No. 21-935

In the Supreme Court of the United States

MCILWAIN LLC AND TIMOTHY J. MCILWAIN,
Petitioners,

v.

HAGENS BERMAN SOBOL SHAPIRO, LLP,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in not considering the issue of whether the District Court had subject matter jurisdiction to consider the sole special defense upon which the court granted summary judgment?

2. Did the decision of the court below in affirming the decision of the District Court granting summary judgment conflict with this Court's decision in. *Transunion, LLC v. Ramirez*, ___ U.S. ___, 141 S.Ct. 2190, 210 L.Ed.2d 568, 2021 WL 2599472 (June 25, 2021)?

3. Did the court below commit reversible error in affirming the decision of the District Court to revoke Plaintiff's *pro hac vice* appearance?

4. Did the court below err by refusing to consider Plaintiff's argument that he should have been permitted to appear pro se on behalf of his limited liability company.

5. Should this court reconsider its holdings in *Osborn v. Bank of the United States*, 9 Wheat. 738, 22 U.S. 738, 6 L.Ed 204 (1824); *and Rowland v. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 113 S.Ct. 716, 121 L.Ed 2nd 756 (1993) to the extent the decisions' prohibition of single owner, single employee, limited liability corporations from appearing in federal courts except through licensed attorneys, violates the due process clause, and equal protection component of the Fifth Amendment to the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners

- McIlwain LLC
- Timothy J. McIlwain

Respondent

- Hagens Berman Sobol Shapiro, LLP

Parties Dismissed in District Court

The parties below were dismissed from the suit in the District Court on November 21, 2018. That order was not part of the appeal to the Ninth Circuit Court of Appeals. They are no longer parties in their individual capacities in this action.

- Steve Berman, Esq.
- Robert B. Carey, Esq.
- Leonard W. Aragorn, Esq.

CORPORATE DISCLOSURE STATEMENT

McIlwain LLC has no parent company and no public company owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-15445

McIlwain, LLC, aka Timothy J. McIlwain, Attorney at Law, *Plaintiff-Appellant,* v. Hagens Berman Sobol Shapiro LLP, *Defendant-Appellee.* and Steve Berman, Esquire; et al., *Defendants*

Date of Final Opinion: August 6, 2021

Date of Rehearing Denial: September 20, 2021

United States District Court for the Northern District of California

Case No. 18-cv-03127 CW

McIlwain, LLC, *Plaintiff,* v.
Steve W. Berman, et al., *Defendants*

Date of Final Order: February 10, 2020

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals dated August 6, 2021, affirming the trial court's decision granting Defendant/Appellee's Motion for Summary Judgment is set forth at App.1a. The Decision of the United States District Court (Wilkens, U.S.D.J) dated February 10, 2020, granting Defendant/Appellee's Motion for Summary Judgment is set forth at App.5a.

The Decision of the United States District Court (Wilkens, U.S.D.J) dated September 9, 2019 revoking Plaintiff's appearance *pro hac vice* is set forth at App.31a. These opinions have not been designated for publication.

JURISDICTION

The basis for this Court's jurisdiction is contained in Art. III. Sec. 2 of the United States Constitution. The initial court had jurisdiction pursuant to 28 U.S.C. § 1332, Diversity of Citizenship. On August 6, 2021, the Ninth Circuit Court of Appeals rendered a decision affirming the decision of the United States District Court for the Northern District of California (Wilkens, U.S.D.J) granting Respondent's Motion for Summary Judgment dated February 10, 2020. On September 20, 2021, the Ninth Circuit Court of Appeals rendered a decision denying Petitioner's Motion for Rehearing and Rehearing En Banc filed August 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, sec. 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more states; between a State and Citizens of another State; between Citizens of different States;-between Citizens of the Same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 1681e
Fair Credit Reporting Act ("FCRA")
Compliance Procedures

> Reproduced in the Appendix at App.45a.

28 U.S.C. § 1332(a)
Diversity of Citizenship;
Amount in Controversy; Costs

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— (1) citizens of different States.

