22-5322

No. _____

ORIGINAL

IN THE
Supreme Court of the United States

Pernell Swahili El
Petitioner

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal
For the Ninth Circuit
Ninth Circuit Case Number: 21-55805

PETITION FOR WRIT OF CERTIORARI

Pernell Swahili El
Pro Per
c/o P.O. Box 151162
San Diego, California 92175

QUESTION (S) PRESENTED

1. Whether the district court was required, under Fed R. Civ. P. 12(b)(6) to "....construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.'" Amadasu v. The Christ Hosp., 514 F.3d 504, 506 (6th Cir. 2008),quoting Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995).

2. Whether the district court was required under Fed R. Civ. P. 12(F) to convert the Respondent's motion into a summary judgment, under Rule 56, for not excluding matters outside of the pleadings that were accepted as true, by the district court?

3. Whether the district court, under their abandonment argument, was required to meet the involuntary dismissal standard, under 41(b); and construed thorugh, *Omstead v. Dell*, minimal of four elements were to be satisfied; and whether the Petitioner's initial responsive pleading was sufficient in addressing the Respondent's assertions in their 12(b)(6) motion.

4. Whether the Petitioner under applicable treaty protection, can exercise his private right.

PARTIES AND RULE 29.6 STATEMENT

The caption of this case contains the names of the parties who participated in the proceedings herein. The Petitioner, Pernell Swahili El is herein referenced as Mr. El. The Respondent SAN DIEGO UNIFIED SCHOOL DISTRICT will here in be referenced as "SDUSD". No corporate disclosure statement is necessary on the Petitioner's behalf.

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OPINIONS AND ORDERS BELOW

The district court issued an unpublished opinion on June 29th 2021, dismissing the Appellant's claim under Fed. R. Civ. P. 12(B)(6), without a hearing (App. 3-7).[1] The Petitioner Motion for relief from a judgment or order was denied, by the district court on the date of April 27th 2021. (App. 8) The Ninth Circuit Court of Appeals issued an unpublished opinion on May 27th 2022. (App. 1-2).[2] The Ninth Circuit Court of Appeals, in its order, dated May 27th 2022, denied the Petitioner's right to be heard, concluding the case was suitable without a hearing, citing Fed. R. App. P. 34(a)(2). (App.1-2) The Petitioner was denied the opportunity for a hearing, therewith the Petitioner timely filed, a motion for reconsideration, entered into the record on June 8, 2022. [3]

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[1] . Pernell Swahili El v. SAN DIEGO UNIFIED SCHOOL DISTRICT, No. 3:20-cv-00257-AJB-AGS (2021) U.S.

[2] Pernell Swahili El v. SAN DIEGO UNIFIED SCHOOL DISTRICT, No. 21: 55805 United States Courts of Appeals for the Ninth Circuit

[3] The motion has not been decided.

JURISDICTION

The Supreme Court of the United States has original jurisdiction under Article III Section II, wherein issues of diversity, federal question(s), constitutional and treaty provisions must be decided; and under V1 of the Supremacy Clause, wherein all debts and engagements entered in before the Constitution are binding against the United States.... All treaties made under the authority of the United States Shall be the Supreme law of the land. This Court has appellate jurisdiction, both as to law, and fact. This Court further has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on Writ of Certiorari.

STATEMENT OF THE CASE

This case presented a recurring question in evaluating the legal standard of the pretrial 12(b)(6) motion to dismiss for failure to state a claim, upon which relief can be granted. The Petitioner, Pernell Swahili El (herein Mr. El), currently works for SAN DIEGO UNIFIED SCHOOL DISTRICT, (herein SDUSD). Mr. El filed a claim of discrimination with Equal Employment Opportunity Commission "EEOC" against the employees of SDUSD, for discrimination on the date of December 25th 2019. SDUSD human resource agent, Rebecca Lee, responded to Mr. El's EEOC claim, in a Position Statement, which represented the opinion of SDUSD. SDUSD response to Mr. El's claim is as follows: Mr. El and others like him are "sovereign citizen". "Mr. El is a Sovereign Citizen who was attempting to evade taxes."[4]

