The Magistrate Judge agreed and issued a fifteen-page Report and Recommendation [D.E. 65] "thoroughly explaining the deficiencies in the second amended complaint and how to correct them ..." D.E. 99.

Noting that "[i]n *Osahar*, the Court dismissed a 62-page shotgun pleading replete with factual allegations and rambling legal conclusions," the Magistrate Judge found that Appellant's second amended complaint was similarly an impermissible pleading. D.E. 65, pp. 3-5. However, Dr. Pierson failed to correct any of the pleading deficiencies the Magistrate Judge identified and explained. The trial court below properly concluded that "the third amended complaint [was] a shotgun pleading for three of the reasons articulated by the Eleventh Circuit." D.E. 99, p. 6 (see *McDonough v. City of Homestead*, 2019 WL 2004006, at *2 (11th Cir. May, 2019).

Shotgun pleadings are characterized by: (1) multiple counts that each adopt the allegations of all preceding counts; (2) conclusory, vague, and immaterial facts that do not clearly connect to a particular cause of action; . . . (4) combining multiple claims against multiple defendants without specifying which defendant is responsible for which act. *Id.*

The third amended complaint begins each paragraph of each cause of action with "Dr. Pierson incorporates and alleges by reference, as though fully set forth herein paragraphs 2-132 inclusive of [the preceding causes of action] for each and every part thereof with the same force and effect as though set out at length herein of this Complaint." D.E. 85, pp. 112, 123, 126, 129. As the court noted from *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1354 (11th Cir. 2006), "[p]leading claims in this fashion imposes a heavy burden on the trial court, for it must sift each count for the allegations that

pertain to the cause of action purportedly stated and, in the process, disregard the allegations that only pertain to the incorporated counts." D.E. 99, pp. 6-7.

The trial court further found the third amended complaint was replete with the same conclusory, vague, and immaterial facts as its predecessor complaints.

Like the initial complaint and second amended complaint, much of the third amended complaint is a lengthy recitation of the events leading up to the present case, including Plaintiff's own history as well as that of the underlying case that gave rise to Plaintiff's appeal. *See, e.g.,* D.E. 85 at 34-45 (Plaintiff states his education, training, background, and early surgical practice then proceeds to discuss the peer review, the subject of the initial lawsuit. Indeed, the third amended complaint often appears to be more of an attempt to re-litigate the underlying case than a short and plain statement of the claims).

Id. at 7. In addition, the third amended complaint included "a four-page 'review' of the Federal Healthcare Quality Improvement Act of 1986." *Id.*

The third amended complaint also failed to correctly allege which claims were being asserted against which defendants. D.E. 99, p. 8. "In the Report and Recommendation, the Magistrate Judge stated '[i]t is unclear from the pleadings in what capacities the Defendants worked on Plaintiff's case. A blanket accusation that all Defendants ... committed a series of legal errors simply does not give rise [to] a reasonable

inference that the individuals accused are liable for the misconductalleged. D.E. 65, p. 5." *Id.* This error in pleading was not corrected. Nor did the Appellant rectify impermissibly grouping the individual causes of actions "without identifying any specific action or omission particularly attributable to any one individual defendant." *Id.*

Furthermore, Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" so to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555.

In his Report and Recommendation, Magistrate Judge Hunt wrote:

The undersigned finds that Plaintiff's 82-page Complaint, with its 42-page exhibit attachment, is [] deficient. Much of the Complaint is a lengthy recitation of the events leading up to the present case, including Plaintiff's own history as well as that of the underlying case that gave rise to Plaintiff's appeal. As Plaintiff is pro se, some excess in the pleadings should be overlooked, However, Plaintiff's Complaint often appears to be more of an attempt to re-litigate the underlying case than a short and plain statement of the claim showing Plaintiff is entitled to relief. D.E. 65, p. 4. Dr. Pierson again chose not to conform his pleading to the Federal Rules. Instead of the 82 pages and 70 paragraphs of the second amended complaint, the third amended complaint has 141 pages and over 132 paragraphs. Appellant stopped using sequential

paragraphs on page 113, nearly thirty pages before the end of the document. Instead of a shorter, concise statement of his claims, Dr. Pierson added 60 pages in length. As the court noted, [t]here is nothing short or plain about [Appellant's] behemoth pleading." D.E. 99, pp. 8-9.

B. Dismissal with Prejudice was Appropriate

The trial court did not abuse its discretion by dismissing the third amended complaint with prejudice. While leave to amend is freely given when justice so requires, courts are not required to permit an amendment "(1) where there has been ... repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163, (11th Cir. 2001). Moreover, courts are "only required to give a plaintiff one opportunity to amend after dismissing for failure to meet the Rule 8 requirements." D.E. 99, pp. 9-10, citing *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018).

Despite being put on fair notice of his pleading defects and being afforded meaningful opportunities to amend his complaint, Appellant repeatedly failed to cure the noted deficiencies (discussion, *supra*, pp. 7-11.); *See, e.g., Lacy v. BP P.L.C.*, 723 F. App'x 713, 717 (11th Cir.2018) (affirming dismissal with prejudice where, "despite multiple opportunities to do so, [the pro se plaintiff] failed to demonstrate that he would be able to resolve the defects in his amended complaint");

Case No.: 14-16109 (appeal of transfer to the Southern District of Florida)

Case No.: 14-11722 (Appeal of dismissal of complaint *McDonough v. City of Homestead*, 771 F. App'x 952, 956 (11th Cir. 2019) (affirming dismissal with prejudice where pro se plaintiff repeatedly "received notice of his complaint's defects," yet failed to remedy them).

Additionally, the Appellees have been on alert and defending this lawsuit since the initial filing in the Eastern District of California on January 21, 2014. Dr. Pierson has appealed decisions in this case to the Ninth Circuit Court of Appeals, to this Court three times, and sought two writs of certiorari in the Supreme Court of the United States. Allowing the Appellant to again amend his complaint would cause undue prejudice to the Appellees.
Magistrate Judge transferred the case to the Southern District of Florida.).

Case No.: 2:14-cv-00324-KJM-CKD (The Eastern District of California subject matter jurisdiction; Dismissal was without prejudice to refile. Appellant filed motion for reconsideration and rehearing en banc. Appellant also filed for writ of certiorari in the Supreme Court of the United States. Review was denied); Case No.:

15-15475 (Appeal of dismissal of complaint based on subject matter jurisdiction.

Appellant filed motion for reconsideration and rehearing en banc. Appellant also filed for writ of certiorari in the Supreme Court of the United States. Review was denied); Case No.: 19-13722 (instant appeal)

Case Nos.: 14A1292 (application to extend time to file petition for writ of certiorari); Case No.: 14A1309 (application for a stay of mandate pending the filing and disposition of petition for writ of certiorari); Case No.: 15-295 (petition for writ of certiorari challenging venue statute); Case No.: 16A1235 (application to extend time to file petition for writ of certiorari); Case No.: 17-316 (petition for writ of certiorari challenging the dismissal of appeal of venue statute).

Furthermore, as Dr. Pierson's prolix filings in the trial court(s), on appeal(s) to this Court, and in his filings to the Supreme Court of the United States demonstrate, any further opportunities to bring his pleadings into compliance with the Federal Rules would be futile.

The third amended complaint did not pass muster under Fed. R. Civ. P. 8(a)(2), even under the liberal review afforded to *pro se* litigants. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008); *Boles v. Riva*, 565 Fed. Appx. 845 (11th Cir. 2014) ("even in the case of *pro se* litigants [] leniency does not give a court license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action."). Acknowledging that *pro se* litigants are "held to less stringent standards than formal pleadings drafted by lawyers," (*Erickson v. Pardus*, 551 U.S. 89, 94 (2007)), "a *pro se* litigant must nevertheless conform to

procedural rules." *Houman v. Lewis*, No. 09-82271-CIV, 2010 WL 2331089, at *1 (S.D. Fla. June 10, 2010) (quoting *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002))." D.E. 65 at 3. The history of this case tells us that Dr. Pierson has never been able to conform to procedural rules.

All of this litigation arises from Dr. Pierson's dissatisfaction with this Court's decision in *Pierson v. Orlando Regional Healthcare Systems, Inc.*, 451 Fed.Appx. 862 (11th Cir. 2012).

CONCLUSION

The Third Amended Complaint does not save the day for the Appellant. Rather than adjust his nonconforming pleadings, Dr. Pierson steadfastly chose to continue to do things his way. He was given fair notice, meaningful opportunities, and leniency, and yet he still failed to meet the basic pleading requirements expected of every plaintiff, represented or *pro se*. The Appellant was granted leave to amend his second amended complaint "with the caveat that no further such motions would be entertained." D.E. 65, p. 15. The trial court correctly dismissed the third amended complaint with prejudice.

For the foregoing reasons, the Court should affirm the order and judgment below.

Respectfully submitted,

/s/ Tara A. Campion

TARA A. CAMPION
Fla. Bar No. 90944
BRUCE S. ROGOW, P.A. 100 N.E. 3rd Ave., Ste. 1000 Fort Lauderdale, Florida 33391
Ph: (954) 767-8909
Fax: (954) 764-1530
campion@rogowlaw.com

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO.: 19-13722-EE

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DISTRICT COURT

CASE NO.: 15-61312-UU

RAYMOND H. PIERSON, III, M.D., *Pro Se*
Plaintiff,
v.

BRUCE S. ROGOW, J.D.; BRUCE S. ROGOW, PA; CYNTHIA GUNTHER, J.D.; AND DOES 1 THROUGH 5,inclusive,
Defendants
_____/

APPELLANT'S INITIAL BRIEF

Raymond H. Pierson, III M.D.
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95685
E : rpiersonmd@sbcglobal.net
T : 209-267-9118

Pro Se Appellant

CERTIFICATE OF INTERESTED PERSONS

Due to Document Length Restraints, the full CIP has been removed.

STATEMENT OF ORAL ARGUMENT

Dr. Pierson, a pro se appellant, advances this critical request to be permitted oral argument before this esteemed Court in order to provide a more complete understanding of this case under federal diversity jurisdiction which was originally filed on January 31, 2014 in the US District Court in the Eastern District of California. Following that original filing the case was immediately improperly transferred to the US District Court in Southern Florida, Fort Lauderdale division by a U.S. Magistrate Judge without notice or an opportunity to file an objection for review by the Article III court with oversight. In South Florida the case faced an early demise within 24 hours of transfer on a *Final Order of Dismissal* for alleged deficiencies of the pleading of diversity jurisdiction. That action which denied Plaintiff the opportunity to amend the pleading also occurred without notice or the opportunity to file a responsive brief addressing the diversity question before the case was terminated on that Final Order of Dismissal. An attempt to amend that original complaint in the form of a *First*

Amended Complaint was subsequently denied by the Court and the revised Amended Complaint was *stricken* from the docket. A first appeal to this Eleventh Circuit Appellate Court which recognized Pro Se Plaintiff's lawful right to amend successfully restored the First Amended Complaint with remand to the South Florida District Court as a "new case". That case was stayed prior to further proceedings by the District Court while appellant sought further relief from the U.S. Supreme Court concerning the improper transfer and a constitutional challenge to the 1990 revision of the Federal Venue Statute 28 USC § 1391 which fully eliminated a plaintiffs' right of choice to venue in their district of citizenship/domicile in federal jurisdiction civil cases. That statutory revision was the root cause of the improper transfer of the originally filed case in California. Within two days of the denial of the Petition for Writ for Certiorari by the U.S. Supreme Court, the Article III District Court in South Florida *sua sponte* re-opened the remanded case and immediately the following day terminated the case on a second *Final Order of Dismissal* again based on the allegation of a deficiency in the pleading of diversity of citizenship jurisdiction which allegedly concerned the corporate entity Bruce Rogow, P.A.. That determination by the District Court occurred despite the fact that the Complaint along with the attached exhibits fully confirmed the fact that complete

diversity existed in the case. That second harsh District Court action necessitated a second appeal to this esteemed Eleventh Circuit Appellate Court which again recognized the sufficiency of the complaint with the appended attachments in establishing complete diversity to all parties in the case. That second Appeal did raise the issue of judicial misconduct in the reply brief which this Court did not address Admittedly, even despite that second favorable decision by this Court, Appellant did again seek further relief concerning the issues of the original improper transfer, the judicial misconduct and to advance a challenge to the 1990 Revision of 28 USC § 1391 by first filing a Petition for Rehearing En Banc with this Court which was denied. That effort was followed by a second Petition for Writ of Certiorari to the U.S. Supreme Court which again denied review. As a result, the case was again restored to the docket in the South Florida District Court on April 10, 2017, a full three years following the original filing of the case in California.

At this time due to the multiple further unfavorable rulings by the original Article III District Court as well as the submission of a third *Order of Dismissal* by a recently reassigned Article III District Court, this case must again be advanced to this esteemed Court for relief. At this stage of the proceedings, the case returns to this Court having been ravaged by

what represents multiple improper and truly unjust interpretations of the Federal Rules and Federal Statutes as well as due to the result of the apparent discriminatory contempt of the newly reassigned Article III District Court for the pleadings of this *pro se* litigant.

In addition, that original District Court had denied (DE 65, 69) to this appellant with proper standing his fundamental right to challenge the constitutionality of the 1990 Revision to 28 USC § 1391 which has irrationally taken from all plaintiffs in Federal civil litigation the right to venue selection in their district of citizenship and domicile. That 1990 revision to 28 USC § 1391 eliminated a right to all plaintiffs which was a right that had existed from the time of the Judiciary Act of 1789.

Appellant must inform this Court that the claim of legal malpractice and all remaining counts advanced in this case on Appeal are the result of the exceptionally deficient legal representation and misconduct of appellant counsel, Defendant Counsel Attorney Bruce Rogow and his legal team in the Appeal to this esteemed Court in that underlying case from the Middle District of Florida which had advanced critical health issues and the health interests of the citizens of the Central Florida region by this pro se Appellant, orthopedic surgeon Dr.

Pierson, whose academic model of patient care included advanced treatment methods and early surgical intervention for the acute injuries sustained by those patients. Those treatment methods achieved outstanding results with the highest quality patient outcomes which far exceeded in quality those outcomes of his orthopedic peers despite having the lowest cost of health expenditures at the Central Florida region's only Level 1 trauma center. Those extraordinary health care results and low cost profile achieved by Dr. Pierson's model of care were fully verified by an intensive data analysis performed by the very health institution, Orlando Health, which had sought to stop the introduction of those advanced techniques by destroying Dr. Pierson's practice through an outrageous seven year sham peer review process infused with the unlawful and fraudulent misuse of the immunity protections provided those peer review participants by the Federal Health Care Quality Improvement Act (HCQIA) of 1986 and the related Florida healthcare peer review statute (Fla. Stat. § 766.101). It is a fact that the referenced health system, Orlando Health, viewed the lost hospital revenues related to the early discharge of Dr. Pierson's successfully treated patients as an adverse insult to their bottom line. As a result, that health system sought to preserve their system of overcharging and extorting patients and their health insurance carriers by eliminating Dr. Pierson's

efficient treatment approach which included early surgical care for acutely injured patients that required surgery. Their method for achieving their unlawful goal was the initiation of a fraudulent peer review against Dr. Pierson. After being subjected to that fraudulent and sham peer review process for a seven (7) years and suffering exceptional financial and professional injury, Dr. Pierson initiated litigation against that hospital system and all other peer review physician participants. Due to the hospital system's severely anti-competitive acts effected through the imposition of fraudulent health market barriers, Dr. Pierson included antitrust claims as a critical aspect of that earlier litigation. It is important to point out that the litigation initiated against all peer review participants inclusive of the hospital system was in large measure to advocate for the health interests of all Central Florida residents who are denied timely surgical intervention for their acute injuries which exposes the to significantly increased health risk and unnecessarily prolonged human suffering. After the unlawful failure of that case before a biased local Orlando District Court in the Middle District of Florida under diversity jurisdiction the case progressed to Appeal before this Eleventh Circuit. In that Appeal Dr. Pierson paid an exorbitant fee ($200,000) to Attorney Rogow and his legal team to not only represent Dr. Pierson, but to also strongly advocate for the health interests of all

residents of the Central Florida region who when acutely injured were denied early surgical intervention at Orlando Health which had the region's only Level 1 trauma center. The exceptional legal malpractice, breach of fiduciary duty, breach of contract and fraud of Attorney Rogow and his team not only abjectly denied Dr. Pierson the right of competent and effective appellate advocacy, but also denied and essentially abandoned those health interests of the citizens of Central Florida. In addition, the loss of that case ended Dr. Pierson's ability to be able to continue as a health advocate for the citizens of the Central Florida region. As a result, those residents of Central Florida who when acutely injured and taken to that regions only Level One trauma center have continued to be subjected to delayed and more costly surgical care as well as to unnecessary health risk and prolongation of patient suffering. Those delays in surgical treatment also exposed injured patients to excessive risk of complications and adverse outcomes. It is Dr. Pierson's sincerest hope that this esteemed Court will invest the necessary effort to fully comprehend the true significance of this case and the health policy issues which it embodies. Dr. Pierson respectfully seeks the opportunity to hold Attorney Rogow and his legal team fully accountable for all of their misconduct, misdeeds and fraud. In addition, the hospital systems with monopolistic tendencies and

which continue to extort patients as well as their health insurance payers, inclusive of many State and Federal government health insurance reimbursement programs must be required to adopt new strategies in patient care which optimize the health outcomes while reducing the cost of that care.

Due to the multidimensional aspects of this complex litigation that has now spanned almost six (6) years (11 years inclusive of the underlying case in the Middle District of Florida) it is this pro se Appellant's belief that the Appellate Panel's perspective and understanding on all issues will be greatly enhanced through the Court's granting the opportunity of oral argument. To that end, Dr. Pierson prays that this esteemed Court provides the opportunity to participate in oral argument in this case.

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TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

Jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit exists in this

Case #19-13722-EE on Appeal from the U.S. District Court of South Florida Case #0:15-cv-61312.

Jurisdiction of the U.S. Court of Appeals for the

Eleventh Circuit exists under:

28 USC § 1291 Appeal of a final decision of a District Court

28 USC § 2106 To seek review by this Eleventh Circuit Appellate Court of the decision to terminate the case by the newly reassigned Article III District Court.

28 USC § 2201 & 28 USC § 2202

a) Plaintiff requests review of the District Court's Order (DE 65, 69) Dismissal with Prejudice of Plaintiff's Constitutional Challenge to the 1990 Revision of 28 USC § 1391 which eliminates to all plaintiffs in federal civil jurisdiction their right of venue in their district of residence/domicile.

b) Plaintiff's request for declaratory relief under the Constitutional challenge to the 1990 Revision of 28 USC § 1391 which resulted in the improper transfer of the

originally filed case from the Eastern District of California. That improper transfer by an unconsented U.S. Magistrate Judge ordered immediate transfer of the case under 28 USC § 1391(a) and 28 USC § 1406(a) to the Southern District of Florida, Fort Lauderdale Division.

28 USC § 2072 For consideration and review of the intent of the U.S. Congress as set forth in Fed. R. Civ. P. Rule 8. That interpretation must not deprive a citizen of a substantiative right and "*must be construed to do justice*". The application of Fed. R. Civ. P. Rule 8(a)(2) cannot deprive one of their substantiative constitutional right to a trial by jury as guaranteed by the Seventh Amendment when the interpretation of the Complaint by the Court violates Fed. R. Civ. P. Rule 8(e) which requires that the Courts "*do justice*".

28 USC § 1651 This almost six year old case in diversity which has existed in Federal District Courts for almost six years has been subjected to the repeated efforts of the Article III District Courts of South Florida to conduct the case in a manner which seeks to deny Plaintiff his day in Court as well as to deny his right to seek redress for his injuries and declaratory relief

from a constitutional challenge. The case now moves forward on this Third Appeal to the Eleventh Circuit Appellate Court for review of an Order granting Defendant's Motion to Dismiss and terminating the case with prejudice [possibly under Fed. R. Civ. P. 41(b)]. At this time Appellant holds the opinion that the only method left to pursue his U.S. Constitutional Seventh Amendment right to seek a just resolution of this case in a trial by jury under federal diversity jurisdiction in the District Court of South Florida is to request the use of the extraordinary remedy of a Writ of Mandamus by the Appellate Court which authorizes remand of this case with a change in the Article III District Court newly re-assigned to the case with the a direct instruction to the new Court to require Defendant's to answer the Complaint and to permit initiation of discovery. In the alternative and even preferably a writ is requested to return this case to the Eastern District of California where jurisdiction of the Court was proper from the outset under 28 USC § 1391(b)(2).

Docket Entries Pertinent to this Appeal

Entry Date – June 22, 2015[Note: The originally filed case in this matter was filed in the U.S.

District Court in the Eastern District of California on Friday, 1/31/2014 (Case #2:14-CV00324)].

- August 19, 2019 the Article III Court newly re-assigned to this case on 6- 27-19, (DE 92) granted (DE 99) Defendant's *Motion to Dismiss Plaintiff's Third Amended Complaint* (DE 93) pursuant to Fed. R. Civ. P. Rule 12(b)(6).
- August 19, 2019 the Judgment was filed pursuant to Fed. R. Civ. P 54 and 58(a) (DE 100).
- September 19, 2019 The Notice of Appeal (Third) was filed in this case and assigned case #19-13722-EE
- October 21, 2019 Over the phone extension granted by clerk as to Party Raymond H. Pierson, III. Appellant's Brief due on 11/19/2019.
- November 6, 2019 Unopposed MOTION for extension of time to file Appellants Brief to 11/26/2019.
- November 12, 2019 Order Motion for extension to file appellant brief is granted. Brief due on 11/26/2019
- November 25, 2019 Unopposed Motion for extension of time to file appellants brief to 12/3/2019.

- December 3, 2019 Unopposed Motion for Extension of Time to File Appellant's Brief to 12/10/2019.
- December 6, 2019 Order Motion for Extension to file appellant's brief to 12/10/2019 filed by Raymond H. Pierson, III is granted.
- December 10, 2019 Unopposed Motion for Extension of Time to File Appellant's Brief to 12/17/19.
- December 12, 2019 Order Motion for Extension of Time to file appellant brief by Raymond H. Pierson III is granted. Appellants brief due 12/17/2019.
- December 17, 2019 Unopposed Motion for Extension of Time to File Appellant's Brief to 12/24/2019.
- December 22, 2091 Order Motion for Extension of Time granted. appellants brief due 0n 12/24/2019.
- December 23, 2019 Unopposed Motion for Extension of Time to File Appellant's Brief to 1/06/2020.
- January 2, 2020 Unopposed Motion for Extension of Time to File Appellant's Brief to 01/07/2020.
- January 6, 2020 Order Motion for Extension of Time granted. Brief is due on 1/21/2020

with appendix due 7 days from the filing of the brief.

- 1/21/2020 Unopposed Motion for Ten (10) Day Time Extension for Submission of the Initial Appellant Brief
- 1/28/2020 Order Motion for Extension of Time Granted. Brief is due 1/31/2020. Appendix is due seven (7) days later. No further extensions should be expected.

STANDARD OF REVIEW

- Dismissal under Federal Rule of Civil Procedure § 12 (b)(6) For failure to state a claim upon which relief can be granted. - *de novo.*
- Dismissal under Federal Rule of Civil Procedure Rule 8(a)(2) – Abuse of Discretion.
- Dismissal under Federal Rule of Civil Procedure Rule 8(a)(2) for Shotgun Pleading – Abuse of Discretion.
- Dismissal under Federal Rule of Civil Procedure 41(b) - Abuse of Discretion.
- Findings entered as a result of 41(b) Motion - Clearly Erroneous (U.S. Court of Appeals for Federal Circuit 1995 – *Lemelson v. U.S.*, 752 F.2d 1538, 1547).
- A Constitutional Challenge to a Federal Statute – *de novo* [Challenge to the 1990 Revision of 28 USC § 1391 & Public Law 101-650, Section 311(1)]. [See *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, (11th Cir. 2017)]
- A Question of the Interpretation of a Federal Statute or Federal Rule of Civil Procedure [Rule 5.1(d)]– *de novo.*
- Judicial Misconduct and Failure of Voluntary

Recusal (An Interpretation of 28 USC § 455) – *de novo.*

- The Judicial Interpretation of 28 USC § 2202 which Represented the Taking of a Substantive Right – *de novo.*
- Declaratory Judgment Act 28 USC § 2201 & 2202 – Abuse of Discretion (Denial of a Request to hear a Declaratory Judgment Action).
- Denial of Leave to Amend Under Fed. R. Civ. P. Rule 15 – The Standard is Abuse of Discretion, but in this case where the decision by the Court to deny the opportunity of amendment was on the basis of futility [citing *Graham v. R.J. Reynolds Tobacco Co.,* 857 F.3d 1169, (11th Cir. 2017)] the standard of review is *de novo* [See *City of Miami v. Wells Fargo & Co.,* 923 F.3d 1260, (11th Cir. 2019)].
- Denial of a Motion for Voluntary Recusal of an Article III Court (28 USC§455) – Abuse of Discretion
- The determination that a Complaint represents a *shotgun pleading* (a conclusion of law) is *de novo* [See *Newell v. Prudential Ins. Co.,* 904 F.2d 644, (11th Cir. 1990)].
- Failure of both District Courts assigned to this

case to respond in any manner or form to five (5) Plaintiff Motions to Request the Opportunity to Proceed with Immediate Interlocutory Appeal under 28 USC § 1292(b) Plaintiff's constitutional challenge to the 1990 Revision of 28 USC § 1391 – Abuse of Discretion.

- A question concerning interpretation of a contract – a pure question of law – *de novo* [See *BioHealth Med. Lab., Inc. v. Cigna Health & Life Ins. Co.,* 706 Fed. Appx. 521, 2017 U.S.App. (11th Cir. 2017)].