F. R. Civ. P. 11(d)

> Inapplicability to Discovery
>
> This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

STATEMENT OF THE CASE

This lawsuit arises from Respondents unilaterally and arbitrarily abrogating a written agreement with the Petitioner to share legal fees in a class action after Petitioner joined the class of claimants, he was representing with those of the respondents.

The Petitioner filed the Complaint on February 17, 2017, in the U.S. District Court for the District of New Jersey. Over strenuous objection of the plaintiff/appellant, the case was transferred to the Northern District of California on May 24, 2018. The Respondent filed an answer on December 3, 2018. On May 2, 2019, Petitioner filed a partial motion for summary judgment. On July 30, 2019, Respondent filed a motion to revoke Petitioner's appearance *pro hac vice*. On August 25, 2019, Petitioner filed a motion for sanctions against the Respondent. On September 9, 2019, the court granted in part, and denied in part, Respondent's motion to revoke petitioner's appearance *pro hac vice*.

On September 25, 2019, the Court denied Petitioner's motion for sanctions. On October 22, 2019, the Court denied Petitioner's Motion for Partial Summary Judgment. On November 21, 2019, Respondent filed a motion for summary judgment that was granted by the court on February 10, 2020. A notice of appeal to the Ninth Circuit Court of Appeals was timely filed on March 11, 2020. The Ninth Circuit Court of Appeals affirmed the judgment of the trial court in a memorandum of decision on August 6, 2021. Petitioner timely filed a Petition for Rehearing and Rehearing En Banc

on August 20, 2021. Petitioner's Petition for Rehearing and Rehearing En Banc was denied by the Court on September 21, 2021.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW ERRED BY NOT ADDRESSING THE ISSUE OF SUBJECT MATTER JURISDICTION AS A THRESHOLD ISSUE.

Petitioner initially raised the issue of whether the trial court had subject matter jurisdiction to rule upon the Respondent's Special Defense upon which the trial court granted summary judgment, in petitioner's memorandum of law in support of petitioner's motion for partial summary judgment. (Trial DKT # 84), and again in his reply brief to the 9th Circuit Court of Appeals. (Appellate DKT # 34).

This Court has consistently held that prior to any other considerations, the issue of whether the Court has subject matter jurisdiction must be addressed as a threshold issue. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones, supra,* at 453, 20 S.Ct., at 691-692. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is 'inflexible and without exception.' *Mansfield, C. & L.M.R. Co. v.*

Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

"This Court's insistence that proper jurisdiction appear begins at least as early as 1804, when the court set aside a judgment for the defendant at the instance of the losing plaintiff who had himself failed to allege the basis for federal jurisdiction. *Capron v. Van Noorden*, 2 Cranch 126, 2 L.Ed. 229 (1804). Just last Term, the court restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy . . . " *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998).

The trial court's entire basis for granting summary judgment, that was raised *sua sponte*, was that plaintiff's misstep in not having a signature on one of the client's (class representative) contingency fee agreement, although the client had signed the duties of class representative that was attached to the agreement, was such an egregious violation of public policy to justify nullifying the contract between the parties. The lower court, however, never addressed the issue Plaintiff had raised pertaining to the issue of standing of the defendant to raise the issue, nor the subject matter jurisdiction of the court to hear it, in light of the fact, *inter alia*, that the client had never been a client of the defendant.

Respectfully, the decision of the Court below, affirming the decision of the trial court, without addressing the threshold issue of jurisdiction, conflicts with the long-established authority of this Court, that issues of subject matter jurisdiction should be resolved prior to other issues being considered.

II. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

The entire basis of the trial court and subsequent appellate court affirmation of the decision granting summary judgment was for Petitioner's alleged violation of the California or New Jersey Rules of Professional Conduct.

Plaintiff initially raised the issue of subject matter jurisdiction in his motion of for partial summary judgment. (Trial DKT # 84), and again in his reply brief to the 9th Circuit Court of Appeals. (Appellate DKT # 34). It is well established in the jurisprudence of this Court that the issue of subject matter jurisdiction may be raised at any time. "A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance. *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question *sua sponte*); *Capron v. Van Noorden*, 2 Cranch 126, 127, 2 L.Ed. 229 (1804)." *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.CT. 906, 915, 157 L.Ed. 2nd 867 (2004); *Henderson ex. rel Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S.Ct. 1197, 1202, 179 L.Ed. 2d 159 (2011).