The Petitioner filed a claim against SDUSD on the date of January 11th 2022, at the United States District Court, Southern District. The Petitioner motioned the district court to leave to Proceed in forma pauperis. The district court denied Petitioner motion to proceed in forma pauperis on November 12th 2020. The district court did not issue the mandatory pre trial scheduling order in accordance with Fed R. Civ. P 16(1)(2). The litigants did not meet and confer, nor was their a hearing. The Petitioner amended his complaint on December 15th 2020. Summons was executed on January 13th 2021. The Respondent submitted their 12(b)(6) Motion to dismiss the amended complaint on January 25th 2021. The Petitioner responded to the 12(b)(6) motion on February 16th 2021. [5] The Petitioner issued a Second Amended Complaint (SAC) concurrently with his response on February 16th 2021. The Respondent filed a motion to dismiss, the Petitioner second amended complaint, under Fed. R. Civ. P. 12(b)(6) on the date of March

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[4] ER. 113,115.116

[5] ER. 96 – 207 (response to 12(b)(6) motion)

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The Petitioner filed a claim against SDUSD on the date of January 11th 2022, at the United States District Court, Southern District. The Petitioner motioned the district court to leave to Proceed in forma pauperis. The district court denied Petitioner motion to proceed in forma pauperis on November 12th 2020. The district court did not issue the mandatory pre trial scheduling order in accordance with Fed R. Civ. P 16(1)(2). The litigants did not meet and confer, nor was their a hearing. The Petitioner amended his complaint on December 15th 2020. Summons was executed on January 13th 2021. The Respondent submitted their 12(b)(6) Motion to dismiss the amended complaint on January 25th 2021. The Petitioner responded to the 12(b)(6) motion on February 16th 2021. [5] The Petitioner issued a Second Amended Complaint (SAC) concurrently with his response on February 16th 2021. The Respondent filed a motion to dismiss, the Petitioner second amended complaint, under Fed. R. Civ. P. 12(b)(6) on the date of March 3rd, 2021. The Petitioner filed a motion to strike the respondents 12(b)(6) motion to dismiss, in

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[4] ER. 113,115,116

[5] ER. 96 – 207 (response to 12(b)(6) motion)

accordance with Fed. R. Civ. P (F), on the date of March 22nd 2021.[6] The Petitioner filed a motion for summary judgment, on March 22nd 2021. [7] The district filed the Petitioner's motions nun pro tunc to the 24th of March 2021. The Respondent filed a "notice" of non-opposition on March 24th 2021. The Petitioner filled and opposition to the respondent's opposition on March 27th 2021. [8] The Petitioner filed a writ of Harmful Errors / Recusal.[9] The district court rejected the Petitioner's motion to strike and summary judgment, without a hearing.

CONSTITIONAL AND FEDERAL VIOLATION OF CLAIMS

First, the Petitioner alleged that the Respondent violated Title 42 U.S. Code § 2000e/ Severe and Pervasive Harassment / Rights protected under the First Amendment. The Respondent's does not refute the factual basis of the Petitioner's claim, the respondent's assertion, though different from their statement to EEOC is as follows: "Plaintiff does not allege that anyone at the District made pejorative remarks about his name, religion, or national; nor does he challenge that anyone knew that his name was associated with a particular religion or national origin." [10] The Petitioner in response the 12(b)(6) motion stated, SDUSD habitually contradicted their arguments to the EEOC and their 12(b)(6) motion, stating that they did make reasonable accommodations, then they did not, because of a feigned ignorance.[11] The Seventh Circuit delineated the standard of an adverse employment action under Title VII, the plaintiff "need only to aver that the employer instituted (specific) adverse actions against the plaintiff on the basis of her [protected status] *See Lueveno v. Walmart Stores Inc. F 722 F. 3d 1014, 1028 (7th Circuit).* The arbitrary changing of the Petitioner's religious and national expression of his