STATEMENT OF THE ISSUES

Issue #1

The case under Appeal before this esteemed Court for Dismissal with Prejudice, though titled a *Third Amended Complaint* (DE 85), is at most correctly considered a First Amended Complaint as that Dismissal by the newly reassigned District Court (DE 99) occurred after only one prior substantive review (DE 65, 66).

Issue #2

The failure of the District Courts of South Florida to liberally construe the pro se pleadings throughout the

almost six year history of this case inclusive of the newly reassigned Court's Order of Dismissal with prejudice (DE 99) violates the well-established legal precedents of the US Supreme Court [*Erickson v. Pardus* 56 US 89, 94, 127 (2007)] and this Eleventh Circuit Appellate Court.

Issue #3

The Defendant (First) Motion for Dismissal (DE 32) of the Second Amended Complaint (a true Original Complaint) (DE 30) was filed 32 days late as the due date was March 13, 2018 but it was filed on April 17, 2018. The failure of the Court to deny that Motion and to provide a Default Judgment (Federal Rule 55) represented frank error. (Tab 4, 27)

Issue #4

The US District Courts have developed a pattern well demonstrated in the case law and indisputably demonstrated in the District Courts' handling of this case to misinterpret the Federal Rule 8(a)(2) phrase a *short and plain statement* as barring longer pleading statements that are more explicit and fact intensive. The District Court's strict interpretation of that phrase was never intended by the US Congress or the US Supreme Court to be applied in such a rigid and non-inclusive manner. (Tab 12)

- The US Supreme Court has instructed *"although the rule (Rule 8(a)(2) encourages brevity, the complaint must say enough"* (see *Tellabs, Inc.* at 318, *Dura Pharma, Inc.*, at 346)
- The US Supreme Court has stated the conflicting requirement that *"The factual allegations must be enough"* (*Twombly* at 555) to establish *"plausible grounds"* (*Id* at 556) which fully diminishes the relevance and even appropriateness of the need to hone true to "brevity". (*Tellabs* at 319)

Issue #5

The *Requisite Specificity* of the individual roles of Attorney Rogow and his legal team was never specified in any manner or form to client Dr. Pierson during the entire time period of that law firm's representation of Dr. Pierson in the Appeal below. As a result, the Defendants cannot now be permitted in the pre-discovery phase of this case to utilize their intentional deprivation of that specific knowledge to Dr. Pierson as a method to achieve dismissal. (Tab 14, 28)

Issue #6

To correct the original Court's determination (DE 65, 69) that *proximate cause* had not been *sufficiently* plead in the Second Amended Complaint (DE 30) with *sufficient factual matter* to support *plausibility*, Dr. Pierson

proceeded in the revision of the Third Amended Complaint (DE 85) to provide a substantial additional body of case specific and *sufficient factual matter* demonstrating proximate cause and fully meeting and exceeding the *Twombly plausibility standards* (*Iqbal at 678)* established by the US Supreme Court. (Tab 15)

Issue #7

The original District Court's Order (DE 65, 69) to deny with prejudice Appellant's timely asserted constitutional challenge to the 1990 revision of 28 USC § 1391 represented frank error. Appellant had *full standing* to advance that constitutional challenge. That adverse decision by the original District Court failed to competently apply the Federal Rule 5.1(d) – *No Forfeiture* Clause. (Tab 17, 30)

Issue #8

Following dismissal with prejudice of Appellant's constitutional challenge to the 1990 revision of 28 USC § 1391, Plaintiff submitted five formal requests to the Courts to *stay* the case and permit interlocutory appeal of the denial of that constitutional challenge which were proper under 28 USC § 1292. The complete failure of the Article III District Courts involved with this case to respond to those motions with a proper justification in

the law was improper and a denial of Dr. Pierson's fundamental right to be heard. (Tab 17, 30)

Issue #9

The newly reassigned Court's Order to grant dismissal with prejudice and possibly a Rule 41(b) sanction provides full confirmation of that Court's lack of knowledge as well as a full misapprehension of the original District Court's Order (DE 65, 69) in this almost six year old case previously successfully appealed twice to this esteemed Court. (Tab 24, 34)

Issue #10

The termination of this case with prejudice under Defendant's Rule 12(b)(6) Motion to Dismiss (DE 93) by the new Court (DE 99) which was exclusively justified on the basis of the Court's Determination of First Impression that this pro se Appellant's Complaint was a *shotgun pleading* (DE 99) was improper and represents frank error: (Tab 9, 21)

- The substantial evidence is that the Complaint was not a *shotgun pleading.* (Tab 32, 23)
- The precedential case law of this Eleventh Circuit does not support a dismissal with prejudice on a determination of first impression by the District Court that the Complaint was a *shotgun pleading.* Such a determination required:

- Fair Notice.
- District Court instructions to Plaintiff on the defects.
- At least one opportunity to replead.

Issue #11

The New Court's Dismissal on s*hotgun pleading* grounds with the possible d*rastic sanction* Under Federal Rule 41(b) has Violated All Existing Precedents of this Eleventh Circuit Appellate Court with regard to the implementation of such a sanction (Tab 24, 33)

- Dr. Pierson was not "forewarned" or provided "Fair Notice".
- There was no *clear record of willful misconduct.*
- A Rule 41(b) sanction represents an *extreme remedy* not warranted by the *circumstances* of the case.
- *"Mere negligence or confusion"* is not sufficient to authorize such an onerous sanction.
- There was **no** Defendant request for dismissal under a Rule 41(b) sanction.

Issue #12

The Breach of Contract Cause of Action was a question of law which required a full review of the factual evidence that would have been produced following

discovery. It was not appropriate for Dismissal at a pre-discovery Motion to Dismiss stage. (Tab 16, 36)

Issue #13

Indisputable evidence provided on review of the Lexis/Nexis national caselaw database provides full confirmation of the exceptional over-utilization of the designation of cases as *shotgun pleadings* by the Federal District Courts in Florida on comparison to all other Federal District Courts nationally. This data confirms an exceptional maldistribution of justice which has disproportionately deprived self-represented Florida plaintiffs' access to the Courts. This taking of *substantive* rights represents an unlawful misuse of the rulemaking authority designated to the federal courts by 28 USC § 2072. (Tab 22, 23, 39, 40)

Issue #14

The newly reassigned District Court's improper application to this case the designation of *shotgun pleading* (DE 99) is just one more example in the tidal wave of such adverse determinations by the District Courts of South Florida which so adversely effect plaintiff rights. The records of the Lexis/Nexis caselaw research system provide irrefutable evidence of a disproportionately high number of such designations

when compared to national federal district court standards: (Tab 22, 23, 39)

- The use of the designation of a complaint as a *shotgun pleading* by the District Courts of South Florida and the related misuse of the interpretation of the Federal Rule 8(a)(2) and Rule 12(b)(6) to disproportionately facilitate dismissal at a pre-discovery phase of litigation in a manner which was never intended by the US Congress and which represents the taking of a *"substantive right"* stands in stark violation of the rulemaking authority designated to the Courts by the Congress under the *Rules Enabling Act* [28 USC § 2072(b)].
- This exceptional variance in the regional application of the Federal Rules by the District Courts in Florida (particularly the Southern and Middle District Courts) provides full evidence of the US Supreme Court's great concern that such regional variances would create "chaos" [*Sibbach v. Wilson & Co.*, 312 US, at 14, 61 S. Ct. 422, 85 L. Ed. 479 (1941)].

Issue #15

There are multiple grounds to reasonably conclude that there was exceptional *local bias* demonstrated by both Article III Courts in the Southern District of Florida in the handling of this litigation by a self-represented party which advanced the onerous claims of legal malpractice, breach of fiduciary duty, breach of contract

and fraud against a well-known South Florida trial and appellate attorney. The convergence of these factors strongly suggestive inherent *"local bias"* leads one to reasonably question whether true justice exists in the South Florida District Courts in a case which advances such onerous claims against an attorney. (Tab 41)

Issue #16

A Writ of Mandamus is necessary to correct the manifest injustices that have been directed by the Article III Courts of South Florida to deny this pro se Plaintiff his fundamental US Constitutional right to access the District Courts under federal diversity jurisdiction as well as to deny access to his Seventh Amendment *"right of trial by jury"* without "impos[ing] great burden" [see *Dura Pharma. Inc. v. Broudo,* 544 v 336, 347 (2005)] by returning this case to the Eastern District of California. (Tab 39, 41)

Issue #17

In the alternative, in order to overcome the exceptional *local bias* and judicial misconduct repeatedly experienced by this pro se Plaintiff in the South Florida District Courts of this now thrice appealed case, it is fully appropriate to request the utilization of the *extraordinary* measure of a Writ of Mandamus by this Appellate Court to require reassignment of the case to a

new and unbiased Article III Court and to instruct that Court to require Defendants to proceed with an Answer to the Complaint. (Tab 40, 41)

STATEMENT OF THE CASE

This is the Third Appeal to the US Court of Appeals for the Eleventh Circuit in this Federal Diversity Jurisdiction case.

This almost six (6) year case which has already been remanded twice to the District Court in South Florida following previous successful Appeals to this esteemed Eleventh Circuit Appellate Court, now returns for this third time on Appeal to this Court to again seek relief from a harsh and unjust dismissal by a newly reassigned District Court. That decision confirms the Court's complete lack of knowledge and understanding of the issues of the case. The complex and irregular path of this case through the District Courts in the Eastern District of California to the Southern District of Florida started by way of an improper dispositive transfer order of an unconsented US Magistrate Judge in California which was effected immediately without the requisite notice or the opportunity to submit a brief in opposition to permit review by the Article III District Court with oversight. Once transferred to the District Court in South Florida it subsequently met with the harsh and unlawful treatment of two separate *Final Orders of Dismissal* for alleged minor deficiencies related to the

pleading of Federal diversity of citizenship jurisdiction. Those actions were taken by that original District Court despite the fact that complete diversity was demonstrated from the outset as well as the fact that those questions concerning diversity jurisdiction advanced by the Court could have been easily resolved on simple amendment following *sua sponte* inquiry. Despite that fact, the District Court sought the more exceptional route of two successive *Final Order[s] of Dismissal.* Even at this stage almost six years into this litigation, Plaintiff still holds the firm position that the original transfer from the California Court was improper and should not have occurred due to the fact that the substantial tortious injuries which have been sustained by Dr. Pierson in California were due to Attorney Rogow and his legal team's negligent and fraudulent acts. The substantial evidence that Plaintiff has sustained severe and ongoing costly financial and professional tortious injury in California which remains to the date of this writing the location where the *"substantial part of property that is the subject of the action is situated"* under [28 USC § 1391(b)(2)] fully supports the determination that personal jurisdiction was proper in California.

At this juncture with this Third Dismissal, the case has now again been harshly and unjustly terminated by a newly reassigned Court which in large measure occurred due to the Court's failure to provide sufficient consideration and weight to the US Supreme

Court's as well as this Eleventh Circuit Court's well established policy of instructing the District Courts to *liberally construe* pro se pleadings. In addition, the late and improper designation of the Third Amended Complaint (DE 85) to be a *shotgun pleading* by that newly reassigned District Court was also utilized as grounds for this dismissal. Remarkably, this latest dismissal has occurred despite the exceptional evidence that a prima facie case has been presented in the Third Amended Complaint (a true First Amended Complaint) that the deficiency of counsel, errors, omissions and fraud of defendants in the appeal of that underlying case were the proximate cause of the loss of that appeal. Those facts confirmed with clear and convincing evidence that due to their fraudulent and anti-competitive acts during the peer review action and the subsequent litigation in that underlying case all peer review defendants (Appellees) fully and irretrievably forfeited their statutory peer review immunity protections. Furthermore, a plethora of the true facts from the underlying case have been provided in the amended complaint to indisputably demonstrate that Dr. Pierson provided the highest quality of care and achieved the best patient outcomes at healthcare institution which had initiated the fraudulent sham peer review against Dr. Pierson in the first place. That evidence demonstrated that Dr. Pierson's patients at that institution were discharged a full 3.5 days earlier than the average for orthopedic surgeons at that

institution and two full days earlier than **any** other orthopedic surgeon peer at that institution. It is a fact that a primary motivation behind the sham peer review was the lost revenue to that health institution from the early (3.5 days earlier) patient hospital discharges of Dr. Pierson's patients that resulted from their earlier recoveries. That lost opportunity to continue to extort unnecessary and unjustifiable healthcare costs from patients and their insurance carriers was the primary motivation behind the fraudulent peer review. In addition, during that time period Dr. Pierson was fully involved with the development of a multispecialty medical group practice (*The Physician Patient Alliance*™) which was positioned to be in direct competition with the hospital's own medical staff group practice. That anticipated competition was also a significant issue that the hospital viewed adversely with great competitive concern and which further motivated the conspiracy to destroy Dr. Pierson's practice.

The Complex Path of this Twice Remanded Six Year in Duration Federal Diversity Jurisdiction Case Originally Filed by this Pro Se Plaintiff in the Eastern District of California which was Improperly Transferred by an Unconsented Magistrate Judge to Unreceptive Courts in the Southern District of Florida Calls Into Question Whether the Founders Intent to Spare Litigants of Different States the Indignities and Injustices of "*Local Bias in State Courts*" by Creating Federal

Jurisdiction in Diversity has Truly been Denied by those South Florida Courts.

The creation of Federal court jurisdiction in cases involving citizens of different states (diversity of citizenship) in the Judiciary Act of 1989 which was authorized by the Framers in Article III, Section 2 of the US Constitution was reviewed by the US Supreme Court in *Guaranty Trust Co. v. York*, 326 US 99, 65 (Sup. Ct. 1945) which reflected upon the insights provided in 1809 by Chief Justice John Marshall:

> "Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained "apprehensions" lest distant suitors be subjected to local bias in State courts, or, at least, viewed with "indulgence the possible fears and apprehensions" of such suitors. *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87"

That opportunity intended by the Framers to spare non-resident litigants from the *"local bias"* of the Courts has been severely denied to this pro se Plaintiff.

The Title of this Dismissed Case on Appeal (Third Amended Complaint) (DE 85) is a Complete <u>Misnomer</u>. This Case Under Appeal for Dismissal

with Prejudice is More Correctly Considered a First Amended Complaint.

The nomenclature of the last filed pleading in this previously twice appealed case which was titled a *Third Amended Complaint* (DE 85) at the time of Dismissal is more correctly considered a *First Amended Complaint* given the fact that only one prior substantive review had occurred.

The Defendants' Initial Motion to Dismiss (DE 32) was Improper Given the Clear Instruction Provided by this Eleventh Circuit Appellate Court for Defendants to Move for a More Definite Statement as Provided in the Federal Rule of Civil Procedure 12(e) *"Before Resorting to a Request for Dismissal".*

An early reference for this Eleventh Circuit Court's recommendation for Defendants or even for the Court *sua sponte* to move for a more definite statement as opposed to an initial Motion to Dismiss can be found in *Byrne v. Nezhat* 261 (11th 2001) at p. 1130. More recently, the Court in *Weiland v. Palm Beach County Sheriff's Office,* 792 F.3d 1313, 1322, (11th 2015) also instructed that defendants should so "*move the court*".

The Defendant (First) Motion for Dismissal (DE 32) of the Second Amended Complaint (DE 30) was Filed a Minimum of 32 Days Late (The Due Date was March 13, 2018). That Late Filing of the Motion Should Have Been Denied by the Clerk as

well as by the Court and a Default Judgment Awarded Plaintiff.

Prior to the filing of the Amended Complaint (DE 30), defense counsel had filed an appearance in the case on February 14, 2018 (DE 28). As a result of the February 20, 2018 filing of the Amended Complaint, the Defendant's response was due in Court within 21 days of that filing which would have been on at the latest March 13, 2018. The Defendant Motion to Dismiss (DE 32) was not filed until April 17, 2018 - a minimum of thirty-two days late.

The basic facts supporting the conclusion that Defendant's had proper service are the following:

- In May 2014 proper service of process was provided to all known defendants with copies of the original Complaint as well as the *First Amended Complaint* which was later remanded by the Appellate Court.
    - That service was proper under Federal Rule 4(e)(1) and the Florida Rule of Service of Process 48.031(1)(a).

Detailed Analysis of the Defendant's Motions to Dismiss DE 32 and 93

Remarkably, the Introduction to both Motions to Dismiss Provides in Almost the Entirety the Completely Misapprehended October 13, 2012 Opinion of the Eleventh Circuit Appellate Court

Panel in the Underlying Appeal in which Attorney Rogow and his Legal Team's Exceptionally Misrepresented Dr. Pierson (See Tab 6)

That misapprehended opinion of the Appellate Court (Case #10-15496) was based in its entirety on the false narrative advanced by the peer review defendant's (Appellees) in that Appeal. That exceptionally misapprehended opinion was the result of the complete failure of legal advocacy by Attorney Rogow and his legal team which failed to advance the true facts of the case which were fully supportive of Dr. Pierson. Those true facts were absolutely damning for the peer review defendants (Appellees) who had acted unlawfully and fraudulently throughout the peer review and the litigation.

A Review of the Analysis Cited by the Original South Florida District Court in Granting (DE 65, 69) the Defendant Initial Motion to Dismiss (DE 32) for Counts I - IV which were Dismissed Without Prejudice with the Opportunity to Amend and the Dismissal of the Constitutional Challenge to 28 USC § 1391 with Prejudice.

This original Court's response to the initial Defendant Motion to Dismiss (DE 32) represents a critical reference as it was this Court's analysis which provided guidance in directing Dr. Pierson's revisions to the Complaint (DE 85) filed on May 31, 2019.

Criticisms Raised by the Court

A. Failure to Provide the *Requisite Specificity* (A criticism raised by Defendants).
B. Despite acknowledging the fact that Pro Se Pleadings must be *Liberally Construed,* no liberal construction was provided.
C. Failure to Demonstrate *Proximate Cause* – This was repeatedly raised as an issue by the Court on review of the legal malpractice, breach of fiduciary duty and fraud/fraud in the inducement causes of action.
D. The Court recognized that *"some overlap"* was allowable for the allegations and facts pertaining to legal malpractice, breach of fiduciary duty, and breach of contract claims which Federal and Florida law permitted to be *"brought together"* (DE 65, p. 12-13).
E. The Court denied with prejudice the *Request for Declaratory Relief* - under the Constitutional Challenge to the 1990 Revision of 28 USC § 1391due to the failure to provide the requisite *Notice* to the Attorney General under Rule 5.1(a)(1).

An Analysis of the Newly Reassigned Article III District Court's Order of Dismissal (DE 99)

Background Section

The Court included an incomplete discussion of the fact that Plaintiff Opposition Motion (DE 97) was "*stricken*" on August 15, 2019 (DE 98) due to excess length. There

was no discussion provided concerning the severe actions taken by the Court which contributed to the extremely adverse conditions created for that opposition filing. Those facts will be reviewed separately as they demonstrate the exceptional prejudice and inherent bias of the Court (Tab 10).

Legal Standard

Despite the fact that the Court had already "*stricken*" (DE 98) Dr. Pierson's opposition response (DE 97) the Court proceeded to make multiple references to that *"stricken"* document. The Court's comments included a complete misrepresentation of Dr. Pierson's expressed position concerning the precedential Federal Rule 8(a)(2) case law. In that statement the Court wrongly concluded that it was Dr. Pierson's position that *Twombly* and *Iqbal* standards had no applicability whatsoever to his case. To the contrary, what Dr. Pierson was attempting to communicate to the Court was the fact that Congress as evidenced by the current form of Federal Rule 8(a)(2) and 8(e) intended for the interpretation of those Rules to be less restrictive and more consistent with the prior *Conley* standards. In addition, the point was made that the US Supreme Court applied a similar *less stringent* standard to pro se filed pleadings (see *Erickson* at p. 94).

Analysis

A. *Shotgun Pleading*

It must be stated with strong emphasis that this mischaracterization of Appellant's *Third Amended Complaint* (DE 85) as a *shotgun pleading* was the first and only such characterization in the entirety of the litigation up through the time of that Dismissal. The District Court states that there are "*conclusory, vague immaterial facts that do not clearly connect to a particular cause of action. For example, in one paragraph, Plaintiff provides a four-page 'review' of the Healthcare Quality Improvement Act of 1986 including legislative statements and comments made prior to enactment*" (DE 99). In response it must be stated that the inclusion of that material was absolutely necessary to demonstrate to the Court the fact that the fraudulent acts of the peer review participants resulted in their irretrievable loss of statutory immunity. The failure of Attorney Rogow and his legal team to properly inform the Appellate Panel of that issue of lost immunity as well as the failure to inform the Court of the many other true facts of the case which confirmed that Dr. Pierson provided the highest level of care to his patients were the proximate cause of the loss of that Appeal. Despite the fact that Dr. Pierson incorporated those facts into the Complaint (DE 85) to be in full compliance with the original Court's order to demonstrate proximate cause, the dismissing Court wrongly concluded that Dr. Pierson was non-compliant with that original Court's Order.

Rather than assessing the plausibility and sufficiency of the facts presented, the Court was too distracted attempting to prove that the Complaint was a *shotgun pleading.*

Leave to Amend

The Court quite inaccurately concluded that the "*Plaintiff has had **an** opportunity to address the defects* ..." and denied the right to amend.

The Newly Reassigned District Court's Order (DE 99) in the "Analysis" Section Made the Determination of First Impression that the Third (Technically Second) Amended Complaint (DE 85) was a *Shotgun Pleading.* That Opinion was Supported with the Observation that "*Each Count Incorporates All of the General Factual Allegations by Reference*" which is Contrary to the Opinion and Review Provided by the Original Court. (DE 65, 69)

The review of the Second Amended Complaint (DE 30) by the original Article III Court addressed this issue of each count incorporating *"all of the general factual allegations by reference"* and concluded that it was fully appropriate:

> "Florida Courts have recognized "some overlap" in the facts relevant to legal malpractice, breach of fiduciary duty and breach of contract claims

(*Brenner,* 2009). Still Florida Courts have recognized that all three can be brought together (DE 65, p. 12-13)

A Review of the Limited but Exceptionally Adverse and Prejudicial Involvement of the New Court from the Time of Case Reassignment on June 27, 2019 (DE 92) Through the Date that the Court Terminated this Six Year Old Twice Remanded Case on August 19, 2019 (DE 99).

To best understand just how onerous and unjust the newly reassigned District Court's involvement was at this later phase of the case, it is important to review the timeline of the multiple critical factors which existed during the time period immediately prior to and subsequent to that new Court's assignment to the case. (Tab 10)

The United States Supreme Court and this Eleventh Circuit Appellate Court have a Long History of Established Precedent which Requires that the Federal Courts Must Liberally Construe the Pleadings Filed by *Pro Se* Litigants to Permit the Full Development of Meritorious Cases.

The position of the US Supreme Court concerning the requirement for the District Courts to *liberally construe* pleadings filed by *pro se* litigants was advanced in two 1972 cases: *Cruz v. Beto*, 405 US 319, 92 (1972), and *Haines v. Kerner,* 404 US 519, 92 (1972). The Court's

discussion of the need to *liberally construe* pro se pleadings in *Haines* had its origins in the earlier Supreme Court opinion in *Conley v. Gibson*, 355 US 41(1957). The often-cited *Haines* excerpt is that the court "*hold[s] [pro se pleadings] to less stringent standards than formal pleadings drafted by lawyers*" (*Haines*, 404 U.S, 520). A consistent approach to *liberally construe* pro se appellate pleadings has been demonstrated by the Eleventh Circuit opinion in *Laurent v. Select Portfolio Serv., Inc.*, 193 F. App'x 831, 833 (11th 2006).

An important reference to this doctrine for the liberal construction of pro se pleadings was provided by the US Supreme Court in the post-*Twombly* decision *Erickson v. Pardus* 551 US 89, 94, 127 (2007). In *Erickson* the Court, despite having just advanced a heightened pleading in *Twombly* two weeks prior, continued to emphasize the need for a more liberal pleading standard in pro se filings:

> "[a] document filed pro se is "to be liberally construed" *Estelle [v. Gamble]* 429 US [97], 106, 97 S.Ct. 285 50 L. Ed. 2d 251 [1976) and "a pro se complaint, however in-artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,"

The Supreme Court in *Erickson* (p. 93) observed (citing *Twombly*):

> "[s]pecific facts are not necessary; the [short and plain] statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" [*Bell Atlantic Corp. v. Twombly,* 550 US 544, 570 (2007)]

Federal Rule of Civil Procedure Rule 8(a)(2) Requirements are Frequently Misrepresented by the District Courts Especially with Regard to the Revised Interpretation that has been Required by the Decisions of the US Supreme Court in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*

It has never been the intent of the Congress or of any permissive interpretation of the US Constitution that the Federal Rules should be permitted to be interpreted with the intent to create exceptional barriers to the Federal Courts for plaintiffs.

The appropriate interpretation of the phrase "*short and plain statement*" provided in Rule 8(a)(2) has important bearing on the interpretation of this Rule. The insights provided in the case law decisions of the Supreme Court demonstrates that Court's opinion that the phrase defines the minimum that is required. In contrast, may Florida District Courts choose to view pleadings that are factually sufficient but not *"short"* to represent violations of the rule and, therefore, impermissible *shotgun pleadings*. The US Supreme Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 US 308,319

provided the definitive answer on this very consideration:

> "In an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Although the rule encourages brevity, the complaint must say enough to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharms., Inc.*, 544 US, at 346. "

Thus, though the intent of Rule 8(a)(2) is to *"encourage brevity"* it in no manner is meant to be interpreted rigidly that such statements must be *"short"*.

In fact, that earlier case (*Dura* at 347) the Supreme Court recognized that compliance with the pleading rules should not be overly burdensome:

> "We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. *Swierkiewicz v. Sorema N. A.*, 534 US 506, 513-515."