The basis of the ruling of the courts below was that the Petitioner's inadvertent failure to obtain a signature on one the client's (class representative) contingency fee agreement, although the client had signed the duties of class representative that was attached to the agreement, was such an egregious violation of public policy to justify nullifying the contract

between the parties, although the Defendant did not represent the client, and had not represented the client in the litigation that was the subject of the current law suit.

This Court recently addressed a similar issue *in TransUnion LLC v. Ramirez*, ___ U.S.____, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). In *Ramirez*, this Court reversed the decision of the Ninth Circuit Court of Appeals that had affirmed the decision of the trial court denying the Appellant TransUnion, LLC, post judgment relief following a jury verdict for the class plaintiffs for violation of the Fair Credit Reporting Act-(FCRA-15 U.S.C. § 1681e).

Ramirez involved a case where the defendant credit reporting agency had flagged as potential matches names of individuals who were allegedly terrorists, drug traffickers, or people involved in other serious criminal activities. Approximately eight thousand people sought and obtained class action status due to being flagged by the defendant. Only 1800 of them, however, had that information published to third parties. This Court, (Kavanaugh, J) ruled that the remaining plaintiffs did not have standing to raise the issue. The mere inclusion of their name in the credit agency's database was insufficient to confer standing on those plaintiffs, despite the violation of the Fair Credit Reporting Act (FCRA-15 U.S.C. § 1681e). They could not demonstrate an injury that was concrete, particularized, and actual or imminent.

This Court held " . . . this Court has rejected the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. An injury in

law is not an injury in fact. Article III standing requires a concrete injury even in the context of a statutory violation" ___ U.S.at ___, 141 S.Ct at 2205. (Internal cites and quotation marks omitted).

In the case at bar, the Defendant proffered a special defense based upon the lack of a signature on a contingency fee between Plaintiff and his client (originally a named class plaintiff) although the client had signed the page immediately following it, pertaining to the rights and responsibilities of being a class representative, and further ratified his signature at a deposition that was conducted during the course of the proceedings in the trial court. The trial court decided that the lack of that signature warranted the nullification of the contract between the parties on the basis that the violation of the Rule of Professional Conduct was so egregious, it violated public policy.[1]

The case of *Ankerman v. Mancuso*, 79 Conn. App. 480, 830 A.2d 388 (2003), *aff'd on different grounds*, 271 Conn. 772 (2004) is instructive to the case at bar.

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[1] The defense had raised other grounds, but they were not ruled upon by the trial court. The Rules of Professional Conduct in both New Jersey and California, in conformity with many other states clearly states that the Rules cannot be used as a basis of civil liability. *Boccone v. Eichen Levinson, LLP.*, 301 Fed. Appx. 162, 164 (3rd Cir. 2008) ("Even assuming defendants did violate a Rule of Professional Conduct, that violation would "not give rise to a cause of action nor [would] it create any presumption that a legal duty has been breached.") (Internal cites and quotations omitted.); *See* Comment to Cal. Rule 1.0. ("Because the rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or *for* damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768].")

In *Ankerman*, defendant cited the violation of RPC 1.8 as a special defense to the plaintiff's enforcement of a promissory note to secure the payment of the plaintiff's legal fees. The Appellate Court, in reversing in part the trial court's judgment for the defendant stated "[plaintiff] asserts that a violation of an ethical rule does not, by itself, form the basis for any civil liability or augment any substantive legal duties of attorneys. Therefore, we address whether a violation of the Rules of Professional Conduct is legally sufficient to preclude the enforcement of the note and mortgage on the defendant's property. We conclude that it is not." 79 Conn. App. At 484, 830 A.2d at 391. (Emphasis added.).

