No. _____

In The
Supreme Court of the United States

DIANA BERBER,

Petitioner,

V.

WELLS FARGO BANK, N.A.,
AND
MARSHA PAINTER,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals, despite the presence of the requisite "extraordinary circumstances", by affirming the District Court's denial of Petitioner Diana Berber's Rule 60, Federal Rules of Civil Procedure, motion to set aside the final judgment, stray from the trail which had been blazed by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238 (1944), *Klapprott v. United States,* 335 U.S. 601 (1949), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and thereby inflict on Ms. Berber a manifest injustice?

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PETITION FOR WRIT OF CERTIORARI

Ms. Berber prays that a Writ of Certiorari issue to review the decision of the Eleventh Circuit in Case No. 20-13222.

CITATIONS TO OPINIONS BELOW

The August 18, 2021, unpublished opinion of the Eleventh Circuit in Case No. 20-13222, electronically reported as *Berber v. Wells Fargo Bank, N.A.,* ___ Fed. Appx. ___, 2021 WL 3661204, 2021 U.S. App. LEXIS 24612, is attached to this Petition at Appendix page A1.

The August 10, 2020, opinion of the U.S. District Court for the Southern District of Florida in Case No. 16-24918, electronically reported as *Berber v. Wells Fargo Bank, N.A.,* 2020 WL 5166528, 2020 U.S. Dist. LEXIS 161466, is attached to this Petition at Appendix A10.

STATEMENT OF JURISDICTION

Ms. Berber invokes this Court's jurisdiction to grant this petition for a Writ of Certiorari to the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on August 18, 2021.

STATUTORY PROVISIONS

Rule 60. Relief from a Judgment or Order:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a

clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
>
> (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
>
> (2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or
>
> (3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

THE FACTS

From July, 2013, to March 18, 2014, Ms. Berber was employed as a personal banker in the Wells Fargo Bank, N.A. ("Wells Fargo"), branch

located at 3600 North Ocean Boulevard, Fort Lauderdale, Florida 33308. On March 18, 2014, her employment was involuntarily terminated by means of a letter signed by Ms. Painter which in pertinent part stated:

> We have reviewed your overall performance as a Personal Banker. We have determined that you have not met the performance expectations regarding daily activities to attain sales goals required in this position.
>
> Based on the reason listed above we will terminate your employment with Wells Fargo effective March 18, 2014.

From October, 2016, until February, 2020, Petitioner Diana Berber ("Ms. Berber") unsuccessfully contended that, in violation of Florida's (a) Private Whistleblower Act, §§ 448.101-105, Florida Statutes ("the FWA"), and (b) Civil Remedies For Criminal Practices Act, §§ 772.101-18, Florida Statutes ("Florida RICO"), she had been fired from her job in retaliation for her failure to meet unlawfully excessive retail sales quotas due to her refusal fraudulently to open unauthorized customer checking, savings and credit card accounts. Wells Fargo successfully claimed that Ms. Berber's dismissal had been the consequence of her shortcomings as an employee. *See, Berber v. Wells Fargo Bank, N.A.,* 2019 WL 7944421, 2019 U.S. Dist. LEXIS 227497 (Case No. 16-CIV-24918-Martinez, S.D. Fla., January 2, 2019), ("Case No. 16-24918")(order granting summary judgment),

affirmed, 798 Fed. Appx. 476, 2020 WL 91065, 2020 U.S. App. LEXIS 410 (11th Cir., January 8, 2020, Case No. 19-10661)(unpublished), *cert. denied,* ___ U.S. ___, 141 S. Ct. 365, 208 L. Ed. 2d 91 (October 5, 2020, Case No. 20-81).

On February 21, 2020, Wells Fargo and its publicly-traded parent, Wells Fargo & Co., announced that the previous day they had entered into deferred prosecution and settlement agreements with the United States Department of Justice ("the DOJ") and the United States Securities and Exchange Commission ("the SEC") whereby Wells Fargo and its publicly-traded parent: (1) stipulated that Wells Fargo's retail sales practices had violated 18 U.S.C. §§ 1005 (false bank entries, reports and transactions) and 1028A (identity theft); (2) agreed to pay $2,500,000,000.00 in fines and penalties to the DOJ; and (3) undertook to pay $500,000,000.00 in restitution to the SEC.