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[6] ER 36
[7] ER 40
[8] ER 31-33
[9] ER. 22 -28
[10] ER. 9
[11] ER. 98

name on in house sign sheet(s), and the arbitrarily moving of his work location, constitutes and adverse action against the Petitioner. Further, the Seventh Circuit reaffirms the standard for an expression to be protected by stating, "in order for a Plaintiff's expression to be protected by section 2000e-3 (a), the challenged practice need not actually violate Title VII. Instead, it is sufficient if the plaintiff has a reasonable belief she is challenging conduct in violation of Title VII. *See Holland v. Jefferson Nat' life Ins. Co., 833 F.2d 1307, 1314. (7th Cir. 1989).* The Ninth Circuit did not review this claim, and or offer an opinion in its order.

Second Claim, for violation of rights protected under Civil Rights: Title VII of the Civil Rights Act of 1964; Title 42 § U.S.C. 1983 (Liability for Defamation). The Petitioner alleged that the Respondents were liable for defamation, as the Respondent being a Human Resource agent, was not protected under a Absolute Privilege. The Respondent's did not deny, that human resource agent Rebecca Lee, publicized her statement that Mr. El is a "sovereign citizen", nor do they deny that Rebecca Lee, castigated an entire group of People, by stating " and others like him are sovereign citizens." [12] The district court opined, "the alleged statements is not defamatory."[13] The district opinion deviates from the standard of federal court, in so much as federal courts do not recognize colorable statements.[14] The Respondent argued, and the district court agreed, " any statement made to the EEOC in a response made to a charge is subject to an absolute privileged." [15] A privilege publication under California State law is governed under California Civil Code 47, wherein 47(a) states, "In the proper discharge of an official duty". Mr.

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[12] ER. 115. 106,103

[13] ER. 9

[14] *Pauska v. Daus, 31 Tex 34*

[15] ER. 9

El argued that the Respondents lacked standing, to petition for an absolute privilege. [16] California Civil Code 47(c), being harmonic with well-established law, does not make privilege any statement made with malicious intent. See *Cottle v. Johnson, 179 N.C. 426, 102 S.E 769, 770.* This Court, in The *New York Times v. Sullivan, 376 U.S254 (1964),* "actual malice" means the that the defendant said the defamatory statements with the knowledge they were false or with reckless disregard of whether it was false or not. The Petitioner's did not argue he was discriminated against because of taxes and or social security withholding, as purported by the Respondent, nor did the Respondent supply a reference within the complaint.[17] The Ninth Circuit did not address whether the reckless and malicious, statements made to the EEOC were protected, nor did it address the calim [18] Even if the district deemed the statements were made in a quasi-judicial platform, under Bradley, human resource agents are not covered under privilege, neither, are statements made with malicious intent. Under the standards of *Bradley v. Hartford Accident Indemnity Co. cal.app.3d 818, 825, 106 cal.rptr. 718 (1973*) the Court stated, "we observe that the fact the defamatory statements were initially protected by absolute privilege because it was uttered on a privilege occasion, by a person covered under privilege...." The standard under Bradley, applied to an attorney, not a human resource agent.

Prima Facia Case

Thirdly, Mr. El alleged that SDUSD discriminated against him, based on his national origin and religion, in violation of Title 42 U.S. code § 2000e (b), by changing the Terms and Conditions of Employment). This claim is analyzed under the burden-shifting framework

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[16] *Restatement of Torts, section 585-589*, the privilege has been held to extend to judges and official officers." (1) was made in judicial proceeding (2) had some connection or logical relation to the action; (3) was made to achieve the objective of the litigation; (4) and involved the litigants or other participants authorized by law.

[17] . ER 72, 73,

[18] . ER. 101, 103 (Response to 12(b)(6) Motion), ER. 43, ER 67

articulated in McDonnell *Douglas Corp v. Green 411 U.S. 792 (1973). See Bulwer v. Mt. Auburn Hosp., 473 Mass. 672,*681 (2016).