The Court then went on to say "[i]n *Noble*, we stated: "[T]he Rules of Professional Conduct do not of themselves give rise to a cause of action, even to an attorney's client. In *Gagne v. Vaccaro*, 255 Conn. 390, 766 A.2d 416 (2001), our Supreme Court stated: They are not designed to be a basis for civil liability. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. (Internal quotation marks omitted.) *Id.*, at 403, 766 A.2d 416." 79 Conn. App. at 485, 830 A.2d at 392. (Internal quotation marks omitted). If a former client does not have the standing to raise the RPC as a special defense, then a non-client certainly doesn't, nor a litigant who never represented that former client.

Respectfully, the holding of this Court in *Ramirez*, should be controlling in the instant case. The lack of a signature did not affect the Defendant. Plaintiff's former client was not their client at the time of the proceedings below. He was not their client at the time of the underlying case, *Keller v. Electronic Arts, Inc.*, Case No. 09-cv-1967 (N.D. Cal. Feb. 8, 2010).[2] The client under the *Mancuso* decision would not have had the standing to raise this issue, and the Defendant, lacking concrete, particularized, and actual or imminent injury certainly does not. As this Court stated in *Ramirez*, "[a]n uninjured plaintiff who sues in those circumstances, is, by definition, not seeking to remedy any harm to herself, but instead is merely seeking to ensure a defendant's compliance with regulatory law . . . Those are not grounds for Art. III standing." ___ U.S. at ___, 141 S.Ct. at 2206.

III. THE COURT BELOW ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT REVOKING PLAINTIFF'S APPEARANCE *PRO HAC VICE*.

On July 30, 2019, Defendant filed a motion to revoke Plaintiff's *pro hac vice* appearance on the grounds that Plaintiff allegedly failed to adhere to the Local Rules of the Northern District of California and was deficient in his response(s) to Defendant's discovery requests. (Tr. Dkt. # 93). Defendant was well aware of the fact that Plaintiff did not have the financial means to engage counsel to actively participate in his stead if the motion was granted, just as they were aware of that fact when they misleadingly convinced

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[2] *Keller* was consolidated with other cases into *In Re NCAA-Student-Athlete Name & Likeness Licensing Litigation*, No. C-09–1967 CW.

the District Court judge to transfer the case from New Jersey to the Northern District of California. (Tr. Dkt. # 38).

On September 9, 2019, the Court (Wilken, U.S.D.J.) granted their motion in part revoking Plaintiff's *pro hac vice* appearance but denied Defendant's request for attorney's fees. (Tr. Dkt. # 23-1). The trial court predicated its decision in large part on the Defendant's alleged failures to respond appropriately to discovery.[3] Discovery violations, however, do not constitute cause to revoke a *pro hac vice* appearance. F. R. Civ. P. 11(d) specifically prohibits the imposition of Rule 11 sanctions for discovery violations. "Inapplicability to Discovery: This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26-37." Respectfully, this issue should be remanded back to the District Court to determine if without the reference to discovery violations, the revocation of Plaintiff's *pro hac vice* status was still justified.

Furthermore, respectfully, the Plaintiff's alleged misconduct did not rise to such an egregious level as to warrant the extreme sanction of revoking his *pro hac vice* status and effectively denying him representation in court.[4]

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[3] One of the other grounds was Plaintiff's alleged failure to participate in person in a futile mediation session. Plaintiff was unable to make a connecting flight and offered to participate by phone. Defendant during mediation, was offering a smaller amount to settle the case then the miniscule amount it had offered previously, thus guaranteeing that the mediation session would be an exercise in futility.

[4] The trial court, in its memorandum of decision (App (9) denied Defendant's request for monetary sanctions ruling in part that

Where an attorney committed the following acts, the Court of Appeals affirmed the decision of the trial court that revoke his *pro hac vice* appearance.

1. Manufactured evidence
2. Materially misled the court more than once
3. Amended the complaint in gross variance to the court's granting of the order to amend the complaint
4. Disobeyed a court order pertaining to discovery
5. Attached personal and irrelevant personal information as exhibits to a hearing request
6. Threatened to embarrass the defendant's wife.

Ryan v. Astra-Tech, Inc., 772 F.3d 50, 54-55 (1st Cir. 2012).