In *Swierkiewicz* (*Id* at 511) the Court recognized that *"under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case"*. Furthermore, the Court recognized that "*liberal discovery*" and summary judgment were required for the proper development of a case (*Id* at 512,

513). In addition, the Supreme Court has expressed the opinion (See *Dura* at 346) that Rule 8(a)(2) does not require the demonstration of proximate causation:

> "We concede that the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2).* And we assume, at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss.

Despite this acknowledgement by the Supreme Court, the original Court (DE 65, 69) wrongly and repeatedly insisted that Dr. Pierson demonstrate proximate causation to have the pleading deemed sufficient. It should be noted that *Twombly* (2007) and *Iqbal* (2009) are silent on proximate cause.

In *Twombly* the Court acknowledged that even though the facts provided didn't need to be *"detailed"* they did need to be *"enough"* (*Twombly* at p.555).

The *Twombly* Court also explained that the factual allegations must *"plausibly"* suggest that there is a right to relief. That requirement has come to be known as the *"Twombly Plausibility Standard"* (*Iqbal* at 678):

> "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold

> requirement that the "plain statement" possess enough heft to "show that the pleader is entitled to relief." (*Twombly* at 557)

In the above Twombly excerpt it must be pointed out that the US Supreme Court emphasized the *"plain statement"* phrase in Rule 8(e)(2) to the exclusion of *"short"*. This further supports the earlier references that *"short"* is the minimum required. In the more recent decision of *Ashcroft v. Iqbal,* 556 US 662, 678 (2009) the Supreme Court held:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929."

The Eleventh Circuit cases since *Iqbal* and *Twombly* have been fully in line with the Supreme Court precedents. [See *Frantz v. Walled,* 513 Fed. Appx. 815, 820 (11th 2013)] in which it is emphasized that facts must be beyond the just speculative.

At this juncture it is important to revisit the precedents of the US Supreme Court case involving complaints advanced by pro se litigants. *Erickson,* which was decided by the Court just two weeks following *Twombly,* appears to be in conflict with *Twombly* (which is not the case). To the contrary, the point is that the Court holds the position that in pro se filed complaints the pleading

requirements should be more typical of those more lenient standards established by the earlier *Conley* Court [see *Erickson* at 93]:

> "Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 US 544, 555, 127 [quoting Conley v. Gibson, 355 US 41, 47, 78 S. Ct. (1957)]"

Federal Rule of Civil Procedure Rule 10(b) in Addition to Requiring the Use of Numbered Paragraphs does Permit that *"A Later Pleading May Refer by Number to a Paragraph in an Earlier Pleading".*

The point to be made is that with Rule 10(b) it was Congress's intent to permit the inclusion of facts into more than one cause of action when appropriate. Despite the intent of the Rule, the newly reassigned Florida Court has concluded that such sharing of facts and allegations is only a feature typical of a *shotgun pleading*. It is important to point out that the original Court acknowledged that the interrelationships of the types of causes of action pursued in this case confirms that such *"overlap"* in the sharing of facts permissible:

> "Although a breach of fiduciary duty claim could seem duplicative of a legal malpractice claim, the

Federal Rules and Florida law allow both claims to go forward in the alternative" (citations omitted)

"Courts have recognized "some overlap" in the facts relevant to legal malpractice, breach of fiduciary duty, and breach of contract claims. (*Brenner*, 2009). Still, Florida courts have recognized that all three can be brought together." (DE 65, p. 12-13)

A Review of the Original Court's Report and Recommendation (DE 65, 69) with Respect to the Issue of *Requisite Specificity*.

With respect to requisite specificity it must be stated that the Rogow Law Firm was represented to Dr. Pierson at all times during their participation in the Appeal below as a "*black box*". The inner workings of the firm were never revealed in any manner or form. Defendants who deprived Dr. Pierson of that specific information cannot be permitted in this case to utilize that deprivation to escape accountability.

The Original Article III Court in that Court's Review (DE 65, 69) Insisted that Dr. Pierson Demonstrate *Proximate Causation* to *Plausibly* State a Claim for Relief (*Iqbal* at 678)

The original Court and Defendants have insisted that a defect in the Second Amended Complaint (DE 30) was the failure to sufficiently demonstrate proximate

causation. The first point to be made in this regard is the fact that the Supreme Court (See *Dura* at 346) has observed that the Federal Rules do not establish a requirement at the pleading stage to demonstrate proximate causation (*Supra* at 23). Though not a proper requirement when viewed through the above stated Supreme Court perspective, this instruction by the Original Article III Court to demonstrate proximate causation represented a particularly difficult and fact intensive task in this complex case. In healthcare peer review cases such as the underlying case which involved the immunity protections provided to the peer review defendants (Appellees) it is a particularly difficult issue to address due to the "*strong presumption*" imbedded within the Federal statute which assumes that peer review actions are *"undertaken"* by a hospital system and physicians "*in compliance with the bill's standard for immunity*". That "*strong presumption*" which had to be overcome in the underlying case with "*clear and convincing evidence*" is the "*reasonable belief*" that the actions taken against Dr. Pierson were in the "*furtherance of quality healthcare*". The plethora of facts and other truths available in the seven year peer review record as well as the two year litigation record provided absolute confirmation that the *"strong presumption"* was overcome thus proving that the fraudulent peer review and the unlawful anti-competitive acts of the peer review defendants resulted in their complete and irretrievable loss of immunity. The failure of Attorney

Rogow and his legal team to inform the Appellate Panel of that lost immunity was absolutely the proximate cause of the lost Appeal.

One Significant Factual Element which Supports the Breach of Contract Claim was the Adamant Refusal of Attorney Rogow to Proceed with the Requested *Petition for Rehearing En Banc* with the Proper Intent to Correct the Exceptional Misapprehension of the Case by the Original Appellate Panel.

In considering this factual issue the original District Court observed that *"Plaintiff ultimately filed [pro se] an unsuccessful Petition for Rehearing En Banc"* suggesting that a fifteen page *Petition for Rehearing En Banc* filed by an inexperienced pro se Appellant eliminated any *"cognizable injury"* with respect to Attorney Rogow's refusal to do so. That suggestion (DE 65, p. 16) represented an illogical and unreasonable conclusion.

The Original Article III District Court's Dismissal (DE 69) with Prejudice of Plaintiff's Second Amended Complaint (DE 30) Constitutional Challenge of the 1990 Revision of 28 USC § 1391 by Public Law 101 – 650 Section 311 (One) Represents Frank Error

The Constitutional *"facial"* and *"as applied"* challenges incorporated within the Second Amended Complaint

(DE 30) arose from Plaintiff's adverse experience and *standing* from the improper, immediate transfer of the originally filed complaint. Dr. Pierson maintains the position that federal jurisdiction in complete diversity was proper in California under 28 USC § 1391(b)(2) due to the fact that the foreseeable tortious injury sustained by Plaintiff was the result of Attorney Rogow and his legal team's Legal Malpractice, Breach of Fiduciary Duty, Breach of Contract and Fraud. The Supreme Court decisions in *Calder v Jones,* 465 US 789-90 (1984), *Indianapolis Colts v Metropolitan Baltimore Football Club*, 34 F.3d 411-12 (1994), *Phillip Bates v. C & S Adjusters, Inc. (1992)* and *Samuel Myers v The Bennett Law Firm*, 138 F.3d 1074-75 (2001) provide full confirmation of the Court's position that the location where tortious injuries and defamation occur is a correct venue.

The original Court's dismissal with prejudice of Plaintiff's Constitutional Challenge to 28 USC § 1391 due to Plaintiff's inadvertent error to not inform the Attorney General of the constitutional question as required by the Rule 5.1(a)(2) represents frank error as Rule 5.1(d) - *No Forfeiture* clause was established to preserve constitutional challenges despite such inadvertent errors.

Following the dismissal of this claim, on five separate occasions Plaintiff filed Unopposed Motions to *"stay"* the case and to permit submission of an immediate

interlocutory Appeal (DE 70, 73, 78, 91, 96). The failure of both Article III District Courts to respond in any manner or form to those Motions represented a fundamental denial of Dr. Pierson's right to be heard.

Just as the Courts of the Eleventh Circuit have Imbedded the Supreme Court Instruction to Liberally Construe Pro Se Pleadings, this Same Requirement must Exist for Informed Attorneys Sophisticated in the Law when Placed in the Position to Answer to Their Former Clients for their Legal Malpractice, Misconduct, Misdeeds and Fraud.

Defendants Attorney Rogow, a legal academic, and his legal team who are recognized sophisticated practitioners of civil and criminal law repeatedly insist in their Motions to Dismiss that Dr. Pierson has not stated *"any cause of action upon which relief can be granted"* (DE 93, p. 1). Those claims are made despite the fact that the Complaint advances a large number of errors, omissions and fraudulent acts which were well below the standard of *"a reasonable degree of care, skill or dispatch"* required. [*Crosby v. Jones,* 705 So. 2d 1356, 1358 (S. Ct. Fla. 1998)].

Attorney Rogow and his law firm have attempted to have this case dismissed on the basis of a failure of the Complaint to provide the *requisite specificity* when they have full knowledge that

from the beginning of representation of Dr. Pierson on the Appeal of the underlying case, they fully and purposely denied that knowledge.

The issue of *requisite specificity* first raised by Defendants has also been cited as a significant deficiency by both Courts which have referenced *"impermissible grouping of the Defendants for Counts One, Two and Four"* (DE 93, p. 6, DE 65, p. 5-6).
Defendants cannot be permitted at this pre-discovery phase of the case to escape accountability by their premeditated denial of this information to clients.

Florida's Judgmental Immunity Doctrine is not Applicable to this Case.

Under the Rule of Decision 28 USC § 1652 in this Federal diversity jurisdiction case, in addition to demonstrating that an attorney failed *"to act with a reasonable degree of care, skill and dispatch."* (*Crosby* at 1358), it is also necessary to provide confirmation that judgmental immunity does not exist. [See *Inlet Condo Ass'n v. Childress Duffy, Ltd., Inc.* 615 Fed App'x. 533, 534 (2015)].
No aspect of the Federal or Florida healthcare peer review law provides legitimate support to a claim for relief by Defendants under this Doctrine.

An Extensive Review of the History of "Shotgun Pleadings" in the Eleventh Circuit Appellate Court is Reviewed to Provide a Full Foundation

in the Arguments which Follow that this Determination of First Impression in the Order of Dismissal (DE 99) by the Newly Reassigned Article III Court that the Third Amended Complaint is a *Shotgun Pleading* is Completely Unfounded.

One of the first opinions in this Eleventh Circuit which pointed out the concerns that exist with a *shotgun pleading* were those expressed by Circuit Judge Tjoflat in *T.D.S., Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, (11th 1985) in a footnote to his dissenting opinion (p. 1544, N14). In *Byrne v. Nezhat*, 261 F.3d 1075, 1131 (11th 2001) Judge Tjoflat provides a more expanded discussion of those harmful effects.

Weiland v. Palm Beach County Sheriff's Office, 792 F.3d 1313, 1321-22 (11th 2015) reviews the four common characteristics of shotgun pleadings. *McDonough v. City of Homestead,* 771 Fed. Appx. 952, 954 (11th 2019) reviews those characteristics more succinctly. A key requirement placed on the District Courts before proceeding with dismissal on *shotgun pleading* grounds is for the plaintiff to be given *"fair notice"* [See *Jackson v. Bank of Am., N.A.,* 898 F.3d 1348, 1358 (11th 2018)]: *"What matters is function, not form: the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them.*". In *Vibe Micro, Inc. v. Shabanets,* 878 F.3d 1291, 1296 (11th 2018) it is

emphasized that the Court must explain the defects and permit at least one opportunity to replead:

> "In the repleading order, the district court should explain how the offending pleading violates the shotgun pleading rule so that the party may properly avoid future shotgun pleadings. Although the *Byrne* line of cases requires one sua sponte chance to amend a shotgun pleading,"

Eleventh Circuit precedent requires that at least one opportunity to replead must be provided following such notification. [See *Muhammad v. Muhammad,* 654 Fed. Appx. 455, 457 (11th 2016)].

The Disproportionate Use of the Designation of a Complaint to be a *Shotgun Pleading* by the Florida District Courts as Compared to National District Court Standard Provides Evidence of an Exceptionally Uneven Distribution of Justice in the Federal District Courts

Research in the Lexis Nexis case law database on December 10, 2019 under the case designation of *shotgun pleading* demonstrated the disproportionate and unexplainable wide disparity which exists across all Federal Circuits concerning the dismissal of cases by the District Courts based on the determination that a case is a *shotgun pleading*. In that query, there were three thousand six hundred and twenty (3,620) cases across

all Federal Circuits with three thousand one hundred and fifteen (3,115) in the Eleventh Circuit. By another measure (3115/3620) or 86% of all such listed cases across all Federal Circuits were from the Eleventh Circuit:

Total Federal	3,620
First Circuit	9
Second Circuit	22
Third Circuit	58
Fourth Circuit	42
Fifth Circuit	72
Sixth Circuit	30
Seventh Circuit	22
Eighth Circuit	30
Ninth Circuit	184
Tenth Circuit	33
Eleventh Circuit Cases	**3,115**
DC Circuit	2
Military	1

Even more glaring was the uneven distribution of such cases within the Eleventh Circuit where one thousand nine hundred twenty-one (1,921) cases were from the Florida District Courts. On State by State comparison within the Eleventh Circuit (1921/3115) fully 62% of those Eleventh Circuit cases were from the State of Florida with 38% from the Southern District. From the national perspective, Florida, as a single state, had 53%

(1921/3620) of all such federal cases. If there was ever evidence of a true a national maldistribution of justice, this observed high frequency of designated *shotgun pleadings* in the District Courts of Florida certainly represents such a case. This maldistribution suggests a systematic and pronounced deprivation of the due process and equal protection guarantees by the District Courts of South Florida. One reasonable conclusion is that there appears to be a definite strategy of the Florida District Courts to *"dump"* a disproportionate number of cases into the dismissal *waste bin* of *shotgun pleadings* as occurred to this case on Appeal. These finding warrants further high level investigation by the US Judicial Conference.

This Disproportionate Use by the Florida District Courts of the Designation of a Case a *Shotgun Pleading* Represents the Taking of a *Substantive* Right which is not Permissible Under the Rulemaking Authority Designated to the Federal Judiciary by the US Congress Under the Rules Enabling Act 28 USC § 2072.

One important aspect of the disproportionate use of the designation of a complaint as a *shotgun pleading* as grounds for dismissal in the Florida District Courts concerns the implications that this approach involves a misapplication of Federal Rule 8(a)(2) and Rule 12(b)(6) standards which contrasts dramatically with those standards which exist in the District Courts throughout

the remaining forty-nine states. Such evidence strongly suggests a disproportionate deprivation to litigants in the District Courts of Florida their due process and equal protection guarantees under the Fifth and Fourteenth Amendments. In addition, it also strongly suggests an equally severe deprivation of access to their Seventh Amendment *"Right of trial by Jury"*. It is indisputable that an effect to *"abridge ... or modify any substantive right"* [28 USC § 2072(b)] is prohibited by that statute [See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 US 393, (S. Ct. 2010)]:

> "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure. *Hanna v. Plumer*, 380 US, at 472, 85 S. Ct. . In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 USC. § 2072(a), but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b).

In that opinion (*Id* at 412-413) the US Supreme Court has expressed the opinion that the decision in *Sibbach* was directed at this very issue which concerns the *"chaos"* that would result with such a divergence in the interpretation of the Federal Rules nationally in the District Courts:

> *"Sibbach*'s exclusive focus on the challenged Federal Rule--driven by the very real concern that Federal Rules which vary from State to State would be chaos, see *Sibbach v. Wilson & Co.* 312 US, at 13-14, 61 S. Ct. 422, 85 L. Ed. 479".

This misapplication of the Federal Rules by Florida District Courts must not be permitted to continue.

A Federal Rule of Civil Procedure 41(b) Involuntary Dismissal with Prejudice Represents a *"Drastic Remedy"* and *"Extreme Sanction"* as Grounds for Dismissal of a Case.

In the newly reassigned Court's Order terminating this case (DE 99) there is a brief mention in the *"Analysis – Shotgun Pleading"* section of the Court's consideration of an involuntary dismissal under Federal 41(b) for the alleged non-compliance with the order of the original District Court. The Eleventh Circuit in *Goforth v. Owens,* 766 F.2d 1533, 1535 (11th 1985) has stated "Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances. [*Jones v. Graham,* 709 F.2d at 1458.]" In *Betty K Agencies, LTD v. M/V Monada,* 432 F.3d 1333, 1337-1339 (11th 2005) the Court stated:

> "Our case law has articulated with crystalline clarity the outer boundary of the district court's discretion in these matters: dismissal with

> prejudice is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct."

In *Zocaras v. Castro,* 465 F.3d 479, 483 (11th 2006) it is emphasized that *"mere negligence or confusion is not sufficient to justify a finding of delay or willful misconduct."* [citing *McKelvey v. AT & T Techs., Inc.,* 789 F.2d 1518, 1520 (11th 1986)].

Judicial Misconduct has been Repeatedly Demonstrated by the Two Article III Courts in the Harsh Treatment of this Diversity Jurisdiction Case. The Second *Final Order of Dismissal* by the Original Court Represented a Manifest Violation of the Law of Case Doctrine

The Article III Court's second *Final Order of Dismissal* (DE 10) which again denied without notice this pro se litigant's lawful right under the Federal Rule 15(a)(2) to correct the alleged defects in the pleading of diversity jurisdiction which did not even exist represented an affront to the authority of this Eleventh Circuit Court in violation of *Law of the Case Doctrine.*

ARGUMENTS

Argument #1 The Amended Complaint (DE 85) established a definitive *prima facie* case against

all Defendants on all causes of action. Dismissal represents an error and a manifest injustice.

Dismissal with prejudice of the pro se pleadings for failure to state a claim under Federal 12(b)(6) was not only improper, but an exceptional manifest injustice:

6. Under the US Supreme Court doctrine requiring that *"a pro se complaint, however inartfully pleaded must be held to less stringent standards and must be liberally construed"* [*Erickson v. Pardus* 56 US 89, 94, 127 S.Ct. 2197, 167 L.Ed 2d 1081 (2007)] (Tab 11). The Complaint fully met the *Erickson* pleading standard for pro se filed complaints.
7. The requirements of Federal Rule 8(a)(2) and Rule 12(b)(6) (*Supra* p. 21-25), Tab 12) were far exceeded in the presentation of *"sufficient factual matter"* (*Iqbal* at 678) which was *"enough to raise the right of relief above the speculative level"* (*Twombly* at 555) and to provide *"fair notice"* (*Conley* at 47) of *"a claim for relief that is plausible on its face"*. (*Twombly* at 570).
    a. The two District Courts in this case appear to have provided a rigid interpretation of Rule 8(a)(2) phrase *"short and plain statement"* which was never intended by the US Congress, and fully divergent from the expressed instruction of the US Supreme Court which has recognized that in Rule 8(a)(2) *"encourages brevity"* but that the *"complaint*

> *must say enough"* (*Tellabs* at 319). That suggestion for *brevity* is further tempered by the Supreme Court's requirement as expressed in *Twombly* (*Id* at 555) which requires *"factual allegations* [that] *must be enough"*. A last point to emphasize concerns the fact that the Court [see *Dura Pharms., Inc. v. Broudo,* 544 US 336, 347 (2005)] did not find that the Federal Rule 8(a) *impose[d]* the requirement for the pleading o *proximate causation* which is contrary to the requirements of the District Court (DE 65, p. 11-13).

<u>Argument #2</u> Defendant's Motion to Dismiss (DE 32) was filed a minimum of 32 days late and should have been denied with a default judgment ordered.

That Plaintiff notice and request for a default judgment was in the form of a Motion (DE 34). The Court response (DE 36, 39) was to deny that Plaintiff Motion. Dr. Pierson then filed an objection (DE 39) which was later denied (DE 43). This issue of the late filing has been reviewed *supra* (at p. 14). (Full discussion at Tab 4)

The critical facts in this regard are that the *Defendant Motion to Dismiss* was a minimum of 32 days late.
The Court's failure to not sanction Defendants for that exceptionally late filing of 32 days and the denial of the

Motion for Default Judgment (DE 34) represents frank error.

Argument #3 Defendant's Claim of the Lack of *"Sufficient Particularity"* (DE 32, p. 6) Supported by the Original Article III Court which Referenced the *"Blanket Accusation"* (DE 65, p.5) and the lack of *"Requisite Specificity as to which Defendant committed the errors alleged"* (DE 65, p. 6) Represents a Blatant Ruse Perpetrated Upon the Court by Defendants.

Both Courts have improperly accepted Defendant's claim advanced at the pre-discovery Motion to Dismiss stage of the case that the Complaint fails to *"state their pleadings with sufficient particularity"* (DE 32, p. 6). It is important to note that during their involvement in the entirety of that underlying Appeal Attorney Rogow and his legal team denied to their client any level of knowledge or information on *who was doing what* concerning the Appeal. At the pre-discovery Motion to Dismiss stage it was totally improper for the District Courts to permit Defendants the opportunity to utilize this fabricated issue as a valid basis for dismissal.

Argument #4 The Extensive and *Sufficient Factual Matter* (*Iqbal* at 678) Presented on Dr. Pierson's Background as well as the Extensive Review Concerning His Exceptional Clinical Results which Far Exceeded those Clinical Outcomes of All of His Peers at the Healthcare

Institution which Initiated the Peer Review Represented Not Only Critical Evidence Necessary to Provide Absolute Confirmation of the Blatant Fraud that the Peer Review Represented but to also Demonstrate the Fact that Attorney Rogow and His Legal Team's Failure to Provide that Information to the Appellate Panel in that Underlying Appeal was the Proximate Cause of the Loss of that Appeal.

The detailed factual evidence concerning Dr. Pierson's exceptional educational background and academic orthopedic surgery experience prior to arriving in Central Florida (DE 85, p. 34-35), along with the evidence of Dr. Pierson's excellent patient treatment results in his Orlando orthopedic practice at the healthcare institution which initiated the peer review (DE 85, p. 37-38, 44-45) have been provided in the Complaint to not only demonstrate the excellence of Dr. Pierson's surgical care of his patients, but to also demonstrate how superior in quality Dr. Pierson's patient outcomes were to those of his peers at that institution. Furthermore, an analysis of the peer review immunity provisions of the Federal and Florida healthcare peer review statutes was appropriately included in the Complaint (DE 85 p. 54-65) to demonstrate that the fraud and anti-competitive acts of the peer review defendants resulted in their irretrievable loss of statutory immunity. In addition,

the excellent clinical data on Dr. Pierson's patient outcomes was provided to confirm that the *strong presumption* that the peer review action was justified (which it was not) was *overcome* by that substantial evidence. The abject failure of Attorney Rogow and his legal team to present that evidence to the Appellate Panel was the proximate cause of the lost Appeal.

Argument #5 The Dismissal with Prejudice of Appellant's Constitutional Challenge to the 1990 Revision of 28 USC § 1931 by Public Law 101-650 Section 311(1) which Eliminated Plaintiffs' Right of Venue in Their District of Citizenship/Domicile was Improper and Represents Frank Error.

- Dr. Pierson had proper *standing* to advance this constitutional challenge as he had sustained injury under the 1990 Revision to 28 USC § 1391 due to the original improper transfer of the case without notice or the opportunity to seek review by the assigned Article III Court. The authority of the Courts to review the constitutional compliance of statutes was reviewed by the Court in *Valley Forge Christian College v. American United for Separation of Church and State Inc*, 454 US 464, 471 (1982). Appellant argues the requisite *"irreducible minimum"* requirements outlined by the Supreme Court have been met (*Id* at 472).

  The Supreme Court decision in *Bennet v. Spear,* 520 US 154, 162 (S.Ct. 1997) reviewed the *"prudential*

principles" which have guided the Court including the requirement that such challenges *"fall within the zone of interests"* which is the case here. This constitutional challenge was not *moot* as the *"exception applies"* [See *Jack Davis v. Federal Election Commission*, 554 US 724, p. 735 (2008)] quoting *Spencer v. Kemna*, 523 US 1, 17 (S. CA 1998).

- The Court's Order to terminate this constitutional challenge resulted from the improper interpretation of Federal 5.1(d) *No Forfeiture Clause.* Dr. Pierson objected to that finding. (See Tab 17)

Following Dismissal with prejudice of this constitutional challenge, Dr. Pierson filed five separate Motions requesting that the Court permit immediate interlocutory appeal. All five requests, advanced under the Supreme Court Collateral Order Doctrine (*Cohen v. Beneficial* at 546) and authorized under 28 USC § 1292(a)(2) went unanswered by the Court.

<u>Argument #6</u> The Order (DE 99) of the Newly Reassigned Article III Court to Dismiss the Third Amended Complaint on that Court's Determination of First Impression that the Complaint Represented a *Shotgun Pleading* Represents Frank Error.

- The substantial evidence is that the Third Amended Complaint (DE 85) provides a *prima facie* case on all counts and is not a *shotgun pleading.*

It must be emphasized that the original Court's Order (DE 65, 69) as well as both Defendant Motions to Dismiss (DE 32, 93) had not designated any version of the Complaint a *shotgun pleading*.

- A thorough review of the newly reassigned Court's Order of Dismissal (DE 99) demonstrates a failure of that Court to substantially review a single fact under even a single cause of action (*Supra* at 16-19).
- The use of the issue of the lack of requisite specificity (Full discussion at Tabs 14, 19) (*"impermissibly groups ... defendants* DE 99, p. 8) was not a valid factor for dismissal at the pre-discovery stage.
    - The Supreme Court has fully recognized that the *Notice Pleading Standard* is reliant on subsequent liberal discovery for the differentiation of meritorious from non-meritorious cases (See *Swierkiewicz* at 512-513). Thus, the opportunity of discovery is required before this issue of requisite specificity can be utilized to support dismissal.
    - This dismissing Court in a footnoted reference (DE 99, footnote p. 1-2) condemns the use of the Doe *"fictious party"* designation for the unnamed attorney defendants (DE 99). In the discussion the Court fully misrepresents the case references provided (*Richardson v. Johnson* and *Guava L.L.C. v Doe*). The facts of those cases confirmed that the Courts

advanced those objections only following discovery.