Under the standards of McDonnell Douglas, "the onus shifts to the defendants, to bear the burden of production and must articulate the rationale for the adverse employment action." Under McDonnell Douglas, an employee alleging discrimination must establish a prima facia case by showing that: (1) he belonged to a protected class; (2) that he performed his job satisfactorily; and (3) his employer took an adverse employment decision against him. See *Miceli v. JetBlue Airways Corp., 914 F3d 73, 81 (1st Cir. 2019).* If plaintiff satisfies this showing, he is entitled to "a presumption of discrimination" and the burden shifts to the defendant. Mr. El has met the threshold requirement under McDonnell. SDUSD has not demonstrated a cognizable rationale for the adverse employment action, nor have they satisfied the burden of production. The Ninth Circuit did address this claim, in its review.

Fourth the Petitioner alleged that the Respondent's violated 701(j) of Title VII of the Civil Rights Act of 1964, for failing to make reasonable Religious Accommodations, by minimally correcting the Petitioner's name on the daily sign in sheet; and training sign in sheets.[19] 701(j) of Title VII makes it unlawful employment practice under 703(a)(1) for an employer to fail to reasonably accommodate the religious practice of an employee of a prospective employee, unless the employer demonstrates that accommodations would result in undue hardship on the conduct of its business. [20] The district court, agreed with the Petitioners sham pleading, stating that, 'religious reasonable accommodations fails because forcing the defendant to oblige by Plaintiff's reasonable accommodation request to change his name to one that is not associated with a *valid* social security card would force the defendant to violate the

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[19] ER. 117

[20] Trans World Airlines, Inc v. Hardison, 423 U.S 74 (1977)

Internal Revenue Code and incur penalties. [21] Here the district court deviated from the well-established legal standard, of accepting matters outside of the pleading as true, with converting the Petitioner 12(b)(6) motion into a summary judgment. The Ninth Circuit did not address this claim, in its review.

Fifth, the Petitioner alleged the Respondents violated Title 42 U.S. Code 2000e-2 Unlawful Employment Practices (a)(1)(2); Disparte Impact (k)(1)(A)(i)(II)(B)(i) / Title VII, the district court opined, "disparate impact claim is legally deficient because he has not pled facts demonstrating facially neutral employment practices that disproportionally affect one protected group over another, based on national origin or religion." [22] The district court is incorrect, as the Petitioner pled facts that were not addressed by the Respondent, nor did they refute any of the evidence, as stated in the Petitioner response to the 12(b)(6) motion. [23]

Sixth, the Petitioner argued SDUSD violated California State constitutional provisions Violation of Article 1, Section 4 the "free exercise and enjoyment without discrimination",

a.) Article 1 Section 28(F)(1) – The Plaintiff alleged that the Defendants' violated the Plaintiff inalienable rights to safe campus.

b.) Article 31(a)(d)(g) – Article 31, of the California State Constitution being *Self Executing*, The Petitioner alleged that SDUSD, violated section (d) and (g) of said constitution, as SDUSD received a court order, for a name change decree, and refused to make reasonable accommodations by minimally correcting the Petitioner's name on sign in house sign in sheets. The district court in its order opined, that the "Plaintiff's claim of constitutional violations are without merit, laws requiring people to pay taxes do not violate the [Free Exercise Clause] of the

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[21] ER. 9, ER. 74

[22]. Id.

[23] ER. 107

constitution". [24] Here, the district court relied on the Respondent's meritless argument, and accepted matters presented outside of the pleadings, without converting the Respondent's 12(b)(6) motion into a summary judgment.