In contrast to *Ryan*, plaintiff's *pro hac vice* appearance in the instant case was revoked for not appearing in person at a mediation conference, nor arranging for local counsel to appear, in person in his stead, and alleged discovery violations.[5] In the trial court's opinion Judge Wilken specifically stated that "although some of McIlwain's problematic conduct as described in the motion involves repeated failures to

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Plaintiff's alleged misconduct was not done in bad faith warranting the imposition of monetary sanctions.

[5] By the time Plaintiff realized that he would be unable to make the connecting flight to arrive at the mediation conference in person, it was too late to arrange a substitution of local counsel. He was in the airport and offered to participate in the conference by phone. Furthermore, there was no guarantee that local counsel would agree to go absent payment in advance, and in any case Defendant had already made the mediation session an exercise in futility by reducing its prior unaccepted amount to settle.

comply with discovery obligations, Hagens Berman has not filed a discovery letter brief or taken any other action to seek Court intervention in connection with such conduct." (Tr. Dkt. # 23-1 *32).[6]

In *Young v. City of Providence, ex. rel Napolitano*, 404 F.3d 33 (1st Cir. 2005), the Court reversed the decision of the court below censuring plaintiff's attorneys and revoking their *pro hac vice* status. In *Young*, the trial court took that action *sua sponte*, on the grounds that the plaintiff's counsel in a memorandum to the Court, had misrepresented the actions of the court regarding a stipulation pertaining to an exhibit.

The Court of Appeals held that under the circumstances of the case, the trial court had abused its discretion in sanctioning plaintiff's counsel and revoking their *pro hac vice* appearances. The Court found that while there were problems in negligently drafting the document in issue, that had offended the court, there was no intent to deceive the court, nor were there knowingly false statements contained therein. Similarly, Judge Wilken declined Defendant's request to impose monetary sanctions finding *inter alia*, "Hagens Berman has not shown that McIlwain's conduct was in bad faith or tantamount to bad faith. To warrant the imposition of sanctions under either 28 U.S.C. § 1927

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6 Plaintiff respectfully suggests that without the Defendant seeking that court intervention, the Court acted solely on the Defendant's allegations, without a factual record upon which to base that finding. Plaintiff, in fact, controverted Defendants' allegations of discovery violations, and stated that he had turned over large amounts of documents to Defendant. In any event, discovery violations, of the kind alleged by the defendant, cannot be used as a basis to revoke Plaintiff's *Pro Hac Vice* appearance. F. R. Civ. P. 11(d). *Supra.*

or the Court's inherent authority, the conduct at issue must rise to the level of bad faith or its equivalent." (App. Dkt. # 23-1; 39-40). (Internal cites omitted).

In imposing the sanctions upon Plaintiff, the trial court relied in part on *In Re Bundy*, 840 F.3d 1034 (9th Cir. 2016); subsequent mandamus proceeding, 852 F.3d 945 (9th Cir. 2017).

Bundy, however, is inapposite to the case at bar. *Bundy* involved a criminal case where the defendant (Bundy) was charged, with others, on a 16-count criminal indictment following an armed stand-off with federal officials. Bundy requested that an out-of-state attorney, Larry Klayman, be permitted to represent him *pro hac vice*. The court refused. "Under our decisions, the district court had more than ample cause to turn down Klayman's application: he is involved in an ethics proceeding before the District of Columbia Bar, and he was not candid with the court about the status of those proceedings; he disclosed that he was twice barred in perpetuity from appearing *pro hac vice* before judges in the Central District of California and the Southern District of New York, but he failed to list numerous cases—all available on Westlaw or LEXIS —in which he has been reprimanded, denied *pro hac vice* status, or otherwise sanctioned for violating various local rules; and he has a record of going after judges personally, and shortly after Chief Judge Gloria Navarro denied his application, Bundy filed a frivolous *Bivens* action against her in her own court. This litany of reasons for denying Klayman *pro hac vice* status demonstrates that the district court did not abuse its discretion, much less commit clear error." *In Re Bundy*, 840 F.3d at 1036.