- The dismissing Court's Order next argued that the Complaint is a *shotgun pleading* (DE 99, p.6) because all *factual allegations* are shared in the four causes of action.

  That conclusion is fully divergent from the position of the Original Court which found that for the particular set of causes of action that are advanced in this case permit sharing of facts due to the inter-relationships that exist (DE 65) (*Supra* at 16, 19), (See Tab 13).

- The new Court also justified designating the Complaint a *shotgun pleading* because many *"vague and immaterial"* facts were presented (DE 99, p. 3). It is important to note that the exceptional factual content was provided in the Complaint to be in full compliance with the original Court's order to provide the *"meat"* to confirm proximate cause.

Conclusion

Though this case is admittedly complex it certainly does not warrant the designation of *shotgun pleading.*

Argument #7 In the Event that This Reviewing Court Agrees with the lower Court's Determination that the Complaint is a *Shotgun Pleading,* it is Reasonably Argued that Termination of the Case under a Federal Rule

12(b)(6) Motion of Dismissal with Prejudice and a Denial of the Right to Amend on that Determination of First Impression Represents Manifest Error.

It must be re-stated with emphasis that the original South Florida District Court as well as Defendants in both of their Motions to Dismiss did not advance the argument that the Complaint was a *shotgun pleading.* As a result, the determination of first impression by the new Court that the Complaint (DE 85) was a *shotgun pleading* which occurred exclusively in that Court's Order of Dismissal (DE 99) resulted in the mandatory requirement that the procedures established by the Eleventh Circuit had to be met before a dismissal with prejudice was proper. Those requirements were not met:

- *"Fair Notice of the defects"* was not provided [*Jackson v. Bank of Am., N.A.,* 898 F.3d 1348, 1358 (11th 2018)].
- *"A meaningful chance to fix them [the defects]" (Id)* was not provided.
- The requirement that *"In the repleading order, the district court should explain how the offending pleading violates the shotgun pleading rule"* [*Vibe Micro, Inc. v. Shabanets,* 878 F.3d 1291, 1296 (11th 2018)] was not met.
- The requirement for the *"District Courts to sua sponte allow a litigant one chance to remedy such deficiencies"* [See *Toth v. Antonacci,* 2019 US App.

LEXIS 29992 (11th 2019) p. 5, citing *Vibe Micro* p. 1295] was not met.

As a result of the above indicated failures to comply with the Eleventh Circuit directives, the Court's Order of Dismissal on *shotgun pleading* grounds and non-compliance with Rule 8 pleading requirements represents frank error.

Argument #8 As Reviewed Earlier in this Brief, it is Not at all Clear to Appellant as to Whether or Not the Dismissal (DE 99) by the Newly Reassigned Court Was or Was Not on the Basis of a Federal 41(b) Sanction. In the Event that this Court Concludes that a Rule 41(b) Sanction of Dismissal with Prejudice Exists, it is Appellant's Position that Such Sanction was Unlawful and Represents a Violation of the Established Precedents of This Eleventh Circuit.

- This new Court which had no experience with this case until reassignment on June 27, 2019 (DE 92) possibly appears to conclude that Dr. Pierson's substantial addition of *sufficient factual matter* (*Iqbal* at 678) to the Amended Complaint (DE 85) represented misconduct and a *"failure to comply with Rule 8 and the previous Court Order"* (DE 99). Such a conclusion demonstrates an absolute failure of the Court to understand the specific instructions of the

original Article III Court. The facts are that Dr. Pierson worked diligently to be in full compliance with that original Court's instruction. Furthermore, there was no *"clear pattern of delay or willful contempt* (contemptuous conduct)" [See *Betty K Agencies, LTD v. M/V Monada,* 432 F.3d, 1337-1338]. The *Betty* Court stated *"with crystalline clarity the outer boundary of the district court's discretion in these matters"* and emphasized that *"dismissal with prejudice is such a severe sanction that it is to be used only in extreme circumstances" (Id* at 1339).

This Circuit has also instructed that *"mere negligence or confusion is not sufficient to justify a finding of delay or willful misconduct"* [*Zocaras v. Castro,* p. 483 (11th 2006) and that such sanction is *"applicable only in extreme circumstances" Birdette v. Saxon Mortg.,* p. 940 (11th 2012)].

In addition, this Circuit has long held that such *"dismissal is an extreme remedy"* which requires that the party be *"forewarned"* [*Moon v. Newsome,* 863 F.2d 835, 837 (11th 1989)].

There is absolutely no basis for a Rule 41(b) sanction in this case.

Argument #9 A *Prima Facie* Case of Legal Malpractice has been Plead with Overwhelming *"Sufficient Factual Matter"* Presented which Far Exceeds the Requisite Threshold Requirement of

the *Twombly "Plausibility Standard"* (*Iqbal* at 678) in Demonstrating that Dr. Pierson is Entitled to Relief.

- It is "undisputed" that Defendants have admitted to the existence of a contractual relationship in which Dr. Pierson's performance was in full compliance (DE 93, p. 9).
- *Sufficient* facts have been provided in the Complaint (DE 85) which provide full confirmation that Attorney Rogow and his legal team exceptionally and fraudulently failed *"to act with reasonable care, skill and dispatch"* [See *Weekly v. Knight,* 116 Fla. 721, 156 So. 625 (1934); *Riccio v. Stein,* 559 So.2d 1207 (Fla. 3d DCA 1990); *Crosby v. Jones,* 705 So. 2d 1356, 1358 (S. Ct. Fla. 1998)].
- That deficient legal advocacy with a literal laundry list of multiple omissions, errors and fraud by Defendants have been reviewed in detail in the Complaint:
    - Attorney Rogow and his legal team failed to gain the requisite knowledge of the case and failed to utilize the plethora of true and verifiable facts in evidence from the seven year peer review as well as from the two year litigation discovery record which so strongly supported Dr. Pierson's care model to demonstrate to the Appellate Panel that the fraudulently managed peer review

represented an absolute sham. Nor did Attorney Rogow and his team inform the Appellate panel that this fraud as well as the unlawful anti-competitive acts of the peer review defendants resulted in their irretrievable loss of the peer review immunity protection.

- The evidence in the necessary reviews of the Federal and Florida peer review statutes has confirmed that there was no *"unsettled area of law"* (Crosby at p. 1358). Thus, *judgmental immunity* does not apply.
- The entirety of that evidence also fully demonstrated that Dr. Pierson's exceptional surgical care practice and superior outcomes which was supported in the litigation by four National Orthopedic experts (DE 85, p. 92-94) far exceeded in quality the outcomes of all his orthopedic surgery peers. That evidence also proved that the *"strong presumption"* standard of HCQIA was overcome by demonstrating that none of the peer review defendants' actions were *"in the reasonable belief that this action was in the furtherance of quality healthcare"*. As a result, it was proven beyond any doubt that there was an irretrievable loss of the immunity protections to all peer review defendants.

- The failure of Attorney Rogow and his legal team to communicate all of these facts to the Appellate Panel was fatal to the Appeal.

- One additional area in which Attorney Rogow and his legal team's deficient advocacy and multiple errors and omissions greatly compromised the success of the Appeal and represented frank legal malpractice, concerned the multiple deficiencies in the handling of the constitutional challenges to the Healthcare Quality Improvement Act (DE 85) which resulted in the loss of Appellate Court jurisdiction over that issue resulting in a complete forfeiture of Dr. Pierson's earlier investment in this aspect of the case ($250.000).
- The last area in the discussion of the legal malpractice cause of action concerns several case law decisions from the Eleventh Circuit which address claims of deficiency of legal counsel and legal malpractice. In the first case [*Chandler v. Moore,* 240 F.3d 907, 2001 US App. (11th 2007)], the Court stated that the issue of an attorney's *"performance is reasonableness under prevailing professional norms"* with the *"strong presumption"* that attorneys *"exercise reasonable professional judgment"*. As in *Chandler,* the Florida Supreme Court (*supra* p. 30) in *Crosby* held that the attorney was not the *"insurer of the outcome of the case"* (*Crosby* at 1358). In another civil case [*Abdulla v. Klosinski,* 523 Fed. Appx. 580, (11th 2013) citing Mosera v. Davis, 306

Ga. App. 226, 701 S.E.2d 864, 869 (Ga. Ct. App. 2010)] the Court found:

> "[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment."

These opinions are reviewed to emphasize the point that in light of the evidence that exists in that underlying case there is no evidence to suggest that Defendants failure to properly inform the Appellate Panel of any of these facts of the case represented a reasonable or honest *"exercise of professional judgment"*.

Argument #10 The Breach of Fiduciary Duty Cause of Action has Been Sufficiently Plead to the Requisite *Twombly Plausibility Standard* (Iqbal at 678).

Even "Decades Ago" the Supreme Court of Florida has clearly stated that where the existence of a fiduciary relationship exists and that trust is then abused there is the right and opportunity to seek relief [*Gracey v Eaker* 837, So. 2d 348, 352 (Fla. S. Ct. 2002)]:

> If a relation of trust and confidence exists between parties, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused,

> that is sufficient as a predicate for relief. The origin of the confidence is immaterial." (citing *Quinn v. Phipps, 93 Fla.* 805, 113 So. 419, (Fla. S. Ct. 1927)

The establishment of the attorney-client relationship marks the point at which the attorney owes a duty to the client. A breach of that fiduciary relationship is established in each instance where *"the attorney acted in a negligent manner"* [See *Ronald E. Mallen & Jeffrey M. Smith,* Legal Malpractice § 1:6, 15:2 (2012)]. Furthermore, it is well established that whenever *"a fiduciary duty claim does involve an attorney-client relationship it is considered to represent an instance of legal malpractice"* [See *Tambourine Comercio Internacional SA v. Solowsky, 312 Fed. Appx. 263, 281 US App. LEXIS 3056, 78 Fed. R. Evid. Serv. (Callaghan) 1057 (11th Cir 2009)*].

Once it is proven that attorneys' negligent acts have breached the attorney's fiduciary duties, it is then necessary to demonstrate proximate causation which has been indisputably demonstrated.

<u>Argument #11</u> The Cause of Action of Breach of Contract has been Properly Plead in the Amended Complaint (DE 85).

In the review of the Second Amended Complaint (DE 30) by the original Court (DE 65, p. 13-14) the Court

recognized that the interpretation of the contract claim was not properly before the Court:

> Here, rather than having to show that but for Defendants' alleged breach, Plaintiff would have prevailed, Plaintiff must merely show there was a benefit he was entitled to that he was denied because of the alleged breach. Plaintiff claims there was an understanding that the contract guaranteed the filing of a petition for rehearing, which was not filed by any Defendant. Defendants counter that such a filing would have been frivolous, a claim Plaintiff vigorously denies. Although it is true that attorneys cannot be required to file frivolous petitions, whether such a petition would have been so, and indeed whether Plaintiff was so promised, are not properly before this Court on a Motion to Dismiss ...

The failure of Attorney Rogow and his legal team to provide competent legal advocacy despite having been paid richly for those legal services represented an indisputable breach of the contract. The abject failure to properly inform the Appellate Panel of the true facts of the case resulted in an impossibility to win the Appeal.

The refusal of Attorney Rogow and his team to proceed with the *Petition for Rehearing En Banc* to correct the Appellate Panel's complete misapprehension of the case

represented a frank breach of the contract which Attorney Rogow composed and which stated *"The fee for all the proceedings in the Court of Appeals will be $200,000.00"* (DE 85, Tab 13).

In a discussion concerning a breach of contract claim, it is important to consider the clear instruction provided by this Eleventh Circuit Court which has established that the interpretation of a contract is not properly considered at the Motion to Dismiss stage [See *Inlet Condo Ass'n v. Childress Duffy, Ltd., Inc.* 615 Fed App'x. 533, 534 (2015)]:

> The issue of breach is ordinarily one for a jury, *see* Keramati v. Schackow, 553 So. 2d 741, 746 (Fla. 5th DCA 1989).

More recently, this Eleventh Circuit in *BioHealth Med. Lab., Inc. v. Cigna Health & Life Ins. Co.,* 706 Fed. Appx. 521, 523 US App. (11th 2017) has again stated that *"Questions of a contractual interpretation are pure questions of law and also reviewed de novo".* [Citing *Gibbs v. Air Canada,* 810 F.2d 1529, (11th 1987). The Court in that case (*Id* at 524) found that *"It was improper for the District Court to interpret the contract when considering the motion to dismiss".*

The breach of contract claim which was properly advanced in this litigation should not have been considered at the pre-discovery Motion to Dismiss stage of the case. In addition, the clear evidence of *"bad faith"*

which existed in Defendants' Appellate representation provides for the recovery of exemplary damages.

Argument #12 Fraud in the Inducement and Fraud have been Plead with *"Particularity"* and with Support with *"Sufficient Factual Matter"* to *"Plausibly"* (*Iqbal* at 678) State a Claim with Entitlement for Relief.

The Federal Rule 9(b) requires that for fraud or mistakes that *"a party must state with particularity the circumstances constituting fraud or mistake"*. The Supreme Court in *Iqbal* (at 686-687) has provided the important insight that the second phrase of that rule [*"malice, intent, knowledge and other conditions of a person's mind [to] be alleged generally"*] must be considered under the Federal Rule 8(a)(2) pleading standard.

Fraud in the Inducement

The opinion in *Paul Gauguin Cruses, Inc. v. eContact, Inc.* 576 Fed. Appx. 900 2014 US App (11th 2014) provides a succinct review of Florida law for claims of fraud in the inducement:

> "A cause of action for fraud in the inducement contains four elements: (1) a false statement regarding a material fact; (2) the statement maker's knowledge that the representation is false; (3) intent that the representation induces another's reliance; and (4) consequent injury to the

> party acting in reliance." *PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V., 598 F.3d 802, 808-09 (11th 2010)* (quoting *Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1315 (11th 2007)* (internal quotations omitted).

The fact that Florida law permits the award of punitive damages in fraudulent inducement claims has been reviewed by this 11th Circuit in *HGI Assocs. v. Wetmore Printing Co.,* 427 F.3d 867, 2005 US App (11th 2005).

The December 6, 2010 Retainer Agreement drawn up by Attorney Rogow himself, (DE 85, Exhibit 13) provides confirmation of his pledge at the cost of a quite substantial sum ($200,000) to provide competent appellate counsel for *"all proceedings in the Court of Appeals".* The well documented evidence of an overwhelming case load that Attorney Rogow's small law firm had at the time that the contract was entered with Dr. Pierson (a fact which Dr. Pierson only later discovered) provides important support to the conclusion that the law firm had completely insufficient resources to manage the intense commitment that Dr. Pierson's Appeal competently done would have required (DE 85, p. 124). The evidence of the incompetent legal advocacy provided throughout the Appeal further supports this conclusion. As to the third element,

Dr. Pierson was convinced at the outset by Attorney Rogow's false representations that his Appellate performance would be exemplary. As to the fourth element, that Appeal which should have been won was lost due to the exceptionally deficient legal advocacy, multitude of errors, omissions and fraud of Defendants.

Fraud

The requisite elements required for pleading a cause of action of fraud in Florida law with *"particularity"* as required by Rule 9(b) have been well stated by the Eleventh Circuit [See *Inman v Am. Paramount Fin.* 517 Fed. Appx. 744, 748-749 (11th 2013) and *Brooks v. Blue Cross & Blue Shield,* 116 F.3d 1364 (11th 1987)].

The detailed allegations made in the Amended Complaint (DE 85) as well as the attached exhibits (the retainer agreement/contract and email communications) (DE 85, p. 67-58, p. 132-137) fully, and with *particularity"*, support the fraud claim elements 1 through 3 [*Inman* (*supra* p. 55)]. As to the fourth element, Attorney Rogow and his law firm were enriched to the amount of over $200,000 for providing exceptionally incompetent legal advocacy. Furthermore, to avoid Dr. Pierson becoming informed of their many deficiencies, errors, and misdeeds, Attorney Rogow and his associates then worked to fraudulently conceal that evidence. In fact, Attorney Rogow's fraudulent

efforts to attempt to stop Dr. Pierson from the production and submission of the *Petition for Rehearing En Banc* had the full intent to prevent Dr. Pierson's discovery of the broad extent of that failed Appellate representation.

Argument #13 The Denial of the Opportunity to Amend the Complaint (DE 85) Represents Frank Error and an Exceptional Manifest Injustice.

The Federal Rule of Civil Procedure Rule 15(a)(2) requires the District Courts to *"Freely give leave [to amend] when justice so requires"*. The instruction by the US Supreme Court in *Erickson v. Pardus* 56 US 89, 94, 127 S.Ct. 2197, 167 L.Ed 2d 1081 (2007) which referenced guidance provided in *Conley v. Gibson* has instructed that a complaint filed by a pro se petitioner *"must be held to less stringent standards than formal pleadings drafted by lawyers"*. Though Dr. Pierson holds the firm position that the pro se filed complaint fully met the requisite sufficiency standards of *Twombly* and *Iqbal*, there can be no question that the Complaint met the more lenient standard advanced by the Supreme Court for pro se filings. At an absolute minimum that standard required that the opportunity to amend should have been provided,

The Eleventh Circuit Court in *Mingo v Sugar Cane Growers Co-op,* 864 F.2d 101, 103 (11th 1989) citing the precedential decision of the parent Fifth Circuit Appellate Court in *Flaska v. Little River Marine Constr.*

Co., 389, F.2d, 888 (5th 1968) has emphasized that the Court must provide *"if possible"* a litigant's right to have *"his day in court"*.

The determination by the Court that the Complaint was a *shotgun* pleading advanced first in the Court's Order of Dismissal created the requirement to provide *fair notice* and the opportunity to *"fix"* the Complaint which was not provided. Lastly, the requirement by this Circuit [*Wagner v. Daewoo Heavy Indus. Am. Corp.* 314 F.3d 541, 542 which overruled *Bank v. Pitt,* 928 F.2d 1108 (11th 1991)] that right to amend must be requested was met (See DE 97).

Argument #14 Appellant Requests that this Esteemed Eleventh Circuit Appellate Court Issue a Writ of Mandamus to Return this Case to the District of Original Filing in California.

The evidence provided in the record of this now thrice Appealed case provides full confirmation that the transferee District Courts of South Florida have provided a harsh and unlawful reception to this case originally filed in the Eastern District of California. The two South Florida District Courts involved with this case have denied this pro se Appellant his lawful right to access the Federal District Courts in this diversity of citizenship litigation without the *local bias* of the Court. A review of the intent behind the Founders' assignment of Federal Court jurisdiction to diversity of citizenship cases as presented by Chief Justice John Marshall in

1809 has been provided (*Supra* p. 12-13). That assignment of Federal jurisdiction to such cases had the purpose of providing true justice and protection from *local bias of [state] courts* to litigants in diversity. The multiple improper actions by both Article III South Florida District Courts involved with this case provides full confirmation that the very intent of our Founders has been undermined by the inherent *"local bias"* of these South Florida District Courts. There is a high likelihood that the Courts have been further tainted by the fact that Dr. Pierson has had the audacity of filing suit against a fellow member of the legal profession who also happens to be a member of the South Florida legal community well known to the District Courts. At this stage almost six years into this litigation, Dr. Pierson has lost all confidence that justice in this case is even remotely possible in the South Florida District Courts. This opinion is further reinforced by the incontrovertible evidence which Dr. Pierson has uncovered concerning the exceptional over-utilization by the District Courts of Florida of the designation of plaintiff complaints as *shotgun pleadings* as grounds for dismissal (*Supra* at 32-35). As a result of these repeated injustices, Dr. Pierson must request that this Court utilize the extraordinary measure of a Writ of Mandamus for the purpose of transferring this case back to the Eastern District of California from which the original case was unlawfully transferred almost six years ago and where venue was truly proper from the outset in California

under 28 USC § 1391(b)(2) due to the permanent tortious injury sustained by Dr. Pierson in California. Furthermore, the case law guidance of the US Supreme Court along with the California Long Arm Statute (410.10) supports the determination that personal jurisdiction was proper in the California District Court as a result of the exceptional tortious injury sustained by Dr. Pierson in California where the *substantial part of property that is the subject of the action is situated.* The Supreme Court has fully supported the determination that venue is proper in the district of plaintiff where the effects of a substantial tortious injury (or defamation) are experienced. The Supreme Court in *Calder v. Jones*, 465 US 783 a case in diversity between Defendants in Florida versus a Plaintiff in California, determined that the case was appropriately litigated in California:

> *"An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California" (p. 790).*

Furthermore, the case law of this Eleventh Circuit fully supports the use of the exceptional measure of a Writ of Mandamus to correct such an improper transfer Order. [See *In re Savers Federal Sav. & Loan Assoc.,* 872 F.2d 963, (11th 1989)].

In the case *In re Mayfonk, Inc.,* 554 Fed. Appx. 943, (Fed. 2014) this Circuit addresses the concept of the *center of*

gravity of a case as a relevant factor in determining where a case should be heard. The tortious professional and financial injuries which are sustained by Dr. Pierson as well as the *substantial part of the property that is the subject of the action* all reside with Dr. Pierson in California which provides confirmation that the *center of gravity* of the case is in California.

Finally, the issuance of the *extraordinary* remedy of a Writ of Mandamus to return this improperly transferred case to California is proper as "*no other adequate means*" exists to achieve that outcome [see *Kerr v. United States Dist. Court for Northern Dist.,* 426 US 394, (1976)].

Argument #15 The Repeated Improper (and Unlawful) Rulings of the District Courts of South Florida in this Thrice Appealed Case of Almost Six (6) Years Duration has Resulted in this Pro Se Appellant Having the Reasonable Belief that He will be Continually Denied Justice in the South Florida District Courts Without the Exceptional Intervention by this Reviewing Court with a Writ of Mandamus.

This reviewing Court has been delegated the authority under 28 USC § 1651 to *issue all writs necessary or appropriate* to achieve justice. In this case, the entirety of this *Initial Appellant Brief* has provided full confirmation to the reasonable conclusion that Dr. Pierson has repeatedly and quite improperly been denied justice by both Article III District Courts of South

Florida assigned to the case. Furthermore, the evidence of the exceptional regional maldistribution of justice demonstrated by the South Florida District Courts through the misapplication of the federal rules as demonstrated by the disproportionately high designation of plaintiff filed complaints as *shotgun pleading* which are then dismissed has provided further confirmation of the harsh reality of that lack of justice and the presence of significant *inherent bias* to plaintiffs (especially self-represented Plaintiffs) which exists generally in the District Courts of South Florida. This evidence has led Dr. Pierson to the reasonable conclusion that he will again be denied justice even should the case be remanded to the Florida District Court as opposed to transfer back to California on this third appeal. Thus, in order to effect justice and to achieve a decision on the merits, Dr. Pierson requests that this reviewing Court remand the case to the South Florida District Court under the extraordinary measure of a Writ of Mandamus which requires that the case be reassigned to a new Court and instructing the new Court to accept the sufficiency of the Complaint (DE 85) on all causes of action and to require Defendants to provide their answer.

Appellant fully understands the reticence of the Court to apply the powers vested in the Court by the US Congress at 28 USC § 1651 [see *Cheney v. United States Dist. Court,* 542 US 367, 380-381 (2004)] which is to be utilized only for truly *extraordinary causes* [see *Ex parte*

Fahey, 332 US 258, 259-260 (S. Ct 1947)]. All three conditions cited by the *Cheney* Court have been met in this case.

Argument #16 Judicial Misconduct has Existed in this Improperly Transferred Thrice Appealed Case in which This Pro Se Appellant has been Repeatedly Denied his US and Florida Constitutional Rights to Due Process and Equal Protection Under the Law. All District Courts Involved with this Case Including the Eastern District of California as well as the Two Article III Courts in the Southern District of Florida have Demonstrated Inherent Bias Toward Pro Se Plaintiff Dr. Pierson in their Repeated Failures to Provide Notice and Their Denials of Dr. Pierson's Right to be Heard which in Addition to Being Improper also Represent Frank Violations of the Code of Conduct for US Judges at Canon 3 (A) & (C).

A full review of the judicial misconduct which this case has experienced at the hands of the assigned Courts has been provided throughout this Initial Appellant Brief. A bullet point review of the more salient points is provided in Tab 41.

In this review of the misconduct by the South Florida District Courts, one particularly glaring example of demonstrated bias and misconduct was the denial of Dr. Pierson's formal request of the Chief Judge of the South

Florida District Courts for leave to file a complaint (DE 53) concerning the Original Article III Court's conduct under 28 USC § 351-364 – The Judicial Conduct and Disability Act:

- The Chief Judge remained completely non-responsive to that request (DE 53) despite the fact that Dr. Pierson had directly titled that request to the attention of the Chief Judge.
- The decision to permit the original Court (DE 94), whose conduct the complaint concerned, to deny that request was not only truly improper but also a violation of the Congressional intent behind the Judicial Conduct and Disability Act of 1980 (28 USC § 351-364).

The demonstration of such *local bias* by the South Florida District Courts in this case in diversity truly offends the very intent of the Founders to create federal jurisdiction in such cases to eliminate *local bias.* It is Plaintiff's belief that a significant factor which has contributed to this conduct by the Courts is the fact that he is pursuing litigation against a well known South Florida attorney. Plaintiff requests that this reviewing Court demand an end to this judicial misconduct by these inferior Courts.

CONCLUSION

Plaintiff prays for relief for all of the issues presented and argued above.