Each of the foregoing agreements was supported by a single "Statement Of Facts." Pertinent excerpts from that statement follow:

> 13. In contrast to the Company's public statements and disclosures about needs-based selling, Executive A implemented a volume-based sales model in which employees were directed, pressured, and/or caused to sell large volumes of products to existing customers, often with little regard to actual customer need or expected use. From at least as early as 2002 to approximately 2013, Community Bank leadership, including

Executive A, directly and/or indirectly encouraged, caused, and approved sales plans that called for aggressive annual growth in a number of basic banking products, such as checking and savings accounts, debit cards, credit cards and bill pay accounts.

14. By approximately 2010, in light of existing product penetration, shifting demand, macroeconomic conditions, and regulatory developments that made certain products, such as checking accounts- less profitable, the sales plans were regarded in various parts of the Community Bank as far too high to be met by selling products that customers actually wanted, need, or would use. Nevertheless, the number of products sold continued to be a significant criterion by which the performance of employees, ranging from tellers and bankers to [Regional Bank Executive]s, was evaluated. Throughout the Community Bank, managers responded to the increasing difficulty of growing sales by exerting extreme pressure on subordinates to achieve sales goals, including explicitly directing and/or implicitly encouraging employees to engage in various forms of unlawful and unethical conduct to meet increasing sales goals. Many employees believed that a failure to meet their sales goals would result in poor job evaluations,

> disciplinary action, and/or termination. Though there had been evidence of employees struggling to ethically meet sales goals as early as 2002, the problem became significantly more acute beginning in 2010 as the sales plans diverged further from market opportunity and managers responded by increasing pressure on employees to sell products that customers did not want or need and would not use.
>
> 15. The Community Bank's onerous sales goals and accompanying management pressure led thousands of its employees to engage in (1) unlawful conduct to attain sales though fraud, identity theft, and the falsification of bank records, and (2) unethical practices to sell products of no or low value to the customer, while believing that the customer did not actually need the account and was not going to use the account.

The Deferred Prosecution Agreement between Wells Fargo and the DOJ, in the section entitled *Wells Fargo's Acceptance of Responsibility,* provided:

> 4. Wells Fargo admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents set forth in the Statement of Facts. Wells Fargo agrees that the

factual statements contained within the Statement of Facts are true and accurate. Wells Fargo agrees that the acts and omissions described in the Statement of Facts are sufficient to establish violations by Wells Fargo of Title 18, United States Code, Sections 1005 and 1028A.

5. Wells Fargo shall not, through any of its officers, employees, attorneys, consultants, or agents, or any other person authorized to make statements on behalf of Wells Fargo, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by Wells Fargo set forth above or of the facts contained in the Statement of Facts. Any such contradictory statement shall, subject to the cure rights of Wells Fargo described below in this Paragraph, constitute a breach of this Agreement, and Wells Fargo thereafter shall be subject to prosecution as set forth in Paragraphs 17 through 21 of this Agreement. If the [United States Attorneys Offices] determine that Wells Fargo has made a public statement contradicting its acceptance of responsibility or any fact contained in the Statement of Facts, the [United States Attorneys Offices] shall so notify Wells Fargo. Thereafter, Wells Fargo may avoid a breach of this Agreement

> by publicly repudiating the statement within five days after such notification. Wells Fargo shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, any statement contained in the attached Statement of Facts. This Paragraph does not apply to any statement made by any present or former officer, director, employee, or agent of Wells Fargo in the course of any criminal, regulatory, or civil case initiated against such individual unless such individual is speaking on behalf of Wells Fargo.

The Wells Fargo news release quoted its recently installed Chief Executive Officer, Mr. Charles Scharf, as stating:

> The conduct at the core of today's settlements- and the past culture that gave rise to it- are reprehensible and wholly inconsistent with the values on which Wells Fargo was built. Our customers, shareholders and employees deserved more from the leadership of this Company. Over the past three years, we've made fundamental changes to our business model, compensation programs, leadership and governance. While's today's announcement is a

> significant step in bringing this chapter to a close, there's still more work we must do to rebuild the trust we lost. We are committing all necessary resources to ensure that nothing like this happens again, while also driving Wells Fargo forward.