In contrast to *Bundy*, however, Plaintiff had no similar history at all at the time of these events. *In Re Davis*, ___ B.R. ___, No. CA 11-07525-DD 2012 WL 3782548 * 1(U.S.B.R. D. S.C. Aug. 30, 2012), is instructive here. The Court recognized "Revocation of an attorney's *pro hac vice* admission is a harsh sanction. As a result, it should be exercised sparingly and only in particularly egregious cases. *See Mruz v. Caring, Inc.*, 166 F.Supp.2d 61, 70 (D.N.J. 2001) ("While it is indeed true that admission *pro hac vice* is a privilege, not a right, . . . revocation of that privilege, once bestowed, sends a strong message which works a lasting hardship on an attorney's reputation.").[7] "Once admitted, *pro hac vice* counsel cannot be disqualified under standards and procedures any different or more stringent than those imposed upon regular members of the district court bar." *Martens, [v. Thomann*, 273 F.3d [159] at 175-76 [2nd Cir. 2001]. Cole *v. U.S. Dist. Ct. For the District of Idaho*, 366 F.3d 813, 821 (9th Cir. 2004). Petitioner respectfully submits that a regular member of the District Court bar would not have been disqualified for the alleged conduct for which Petitioner's appearance was revoked, especially as it deprived him of the effective assistance of counsel to represent him.

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[7] This is amply illustrated as Petitioner's admission to the United States District Court for the Southern District of New York appears to be delayed as a result of Judge Wilken's decision revoking Petitioner's Pro Hac Vice appearance in the instant case.

IV. THE COURT BELOW ERRED BY NOT CONSIDERING PLAINTIFF'S ARGUMENT THAT FOLLOWING THE REVOCATION OF PLAINTIFF'S APPEARANCE *PRO HAC VICE*, HE SHOULD HAVE BEEN PERMITTED TO APPEAR PRO SE.

The trial court, throughout its memorandum of decision granting defendant's motion for summary judgment, recognized the inter-relationship with Attorney McIlwain and McIlwain Law, LLC. "Timothy McIlwain is a 'solo practitioner operating as McIlwain LLC a/k/a Timothy J. McIlwain, Attorney at Law . . . .Timothy McIlwain is the principal of McIlwain . . . " Court Memorandum of Decision, Feb. 10, 2010 p. 2 n.2. (Hereafter "Mem. Of Dec.") "Timothy McIlwain of 'Timothy McIlwain, Attorney at Law, LLC' became counsel for Ryan Hart in HartC on July 10, 2013 . . . Timothy McIlwain is the principal of McIlwain, LLC." Mem. of Decision p. 4.

"Timothy McIlwain signed this term sheet as 'Plaintiff's Counsel in Hart; this document does not mention McIlwain, LLC." Mem. Of Decision p. 8.30 This document was signed by Timothy McIlwain but contains references to McIlwain 'law firm.'" The trial court basically acknowledged the realities of sole proprietorships and solo practices of law.

Petitioner refers to its motion for sanctions where there were among other things, overwhelming evidence that Defendant deliberately misled a federal court judge in New Jersey in connection with this case, affecting the appropriate venue. This had the effect of forcing Plaintiff to litigate in a jurisdiction where he was not admitted, and as a limited liability company, seemingly, could not appear pro se. Consequently, in addition to the expense of being required to appear in California

to prosecute his case, he was also forced to retain local counsel.

The fact that Attorney McIlwain executed this preliminary document in this manner was, of course, not intended to imply that he represented Mr. Hart individually. Obviously, it was shorthand for the Hart class of ROP plaintiffs.