The Petitioner's Motion to strike was timely, and applicable, under Federal Rules Civil Procedures 12(f), wherein, " a part of pleading can be removed if it is redundant and or scandalous. The Petitioner argued that the Respondents pleadings were a mired conjecture of unverified hearsay. The district did not consider the motion to strike in its entirety, stating, " it appears that the Plaintiff request the Court to strike the Defendant's second motion to dismiss, on the basis that the Defendant has failed to file a timely and verified answer.[25] The Petitioner further gave the district court multiple references within the Respondents pleading, wherein their only defense was tax evasion and social security withholdings.[26] Under 12(f), court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Under the standard of McArdle,'s summary judgment are reviewed de novo, "Because the district court dismissed McArdle's claim on summary judgment before any fact finder could evaluate the competing evidence, and inference, we will describe the facts giving rise to the lawsuit in a light as favorable to McArdle's as the record will reasonably allow." *Colburn v. Parker Hanifin / Nicholis Portland Div. 429 F.3d 325, 327 (1st Circuit, 2005)* The Petitioner's

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24. ER. 9
25 ER. 20
26 ER. 73

motion for summary judgment was timely, as there were no dispute, of any of the material facts, and strategically it would have compelled SDUSD to address the claim on its merits, as opposed to relying on their concocted, moot "sovereign citizen" argument. The Ninth Circuit was incorrect, as there were no local rules, and or a pre trial order, that stipulated the Petitioner could not resolve the pleadings, by summary judgment. Rule 56(b), states, unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery. The Court grants summary judgment where there is no genuine dispute regarding any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A material fact is one that "carries with it the potential to affect the outcome of the suit under the applicable law." García-González v. Puig-Morales, 761 F.3d 81, 87 (1st Cir. 2014) (quoting Newman v. Advanced Tech. Innovation Corp., 749 F.3d 33, 36 (1st Cir. 2014)) (internal quotation mark omitted). The moving party "bears the burden of demonstrating the absence of a genuine issue of material fact." Rosciti v. Ins. Co. of Pa., 659 F.3d 92, 96 (1st Cir. 2011) (citation omitted). Once that burden is met, the non-moving party may not rest on the allegations or denials in his pleadings, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)*

The district court, granted the Petitioner's 12(b)(6) motion, stating that the Petitioner abandoned his claim, as he was ordered to directly respond to the arguments in the Defendant's motion, despite being ordered to do so. [27] The Petitioner affirmatively stated he was not abandoning his claim. [28] Pursuant to Federal Rules Civ. P 41(b) a court may dismiss an action for failure to prosecute or comply with a court order. See *Hells Canyon Preservation Council v.*

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[27] . ER. 10 &11

[28] ER. 15

U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that a court may sua sponte dismiss an action pursuant to Rule 41(b)). However, "A Rule 41(b) dismissal must be supported by a showing of unreasonable delay." *Omstead v. Dell, Inc., 594 F.3d 1081, 1084 (9th Cir. 2010) (internal citation and quotation marks omitted)*. In determining whether a Rule 41(b) dismissal is appropriate, the court must weigh the following factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions." Id. (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.1986)). Dismissal is appropriate "where at least four factors support dismissal . . . or where at least three factors strongly support dismissal." *Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (internal citation and quotation marks omitted)*. At least 4 of the 5 factors, under Henderson, must be satisfied, before dismissal. Neither district court, nor ninth circuit considered any of the five factors, as established under Henderson, which would warrant a dismissal.[29] The Ninth Circuit states, "in dismissing El's action because he failed to file a substantive opposition to defendant's motion to dismiss, despite being ordered to do so." If the district reviewed the case de novo, the substantive opposition was filed to the initial 12(b)(6) motion to dismiss, which was contextually the same.[30]

The district court stated, "Plaintiff is DIRECTED to respond to the arguments raised in the Defendant's motion to dismiss the Seconded Amended Complaint. Failure to do so will

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[29] The Ninth circuit citation *of Pagtalunan v. Galaza, 291 F.3d 639, 640 (9th Circuit)* is correct, insomuchas, in Pagtalunan, the Supreme Court, weighted the same five standards under *Ferdik v. Bonzelet 963 F. 2d 1258, 1260 (9th Cir. 1992)*