Mr. Scharf's observation that "there's still more work we must do to rebuild the trust we lost" is accurate in at least one aspect. To date, Wells Fargo has not paid a penny in compensation to employees, including Ms. Berber, who were fired between 2002 and 2016 for refusing to engage in the fraudulent retail sales practices necessitated by Wells Fargo's unlawfully excessive retail sales quotas and whose personal and occupational lives were thereby damaged or ruined.

PROCEDURAL HISTORY

Ms. Berber, on March 3, 2018, in Case No. 16-24918 filed her Fourth Amended Complaint against Wells Fargo and Ms. Painter. In Count I of her Fourth Amended Complaint, Ms. Berber sought compensatory damages, punitive damages and injunctive relief against Wells Fargo and Ms. Painter under the FWA. Ms. Berber, in Count II of her Fourth Amended Complaint, prayed for treble damages against Wells Fargo and Ms. Painter under Florida RICO.

Wells Fargo, on March 20, 2018, partially answered Ms. Berber's Fourth Amended Complaint by denying liability under the FWA. Further, on March 20, 2018, Wells Fargo and Ms. Painter moved

to dismiss Count II of Ms. Berber's Fourth Amended Complaint for failure to state a claim for relief under Florida RICO. In that submission, Wells Fargo also moved to strike Ms. Berber's claim for punitive damages relating to Count I of the Fourth Amended Complaint.

Ms. Berber, on May 1, 2018, responded in opposition to Wells Fargo's motion to strike Ms. Berber's claim for punitive damages under the FWA. Also on May 1, 2018, Ms. Berber opposed the motion of Wells Fargo and Ms. Painter to dismiss Count II of the Fourth Amended Complaint.

Wells Fargo and Ms. Painter, in support of their March 20, 2018, motions to dismiss and strike, filed a reply memorandum of law on May 8, 2018.

The District Court, on May 9, 2018, dismissed Ms. Painter from the civil action, without prejudice.

On May 24, 2018, the District Court issued an order dismissing Count II of Ms. Berber's Fourth Amended Complaint for failure to state a claim upon which relief could be granted and striking Ms. Berber's claim for punitive damages under Count I of her Fourth Amended Complaint.

On August 27, 2018, Wells Fargo moved for a summary judgment dismissing Count I of Ms. Berber's Fourth Amended Complaint. In support of that motion, Wells Fargo filed Ms. Painter's affidavit, which depicted Ms. Berber as an incompetent retail sales representative of Wells Fargo. Ms. Berber opposed that motion on September 3, 2018, which opposition was supported by an affidavit in which Ms. Berber described the retail sales quotas-based pressures to engage in fraudulent and unethical retail sales practices to which she had been subjected as a Wells Fargo

personal banker. Wells Fargo filed a reply in support of its summary judgment motion on September 3, 2018.

The District Court, on January 2, 2019, issued an order granting Wells Fargo's motion for summary judgment dismissing Count I of Ms. Berber's Fourth Amended Complaint.

On February 7, 2019, the District Court entered a final judgment in favor of Wells Fargo and Ms. Painter and against Ms. Berber on all claims. Ms. Berber's notice of appeal to the Eleventh Circuit was filed on February 19, 2019. The Eleventh Circuit assigned Case No. 19-10661 to Ms. Berber's appeal.

The Eleventh Circuit, on January 8, 2020, in Case No. 19-10661, in an unpublished opinion, affirmed the District Court's judgment in favor of Wells Fargo. On February 21, 2020, Wells Fargo and its publicly-traded parent, Wells Fargo & Co., announced that the previous day they had entered into three settlement agreements with the DOJ and the SEC and agreed to pay $3,000,000,000.00 in fines, penalties and restitution.

Ms. Berber, on July 20, 2020, invoking Rule 60 and citing this Court's decision in *Hazel-Atlas Co. v. Hartford-Empire Co., supra,* and the February 20, 2020, settlement agreements, moved in the District Court to set aside the final judgment in Case No. 16-CIV-24918-Martinez. Wells Fargo responded in opposition on July 31, 2020. The District Court, on August 10, 2020, denied Ms. Berber's motion.

Ms. Berber appealed to the Eleventh Circuit, which designated it as Case No. 20-13222. On August 18, 2021, the Court of Appeals affirmed.