The court permitted a principal (non-attorney) to appear and represent himself in *Curtis v. Illumination Arts, Inc.*, 2014 WL 556010, (W.D. Wash. Feb. 12, 2014). The court, in ruling on defense counsel's 2nd motion to withdraw his appearance granted in part and denied in part the motion. "The court has already granted Mr. Thompson and Ms. Thompson leave to appear pro se. Order (ECF # 65) at 3." Curtis * 1. (Emphasis added and original.). The court permitted the attorney to withdraw from representing the principals individually but ordered him to continue to represent the companies as otherwise it would leave them unrepresented. "A business entity except a sole proprietorship must be represented by counsel." W.D. Wash. Local Rule GR 2(g)(4)(B). *3 "While individuals and sole proprietorships may appear in court pro se, 'a business entity . . . must be represented counsel.' Local Rules W.D. Wash. LCR 83.2(b)(3). * 4 n.2 How the defendants' representation of their individual interests, differed as opposed to the interests of their business entity was not addressed by the court.

The same issue arose, however, in *Serna v. Webster*, 2017 WL 3149339 (D. New Mexico June 2, 2017). In *Serna*, the court expressed its displeasure at the local rule requiring an appearance by counsel representing a corporation or a partnership.

Given the arguable tension between the plain language of the statutes and the case law, the court would be inclined on a clean slate, not to extend the prohibition against unrepresented corporations further than that entity, and to limit the rule to what the case law requires. On a clean slate, the Court might be inclined to distinguish limited liability companies from corporations. Federal courts do not, for example, find limited liability companies to be comparable to corporations for the purposes of establishing diversity under 28 U.S.C. § 1332.

In *Wise v. Wachovia Securities, LLC*, 450 F.3d 265 (7th Cir. 2006) (Posner, J.) the Seventh Circuit stated: "Because the overriding goal in crafting a jurisdictional rule is simplicity, the courts have held that all corporations are to be treated alike for diversity purposes: all are citizens both of the state of incorporation and the state in which the corporation has its principal place of business. The citizenship for diversity purposes of a limited liability company, however, despite the resemblance of such a company to a corporation (the hallmark of both being limited liability), is the citizenship of each of its members." *Serna* at *5-6 (Cites omitted.)

"On a clean slate, if Serna is the only principal of the LLC, it would be practical to allow her to proceed pro se and represent the LLC, too. It is hard to see how Serna d/b/a/ as a sole principal LLC is meaningfully different than as a sole proprietorship, which does not similarly implicate local rule 83.8(c). The Court is not, however, writing on a clean slate. The Tenth Circuit has said all 'business entities' require an attorney. *See Roscoe v. United States*, 134 Fed. Appx. at 228. The

Court and Serna are bound by that legal rule." *Serna* at 6.

V. THE PRIOR DECISIONS OF THIS COURT PROHIBITING REPRESENTATION OF A LIMITED LIABILITY CORPORATION, EXCEPT BY A LICENSED ATTORNEY DEPRIVES THE PLAINTIFF OF DUE PROCESS OF LAW BASED UPON THE SPECIFIC FACTS OF THE CASE AT BAR.

Petitioner respectfully submits that under these limited circumstances, where a limited liability company has a sole organizer, and one employee (the aforementioned sole organizer), the requirements of justice should allow him to appear pro se on behalf of his one-person limited liability company, with the result being, that denial of that ability would ultimately foreclose meaningful access to the courts to either redress his grievances or defend himself.[8]

The Plaintiff is a sole proprietorship, with one employee, himself, who, at the time of this litigation was registered in New Jersey as a Limited Liability Corporation. The Defendant successfully had the case transferred to the Northern District of California, where Plaintiff is not licensed as an attorney. Petitioner respectfully submits that under these limited circumstances, where a limited liability company as a sole organizer, and one employee (the aforementioned sole

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[8] Theoretically, a plaintiff could file suit against a limited liability company on a claim that the company was not insured for. If the limited liability company could not afford counsel to represent it, the Plaintiff could obtain a default judgment based solely on the defendant's limited means. The defendant's sole remedy in that situation would be to dissolve the LLC thereby making his personal assets vulnerable to seizure by the court.

organizer), the requirements of justice should allow him to appear pro se on behalf of his one-person limited liability company, with the result being, that denial of that ability would ultimately foreclose meaningful access to the courts to either redress his grievances or defend himself.

The Fifth Amendment to the Constitution is clear.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

This decision by the District Court in New Jersey forced the Plaintiff to retain local counsel at great expense, and when the District Court in California revoked Plaintiff's *pro hac vice* appearance, he was obligated to come up with more money to have local counsel actively represent him. When his local counsel declined to represent Plaintiff further, due to Plaintiff's lack of funds, Plaintiff effectively was left without counsel.