Exceptional Relief Sought

Under Federal Rule of Civil Procedure Rule 60(b)(6) and Rule 60(d)(1) & (3)

Under this Rule this esteemed Court has the unrestricted authority to grant relief from the decision that occurred in the Appeal of the underlying case (Case #10-15496) which was the result of the exceptional combination of the abject deficiency of counsel that was provided by Attorney Rogow and his law firm associates as well as the multitude of completely fraudulent claims advanced by the Appellee Peer Review Defendants which had the full intent to misinform and mislead the Eleventh Circuit Appellate Court Panel to result in that Court's complete misapprehension of the underlying case due to that fraudulent narrative. The adverse decision by the Eleventh Circuit Appellate Court in that underlying case as well as the earlier dismissals and summary judgment by the Middle District of Florida Court have resulted in an exceptional manifest injustice that will continue in perpetuity for Dr. Pierson. Furthermore, those adverse decisions which were the result of the exceptionally fraudulent and intentional misrepresentations by the peer review defendants (Appellees) also resulted in the compromise of the health

interests of the citizens of Central Florida who receive deficient and delayed orthopedic trauma care at the Level 1 trauma center of Orlando Health which is the only Level 1 trauma center in the Central Florida region. The Rule of Law and the health and life interests of the citizens of Central Florida demand that those decisions and judgments in that underlying case and the Appeal be reversed and the case be remanded to the Middle District of Florida for a trial by jury. Dr. Pierson has a constitutional right to have an opportunity to clear his good name and to eliminate this *"badge of infamy"* that he has done nothing to deserve [*Wisconsin v. Constantineau,* 400 US 433, 437 (1971)].

Respectfully Submitted,

/s/ Raymond H. Pierson, III M.D.
Pro Se Appellant

March 11, 2020
Date

Raymond H. Pierson, III, M.D.
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95685
T: 209-267-9118
F: 209-267-5360
E: rpiersonmd@sbcglobal.net

October 10, 2019

David J. Smith
Clerk of the Court
United States Court of Appeals
For the Eleventh Circuit
Elbert Parr Tuttle Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

RE: Appeal # 19-13722-EE
Case Caption: Raymond Pierson, III v. Bruce Rogow, J.D., et al.
District Court Docket No: 0:15-cv-61312-UU

NOTICE: FRAP 44 Notice of a Constitutional Challenge to the 1990 Revision of the Federal Statute 28 USC § 1391 which Eliminated to Plaintiff as a Proper Choice of Venue in Federal Jurisdiction Civil Actions Their Districts of Residence and Domicile

Dear Mr. Smith:

This notice is forwarded in compliance with FRAP 44 (a) in the revised Federal Rules of Appellate Procedure for the Eleventh Circuit Appellate Court which requires notice to the Clerk of Court when a constitutional challenge arises to a federal statute in a proceeding in a case in which:

> **"...the United States or its agency, officer, or employee is not a party in an official capacity...".**

The constitutional challenge concerns the revision to 28 U.S.C. § 1391 which was revised by the *Judicial Improvement Act of 1990* (Public Law 101-650, Enacted on December 1, 1990). That revision eliminated the judicial district of the Plaintiff's residence and domicile as proper choice of venue in federal jurisdiction civil actions. The elimination of that right of the Plaintiff had been established in the *Judiciary Act of 1789* and continued for over 200 years in this Republic through to the time of revision which occurred in the 1990 legislation. This Pro Se Appellant was denied the right to advance this constitutional challenge by the District Court despite Appellant's timely assertion of that challenge in the Second (technically the First) Amended Complaint (DE 30). The argument that will be presented in the Appellant initial appeal brief will be that the District Court's denial of Plaintiff's right to advance that constitutional challenge is contrary to Federal Rule of Civil Procedure Rule 5(d). In addition,

the revision to 28 USC § 1391 represents a substantial loss of a Plaintiff right which is contrary to the intent of Article III, Section 2 of the U.S. Constitution as well as to the due process and equal protection provisions of the 5th and 14th amendments to the U.S. Constitution. The substantial loss of this right to all Plaintiffs in federal jurisdiction civil actions requires review under *strict scrutiny*. A rational basis review is not at all sufficient for the taking of such a substantial constitutional right which is confined only to the Plaintiff's side of a case.

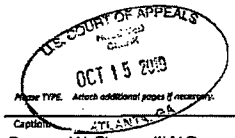
Please note that a copy of the ***Civil Appeal Statement*** which reviews, in part, this constitutional challenge has been submitted to the Court along with this letter.

Respectfully submitted,

/s/Raymond H. Pierson, III, M.D.
Pro Se Appellant

Rev. 4/18

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CIVIL APPEAL STATEMENT



Please TYPE. Attach additional pages if necessary.

11th Circuit Docket Number: 19-12723-GG

Caption:
Raymond H. Pierson, III M.D.
Appellant

v.

Bruce S. Rogow, J.D., Bruce S. Rogow, P.A., Cynthia Gunther, J.D., Gunther Law, LLC and Does 1 through 5 inclusive
Appellees

District and Division: U.S. District Court for the Southern District of Florida
Name of Judge: Ursula Ungaro
Nature of Suit: Civil
Date Complaint Filed: Originally filed 1/21/14 Reopened by the 11th Circuit 9/22/15
District Court Docket Number: 15-61313-CIV
Date Notice of Appeal Filed: December 6, 2019
☐ Cross Appeal ☐ Class Action
Has this matter previously been before this court?
☑ Yes ☐ No
If Yes, provide
(a) Caption: Pierson v. Rogow et al.
(b) Citation:
(c) Docket Number: 15-15475-BB and 16-17788

	Attorney Name	Mailing Address	Telephone, Fax, Email
For Appellant: ☑ Plaintiff ☐ Defendant ☐ Other (Specify)	Raymond H. Pierson, III, M.D. Pro Se	3 Gopher Flat Rd. Unit #7 Sutter Creek, CA 95685	T: 209-267-9118 F: 209-267-5360 E: rpiersonmd@sbcglobal.net
For Appellee: ☐ Plaintiff ☑ Defendant ☐ Other (Specify)	Tara Campion, J.D.	100 Northeast Third Avenue, Suite 1000 Ft. Lauderdale, FL 33301	T: 954-767-8909 E: tcampion@rogowlaw.com

Please CIRCLE/CHECK/COMPLETE the items below and on page 2 that apply.

Jurisdiction	Nature of Judgment	Type of Order	Relief
☑ Federal Question ☑ Diversity ☑ US Plaintiff ☑ US Defendant	☑ Final Judgment, 28 USC 1291 ☐ Interlocutory Order, 28 USC 1292(a)(1) ☐ Interlocutory Order Certified, 28 USC 1292(b) ☐ Interlocutory Order, Qualified Immunity ☐ Final Agency Action (Review) ☐ 54(b)	☑ Dismissal/Jurisdiction ☐ Default Judgment ☑ Summary Judgment ☐ Judgment/Bench Trial ☐ Judgment/Jury Verdict ☐ Judgment/Directed Verdict/NOV ☐ Injunction ☐ Other _____	Amount Sought by Plaintiff: $ In excess of $75,000.00 Amount Sought by Defendant: $ unknown Awarded: $ _____ to _____ Injunctions: ☐ TRO ☐ Preliminary ☐ Permanent ☐ Granted ☐ Denied

Page 2 11th Circuit Docket Number: 19-13722-EE

Based on your present knowledge:

(1) Does this appeal involve a question of First Impression? ☑Yes ☐No
What is the issue you claim is one of First Impression? A constitutional challenge to the 1990 Revision of 28 USC 1391 which eliminated in federal jurisdiction civil actions as a proper choice of venue. Plaintiff's district of residency/domicile.

(2) Will the determination of this appeal turn on the interpretation or application of a particular case or statute? ☑Yes ☐No in part.

If Yes, provide
(a) Case Name/Statute 28 USC 1391 and Federal Rule of Civil Procedure - Rule 5.1(c)
(b) Citation
(c) Docket Number if unreported

(3) Is there any case now pending or about to be brought before this court or any other court or administrative agency that
(a) Arises from substantially the same case or controversy as this appeal? ☐Yes ☑No - Not that I am aware of at this time.
(b) Involves an issue that is substantially the same, similar, or related to an issue in this appeal? ☐Yes ☑No

If Yes, provide
(a) Case Name
(b) Citation
(c) Docket Number if unreported
(d) Court or Agency

(4) Will this appeal involve a conflict of law
(a) Within the Eleventh Circuit? ☐Yes ☑No
(b) Among circuits? ☐Yes ☑No

If Yes, explain briefly:

Not that I am aware of at this time.

(5) Issues proposed to be raised on appeal, including jurisdictional challenges:

The list of the issues which will be raised in this Appeal (13 issues) have been briefly referenced in the originally filed Notice of Appeal (see attachment). Please note that one of those issues represents the constitutional challenge to the 1990 Revision of 28 USC 1391.

I CERTIFY THAT I SERVED THIS CIVIL APPEAL STATEMENT ON THE CLERK OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SERVED A COPY ON EACH PARTY OR THEIR COUNSEL OF RECORD, THIS 10th DAY OF October, 2019

Raymond H. Pierson, III M.D., Pro Se Appellant
NAME OF COUNSEL (Print)

SIGNATURE OF COUNSEL

Case 0:15-cv-61312-UU Document 104 Entered on FLSD Docket 09/19/2019 Page 1 of 18

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FORT LAUDERDALE DIVISION

Case Number: 15-cv-61312-UU

Raymond H. Pierson, III, M.D., Pro Se

Plaintiff,

v.

Bruce S. Rogow, J.D.; Bruce S. Rogow, PA Cynthia Gunther, J.D.; And Does 1 through 5, inclusive,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Pro Se Plaintiff, Raymond H. Pierson, III, M.D., in theabove named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the District Court Order of Dismissal (DE #99) entered on 8/19/2019 in response to Defendant's June 28, 2016 Motion to Dismiss Plaintiff's Third (Technically Second) Amended Complaint (DE #93) which was responsive to the Plaintiffs Third

(Technically Second) Amended Complaint (DE #85) that was timely filed by Plaintiff on 5/31/2019. This appeal is submitted on this 18th day of September 2019 to Fedex for next day delivery to the U.S. District Court of the Southern District of Florida, Fort Lauderdale Division.

In addition to this Appeal of the Court's Order (DE #99) granting with prejudice the Defendant's Motion to Dismiss Plaintiff's Third (Technically Second) Amended Complaint and Judgment terminating the case, the following list of the Court's rulings as well as the Court's failure to take the appropriate and lawful actions required will be advanced within the planned appeal:

1. The District Court's Consideration and Granting (DE #43) of the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (DE #32) despite the fact that Defendant's Motion was filed a full thirty-three (33) days late. It is a well-established fact that all Defendant's had received proper service of process for the First Amended Complaint from May 3rd through May 6th, 2014.

2. The failure of the Court to require Defendant's to provide an Answer to the Plaintiff Second Amended Complaint (DE #30) despite their filing of a Motion to Dismiss to Plaintiff's Second Amended Complaint (DE #32) thirty-three (33) days late.

3. The failure of the Court to Grant Plaintiffs Motion to Request a Default Judgment (DE #34) due to Defendant's failure to either timely file an Answer tothe Complaint or to timely file a Motion to Dismiss.

4. The failure of the originally assigned Article III District Court Judge to grantPlaintiffs Motion (DE #49) to Request that Article III Judge to Voluntarily Recuse himself from further involvement in the case proceedings despite the manifest evidence which when reviewed by any *reasonable* person fully informed of the facts would have led to the determination that substantial bias and prejudice existed on the part of that Judge toward Plaintiff.

5. The Denial by the Article III District Court (DE #54) of Plaintiffs Request for a Temporary Stay of the Case (DE #52) to permit a review of the District Court's denial (DE #50) of the Plaintiffs Motion for a Voluntary Recusal of theoriginal Article III Judge by the Chief Judge of the District.

6. The complete failure of the Chief Judge of the District Court of South Florida to respond in any manner or form to Plaintiffs direct request (DE #53) of the Chief Judge for Leave of the Court to permit Plaintiffs submission of a Motion requesting review by the Chief Judge of the denial by the original Article III Judge of Plaintiff's Motion (DE #50) requesting Voluntary Recusal of that Article III Judge then Assigned to the Case. That Plaintiff Motion (DE

#53) was responded to exclusively by the originally assigned Article III District judge with an outright denial (DE #54).

7. The denial with prejudice of Plaintiff's lawful right to challenge the constitutionality of the 1990 Revision of 28 USC § 1391 which eliminated to all plaintiffs in Federal Court Jurisdiction cases the possible choice of venue in their district of residence and domicile. The denial with prejudice of that constitutional challenge was part of the Court's decision to grant (DE #69) the Defendant's Motion to Dismiss the Plaintiff's Second Amended Complaint (DE#32) with leave to amend the remaining counts.

8. The failure of the originally assigned Article III District Court and the reassigned Article III District Court to respond in any manner or form to Plaintiffs original Motion (DE #70) and his multiple subsequent requests (DE#73, #78, #91) for a response from the Court to Plaintiff's request for a Temporary Stay of the Case proceedings to permit Plaintiff's direct appeal to the Eleventh Circuit Appellate Court of the District Court's denial with prejudice of Plaintiff's right to challenge the constitutionality of the 1990 Revision to the venue statute, (28 USC§ 1391), which eliminated as a proper choice of venue in Federal jurisdiction cases District of Residence and Domicile.

9. The failure of the newly reassigned Article III

District Court to Grant PlaintiffsUnopposed Motion (DE #94) for a Twenty-One (21) day Time Extension for filing his Opposition to the Defendant Motion to Dismiss (DE #93) to Plaintiffs Third (Technically Second) Amended Complaint (DE #85) despite Plaintiffs having informed the Court almost two (2) full months earlier on May 9, 2019 of Plaintiffs exceptional unavailability (DE #77) during the time period of the Court's required time deadline for submission of that Plaintiff Oppositionresponse.

10.The newly reassigned Article III District Court's improper order Striking Pro SePlaintiffs Opposition to Defendant's Motion to Dismiss due to improper form (Excess Length) despite Plaintiffs clear demonstration to the Court (see the lastparagraph of that stricken opposition response) that his exceptional unavailability (previously noticed to the Court) had resulted in circumstances which made it impossible for him to complete that response submission at the last minute of an opposition in an *"unedited and unredacted"* form at excess length.

11. The newly reassigned District Court's multiple violations of the requisite Rulesof Judicial Conduct in fully denying Plaintiff's *"right to be heard"* as to his opposition to the Defendant Motion to Dismiss Plaintiff's Third (Technically Second) Amended Complaint by not only ignoring Plaintiff's prior Notice of Unavailability to the Court in the denial of

Plaintiff's Unopposed Twenty-One
(21) Day Time Extension Request for Submission of the Plaintiff Opposition tothe Defendant Motion to Dismiss, but also in the Court's striking Plaintiff's Opposition from the Docket due to that *"unedited and unredacted"* document's improper form which the Court provided no opportunity to correct despite Defendant's lack of opposition to the opportunity to correct that form (DE #101& DE #102).

12. The newly reassigned Article III District Court's Order granting Defendant's Motion to Dismiss Plaintiff's Third (Technically Second) Amended Complaint (DE #99) despite the substantial factual evidence provided within that Complaint which provided a strong basis for and high probability that Plaintiff would prevail at trial on all counts.

13. The denial of the newly reassigned Article III District Court to permit this Pro Se Plaintiff to submit an Amended Complaint which would have represented atrue Third Amended Complaint (despite being named Fourth Amended Complaint) despite the substantial factual evidence presented in the Third (Technically Second) Amended Complaint which supported Plaintiff's allegations on all counts. That denial of the right to amend also occurred despite the exceptional adversity created by the Court for Plaintiff in that final phase of the case which resulted from the Court's denial of Plaintiff's well- founded Time Extension request for

submission of the Plaintiff Opposition to the Defendant's Motion to Dismiss as well as by the Court's *striking* of that Plaintiff Opposition due to improper form with no opportunity provided whatsoever for Plaintiff's unopposed opportunity to resubmit that opposition in a corrected form.

September 18, 2019

/s/ Raymond H. Pierson, III, M.D.

Pro Se Appellant

3 Gopher Flat Road, Unit #7,
Sutter Creek, CA 95685
T: 209-267-9118
F: 209-267-5360
E:rpiersonmd@sbcglobal.net

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Thursday 9/19/2019 at 10:14 am

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DELIVERED TO Receptionist/Front Desk	**TOTAL PIECES** 1	**TOTAL SHIPMENT WEIGHT** 1 lbs / 0.45 kgs
TERMS Shipper	**PACKAGING** FedEx Envelope	**SPECIAL HANDLING SECTION** Deliver Weekday
STANDARD TRANSIT 9/19/2019 by 3:00 pm	**SHIP DATE** Wed 9/18/2019	**ACTUAL DELIVERY** Thu 9/19/2019 10:14 am

Travel History

Local Scan Time

Thursday, 9/19/2019		
10:14 am	FL	Delivered
8:05 am	FORT LAUDERDALE, FL	On FedEx vehicle for delivery
7:26 am	FORT LAUDERDALE, FL	At local FedEx facility
5:42 am	FORT LAUDERDALE, FL	At destination sort facility
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12:33 am	MEMPHIS, TN	Arrived at FedEx location
Wednesday, 9/18/2019		

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PM 2-Day Flat Rate Env (Domestic) (FORT LAUDERDALE, FL 33301) (Flat Rate) (Expected Delivery Day) (Friday 09/20/2019) (USPS Tracking #) (9505 5141 4637 9261 1696 24)	1	$7.35	$7.35
Insurance (Up to $50.00 included)			$0.00
Total:			$7.35
Credit Card Remitd (Card Name:VISA) (Account #:XXXXXXXXXXXX6768) (Approval #:09611A) (Transaction #:429) (ATD:A0000000031010 (AL:Visa Credit) (PIN:Not Required)		Chip)	$7.35

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apply. You may also visit www.usps.com
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Source of Notice of Appeal to Attorney Rogers counsel

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:15-cv-61312

Raymond H. Pierson, III, M.D., Pro Se

Plaintiff,

vs.

Bruce S. Rogow, J.D.; Bruce S. Rogow, PA; Cynthia Gunther, J.D.; And Does 1 through 5, inclusive,

Defendants.

PLAINTIFF'S UNOPPOSED MOTION TO REQUEST OF THIS COURT THE OPPORTUNITY TO SUBMIT A REVISED MOTION IN OPPOSITION TO DEFENDANTS' MOTION (DE 93) TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT (TECHNICALLY THE SECOND) (DOC 85) AT THE CORRECT LENGTH

Raymond H. Pierson, III M.D.
3 Gopher Flat Rd., Unit #7
Sutter Creek, CA 95685
E : rpiersonmd@sbcglobal.net

Plaintiff's Unopposed Motion to Request of this Court the Opportunity to Submit a Revised Motion in Opposition to the Defendant's Motion (DE 93) to Dismiss Plaintiff's Third Amended Complaint (Technically the Second) (DE 85) at the Correct Length

The former Article III Court was informed on May 9, 2019 in Plaintiff's Notice of Unavailability filed with the Clerk's office (DE 77) that he would be unavailable with *just cause* during two time periods during the early summer months. Those periods were June 21, 2019 through June 30, 2019 and July 9, 2019 through July 21, 2019. During the first period, Dr. Pierson as on an extended road trip through multiple National Parks in the Western United States with his family which includes his two young children (a daughter 5 years old and a son 8 years old). During most of that time period including a five (5) day period at Yellowstone National Park had no internet access whatsoever. Following his return home, late on the afternoon of July 2, 2019, Dr. Pierson received a copy of the Defendants' Motion to Dismiss (DE 93) delivered to his P.O. box by Fedex.

The second time period of unavailability began shortly thereafter and spanned the period of July 9, 2019 through July 21, 2019. During that period Dr. Pierson and his only assistant, Ms. Shelly Hills, had planned to be traveling as well. During that later period, Ms. Hills, Dr. Pierson's only assistant, was in Alaska attending and greatly assisting with the organization of the

wedding of an immediate family member. Even with the exceptional measures taken, Ms. Hills was only available on a limited basis on Monday, July 15th and Tuesday, July 16th to assist Dr. Pierson through quite inefficient internet access with the production of the Motion in Opposition to the Defendants' Motion to Dismiss the Third Amended Complaint which this Court required be submitted by Tuesday, July 16, 2019. An earlier Unopposed Motion to Request a Time Extension of Twenty-One (21) days (DE 94) had been denied in large measure by the Court. Due to these exceptionally adverse circumstances and to the extreme duress which resulted from the denial of the requested time extension as well as the quite limited availability of Pro Se Plaintiff Dr. Pierson's only office assistant, Ms. Hills, during the Court ordered period of submission, Dr. Pierson had no ability to sufficiently edit or to downsize the document and yet still meet the required submission to the FedEx Kinko's location in Sacramento, CA (a harrowing 40 mile drive) before midnight on Tuesday, July 16, 2019. (Note: Dr. Pierson, a pro se litigant, is not permitted the opportunity of electronic filing.) The Court was fully informed of that duress in the *"Notice to the Court"* provided within the last section of that Motion in Opposition on pages 41 and 42. It was also due to those adverse circumstances that Dr. Pierson also had insufficient time or resources to compose and submit a request for the submission of a motion of extended length to the Court.

On a random check of the docket on Pacer today, Dr. Pierson's assistant, Ms. Hills, found the Court's Order of August 15, 2019 (DE 97-98), which had the Motion in Opposition to the Motion to Dismiss *"stricken"* due to the extended length of that submission. That Court Order did not specifically address the issue of whether or not a resubmission of the Motion in Opposition at the required length of twenty (20) pages would be permitted. For these reasons, prose Plaintiff, Dr. Pierson, now advances this unopposed Motion to the Court to permit the opportunity for such a submission in the interest of justice and in order to permit achievement of a decision on the merits in this litigation. As the U.S. Supreme Court has so clearly stated in *Foman* v. *Davis* 371 U.S. 178, 181-182 (1962) it is the intent of the Federal Courts to achieve decisions on the merits not "mere technicalities":

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson,* 355 U.S. 41, 48.

One last point that should be made with respect to the extended length submission concerns the fact that much background information was included concerning the

complex course of this litigation through the District Court in the Eastern District of California, the District Court of South Florida as well as the U.S. Courts of Appeal for the Ninth and Eleventh Circuits was provided to this newly re-assigned Article III Court in order to facilitate the Court's review and understanding of this case which has now spanned five and one half (5½) years. That information was truly provided with the intent to assist the Court in fully understanding the case and to achieve a just decision on the *"merits"*. That extensive review of the course of this litigation through the Federal District and Circuit Courts as well as the review of the underlying case in the Middle District of Florida was provided to assist the Court. It was not done with the intent to overburden this Court. The Court must understand that Dr. Pierson is a prose litigant with quite limited personal and financial resources and must liberally construe Dr. Pierson's filings - he has never claimed to be an attorney. Furthermore, Dr. Pierson does not have a fully staffed law office at his disposal to assist and advise. He is currently located in a rural community in the Northern California Sierra foothills with no back-up and with only one very part time assistant, Ms. Hills. Despite these limitations, Dr. Pierson has honestly and conscientiously attempted to proceed in this litigation in a manner which does not overburden the Court nor adversely prejudice the proceedings for the defendants. He has lawfully and appropriately as is his constitutional right to seek to achieve redress for the tremendous professional and financial injuries he has sustained due to the many exceptionally negligent acts of the defendants.

Prayer for Relief

This pro se Plaintiff prays that the Court permit the refiling of the Motion in Opposition to the Defendants' Motion to Dismiss at the proper length of twenty (20) pages.

Respectfully submitted

Raymond H. Pierson, III M.D

8-16-19

Date

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IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 0:15-cv-61312

Raymond H. Pierson, III M.D.
Plaintiff

v

BRUCE S. ROGOW, *et al.*,
Defendants.

Complaint for:
(1) Legal Malpractice;
(2) Breach of Fiduciary Duty;
(3) Breach of Contract;
(4) Fraud and Fraudulent Inducement
Demand for Jury Trial

PLAINTIFF RAYMOND H. PIERSON, III M.D.'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD (TECHNICALLY THE SECOND) AMENDED COMPLAINT (DE 85)

Raymond H. Pierson, III M.D.
3 Gopher Flat Rd., Unit #7
Sutter Creek, CA 95685
E : rpiersonmd@sbcglobal.net
T: 209-267-9118
Pro Se Litigant

Plaintiff Raymond H. Pierson, III M.D.'s Opposition to Defendant's Motion to Dismiss Plaintiff's Third (Technically the Second) Amended Complaint (DE 85)

Preface

Defendant's formally titled Motion to Dismiss Dr. Pierson's recently submitted Amended Complaint made a significant omission to the actual title of the Amended Complaint submitted tothis Court (DE 85) which was: *"Third Amended Complaint (Technically the Second) and Demand for Jury TriaI"*. The fact that the Amended Complaint (DE 85) truly represents a Second Amended Complaint in this matter and not an actual Third Amended Complaint is a fact of critical significance for this Court in the consideration of this Motion to Dismiss. It is a fact which is of particular importance for this new assigned Article III Court to understand given the fact that the Court's Order (DE 95) received by U.S. First Class Mail on Monday, July 15, 2019 by Dr. Pierson in California which denied the requested twenty-one (21) day extension for submission of this Opposition to the Motion to Dismiss referenced the fact that *"this lawsuit has been pending for over four years"*. In fact, the original Complaint in this matter was filed in the U.S. District Court of the Eastern District of California in late February 2014 almost 5½ years ago. In the Court's Order Dr. Pierson has the impression that the Court has made the

assumption that Dr. Pierson has been primarily responsible for the extended tenure of this case within the District Court in which no progress has been made beyond this Motion to Dismiss stage. Nothing could be more incorrect. In order to provide further clarification of this critical point, the following brief review of the complete course of this litigation through the courts has been provided. This review also fully substantiates the conclusion that Dr. Pierson has not been the primary cause of the extended tenure of this case which has had to be advanced for Appeal to the Eleventh Circuit on two occasions during this tenure. This review will also fully explain just why this current version of the Amended Complaint truly represents a Second Amended Complaint as opposed to a Third Amended Complaint:

1/31/2014	Original case tiling under Federal diversity jurisdiction in the U.S. District Court of the Eastern District of California (Case# 2:14-CV-003240KJM-CO).
2/4/2014	Immediate order to transfer the case to U.S. District Court of South Florida, Fort Lauderdale Division without notice to Dr. Pierson or the opportunity for a response in opposition (Case #0:14-CV-60270-W JZ) contrary to Federal Rule 72 (a) & (b) and 28 USC 636 (b).