[30] ER. 96 -107 (Response to 12(b)(6) motion

constitute abandonment."[31] First, the Petitioner responded specifically to SDUSD initial 12(b)(6) motion to dismiss, which in terms of content was the same as the second. Second, the Petitioner motion to strike and motion for summary judgment was an appropriate response. Third, the Petitioner does not have to prove he is not a "sovereign citizen", and or entertain the fanciful and theoretical defense of the Respondents. The Fifth circuit held in *Woodsfield v. Bowman, 11, 193. F3d. 354, 326 (5th Circuit)* that "an affirmative defense is subject to the same pleading standards as is the complaint." The Respondent's social security and tax defense is moot. And by compelling the Petitioner to defend himself as the Plaintiff, without forcing the Petitioner to address the merits of the claim was illogical. The district court in act of impartiality, should have directed the Respondents to address the Petitioner's claim with specificity, and or convert the Respondent's motion into a summary judgment.

REASONS FOR GRANTING THE WRIT CERTIORARI

1. This petition presents the review standard, under Morin, wherein it states, granting of a motion to dismiss is subject to De Novo standards. See *Morin v. Caire, 77 F.3d 116, 120 (5th Cir. 1996).* The Ninth Circuit, in its unpublished opinion did not review the record De Novo. The Ninth Circuit has departed from the accepted course of judicial proceedings by not reviewing this case, under the De Novo standards, of an appealable 12(b)(6) Motion to dismiss, by reviewing each claim, and the record in its entirety.

2. This Petition presents the same standards of review for a 12(b) 6 Motion to Dismiss under *Twombly,* wherein " a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 554,*

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[31] ER. 21

127 S.C.t 1955, 167 L.Ed2d 929. Under this traditional rule, when "considering a Fed.R.Civ.P. 12(b)(6) motion to dismiss, '[t]he district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.'" *Amadasu v. The Christ Hosp., 514 F.3d 504, 506 (6th Cir. 2008), quoting Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995).* In Twombly, the Supreme Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." Twombly, 127 S.Ct. at 1964-65 (internal citation and quotation marks omitted). The Petitioners amended complaint(s), were not devoid of the factual allegations, as required to meet the threshold pleading standards under 12(b)(6) motion. The Respondent's affirmative defense, as presented within their mired 12(b)(6) motion does not disprove the Petitioner's claims. Dismissal of the Petitioner's claim, based on the pleading was incorrect.

3. This Court should grant the Petitioner writ of certiorari and clarify that Rule 12(b)(6) does not permit dismissal of a claim by considering matters outside the pleadings to resolve disputed issues of material facts and failure to comply with Rule 12(d) violates a plaintiffs rights to procedural due process. Rule 12(d) needs no interpretation, if on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are accepted by the court on a motion to dismiss, the court "must convert the motion to dismiss into one for summary judgment." *Garfield v. NDC Health Corp., 466 F.3d 1255, 1260 n.2 (11 Cir. 2006) (citing Carter v. Stanton, 405 U.S. 669, 671 (1972)* Further, if the Court treats the defenses motion as a 12(b)(6) motion, the Court "must accept as true all material of allegations of the complaint, and must construe the complaint in

favor of the complaining party." *Warth v. Seilden, 422 U.S. 490, 501(1975)*. The fact remains that the district court did not comply with Rule 12(f) and 12(d), and thus misapplied the law, by allowing and relying heavily on the matters presented outside of the pleadings in its ruling. (App. 3 -7) The district rejected the Petitioner's motion for summary judgment, before fact finding could occur. The Ninth Circuit under the standard of *McArdle*, was supposed to review the summary judgment de novo, by not doing so it violated said standard. "Because the district court dismissed *McArdle's* claim on summary judgment before any fact finder could evaluate the competing evidence, and inference, we will describe the facts giving rise to the lawsuit in a light as favorable to *McArdle's a*s the record will reasonably allow." *Colburn v. Parker Hanifin / Nicholis Portland Div. 429 F.3d 325, 327 (1st Circuit, 2005)*