The Court below ruled that because Plaintiff had failed to raise with the District Court the issue of appearing pro se on behalf of his LLC, the issue was

waived for appellate review. Respectfully, that would have been a futile gesture since undoubtedly the District Court would have felt itself bound by this Court's decisions in *Osborn v. Bank of the United States*, 9 Wheat 738, 22 U.S. 738, 6 L.Ed. 204 (1824) and *Rowland v. Men's Colony Advisory Council*, 506 U.S. 194, 113 S.Ct. 716, 121 L.Ed. 2d 756 (1993). "The law does not require the doing of a futile act."[9]

In *Osborn, Supra*, this Court first announced the rule that a corporation could only appear in a court through legal counsel. "This principle is peculiarly applicable to suits brought in the name of corporations; because, such a body must always appear by attorney, either to institute or defend a legal proceeding. It cannot appear in person, and it can only constitute an attorney by written power, under its common seal." *Osborn*, 22 U.S. at 745, 6 L.Ed. 204.[10]

In *Rowland v. Men's Colony Advisory Council*, 506 U.S. 194, 113 S.Ct. 716, 121 L.Ed. 2d 756 (1993), this Court reversed the decision. of the 9th Circuit Court of Appeals that had reversed the decision of the District Court who had denied the petitioner's motion based upon an inadequate showing of indigency. This Court ruled that the 9th Circuit was incorrect in deciding that an association could apply for in forma pauperis status. This court examined the statute in question

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[9] Given that same logic it was likely an error for Petitioner to raise the issue before the Court of Appeals as that Court would have been similarly bound.

[10] While New York had recognized the existence of a limited liability company in 1811. There's no indication that this Court had recognized the existence of one until 1824 in deciding a case from New York.

and held the statute could only apply to "natural persons."

"Underlying this congressional assumption are probably two others: that the 'person' in question enjoys the legal capacity to appear before a court for the purpose of seeking such benefits as appointment of counsel without being represented by professional counsel beforehand, and likewise enjoys the capacity to litigate without counsel if the court chooses to provide none, in the exercise of the discretion apparently conferred by the permissive language. The state of the law, however, leaves it highly unlikely that Congress would have made either assumption about an artificial entity like an association, and thus just as unlikely that "person" in § 1915 was meant to cover more than individuals. It has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel" 506 U.S. at 201-02, 113 S.Ct. at 721.

The Court then went on to say "Whatever the state of its treasury, an association or corporation cannot be said to 'lac[k] the comforts of life,' any more than one can sensibly ask whether it can provide itself, let alone its dependents, with life's 'necessities.' Artificial entities may be insolvent, but they are not well spoken of as 'poor.' So eccentric a description is not lightly to be imputed to Congress. 506 U.S. at 203, 113 S.Ct at 722. While this Court in *Rowland* was addressing the issue in the context of whether a prisoner's rights organization could apply to proceed *In Forma Pauperis* to bring suit against employees of the prison, it decided in the alternative that the individuals affected could apply for *In Forma Pauperis* status. No decision, however, addresses the dilemma of a limited liability

company with a sole organizer, who is also the sole employee, needing access to the courts to either defend against a legal action, or to bring one to redress a legal wrong, but is denied such access because it lacks the means to afford legal counsel. This dichotomy invokes the essence of the protection of the Fifth Amendment's prohibition against depriving persons of property without due process of law.[11]

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[11] Unlike the statute being considered in *Rowland, Supra*, the term "persons" in the Fifth Amendment also includes corporations. *Perkins v. Benguet Consolidated Mining, Co.*, 342 U.S. 43772 S.Ct. 41396 L.Ed. 485 (1952); *International Shoe Co. v. State of Washington, Office of Unemployment Compensation*, 326 U.S. 310, 66 S.Ct. 154,90 L.Ed. 95 (1945).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to grant Certiorari in the above captioned case.

Respectfully submitted,

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