REASON FOR GRANTING THE PETITION

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra (*which was decided before the promulgation of Rule 60(b), Federal Rules of Civil Procedure), a patent for a "gob feeding" device had been obtained and judicially validated by the publication of an article written by a lawyer for the patent's proponent and fraudulently attributed to a purported impartial expert in the manufacture of glass. The Court reversed the Court of Appeals' denial of relief to the innocent litigant. Justice Black's opinion for the Court declared:

> Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered... This salutary rule springs from the relief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed alongside the term rule a rule in equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgment regardless of the term of their entry... This equity rule, which was firmly

> established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments... But where the occasion has demanded, where enforcement of the judgment is "manifestly unconscionable"..., they have wielded the power without hesitation... (Citations and footnotes omitted)

322 U.S. at 244-245.

The Court, in *Klapprott v. United States, supra* (which was decided after the promulgation of Rule 60(b), Federal Rules of Civil Procedure), reversed the Court of Appeals' affirmance of the District Court's denial of a Rule 60 motion to set aside a default judgment of denaturalization. Justice Black's opinion announcing the judgment of the Court observed:

> Fourth. Thus we come to the question whether petitioner's undenied allegations show facts "justifying relief from the operation of the judgment." It

is contended that the "other reason" clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under the common law writs of *coram nobis* and *audita querela*, and that the facts shown here would not have justified relief under those common law proceedings. One thing wrong with this contention is that few courts have ever agreed as to what circumstances would justify relief under these old remedies. To accept this contention would therefore introduce needless confusion in the administration of 60(b) and would also circumscribe it within needless and uncertain boundaries. Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

Fifth. The undenied allegations already set out show that a citizen was stripped of his citizenship by his Government, without evidence, a hearing, or the benefit of counsel, at a time when his Government was holding the citizen in jail with no reasonable opportunity to

> defend his right to citizenship. Furthermore, the complaint in the denaturalization proceeding strongly indicates that the Government here is proceeding on inadequate facts, just as it did in the criminal cases it brought against petitioner. For if the Government had been able on a trial to prove no more than the particular facts it alleged in the denaturalization complaint, it is doubtful if its proof could have been held sufficient to revoke petitioner's citizenship under our holdings in *Baumgartner v. United States,* 322 U.S. 665, *Schneiderman v. United States,* 320 U.S. 118, *Knauer v. United States,* 328 U.S. 654, 659, and see Rule 9(b) of the Rules of Civil Procedure. And all petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. Petitioner is entitled to a fair trial. He had not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the Court to set aside the default judgment and granting petitioner a fair hearing.

335 U.S. at 614-615.

In *Liljberg v. Health Services Acquisition Corp., supra*, the Court affirmed the Court of Appeals' reversal of the District Court's denial of a Rule 60(b) motion which had been premised upon the disqualifying conflict of interest of the predecessor presiding U.S. District Judge. Justice Stevens' opinion for the Court noted:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

486 U.S. at 864.

From July, 2013, to March, 2014, Ms. Berber served as cannon fodder for Wells Fargo's efforts to support its parent company's stock price through the fraudulent boast that it provided each of its customers with more banking services than any of its competitors. When she refused to fabricate consumer accounts in order to satisfy her excessive retail sales quotas, Ms. Berber was fired and thereby rendered a pariah in the banking industry. From October, 2016 to February, 2020, Wells Fargo successfully contended that it had fired Ms. Berber for substandard work performance. It was not until February 20, 2020, after the District Court's

judgment had been affirmed by the Eleventh Circuit, that Wells Fargo "fessed up" to its violations of federal banking laws.

Wells Fargo, as belated penance for the sinfulness of its retail sales practices, has paid $2,500,000,000.00 to the DOJ and $500,000,000.00 to the SEC. By so doing, Wells Fargo has avoided prosecution for its violations of two federal criminal statutes. However, Wells Fargo has not paid a penny to Ms. Berber.

This petition constitutes Ms. Berber's last chance to prosecute her claims against Wells Fargo the old-fashioned American way- before a jury of her peers. If ever a "manifest injustice" case has been presented to the Court for consideration in the light of its decisions in *Hazel-Atlas Glass Co. v. Hartford-Empire Co., Klapprott v. United States,* and *Liljeberg v. Health Services Acquisition Corp., supra,* Ms. Berber's is the one.

CONCLUSION

Ms. Berber's foregoing petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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