4. The Petitioner invoked his private right to specific applicable treaties between the United State of America, and Morocco, as it relates to this case. Citing, *Asakura v. City of Seattle 122 Wash. 81, 210 P. 30,* the Supreme Court decided in 1924, whether a Seattle city ordinance prohibiting non-citizens from obtaining a business license violated the peace treaty between the United States and Japan, the Plaintiff sued relying on the treaty, to enjoin the enforcement of the Seattle ordinance "without addressing the question directly, the court inferred a private right of action, from text of the treaty." Id. The Court held, the treaty was a means "for the provide for protection of citizens in one country residing in the territory of another." Therewith, this Court, in viewing the principle held under *Asakura,* and the district court unwillingness to consider the evidence, the facts, and the claim in its entirety, should find that Mr. El's of invocation of his private right of action, protected under treaty law, was proper.[32] The Respondent did not address any of the aforementioned treaty violations, with specificity. [33]

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[32] ER. 10 Mr. El invoked these specific treaties and subsequent articles, Article 123 of General Act of Algerciras 1906/ Statues at large of the United States of America December 1905 to March 1907, Part three Recent Treaties

5. The Ninth Circuit Courts of Appeals, in its opinion dated may 27th 2022, denied the Petitioners opportunity to be heard, in variance to the standards under Ninth Circuit Rule 34(a)(2), wherein it states, "oral arguments **MUST** be allowed, in every case unless the panel of three judges agrees after the examination of the briefs and record, it is not needed for one of the following three reasons."

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequatcly presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

The Ninth Circuit did not resolve the dispositive issues at hand, as it did not review this case de novo.

The Petitioner was denied procedural due process, by denying his right to be heard (hearing) "It is a fundamental doctrine of law that a party to be affected by a personal judgment must have his day in court, and an opportunity to be heard." *Renaud v. Abbott, 116 US 277, 29 L Ed 629, 6 S Ct 1194.* Every person is entitled to an opportunity to be heard in a court of law upon every question involving his rights or interests, before he is affected by any judicial decision on the question. *Earle v McVeigh, 91 US 503, 23 L Ed 398.* The Petitioner motioned the Ninth circuit for reconsideration, as he was denied his hearing.

6. The Petitioner never abandoned his claim, and the involuntary dismissal as ordered by the district court was incorrect, and not harmonic with standards under an involuntary dismissal Fed.

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and Conventions): Article IV and V of the General Treaty, Between Great Britain and Morocco; Treaty of Peace and Friendship, between the Morocco and the United States (1787, 1836) article 23, 24, and 25; Article 11 Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary) signed in 1796; Rights of Protections in Morocco (Madrid July 3, 1880) article 15.(Article 123 of the 1906 treaty, "All treaties, conventions, and arrangements of the Signatory Powers with Morocco remain in force.

[33] ER 120 -121 (Second Amended Complaint)

R. Civ. P. 41(b). Properly, a pre trial 12(b)(6) motion does not allow dismissal under abandonment.

CONCLUSION

The Court views the record in the light most favorable to the non-moving party, "drawing reasonable inferences" in his favor. *Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009)* (citation omitted). "Conclusory allegations, improbable inferences, and unsupported speculation," however, are "insufficient to establish a genuine dispute of fact." *Travers v. Flight Servs. & Sys., Inc., 737 F.3d 144, 146 (1st Cir. 2013)* The question presented in this case is In Twombly, the Supreme Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Twombly, 127 S.Ct. at 1964-65 (internal citation and quotation marks omitted).* This Court, in reviewing the record de novo, will infer that the Petitioner satisfied all requirements to survive a 12(b)(6) motion to dismiss, and did not abandon his claim; and involuntary abandonment order was an egregious error.

Date: August 4th 2022

Pernell El / AA222141

Pro Per