2/5/2014	Case dismissal Final Order of Dismissal" (DE 7) for lack of subject matter jurisdiction.
2/25/2014	First Amended Complaint Jury Trial Demanded (DE 8).
4/7/2014	Order Plaintiff's First Amended Complaint (DE 8) be and the same is hereby "STRICKEN "
4/18/2014	Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit (Case #14-11722-BB)
12/31/2014	Opinion of the Appellate Panel: The District Court's Order was "vacated" and the case remanded.
6/22/2015	The First Am ended Complaint was remanded to the U .S. District Court of South Florida as a "new case" with a new case number assignment - case #l5-CV-61312-WJZ.
11/5/2015	Second "Final Order of Dismissal" (DE 10) for "lack of subject matter jurisdiction".
12/4/2015	Notice of the Second Appeal to the U.S. Court of Appeals for the Eleventh Circuit (Case #15-1 5475)
10/12/2016	Decision of the Eleventh Circuit: The District Court Order was "vacated" and the case "remanded".
4/10/2017	Mandate of the Appellate Court - "Vacated and Remanded" (DE 17)
1/24/2017	Order referring the case to Magistrate Judge Patrick Hunt (DE 22)

1/25/2018	Order granting Plaintiff Motion for Leave to Amend (DE 23)
2/20/2018	Second Amended Complaint tiled (This was technically the First Amended Complaint in this "new case")
4/17/2018	Plaintiff Motion in Opposition to Defendant's Motion to Dismiss (DE 47)
8/30/2018	Hearing before Magistrate Judge Hunt - Oral argument on the Motion to Dismiss and Opposition
1/:3/2019	Report and Recommendation of Magistrate Hunt to grant the Motion to Dismiss but to permit Plaintiff the opportunity to amend Counts 1 - 4, but to dismiss with prejudice the constitutional challenge to the 1990 Revision of 28 USC 1391which eliminated to a11 plaintiffs in Federal civil jurisdiction cases their right as a choice of venue selection their district of residence/domicile (DE 65). The decision to deny the right to amend the constitutional challenge is in direct conflict with Fed. Rule 5(d).
3/25/2019	Article III Court's Order adopting the Report and Recommendations of Magistrate Judge Hunt (DE 69).
4/18/2019	Unopposed Plaintiff Motion to "Stay" the Proceedings and Perm it Leave to Appeal the Denial with Prejudice of Plaintiff's Right to Advance His Constitutional Challenge of the 1990 Revision of 28 USC 1391 (DE 70). At the time of this writing despite four additional requests for a

definitive decision by the Court on Motion DE 70 (DE 71, 73, 78 and one as yet undocketed Motion submitted to the Court on 6/25/2019) no definitive decision has been provided by the Court. Those requests remain unanswered as of the time of this writing.

5/31/2019 Third Amended Complaint (Technically the Second) (DE 85).

6/25/2019 Defendant's Motion to Dismiss (DE 93).

The above limited review has been provided to ensure that this newly assigned Article III Court has a proper understanding of the extended duration (almost 5 ½ years) of this case. That extended tenure of the case has been in large measure due to Plaintiffs need to successfully appeal to the Eleventh Circuit Appellate Court two previous improper decisions by the District Court to dismiss the case for lack of subject matter jurisdiction. There has also been a recent moderate delay awaiting the Magistrate Judge to provide a formal Report and Recommendation (DE 65) on the Defendant's earlier Motion to Dismiss (DE 32). As should be evident from the review provided above, the Amended Complaint to which Defendants now advance their Motion

to Dismiss though formally titled a Third Amended Complaint is truly, in fact, a Second Amended Complaint.

Introduction

In the introductory section to their Motion to Dismiss (DE 93), Defendants again chose the path, as they did formerly in their earlier Motion to Dismiss (DE 32), to advance the decision of the Eleventh Circuit Court in that earlier Appeal of the Middle District of Florida case in which they were hired as Appellate counsel by Dr. Pierson. They do so despite the facts that the (unpublished) decision of the Eleventh Circuit Appellate Panel in its entirety reflects the fraudulent positions advanced in that Appeal by the Defendant Appellees. Remarkably, Defendants again resort to this tactic of utilizing that exceptionally misapprehended and misinformed opinion of the Appellate Court that was proximately caused by the abject failure of Attorney Rogow and his employed attorneys in that appeal to properly inform and educate that Appellate Court as to the true facts of that case. Defendants again attempt to utilize that misinformed Appellate decision despite the exceptional fact that the extensive case record evidence of the underlying Peer Review as well as that of the Middle District of Florida Federal litigation inclusive of the voluminous discovery

obtained during that litigation does not support even a single element of those false statements contained in the fraudulent statements by Appellate Court decision that were advanced by the Defendant/ Appellants in that Appeal of the underlying Middle District of Florida case. It is an indisputable fact that the complete and utter failure of Attorney Rogow and his employed associate lawyers (Gunther and Does One through Five) to inform the Appellate Panel of the true facts of that case resulted in the abject void whichwas then filled with the lies and deceits of the Defendant/ Appellees. Thus, Attorney Rogow and the other Defendants in now advancing their Motion to Dismiss by attempting to utilize the exceptional evidence of their own legal incompetence and the woefully deficient legal representation which they provided in that prior Appeal to defend themselves in this current action advanced against them by Dr. Pierson cannot be permitted. The Amended Complaint (DE 85) has provided a full and encyclopedic discussion of the facts of the underlying Peer Review aswell as the related Middle District of Florida Court proceedings inclusive of the voluminous discovery obtained in that case in order to provide a full and accurate understanding of the ca e to this Court with the purpose of ensuring that this Court is not similarly misinformed as was the Appellate Panel in that underlying Appeal. The multiple false conclusions relied upon by that

misinformed Eleventh Circuit Appellate Panel and expressed in their unpublished decision have been thoroughly reviewed in the Third (Technically Second) Amended Complaint. That evidence will again be reviewed in this section in order to fully discredit those false statements and to hold to account Attorney Rogow and his employed attorney associates for their exclusive role in proximately causing that Appellate Court's complete misapprehension of the entirety of that prior case which was the result of their exceptionally deficient legal advocacy (legal malpractice,breach of fiduciary duty, breach of contract and fraud). In the section that follows quoted sections of the Appellate Court's decision are followed by the substantial case record evidence which proves indisputably that the Appellate Court fully misapprehended those issues:

1. "*Raymond Pierson, M.D., an orthopedic surgeon, appeals the dismissal of most counts inhis Amended Complaint and Third Amended Complaint ... arising from the hospital's investigation of complaints regarding his emergency room usage lodged against Pierson by nurses, technicians* and physicians at ORHS hospitals".

- The true facts and eμtirety of evidence from the Peer Review hearing as well as theexceptionally voluminous discovery of the civil litigation did not provide a single element of support or witness

testimony that attested to this claim either with emergency room or operating room utilization. There was not a single nurse, surgical technician or resident physician who provided testimony or submitted a signed affidavit that advanced even a single complaint against Dr. Pierson. It is an absolute fact that the only evidence inthe entire case record from a surgical technician or an ORHS resident physician was highly complementary of Dr. Pierson and fully confirmed the high quality of Dr. Pierson's patient care.

- Furthermore, the indisputable evidence of Dr. Pierson's patient care as compared to his peers as fully analyzed by ORHS hospital personnel in the Information Technology section and the Department of Case Management provided absolute confirmation that the quality of Dr. Pierson's patient outcomes were superior to and far exceeded the patient outcomes of not only all of his peers at the ORHS institutions, but also were far superior to those outcome averages of Dr. Pierson's orthopedic peers across the State of Florida (see TAC [Third Amended Complaint] paragraphs 27, 30, 43 - 45, pages 39 - 40, 88 - 90).
- Dr. Pierson's treatment methods and clinical outcomes were strongly and fully supported by three (3) Nationally prominent orthopedic surgeon experts in the Peer Review and by four (4) Nationally prominent orthopedic surgeon

experts in the civil litigation (see TAC paragraph 91, pages 90 - 91).

- Dr. Pierson provided eight (8) full volumes which reviewed and substantiated the high quality care which he provided in all patient cases reviewed during the Peer Review. That evidence was later further supported by 149 volumes of extensive reviews of the orthopedic literature which reviewed all patient care issues raised in the peer review those reviews fully supported every single aspect of Dr. Pierson's patient care inclusive of the timing of surgery, duration of surgery as well as the specific treatment methods utilized.

2. *"The Complaint consisted of concerns that Pierson (1) took an excess length of time completing his surgeries, (2) scheduled surgery at inappropriate times."*

- The evidence in the extensive case record fully discredited this claim. The initial eight volume extensive patient review and four volumes of literature evidence which was later supplemented with 149 volumes of literature reviews which fully discredited these aspects of the complaints against Dr. Pierson and proved beyond any doubt that the ORHS Peer Review complaints advanced against Dr. Pierson represented fraudulent claims. (see TAC Paragraphs 81 - 83, pages 82 - 85).
- The three National orthopedic experts who

testified in support of Dr. Pierson's case during the Peer Review as well as the four Nationally prominent orthopedic surgeons who participated in support of Dr. Pierson's patient care in the civil litigation, fully discredited all aspects of the ORHS complaint. Those experts found Dr. Pierson's surgeryduration and timing of surgeries fully appropriate and consistent with national and international standards. (see TAC Paragraph 91, pages 90 - 91)

- As reviewed above, the analysis of ORHS's own patient care data for all orthopedic surgeon practicing at ORHS inclusive of Dr. Pierson performed by ORHS personnel in the ORHS Information Technology and Case Management sections provided full and indisputable confirmation that Dr. Pierson's patient outcomes far exceeded in quality those outcomes of all of his orthopedic surgery peers at ORHS as well as those results ofhis peers across the State of Florida. (TAC Paragraphs 30, 90-91, pages 43-45, 88-90)

- During the entire Peer Review action inclusive of the six (6) day Peer Review hearing as well as in the Federal Court civil litigation in the Middle District of Florida case ORHS did not provide the testimony of any independent (not employed by ORBS) expert orthopedic surgeon who supported their positions. The only exception in the Peer Review was of Dr. Philip Spiegel, a discredited and previously fired prior Orthopedic Department Chairman at the University of South Florida. It is important to emphasize the fact that in the process of that firing, Dr. Spiegel's actions resulted in the destruction of the Orthopedic Surgery Residency Program at that South Florida institution. Furthermore, Dr. Spiegel only testified during the Peer Review Hearing and not the civil litigation because he had passed away by the time of the civil litigation. In that Peer Review Hearing, Dr. Spiegel's criticisms of Dr. Pierson's patient care and treatment was not only fully discredited by the extensive 149 volume review of the orthopedic literature presented, but was also fully discredited by the substantial testimony provided by Dr. Pierson's three (3) orthopedic experts which included Dr. Michael Baumgaertner, Professor of Orthopedic Surgery and Chief of Orthopedic Trauma at Yale University, in New Haven, Connecticut.
    - In the civil litigation, there was no

orthopedic expert who provided a written opinion or deposition testimony which supported even a single ORBS adverse criticism of Dr. Pierson's care and treatment of patients.

3. *"The Complaint consisted of concerns that Dr. Pierson ... (3) delayed dictating operativenotes":*

- There was not a single piece of evidence submitted either in the Peer Review or in the civil litigation which supported this fraudulent claim. To the contrary, the medical record produced by Dr. Pierson from the ORHS Medical Record Department in the Peer Review demonstrated that the adverse claims of deficient medical records was a fabricated and fraudulent claim. In fact, the evidence presented by Dr. Pierson concerning his patient health records as well as the evidence presented by ORHS MedicalRecords Department proved that Dr. Pierson's compliance with ORHS medical record procedures far exceeded the medical record compliance of the vast majority of the almost1000 physicians on the Medical Staff of the Orlando Health System.

4. *"The Complaint consisted of concerns that Dr. Pierson ... (4) treated elective surgeriesas urgent or semi-urgent cases."*

- The initial eight volume patient reviews along with the four volume literature reviews aswell as

the subsequently presented 149 volumes of orthopedic topic literature reviews fully supported Dr. Pierson's selection of injured patients for urgent/emergent surgeries (TAC paragraphs 81 - 83, pages 82 - 85).

- The three nationally prominent orthopedic experts who testified for Dr. Pierson in the Peer Review as well as the four Nationally prominent orthopedic surgeons who testifiedfor Dr. Pierson in the civil litigation fully supported Dr. Pierson's choice of operative procedures, the duration of those surgeries as well as the timeliness of the operative procedures for those injured patients requiring urgent/emergent surgery (TAC paragraph91, pages 90 - 91).
- Dr. Pierson's far superior patient clinical outcomes with early patient discharge and shorter lengths of patient hospital stays, which were far superior to all of his ORHS peers, also fully supported the conclusion that Dr. Pierson's choice of surgery and timing of that surgery was fully appropriate(TAC paragraphs 30, 90, pages 43-45, 88-90).
- Furthermore, the deposition testimony by 0RHS employed Orthopedic Surgeon, Thomas Csencsitz, in the civil litigation case in which Dr. Csencsitz expressed his patient care philosophy demonstrated the absolute insensitivity and

inhumanity of ORHS orthopedic surgeons such as Dr. Csencsitz with regard to their substandard delayed surgical treatment of acutely injured orthopedic patients:

> "... *I think he (Pierson) believes it to be inhumane treatment to keep a person with an inter-trochantericfracture (hip) overnight before operating on him, and my contention is that we do this all the time ...* " (Csencsitz depo. DKT 358-1, Exhibit 814, p. 66) R: p.452

- There was no evidence presented in the Peer Review or subsequent litigation which provided any confirmation that Dr. Pierson improperly treated elective cases urgently or emergently. To the contrary, there was substantial evidence presented that ORHS employed physicians were the ones who improperly delayed surgical treatment of acutelyinjured patients in need of urgent/emergent surgery. Those cases were inappropriately treated as elective cases which resulted in unacceptable patient risk as well as unnecessary and prolonged patient suffering. (TAC Paragraph 97 - 99, page 95 - 96)
- In summary, there was absolutely no evidence provided either in the peer review or the subsequent civil litigation that Dr. Pierson *"treated elective surgeries as urgent or semi - urgent cases".* To the contrary the opinions

presented by the seven (7) orthopedic experts involved in the peer review and subsequent civil litigation confirmed that Dr. Pierson appropriately treated his acutely injured patients with early surgical intervention and as a result achieved quite excellent outcomes.

5. *"The hospital's medical staff established an Investigative Committee to assess complaints".*

- The substantial evidence from the Peer Review as well as deposition testimony

obtained in the civil litigation of two of the three Investigation Committee members (thethird member was disabled at the time by dementia) provided confirmation that those Investigation Committee members performed no investigation whatsoever.

- Those committee members admitted in deposition that they did not look at, let alonereview, even a single patient chart or x-ray. (TAC Paragraph 74-75, page 78 - 79.
- The evidence in the Peer Review record also fully confirmed that the investigation repeatedly and even outrageously violated the Medical Staff Bylaws. (TAC Paragraph 76-78, pages 79 -86).
- The Hearing Panel in their final report following six days of hearing testimony also came to the conclusion that the Investigation Committee violated the ORHS Medical Staff Bylaws (paragraph 77 - 78, pages 79 - 80).

"It is also difficult to understand why an investigation was conducted on those subjects without any participation by [Plaintiff] until the day before summary suspension of his trauma call an emergency call privileges on November 26, 1996,which suspension remains in effect to this date. The latter omission appears to violate the spirit if not the letter of the Medical Staff Bylaws in effect both in 1996 and at the date of this hearing which state that the individual who is the subject of the investigation shall have the opportunity to appear before the Investigative Committee before it makes its report. These two omissions essentially polarized [Plaintiff] and the MEC from the beginning and rendered impossible the goal of conducting Peer Review with collegiality and professionalism." (Excerpt from theJuly 2003 Hearing Panel report)

- The Investigation Committee even came to a preliminary conclusion that Dr. Spiegel was "biased" and requested a "second academic review by an unbiased instructor". Despite that knowledge and opinion, the Committee failed to insist that such an independent "second academic" review occur. Furthermore, despite the Committee's impression that Dr. Spiegel had bias,

the Committee later permitted a second extended eleven (11) month
review to be performed by Dr. Spiegel (TAC paragraph 79, page 80-81).

8. *"After the Committee (Investigation Committee) conducted a preliminary review, and pending further independent review of Dr. Pierson's charts by Dr. Philip Spiegel, the former Chairman of Orthopedic Surgery at the University of South Florida, and editor of an orthopedic journal, Pierson was removed from trauma and emergency call list.* " (Note: This excerpt represents the full description of Dr. Spiegel contained within the Appellate Court decision which was only incompletely referenced in the excerpt provided in Defendant's Motion to Dismiss.)

This statement by the Appellate Court provides full evidence that the Appellate Court considered Dr. Spiegel an unquestioned orthopedic authority despite the substantial evidence that existed to the contrary. That unassailed opinion of Dr. Spiegel by the Appellate Court was due to the failure of Attorney Rogow and his legal team to present to the Court the substantial evidence which indisputably confirmed that Dr. Spiegel was no authority at all:

- The Investigation Committee had the strong early suspicion that Spiegel was *"biased"* resulted in their request for a second review by an *"unbiased*

instructor". That unbiased second academic review never occurred and Dr. Spiegel was permitted to perform a second review. (TAC paragraph 79 - 80, pages 80 - 82)

- The three orthopedic experts for Dr. Pierson in the Peer Review as well as the four Nationally prominent orthopedic experts who supported Dr. Pierson in the civil litigationfully agreed with Dr. Pierson's care and treatment of patients. They also fully refuted all of the fabricated and fraudulent claims advanced by Dr. Spiegel in his two reports (paragraph 91 - 92, page 90 - 92).
- Dr. Spiegel was the fully discredited former orthopedic department chair who had been **fired** from that position at the University of South Florida by the then Academic Dean Dr. Bunch who was also an orthopedic surgeon. In the process of that dismissal, Dr. Spiegel saw to the destruction, loss of accreditation and closure of the University of South Florida Orthopedic Residency Program. The failure of Attorney Rogow to provideall of the evidence that existed which confirmed that Dr. Spiegel was not a credible authority resulted in the Appellate Panel's full acceptance that Dr. Spiegel was such an authority. Furthermore, Attorney Rogow and his legal team failed to inform the AppellateCourt that an exceptional panel of a total of seven Nationally prominent orthopedic experts had fully supported Dr. Pierson's care and treatment of patients in both the underlying Peer Review as

well as the civil litigation. In addition, remarkably Attorney Rogow even failed to inform the Appellate Panel that Dr. Pierson, prior to his arrival in Orlando, was an Assistant Professor of Orthopedic Surgery at Rush Medical Center in Chicago, a consistently top 10 Nationally ranked orthopedic surgery program.

- Due to all of these exceptional deficiencies in the legal representation of Dr. Pierson by Attorney Rogow and his associates with regard to Dr. Spiegel's participation in the Peer Review, the Appellate Panel was exceptionally misinformed as to Dr. Spiegel and as a result relied heavily on that discredited orthopedic surgeon's opinions as unassailable despite the substantial evidence that he was far from the expert he was held out to be.

6. *"At the conclusion of the hearing, Hearing Panel found that certain of the concernsexpressed were valid and encouraged the hospital to work with Pierson ":*

The above conclusion expressed in the Appellate Court's decision was fully at odds with theopinions expressed in the Hearing Panel's July 7, 2003 report:

- With respect to the charge that there was an excessive length of surgery for Dr.Pierson's cases, the Hearing Panel came to a conclusion contrary to that advanced by the Medical Executive Committee and Dr. Spiegel in the

peer review. The Hearing Panel found that Dr. Pierson's selection of surgical procedures as well as the durationof those surgeries was within the accepted standards reported in the orthopedic literature:

a. Excessive length of surgery:

> "Physician presented expert testimony and medical literature to the effect that while Physician may not be the fastest of surgeons the length of his surgery was not excessive. Physician's expert witnesses felt that the time of several of his surgeries was misjudged by reviewers because several procedures were performedduring the same operative event which justified the time spent. Physician's expert witnesses further pointed to the fact that the Physician's patients had good outcomes that based on the charts and x-rays there was no competence or quality of care issue with respect to Physician." (Page 7 of 17 of the Hearing Panel Report)

- With respect to the charge of Dr. Pierson's *"inappropriate scheduling of surgical time and elective cases being performed as urgent or semi - urgent"* the Hearing Panel concluded that there was literature which fully supported Dr. Pierson's treatment approach:

Physician (Dr. Pierson) expressed the opinion that the timing of his surgeries was always dictated by the best interest of his patients. He acknowledged that he has a difference of opinion with his peers at the hospital with respect to the necessity that surgical intervention, in many cases, be commenced promptly, but nevertheless he felt that his practice was best. As a result, Physician did not think it was inappropriate to schedule cases late in the evening or early in the morning if it would improve the patient's outcome and differed with his reviewers on their assessment of whether a case was urgent, semi-urgent or elective. Literature presented by the Physician as well as expert testimony supported his view. (Page 7 of 17 of the Hearing Panel Report).

- With respect to the handling of the peer review by the Investigation Committee from the onset of involvement in early 1996 through the Committee's final report of July 1, 1999- an investigation which the Medical Staff Bylaws guidelines provided should be completed in 30 days. but was not completed for a period of almost 3 years, the Hearing Panel concluded that the Investigation Committee's conduct of the peer review:

  "... Appears to violate the spirit if not the letter of the Medical Staff Bylaws ineffect

both in 1996 and at the date of this hearing ... "

- It is indisputable that the Appellate Panel's report concerning the Hearing Panel's conclusions which stated *"at the conclusion of the hearing the Hearing Panel found that certain of the concerns expressed were valid...* "represented a conclusion quite at odds with the Hearing Panel's findings provided above and which fully supported Dr. Pierson's duration of surgery, scheduling of surgery, the excellent quality of his surgical outcomes and the evidence that Medical Staff Bylaws violations were pervasive in the sham peer review process that Dr. Pierson was subjected to.

7. "Following an appeal process of the Hearing Panel's recommendations, the ORHS Board affirmed the Appeal Panel's recommendations and the Board filed an Adverse Action Report with the [National Practitioner Data Bank].

- This statement contained within the Appellate decision (see page 3 of Defendant's Motion) could not be further from the truth. In fact, the Hearing Panel Report and Recommendations which were largely favorable to Dr. Pierson and which recommended restoration of Dr. Pierson's Orthopedic Surgery Level One Trauma privileges was appealed by the Medical Executive

Committee. In fact, those Hearing Panel recommendations were immediately and loudly rejected by the very Medical Executive Committee that had participated in the selection of that Hearing Panel. That Hearing Panel decision was then appealed by the Medical Executive Committee which convince the small subcommittee of the ORHS's Hospital Board Members assigned to reject the Hearing Committee's recommendations outright. That subcommittee then successfully convinced the ORHS Board to agree with that position.

- It was a fact unappreciated by the Appellate Panel that the Hearing Panel's decision which resulted from those Hearing Panel members attendance at and review of six (6) , days of peer review hearing testimony was soundly rejected by the ORHS Medical Executive Committee which had heard none of the evidence presented at those hearings.
- Furthermore, it is a fact that the Hearing Panel also concluded that the peer review process inclusive of the Investigation Committee had repeatedly violated "the spirit, if not the letter of the Medical Staff Bylaws". The Hearing Panel concluded that those violations essentially *"polarized Plaintiff and the MEC from the beginning and rendered impossible the goal of*

conducting peer review with collegiality and professionalism". (TAC Paragraph 72, page 80).

Conclusion to this Introduction

The Defendants now advance almost the entirety of the Appellate Panel's unpublished opinion tosupport their position that the evidence in the case as concluded by the Appellate Panel provides substantial proof that Dr. Pierson was a nonconforming, compromised physician who practiced substandard medicine and that those were the true reasons for the failure of that appeal effort by Attorney Rogow and his employed attorney assistants (Attorney Gunther and Does One through Five). Nothing could have been further from the truth. It is indisputable that the exceptional evidence from the case record presented in part above from the peer review as well as from the civil litigation discovery process provides absolute confirmation that Dr. Pierson was the singular orthopedic surgeon at the ORHS hospitals who had the highest quality patient outcomes which far exceeded those of all of his peers at that institution and which not only greatly reducedthe duration of patient suffering, but also dramatically reduced the duration of patient hospital length of stays while substantially reducing related health expenditures. That evidence also fully demonstrated that Dr. Pierson's duration of surgery, scheduling of surgery, surgical treatment methods

and surgical outcomes were fully consistent with the vast evidence presented from the orthopedic literature and well supported by the illustrious panel of seven national orthopedic experts who reviewed Dr. Pierson's cases. Those orthopedic experts strongly supported all aspects of Dr. Pierson's treatment of patients at those ORHS hospitals where he was peer reviewed.

A review from the opinion of the Appellate Panel when compared to the true evidence provides absolute confirmation that the Appellate Panel had a complete and indisputable misapprehension of all aspects of the case. Furthermore, it is beyond any doubt, that the misapprehension of the Appellate Panel resulted from the complete failure on the part of Attorney Rogow and his employed attorney associates under the de novo standard of review that existed in the appeal to properly educate and inform the Appellate Panel as to the true facts of the case. Thus, Attorney Rogow and his associates and their woefully deficient legal advocacy were unquestionably the proximate cause of the Appeal loss which resulted from the abjectly deficient legal advocacy provided. This Court cannot permit the Defendants to utilize their abject failure and blatant legal malpractice in that Appeal to properly inform the Appellate Panel of the true facts of the case which

resulted in the Appellate Court's complete misapprehension, to now be utilized in their as a defense from the charges advanced by Dr. Pierson in his complaint of legal malpractice, breach of fiduciary duty, breach of contract and fraud as well as fraud in the inducement which they are so completely guilty of.

Standard of Review for a Motion to Dismiss

In the Defendant's Motion to Dismiss in Section B (p. 3-4) an abbreviated and typical example of a Defendant boiler plate responses for their Rule l 2(b)(6) Motions to Dismiss Standards of Review is presented. It must be stated at the outset of this Plaintiff response that the U.S. Constitutional guarantees of Due Process and Equal Protection under the law. That law is required to provide legal process that gives full consideration to both defendants and plaintiffs in Federal District Court subject matter jurisdiction cases. Those constitutional guarantees must insure that the standards which exist for Motions to Dismiss as well as of Summary Judgement do not evolve to the level that they significantly and unjustly deny plaintiffs in Federal civil litigation access to the courts and to trials before juries of their peers. This is particularly the case when motions to dismiss are advanced even before the discovery process has begun and before a

plaintiffs right to develop the necessary evidence in the case has been permitted. It is not sufficient to merely provide plaintiffs, the non-movant's in such motions, the assumption as *Elkind v. Bennett,* 958 So. 2d 1088, 1090 (Fla 4th DCA 2007) instructs that *"the facts alleged in the complaint must be accepted as true and all reasonable inferences must be drawn in favor of the pleader".* The Courts must recognize the significance of the fact that the plaintiff at such an early stage of the litigation has not had the opportunity of discovery to develop additional facts to support their pleadings. Even a single fact identified at the later stage of discovery would permit the advancement of a complaint which otherwise might be improperly and unjustly terminated by the Court during the pre-discovery phase under a motion to dismiss. It must be emphasized that there is no provision in the Constitution or in Federal Statutes which expressly requires or directly authorizes the Federal District Courts to reduce the Federal Court caseload by improperly, on insufficient evidence, terminating the *"peoples"* rights to seek recovery for injuries sustained. In fact, the guarantees of the U.S. Constitution (7th and 9th Amendments) and of the Federal statutes have the intent to preserve the *"peoples'"* right to seek redress for injury as noted by Edward Coke in the King's Court. "Every subject may take his remedy by the courseof the Law, and have justice, and right for the injury done to him ... " (1

Edward Coke, *The Second Part of the Institutes of the Laws of England* *55 (London E.&R. Brooke 1797)).

It is important to emphasize that it is the Congress that is empowered to develop the laws in this Great American Republic. The Court's role is to accurately interpret those laws as well as to ensure that the Congress remains true to the Founder's vision as espoused in the Constitution andfurther defined in the few amendments. Thus, the Courts truly have no Constitutional authority to purposely implement artificial and prejudicial barriers to the Federal Courts.

With regard to the sufficiency of a pleading an analysis of the specific requirements of FederalRule 8 (a) Claim for Relief follows:

(a) Claim for Relief. A pleading that states a claim for relief must contain:
    1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
    2) a short and plain statement of the claim showing that the pleader is entitled to relief;
    and

3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

It is important to emphasize the fact that though Rule 8(a) has been changed stylistically there has been no effort by Congress to change it substantiatively over recent years despite the evolving U.S. Supreme Court standards for Motions to Dismiss as expressed in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and subsequently in *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (May 2009). In fact, the instruction provided by Rule 8 subsection (a) ***Claim for Relief*** is moreconsistent with the prior standard ofreview for Motions to Dismiss as expressed by the U.S. Supreme Court in *Conley v. Gibson,* 355 U.S. 41, 47-48 (1957):

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination, and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [Footnote 8] that will give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified

> 'notice pleading' is made possible by the liberal opportunity for discovery andthe other pretrial procedures established by the Rules to disclose more precisely the basisof both claim and defense and to define more narrowly the disputed facts and issues."

When one considers the current language of Federal Rule of Civil Procedure Rule 8 approved bythe U.S. Congress with the advice of the U.S. Supreme Court and which is revised and approvedby the Congress every two years with each successive Congress it should be fully evident that the current language of that Rule is more fully consistent with that earlier pleading standard expressed by the U.S. Supreme Court in the *Conley* decision and not the more rigid standards that the U.S. Supreme Court has advanced in *Twombly et al.* or later in *Ashcroft v. Iqbal et al.*

Certainly, Congress is fully aware of the standards implemented by the *Twombly* Court as well asthe *Iqbal* Court and has in the alternative chosen to maintain the more liberal instruction for the Courts in Rule 8. The last part of the statement by the *Conley* Court expressed above requires particular emphasis (Id):

> *"Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by*

> *the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputedfacts and issues.*

It is fully evident from those remarks that the *Conley* Court recognized the exceptional relevance and actual necessity for discovery to more fully and more narrowly define the facts of the case which support the claims advanced in a dispute.

From the above perspective it is useful to consider the U.S. Supreme Court's opinion in *Twombly* in which their interpretation of Federal Rule 8(a)(2) expresses the requirement that sufficient factual allegations must be present in a pleading to permit the District Court to find that the allegations are facially *"plausible"*. The *Twombly* Court expressed that opinion as follows:

> *"Factual allegations must be enough to raise a right to relief above the speculative level, see 5* C. *Wright & A. Miller, Federal Practice and Procedure§ 1216, pp. 235-236 (3d ed. 2004) (hereinafter Wright & Miller) (The pleading must contain something more ... than ... a statement of facts that merely creates a suspicion of a legally cognizable right of action.) on the assumption that all allegations in the complaint are true (even if doubtfulin/act), see e.g. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508. N 1, 122 S. Ct. 992,152 L.Ed.2d 1 (2002), Neitzke v. Williams 490 U.S. 319,327, 109 S. Ct. 1827, 104L.Ed.2d 338 (1989)*

> *(Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations); Scheuer v. Rhodes 415 U.S. 232, 236, 94 S. Ct. 1683, 40 L.Ed.2d 90 (J 984) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely")."*

It is important to emphasize the fact that the above stated *Twombly* standard is frequently misrepresented by Defendants as has even occurred in this case in order to suggest a higher bar than *Twombly,* in fact, actually created. Furthermore, the Defendants even attempt to misdirect the Court by suggesting that Florida cases, *!BEW et al.* and *Elkind,* require a higher standard.

Despite that attempt, it is fully evident that the opinions of those Florida Courts are derived from and fully consistent with *Twombly.* More recently in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (May 2009) the U.S. Supreme Court has restated their intent in *Twombly* and stated that *"two working principles underlie Twombly":*

> "(b) Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."

"Detailed factual allegations" are not required, *Twombly,* 550 U.S., at 555, but the Rule does call for sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," id., at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556. Two working principles underlie *Twombly.* First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, support by mere conclusory statements. *Id.,* at 555. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.,* at 556. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's. framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a courtshould assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Pp. 13-16."

The *Iqbal* Court emphasized that the factual allegations assumed to be true must "plausibly give rise to an entitlement to relief' (Id). Emphasis must

be added to the fact that the Iqbal Court considers that a *"plausibility"* determination of a claim is *"context-specific"* requiring the Court to draw on experience and common sense. That consideration is of particular importance for the Court in this case which involves claims of legal malpractice. Throughout their motion, defendants wish to completely disregard as fully insignificant "legal conclusions". From a review of this section from *Twombly* provided though confirming that though the court has determined that *legal conclusions* are not sufficient, they certainly expressed the opinion that such conclusions do offer the benefit of contributing to a complaint's framework. In other words, such conclusions are useful and relevant and not pointless as Defendants would have onebelieve.

The Eleventh Circuit Appellate Court. in *Red/and Co. V Bank of America Corp.* 568 F. 3D, 1232, 1234 (2009) has advanced this issue of plausibility which is fully in line with Twombly:

> "To survive dismissal, the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level."

It is important to recognize and emphasize the limits imposed on *plausibility* by *Twombly* (at p.556) where it is emphasized that allegations must be supported by facts and elevated above a speculative level; however, it has not been the Court's intent to impose a *"probability requirement":*

> "Asking for plausible grounds ... Does not impose a probability requirement at thepleading stage it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence... "

From the perspectives provided by the review of these U.S. Supreme Court decisions in *Conley, Twombly & Iqbal* which address the pleading standards and the standards for review of Motionsto Dismiss, it is now useful to compare those standards to the specific instruction provided by Congress to the Federal Courts in the form of Federal Rule Civil Procedure -Rule 8(a)(2). The specific requirements of that Rule make no mention of *"facts"* which have become so prominentin the U.S. Supreme Court's opinions in *Twombly* & *Iqbal.* It is important to note that Congress in the years since those decisions, has chosen not to incorporate that requirement of *"facts"* into the Rule with each re-authorization of those Rules that occurs every two years. In fact, even today the composition of Rule 8(a) remains more compatible with the U.S. Supreme Court's decision

in *Conley* than the successor cases of *Twombly* & *Iqbal.* This persistent form of Rule 8clearly suggests that Congress fully understands the importance in litigation of the opportunity that discovery and other pretrial procedures represent for obtaining the additional necessary factsto "more precisely" define the case. To the contrary, in the decisions by the Court in *Twombly* and *Iqbal,* there is the implied requirement that there should be sufficient facts known at the outset and pled sufficiently to *"plausibly"* support the claim for relief sought in Federal Court.

This in a pure sense is truly putting the *"cart before the horse".* Thus, to some degree there is arelative illogic to such a position especially if the interpretation of plausibility becomes too restrictive. That fact, along with the evidence that the Congress has not revised the Rule 8(a) tobe more consistent with the decisions expressed in *Twombly* and *Iqbal* fully suggests that those U.S. Supreme Court decisions though reducing the size of Federal Court caseloads are not fully consistent with the Rules approved by the Congress, the rule-making body in our government. From that perspective as well as from the perspective that the elevated pleading standards of *Twombly* and *Iqbal* which are imposed before the discovery phase are being aggressively utilized by Defendants to deny Plaintiff access to the Federal

Courts. Such trends are not only contrary to apparent Congressional intent but also lean toward an unconstitutional restriction of access to the Federal Courts and a denial of due process and equal protection under the law.

The insights provided by these considerations reviewed above now appropriately direct the discussion to the fact that multiple Courts have recognized this problem and have thus offered the opinion that the higher-level pleading standards of *Twombly* and *Iqbal* are applicable only to complex and potentially expensive litigation [see Judge Posner's decision in *Smith v. Duffey,* 576F.3d 336, 340 (7th Cir. 2009) as well as the decision in the Rhode Island Court case *Siemens Financial, Inc. v. Stonebridge Equipment Leasing,* 91 A.3d 817 S. Ct. (RI 2014)].

One clear example of just how prejudicial such indiscriminate use of these heightened pleading standards can be is evidenced by the Defendant's again repeated claims expressed in Section C titled *"Failure to Comply with Pleading Requirements"* (DE 93, page 6) that criticizes the Amended Complaint references to Bruce S. Rogow, J.D., Bruce S. Rogow, PA., Cynthia Gunther, J.D. and Does 1 through 5 and in some areas of the counts as Attorney Rogow and his associates. That said, it is acknowledged by Defendants that Count Three, Breach of Contract, is

pied only to Attorney Rogow and his PA, however, a repeated claim of "impermissible grouping" is advanced by the Defendants with respect to counts one, two and four. From the Plaintiffs perspective during and subsequent to the original appeal in which Attorney Rogow, his PA and his law firm associates were involved through to the present time the functioning of that law firm has literally been a "black box" which has been presented to Plaintiffin a monolithic form as to who did what with regard to Dr. Pierson's Appeal. So, pre-discovery it remains impenetrable with respect to defining the specific legal duties or responsibilities which were attributed or assigned to which specific individual. In fact, Plaintiff has only indirect knowledge that there was at least one Doe - another attorney working at the firm under the direction of Attorney Rogow during the time period of that earlier appeal. It should be evident tothe Court that only with the opportunity of discovery and the provisions of subpoena authority which have not been provided thus far in this litigation will it be possible to address the counts specifically. Until that time, Plaintiff will not be able to parse the duties, responsibilities or misdeeds of those lawyers who worked on Plaintiffs Appellate case. As a result of these facts the Complaint has directed the allegations under counts one, two and four against all Defendants individually as is evident under the heading to each section in those counts. Defendant's

charge in this regard is invalid and does not detract from the counts as pied.

Federal Courts Must Liberally Construe the Pleading of Pro Se Litigants.

The Federal Courts have a well-accepted policy fully developed in the case law of the U.S. Supreme Court and the multiple Appellate Circuits to liberally construe pleadings filed by *ProSe* litigants in order to permit the opportunity for *pro se* litigants to fully develop potentially meritorious cases. *See Cruz v. Beto,* 405 U.S. 319. 92 S. Ct. 1079, 31 L.Ed.2d 263 (19720, and *Haines* v. *Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

In the Defendant's Motion to Dismiss the more recent case law of the Eleventh Circuit Appellate Court (page 6) which fully supports that concept of liberal review of *pro se* pleadings is provided. *See Alba v. Montford,* 417 F.3d, 1249, 1252 (11th Cir.2008) and *Boles v. Riva,* 565 Fed. Appx 945 (11th Cir. 2014). In the Defendant reference to a quotation from *Boles* they misrepresent the Court's position by failing to begin with the first sentence of the quoted paragraph which states *"We construe a pro se litigant's pleading liberally."Alba v. Montford,*417 F.3d, 1249, 1252 (11th Cir.2008). It is evident from these multiple Federal Appellate references that there is a requirement placed upon the Courts to liberally construe *pro se*

pleadings in a manner in which the heightened pleading standards of *Twombly* and *Iqbal* are somewhat more liberally interpreted as it is well recognized by the courts that the *pro* se pleading standards are not able to reach that level of refinement of a licensed attorney. In addition, it is evident in these related opinions that the opportunity for amending a complaint to correct perceived deficiencies of the pleading is more liberally granted to *pro se* litigants. This *pro se* litigant requests that this Court review this Third Amended Complaint (which is technically a Second Amended Complaint) as well as this Motion in Opposition to the Defendant Motion to Dismiss with such a liberal view. Should the Court find these amended pleadings to be insufficient Plaintiff requests that the Court provide another opportunity to amend the Complaint or in the alternative to delay a decision on the motion until the initial phase of discovery has provided the opportunity to discover and incorporate additional facts in support of the Complaint.

First Cause of Action - Legal Malpractice

In the establishment of a prima face case of legal malpractice an injured client must demonstrate that the attorney's conduct rose to the level of negligence. The concept of legal malpractice originally evolved from the original concept of an

attorney's liability existing for "gross negligence" and not an "honest mistake" (see 1767 King's Bench Case *Pitt v. Yalder).* In the late 1800's the courts rejected the heightened requirement of"gross negligence" as the standard and the concept of "ordinary negligence" was determined sufficient to access liability. This concept of liability for legal malpractice has now advanced to the concept that an attorney has the affirmative duty to use "reasonable skill and diligence" in the representation of clients (see 1 Mallen & Smith). The courts vary in the determination of whether the cause for action for legal malpractice is grounded in tort or contract. Irrespective of that determination, many courts view legal malpractice as a tort action. Regardless of whether legal malpractice is one of breach of contract or negligence, the standard for legal malpractice is the same with the attorney held liablefor all damages proximately caused by his/her wrongful acts. The elements of legal malpractice are well reviewed by N. Boothe-Perry in the article titled "No Laughing Matter: The Intersection of Legal Malpractice and Professionalism" in the Journal of Gender, Social Policy and the Law, Volume 21, Issue 1, pages 21 -23:

> "The elements of a legal malpractice[119] claim arising from a civil action mirror those required for any civil tort claim rooted in negligence: a duty, a breach, causation, and damages. [12] From a

technical standpoint, the courts have recognized five elements (or some combination thereof)[121] as necessary to form a prima facie case oflegal malpractice: (1) the existence of an attorney-client relationship; [122] (2) a duty owed to the client as a result of the attorney-client relationship;[123] (3) breach of the attorney duty by failure to perform in accordance with established standards of care or conduct of a "reasonable attorney"; (4) establishment that the breach was the proximate cause of injury or loss;[124] and (5) the existence of damages.[125] The inception of the attorney-client relationship marks the point at which the attorney owes a duty to the client.[126] Once the plaintiff satisfies his or her burden of proof and establishes the existence of the attorney- client relationship,[127] the plaintiff must then provide evidence of a breach of the attorney's fiduciary duty.[128] This element is satisfied where the plaintiff establishes that the attorney acted in a negligent manner.[129] The plaintiff must next prove causation, i.e., that the attorney's negligence (or breach of contract) was in fact the cause of the harm.[130] The causation analysis requires both a determination of cause-in-fact, and proximate/legal cause.[131] An attorney is subsequently liable for any foreseeable loss caused by his negligent actions (i.e., his breach of the fiduciary duty).[132] The plaintiff may recover for both tangible and intangible injuries, including emotional damages."

A more simplified discussion of what constitutes legal malpractice in a Florida case can be foundin *Elkin v. Bennett,* 958 So. 2D, I088, I090:

> "For a party to recover for legal malpractice, three elements must be proven: (1) the attorney was employed by or in privity with the plaintiff(s); (2) the attorney neglected a reasonable duty to the client(s); (3) the negligence proximately caused any loss to the plaintiff(s)." *Gresham v. Strickland,* 784 So. 2d. 578. 580 (Fla. 4th DCA 2001). See also *Brennen v. Ruffner,* 640 So. 2d. 143. 145 (Fla. 4th DCA 1994) ("In a legal malpractice action, a plaintiff must prove three elements: the attorney's employment the attorney's neglect of a reasonable duty and that such negligence resulted in and was the proximate cause of loss to the plaintiff.")"

With respect to the determination of what is "reasonable", an attorney's acts are weighed against the law's standards for the due care, skills and diligence required (Id).

Though the violations of ethical rules by an attorney do not directly translate into a legal malpractice claim, they are still considered supportive of such claims by the Courts. Due to this supportive role that such claims have in the setting of legal malpractice, the Amended Complaintat paragraphs 63-73 (pages 73-78) in entry 14) under Legal Malpractice on page

122. Those areas review in some detail those Rules of Professional Conduct of the Florida Bar Association which Attorney Rogow, Attorney Gunther and Does One through Five indisputably violated in their providing exceptionally deficient legal advocacy in the Appeal. Those violations do fully support the allegations of legal malpractice.

Though such violations of ethical rules by an attorney do not directly translate into a legal malpractice claim, they are still considered supportive of such claims by the courts.

Legal Malpractice - A Review of the Evidence

Defendants Bruce Rogow, J.D., Cynthia Gunther, J.D., Bruce S. Rogow, PA and Does 1 through 5 individually and collectively (Rogow et al.) provided negligent legal services which failed in an exceptional number of areas to meet the "reasonable" duties required and which fell well below the "reasonable" Appellate standards required in the representation of Plaintiffs Appeal (case #10-15496) before the Eleventh Circuit Appellate Court. In that regard the extensive factual evidence of legal malpractice far exceeded the plausibility standard to the point of achieving the high *"probability"* of success in this litigation on this count.

1. Bruce Rogow, J.D., Cynthia Gunther, J.D.,

Bruce S. Rogow, PA and Does 1 through 5(Rogow et al.) were employed to represent Plaintiff, Dr. Pierson, before the Eleventh Circuit Court of Appeals (case #10-15496) in the appeal of Case #6:08-cv-0046-JA-GLK from the United States District Court for the Middle District of Florida, Orlando Division which was terminated on a series of Dismissals and a Final Summary Judgement.

The engagement for legal services in the matter was formalized in the December 6, 2010 Contract composed and signed by Attorney Rogow and retained and signed by Dr. Pierson dated December 7, 2010.

- That Contract specified a total cost of $200,000.00 for "all the proceedings in the Courtof Appeals".

2. Defendants Bruce Rogow, J.D., Cynthia Gunther, J.D., Bruce S. Rogow, PA and Does 1 through 5 individually and collectively fell well below the standards required in their affirmative duty to utilize "reasonable skill and diligence" in representing Plaintiff before the Eleventh Circuit Appellate Court.

- A premise that Rogow et al. appears to suggest in their Motion to Dismiss is that even if a client pays $200,000 for appellate

advocacy even the complete failure to meet their affirmative duty to provide legal advocacy with "reasonable skill and diligence" never rise to the level sufficient to create a "plausible" charge of legal malpractice. Such aconclusion is tantamount to stealing from their clients. In the alternative they appear to believe that they can provide deficient Appellate advocacy which can fully deny clients of their constitutionally designated rights to due process and equal protection with no adverse consequences.

- Before proceeding further in this section, it is important to briefly review with the Court the intent of Congress in passing the Healthcare Quality Improvement Act of 1986 (HCQIA). That intent was to advance the quality of healthcare nationally and to remove practitioners who practiced substandard care. In his own words the Honorable Henry Waxman, a co- sponsor of the bill, in his statement before the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee on October 8, 1986 stated:

  > "In short, we have addressed every serious problem area that has been brought to our attention and we have

made it perfectly clear that the only matter at issue under our bill is the ability of doctors - one by one - to practice medicine competently and professionally."

That statement provides full confirmation that the intent of HCQIA was to encourage quality healthcare. In addition, the bill was written with the intent to not protect anti-competitive behavior in the healthcare marketplaces by hospitals and physicians.

- From the perspectives provided in the discussions above concerning HCQIA and especially those comments provided by the Honorable Representative Henry Waxman it is fully reasonable to conclude that the Courts would not permit a sham peer review to compromiseor eliminate the surgical practice of the practitioner (Dr. Pierson in this case) who demonstrated the highest quality of innovative care at those health institutions where he was being sham peer reviewed. The bill was also specifically designed to not permit sham professional review activities from being directed at stopping the implementation of innovative and advanced health methods which actually occurred in this case. It is also fully reasonable to

assume that the Federal Courts would not permit the anti-competitive intent of malicious professional review activities from stifling competition in the healthcare marketplace which again occurred in this case.

- When one considers the indisputable evidence presented in introductory section to this Motion which provides full confirmation that Dr. Pierson was the singular orthopedic surgeon at the Orlando Health institutions where the sham peer review activities occurred who had the most outstanding results which were achieved through his innovative and humane patient care techniques. Those techniques not only produced outstanding results which far exceeded those of his peers at those institutions, but also greatly reduced the duration of human suffering. As reviewed above, HCQIA was certainly never intended to destroy the practice of such a high quality, innovative physician who was achieving such tremendous success in advancing the quality of healthcare for his patients. Rogow et al. negligently failed to use the opportunity of the *de nova* standard review required in the Appellate review of the case, which had been terminated in the District Court due to a

series of dismissals and summary judgement, to properly educate the Appellate Court to those essential true facts of the case. If Rogow et al. had properly educated the Appellate Panel to those true facts it is a certainty that the manifest injustice of the adverse District Court decision would not have occurred, and that the case would have been remanded for jury trial in Central Florida. Thus, from these perspectives it can be stated with a certainty that the exceptionally substandard legal representation provided by Rogow et al. through all levels of the Appeal was the proximate cause of the failure of the case at the Eleventh Circuit Court of Appeals.

3. Bruce S Rogow, J.D., Cynthia Gunther, J.D., Bruce Rogow, PA and Does 1 through 5 repeatedly and with apparent complete disregard consistently violated a multitude of the Florida Bar *Rules of Professional Conduct* which have been incorporated in the Complaint.

4. Further substantial evidence of legal malpractice.

- Many specific facts of legal malpractice are entered in the complaint under Count one at pages 114-123.
- The introduction section to this opposition

provides an exceptional listing of the absolute deficiencies of the legal advocacy (i.e. legal malpractice) in the Appeal at p.7-24.

- Additional reviews of the facts supporting the claims of legal malpractice are found at paragraphs 12-15 on pages 27-34, at paragraphs 48-67 on pages 64-73 and at paragraphs 92-103 on pages 88-103.
- A full review of the federal (HCQIA) and Florida Peer Review statutes has been provided at paragraph 36-47 on pages 53-63. That analysis of the Federal and State Peer Review statutes provides full confirmation that the sham peer review that Dr. Pierson was subjected to should have resulted in the complete loss of the peer review statutory protections to the Defendant/Appellants because of the absence of a "reasonable belief' it was "in the furtherance of quality healthcare" and the evidence of "intentional fraud" and malice by the defendant/appellants in the underlying peer review and civil litigation which was appealed. Thus, the HCQIA and the Florida Peer Review statutes did not represent a barrier to Dr. Pierson prevailing in litigation.

Second Cause of Action - Breach of Fiduciary Duty

1. The national experts in the field oflegal malpractice law readily agree that an attorney's negligent acts fully represent evidence of a breach of the Attorney's fiduciary duty:

> "The inception of the attorney-client relationship marks the point at which the attorney owes a duty to the client. Once the plaintiff satisfies his or her burden of proof and establishes the existence of the attorney-client relationship, the plaintiff must then provide evidence of a breach of attorney's fiduciary duty. This element is satisfied where the plaintiff establishes that the attorney acted in a negligent manner."
>
> (Citing Ronald E. Mallen & Jeffrey M. Smith Legal Malpractice (2012), a five-volumetreatise on legal malpractice.)

In fact, the Florida case *Elkin v. Bennett,* 958 So. 2d 1088, 1091(Fla. 4th DCA 2007) has advanced the concept *"an attorney and client relationship is one of the closest and most personal and fiduciary in character that exists."*

Thus, in the body of law that has developed around legal malpractice the legal principle has developed where all negligent acts by an attorney not only represent legal malpractice, but also in each instance represent specific occurrences of a Breach of Fiduciary Duty. Based on that broadly accepted

legal theory all instances of legal malpractice in this case reviewed with respectto the legal malpractice claims advanced above represent specific occurrences of Breach of Fiduciary Duty as well. Thus, formal notice is provided to the Court that all of the evidence presented in that section above is to be incorporated herein in this section on Breach of FiduciaryDuty.

2. In the discussion of Breach of Fiduciary Duty in Defendant's brief they cite *Gracey v.Eaker,* 837 So 2d 348 (Fla. 2002) to provide insight into Florida law on this topic. Remarkably, Defendants do not draw attention to the *Gracey* Court's further discussion of the concept of fiduciary duty in the context of *Counseling Relationships:*

> *"In* addition to our stated public policy and statutory structure of protection for certain confidential relationships, we h;te recently recognized the fiduciary duty generally arising in counseling relationships, in *Doe v. Evans,* 814 So 2d 370, 373-75 (Fla 2002).There, one having marital difficulties alleged that priest intervened in the situation and during counseling activities breached a duty of trust and confidence by becoming sexually involved with her. *See id* at 372-373. Recognizing the principles suggested in the Restatement (Second) of Torts, we noted that a fiduciary

> relationship does exist between persons when one is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship. *See id* at 374. Further, one is such a fiduciary relationship is subject to legal responsibility for harm flowing from a breach of fiduciary duty imposed by the relationship. *See id.*"

It should be fully evident from the above discussion provided in this Florida case that the Attorney - Client relationship represents such a *counseling relationship* in which there is an established fiduciary relationship with legal responsibilities that flow from it. The harm that results represents a breach of that fiduciary relationship. In the relationship that existed betweenAttorney Rogow, the Rogow PA, Attorney Gunther and Does One through Five individually andcollectively with Dr. Pierson every noted breach of that fiduciary duty inclusive of every fact affirming legal malpractice of which there were many instances that have been noted and others that have not been noted, represents an episode of harm from which legal and fiduciary responsibility flows.

3. The emotional distress to Plaintiff that emanated from the legal negligence and resultant breach of fiduciary duty by Rogow et al. individually and collectively all represent

actionable claims under Florida law as reviewed by the *Gracey* Court (page 355) discussion of the Florida "impact rule":

> "The 'impact rule' requires that a plaintiff seeking to recover emotional distress damages in a negligence action prove that "the emotional distress ... flow(s) from physical injuries the plaintiff sustained in an impact (upon his person)" *R.J v. Humana of Florida, Inc.*652 So. 2d 360, 362 (Fla. 1995). Florida's version of the impact rule has more aptly been described as having a "hybrid" nature, requiring either impact upon one's person or, in certain situations, at a minimum the manifestation of emotional distress in the form of a discernible physical injury or illness. *See Kush v. Lloyd,* 616 So. 2d 415 (Fla. 1992).

It should be fully evident from this review that the extreme emotional distress that Plaintiff has been put through as a result of Attorney Rogow, the Rogow PA, Attorney Gunther and Does One through Four repeated breaches of this fiduciary relationship and the physical effect that the stress has had on Plaintiff is an actionable tort under Florida law. Plaintiff intends to seek recovery not only for the breaches of fiduciary duty but also for the harm to his physical health the impact of the exceptional stress that has resulted.

Third Cause of Action - Breach of Contract

In citing the requirements necessary for breach of contract the Defendant's motion cites the Florida case *DeGazelle Group, Inc. v. Tamaz Trading Establishment,* 113 F.Supp. 3d 1211, 1223(M.D. Fla. 2014) to review the grounds for an action under a Breach of Contract claim. Those criteria are stated as follows (see DE 32, p. 10):

> "Under Florida law, the elements for a claim of breach of contract are 1) a valid contract existed between parties, 2) a material breach of the contract, and 3) plaintiff suffered damages as a result of the breach. [Also citing *Havens v. Coast Florida, P.A.,* 117 So. 3d 1179, 1181 (Fla. 2dDCA2013)]"

In further commenting on this issue of breach of contract, Defendants suggest that "the same deficiencies found in the claims for legal malpractice and breach of fiduciary duty are also present in Plaintiffs breach of contract." (DE 32, p. 11).

Before commenting further on that issue, it should be emphasized that the *Haven 's* Court also reviewed the requirements of a breach of contract claim in a manner similar to that of the *Gracey* Court above:

> "A cause of action for breach of contract has three elements: (1) a valid contract, (2) a material breach, and (3) damages. *Rollins, Inc,*

v. Butland, 951 So.2d 860, 875 (Fla. 2d DCA 2006)."

In reviewing these two Florida cases it becomes fully apparent that there is a critical difference (ignored by Defendants) between the requirements stated to prove claims of legal malpractice or breaches of fiduciary duty as opposed to that for breach of contract as found in Florida law. That critical difference concerns the absence of the requirement for demonstrating proximate cause which is the additional condition required in legal malpractice and breach of fiduciary duty claims. Thus, the height of the bar to achieve redress for a breach of contract claim does not require proof of proximate cause only that the breach resulted in damages. From that perspective and depending on the Court that has jurisdiction, a breach of the contract that does not sufficiently reach the standard of legal malpractice still provides the opportunity for redress for the injury when damages have been sustained. In further reviewing the distinctions between these various types of legal claims it should be evident that all claims of legal malpractice represent a breach of contract as well as a breach of fiduciary duty; whereas, not all breaches of contract meet the threshold conditions required for a claim of legal malpractice. By way of example, Defendants argue that their failure to proceed with Plaintiffs demand

for submission ofa Petition for Rehearing En Banc did not represent legal malpractice. Plaintiff and the facts of the Appellate Courts gross misapprehension of the case go strongly against that position, but a Court in the alternative might choose to agree on this point with Defendants. Irrespective of that determination, in the absence of a valid claim of legal malpractice, Plaintiff would certainly then have a valid claim of breach of contract given the fact that Rogow et al. drafted the contract which stated that the fee of $200,000 would cover "all the proceedings in the Court of Appeals". A failure to agree to submit the Petition for Rehearing En Banc represents just such a blatant failure to comply with the contractual terms.

Finally, in the last paragraph of this section of the Defendant's Motion to Dismiss (DE 32, p. 12)when addressing the issue of the Plaintiff request for Rogow et al. to file a Petition for Rehearing the statement is made:

> "Not filing a Petition for Rehearing En Banc because such a Petition would be frivolous(see Attachments #17 to Second Amended Complaint) does not constitute a breach of contract where no ground existed for such a motion." (p. 17)

This statement must be considered from several perspectives. The first consideration that has been

stated previously and warrants restatement at this time concerns the irrefutable fact that Plaintiff had the most outstanding patient outcome results with the shortest length of patient hospital stays at those Orlando Health institutions where he was sham peer reviewed. In addition, the Congressional record and text of the HCQIA of 1986 confirms that the intent of thatbill was to advance the quality of medical care and to advance the "ability of doctors ... to practice medicine competently" (TAC paragraphs 36-38, pages 53-57 and paragraph 47, page 62). Based upon Dr. Pierson's exceptional patient outcomes with proven conservative use of health resources it should be evident to this Court that he was literally the last surgeon that should have been targeted with peer a review action. Certainly, had the case been properly advanced by Attorney Rogow to the Appellate Court under the de novo standard of review, that Court would have been instructed in the true facts of the case which fully supported Dr. Pierson as the model physician with exceptional patient outcome results. Unfortunately, due to their extreme negligence Defendants grievously failed in that effort to inform the Court. That failure to properly inform the Court resulted in the Appellate Court's gross misapprehension of the case which has been fully reviewed and substantiated with the prolific facts from the case record.

That exceptional negligence to fail to educate the Court to the true facts represents the proximate cause of the adverse outcome on Appeal. The breach of contract which the failure to proceed with the Petition for Rehearing represented the final proximate act that eliminated any chance of success. It truly represents an exceptional outrage in the presence of such an exceptional court misapprehension of the case by the Appellate Court to call such a necessary effort "frivolous". Furthermore, the Petition for Rehearing En Banc represented the only feasible option available to correct the manifest injustice that occurred to Dr. Pierson as a result of the misinformed Appellate decision that was proximately caused by the exceptionally substandard and negligent legal representation provided by Defendants. There can be no question that the substantial factual evidence available fully and plausibly supports a claim of breach of contract.

Fourth Cause of Action - Fraud/Fraud in the Inducement

Bruce S. Rogow, J.D., Cynthia Gunther, J.D., Bruce S. Rogow, PA and Does 1 through 5 individually and collectively made multiple onerous and blatantly fraudulent representations to Plaintiff with the full intent to deceive. Those actions therefore meet the

definition of fraud as advanced by the Florida Bar Association.

The Defendants have referenced the Florida case *Houri v. Boaziz,* 196, So. 3d 383, 393 (Fla. 3dDCA 2016) to review the requirements of a claim of fraud (and fraud in the inducement).

1) A false statement containing a material fact.
2) Knowledge by the person making the statement that the representation is false.
3) The intent by the person making the statement that the representation induces another toact on it (or two purposefully cause one to not act by concealing the information).
4) Reliance on the representation to the injury of the other party.

Ashcroft v. Iqbal 556 U.S. 662, 686 2009 provides emphasis on the requirement of Federal Ruleof Civil Procedure 9(b) to require "particularly where pleading fraud or mistake, while allowing malice, intent, knowledge and other conditions of a person's mind to be alleged generally". In this case, the conditions of *Houri* have been met. The many facts of that fraud have been fully reviewed under the count four in the Amended Complaint (TAC p. 129-135) confirm that a charge of fraud is not only plausible, but also that it has been pled with particularity.

Conclusion

Plaintiff prays that this Court deny this Defendant Motion to Dismiss Plaintiffs Third Amended (technically the Second Amended) Complaint in its entirety, and to require Defendant to promptly answer the Complaint and permit this case to proceed through the discovery phase in preparation for trial. In the alternative, should the Court determined that the Complaint is deficient, this pro se Plaintiff requests leave of the Court to permit the submission of an Amended Complaint that would represent though named the Fourth Amended Complaint it would truly represent a Third Amended Complaint.

Oral Argument Requested.

Notice to the Court

The Court's denial to permit Dr. Pierson's Unopposed Motion for a Time Extension of 21 days to file his Opposition to the Defendants Motion to Dismiss (DE 93) while Dr. Pierson and his only assistant were out of area on preplanned vacations has greatly taxed the limited resources ofthis prose litigant. Dr. Pierson is a prose litigant with no back-up whatsoever and lives in a rural area in the California Sierra Foothills in Northern California where there are no temporary personnel services available to assist at the last minute with this type of time intensive project requiring exceptional

document and legal formatting skill set. Please understand that as a pro se litigant, Dr. Pierson is not permitted the opportunity of electronic filing in the U.S. District Court in South Florida and only receives notices from the Clerk of Court via U.S. First Class Mail which typically requires three to five days for delivery. The exceptionally adverse circumstancescreated by the denial of the unopposed time extension request have greatly and adversely affected the quality of this filing thus unnecessarily compromising Dr. Pierson's pro se advocacy. That Order of Denial is of particular concern given the fact that Dr. Pierson had formally informed the Court of his unavailability during the periods of June 20 through June 30 and July 9 through July 16 (DE 77) two months in advance. As a result of these adverse circumstances, Dr. Pierson has been forced to file this Opposition in what he considers, even from his prose perspective, a crude and un-developed draft form.

Respectfully submitted,

/s/Raymond H. Pierson, III, M.D.
Raymond H. Pierson, III M.D.
3 Gopher Flat Road, Unit #7
Sutter Creek, CA 95685
T: 209-267-9118
E: rpiersonmd@sbcglobal

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IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:15-cv-61312

Raymond H. Pierson, III M.D.
Plaintiff

v
BRUCE S. ROGOW, *et al.*,
Defendants.

UNOPPOSED PLAINTIFF REQUEST OF THIS COURT FOR A TIME EXTENSION OF TWENTY-ONE (21) DAYS FOR THE SUBMISSION OF HIS RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE THIRD (TECHNICALLY THE SECOND) AMENDED COMPLAINT

Raymond H. Pierson, III M.D.
3 Gopher Flat Rd., Unit #7
Sutter Creek, CA 95685
E : rpiersonmd@sbcglobal.net
T : 209-267-9118
Pro Se Litigant

Raymond H. Pierson, III, M.D., a pro se plaintiff in this action pending in the U.S. District Court of South Florida where he has not been permitted electronic filing privileges, received from the Defendant's Counsel via Fedex overnight delivery on the late afternoon of Tuesday, July 2, 2019, a copy of defendant's June 28, 2019 Motion to Dismiss Plaintiff's Third Amended Complaint (technically the Second Amended Complaint). Plaintiff had previously informed the Court in his Notices of Unavailability filed on May 9, 2019 (DE 77) that he would be unavailable during several time periods inclusive of the period of June 21 through June 30, 2019 due to a preplanned and prepaid family vacation to Yellowstone National Park where he had absolutely no internet access. In addition, at the time of this writing Plaintiff has not yet received the Clerk's formal notice of Defendant's Motion to Dismiss filing which the Clerk forwards by U.S. First Class Mail the typical method of notice of such Defendant filings and Court Orders to Dr. Pierson who is located in the rural Sierra Foothills of California. As a result of the above circumstances and Court policies, the June 28, 2019 filing of the Defendant's Motion to Dismiss was only received by Dr. Pierson on Tuesday, July 2, 2019. Asa result of the June 28th filing it is Dr. Pierson's understanding that his intended response in opposition is due in this Court on July 12, 2019. In this regard it must be

further noted that in that same Notice of Unavailability filed with the Court on May 9, 2019 (DE 77) Plaintiff also informed the Court of a period of unavailabilityfrom July 9 through July 21, 2019 due to an extended absence of his singular and critical assistant, Ms. Shelly Hills, who will be in Alaska for that extended period to attend a family gathering and the wedding of an immediate family member, her niece. Ms. Hills' expertise in document production and formatting is absolutely critical and essential to Dr. Pierson's pro se efforts. Because of Ms. Hill's requiredabsence during that period and his prior Notice to the Court, Dr. Pierson has also made advanced and prepaid plans to be away from his home and office also with no availability for that same time period. In addition to the above circumstances, it also must be noted that the extended four-day July 4th holiday weekend also intervenes during this period immediately prior to July 12th. Ms. Hills will also not be available for that four-day period due to her requisite family holiday commitments and duties. As a result, of all of these factors, this pro se Plaintiff can in no manner be able to compose and produce his Response in Opposition to the Defendant's Motion to Dismiss by July 12, 2019. It is for these multiple significant reasons as well as for other equally valid reasons not the least of whichis his quite limited financial resources as he advances his prose advocacy, Dr. Pierson must now

advance this unopposed request to this Court for a twenty-one (21) day time extension for the filing of Plaintiffs Response in Opposition to theDefendant's Motion to Dismiss the Third Amended Complaint.

Prayer for Relief

Dr. Raymond Pierson, a pro se Plaintiff in this matter, prays that this Court providethe unopposed relief of the requested twenty-one day time extension for submission of his Response in Opposition to the Defendant's Motion to Dismiss the Third Amended Complaint.

Respectfully submitted,
/s/Raymond H. Pierson, III, M.D.
Date: 8th day of July 2019
Raymond H. Pierson, III, M.D.
3 Gopher Flat Rd., #7
Sutter Creek, CA 95685
T: 209-267-9118
E: rpiersonmd@sbcglobal.net

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:14-cv-61312

Raymond H. Pierson, III M.D.
Plaintiff

v
BRUCE S. ROGOW, *et al.*,
Defendants.

PLAINTIFF NOTICE TO THE COURT OF THREE TIME PERIODS OVER THE NEXT THREE MONTHS THAT PLAINTIFF WILL BE UNAVAILABLE TO PARTICIPATE IN THESE LEGAL PROCEEDINGS:

MAY 16, 2019 THROUGH MAY 31, 2019;
JUNE 21, 2019 THROUGH JUNE 30, 2019;
AND JULY 9 THROUGH JULY 21, 2019

Raymond H. Pierson, III M.D.
3 Gopher Flat Rd., Unit #7
Sutter Creek, CA 95685
E:rpiersonmd@sbcglobal.net
T: 209-267-9118
Pro Se Litigant

Plaintiff Notice to The Court of Plaintiff Unavailability

Notice is hereby given to the Court of Plaintiff's three time periods ofunavailability during the upcoming months:

May, 16 through 31, 2019 Dr. Pierson will be unavailable due to his need toagain assist with the care of his terminally ill mother in Pennsylvania.

June 21 through 30, 2019 Dr. Pierson will be away from home for a long- planned extended family road trip vacation to Yellowstone and Grand Teton National Parks with multiple other extended family members from Minnesota and Colorado.

July 9 through 21, 2019 Dr. Pierson's essential and singular office assistant,Ms. Hills, will be completely unavailable to assist Dr. Pierson with legal filings in this legal matter due to her attendance at the wedding of an immediate family member in Alaska.

Respectfully submitted,

/s/ Raymond H. Pierson, III, M.D.

Date: 5th day of May, 2019

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No.: 15-cv-61312

RAYMOND H. PIERSON, III, M.D., *Pro se*

Plaintiff,

v.

BRUCE S. ROGOW, J.D.; BRUCE S. ROGOW., P.A.; CYNTHIA GUNTHER, J.D.; AND DOES 1 THROUGH 5, Inclusive,

Defendants.

NOTICE OF UNAVAILABILITY

Tara A. Campion, Counsel for Defendants Bruce S. Rogow, Bruce S. Rogow, P.A., and Cynthia Gunther, files this Notice of unavailability stating that Ms. Campion will be unavailable from May 17, 2019, and out of the country from May 23, 2019 through June 17, 2019. Counsel requests that no hearings, depositions, mediations, or other proceedings requiring attendance of counsel be scheduled during this time period.

Respectfully submitted,
/s/ Tara A. Campion

TARA A. CAMPION
Fla. Bar No. 0090944
BRUCE S. ROGOW, P.A.
100 N.E. 3rd Ave., Ste. 1000
Ft .Lauderdale, Florida 33391
Ph:(954) 767-8909

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IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:15-cv-61312

Raymond H. Pierson, III M.D.
Plaintiff

v

BRUCE S. ROGOW, *et al.*,
Defendants.

PLAINTIFF'S UNOPPOSED MOTION TO REQUEST THE COURT TO STAY THE PROCEEDINGS OF THIS CASE IN DISTRICT COURT AND GRANT PLAINTIFF THE OPPORTUNITY TO PROCEED WITH IMMEDIATE APPELLATE REVIEW OF THE COURT'S DENIAL OF PLAINTIFF'S CONSTITUTIONAL CHALLENGE OF THE 1990 REVISION OF 28 USC§ 1391 BY PUBLIC LAW 101-650 SECTION 311 (1) WHICH ELIMINATED TO ALL PLAINTIFFS THEIR RIGHT OF VENUE IN THEIR DISTRICT OF RESIDENCE/DOMICILE

Raymond H. Pierson, III M.D.
3 Gopher Flat Rd., Unit #7
Sutter Creek, CA 95685
E: rpiersonmd@sbcglobal.net
T : 209-267-9118
Pro Se Litigant

On Monday, April 1, 2019 this Court's Order affirming the Report and Recommendation (DE) of the Magistrate was adopted by the Court. That Orderthus granted Dr. Pierson the right to amend the Counts I - IV of the Second Amended Complaint (DE 30) but denied with **prejudice** Dr. Pierson's Constitutional Challenge to the 1990 Revision of 28 USC§ 1391 Public Law 101-650 Section 311 (1) which eliminated the Right of Venue in their District of residence/domicile in Federal District Court civil litigation to all plaintiffs. Dr. Pierson had advanced that constitutional challenge in his Second Amended Complaint filed with this Court on February 20, 2018 (DE 30). In the Complaint he advanced his argument that the 1990 Revision of 28 USC § 1391 represented an unjustified taking of a substantiative plaintiff right which has no rational basis and which is unconstitutional both "facially" as well as "applied" even to the manner inwhich it was applied to this case prior to transfer from the U.S. District Court in the Eastern District of California. That revision to 28 USC § 1391 fully eliminated a plaintiff right that had been present in this republic for over 200 years since the time of the (First) Judiciary Act of 1789. This Court's ruling to eliminate Plaintiffs right to amend his constitutional challenge at this early stage of this litigation before Defendants have even submitted an answer to the charges represents not only a taking of Plaintiffs Federal Rule 15 (a)(2) right to amend which *"The Court should freely give leave when justice so requires"* as well as Plaintiffs Federal Rule 5.1 (d) right to advance a constitutional challenge, with *"no forfeiture"* of that" *constitutional claim or defense that is otherwise timely asserted".* The constitutional claim concerning the

revision of 28 USC § 1391was timely filed in the Second Amended Complaint on February 20, 2018 (DE 30).

This pro se litigant fully acknowledges that it was his lack of familiarity with and misinterpretation of Federal Rule 5.1 (a) (1) (A) and Rule 5.1 (b) that contributed to his failure to serve notice on the Attorney General of the United States at the time of filing of the Second Amended Complaint. It was Plaintiffs understandingon reviewing the Rule 5.1 (b) prior to that filing of the Second Amended Complaint that the Court's required confirmation of that constitutional challenge to the Office of the Attorney General of the United States as required under 28 USC §2403 would be sufficient notice obviating any need for Dr. Pierson to duplicate that notice.

The Court's Order (DE 69) which has denied with **prejudice** Dr. Pierson's right to pursue the above stated constitutional challenge represents an indisputable and unjust denial of his right certified and guaranteed within the Federal Rules that his timely asserted constitutional challenge despite the failure of notice to the government official should not be subject to forfeiture. This Court's decision that Dr. Pierson forfeited that right of challenge represents indisputable error which Plaintiff is fully justified at this time in having immediately reviewed and corrected by the reviewing court. Therefore, Plaintiff now requests that this Court *stay* this case from further

proceedings in the District Court and grant this right to proceed with immediate appellate review by the United States Court of Appeals for the Eleventh Circuit. It has been well established by the Supreme Court of the United States under the Gillespie Doctrine in the *Gillespie* v. *United States Steel Corp.* 379 U.S. 148, p.153 (1964) citing *United States* v. *General Motors Corp.,* 323 U.S. 373,377 (1945) that appellate review at this time is fully warranted because it is so *"fundamental to the further conduct"* of the case as well as to having exceptional relevance to all plaintiffs involved in civil litigation in which jurisdiction resides with the Federal District Courts. Furthermore, this right to pursue appellate reviewat this time is further supported by the *"Collateral Order Doctrine* as presented by the U.S. Supreme Court in *Cohen* v. *Benefit Industrial Loan Corp,* 337 U.S. 541, 546. That is, the constitutional challenge to the 1990 Revision of 28 USC§ 1391 raises a question not only of tremendous significance to this case, but to the rightsof all plaintiffs involved in civil litigation adjudicated under Federal District Court jurisdiction. The U.S. Supreme Court expressed this doctrine as follows:

> *"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that*

appellate consideration be deferred until the whole caseis adjudicated. "

Conclusion

For all of those reasons state above, Dr. Pierson requests that this Court *"stay"* allproceedings in this case while Dr. Pierson is permitted the opportunity to seek immediate appellate review of this Court's erroneous and unjust denial of Plaintiffs right to pursue his constitutional challenge to the 1990 Revision of 28 USC§ 1391 contained within the Second Amended Complaint.

Prayer for Relief

This pro se Plaintiff prays that the Court permit his request to *"stay"* these DistrictCourt proceedings and grant Plaintiff the opportunity to seek immediate appellate review.

Respectfully submitted,

/s/Raymond H. Pierson, III, M.D.
Date: The 8th day of April, 2019

Raymond H. Pierson, III, M.D.,
Pro Se Appellant

NOTE: There were four additional related filings with the District Court which addressed Dr. Pierson's request for "stay" of the case proceedings and leave of Court to advance for interlocutory Appellate review of the Court's denial of Defendant's right to advance a constitutional challenge to the 1990 Revision of Federal Statute 28 USC 1391 which eliminated to all plaintiffs in Federal Civil Litigation their right as a choice of venue selection their district of domicile/residence. The District Courts remained entirely non-responsive to each and every one of those motions through the date of termination of the case.

4/25/19 **DE 73** - Plaintiff Requests That This Court Provide a Definitive Decision Concerning Plaintiff's April 8, 2019 Unopposed Motion (DE 70) to "Stay" the Proceedings of this Case In The District Court and grant plaintiff the opportunity to proceed with immediate appellate review of the court's denial of plaintiff's constitutional challenge of the 1990 revision of 28 USC § 1391. . .

5/9/19 **DE 78** - Second Plaintiff Request (First Request-DE 73) Concerning Plaintiff's April 8, 2019 Unopposed Motion (DE 70) to "Stay" the Proceedings of this Case In The District Court and grant plaintiff the opportunity to proceed with immediate appellate review of the court's denial of plaintiff's constitutional

challenge of the 1990 revision of 28 USC § 1391. . .

6/24/19 **DE 91** - Plaintiff, Dr. Raymond H. Pierson, III's Third Request of the Court (DE 73 & 78) to Provide a Definitive Decision Concerning Plaintiff's April 8, 2019 Unopposed Motion (DE 70) to "Stay" the Proceedings of this Case In The District Court and grant plaintiff the opportunity to proceed with immediate appellate review of the court's denial of plaintiff's constitutional challenge of the 1990 revision of 28 USC § 1391. . .

7/9/19 **DE 96** - NOTICE to the Court in this Newly Reassigned Case that a Pending Plaintiff Request to Provide a Definitive Decision Concerning Plaintiff's April 8, 2019 Unopposed Motion (DE 70, 73, 78, & 91) to "Stay" the Proceedings of this Case In The District Court and grant plaintiff the opportunity to proceed with immediate appellate review of the court's denial of plaintiff's constitutional challenge of the 1990 revision of 28 USC § 1391. . .