No._____

In The

SUPREME COURT OF THE UNITED STATES

MARY GRACE and TAMIO SAITO
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION
Respondent,

On Petition for Certiorari to the United States Court for the D.C. Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED: Corporations, have long had rights: *1819 Dartmouth v. Woodward, "Corporations receive constitutional protection, to protect constitutional rights of the individuals behind the entity*"; 1853 *Marshall v. Baltimore Ohio Railroad*: corporations were citizens, for the purposes of court jurisdiction; 1886 *Santa Clara v. Southern Pacific: Corporations* are *persons under 14th Amendment; 1893* Noble v. Union Rail.: *due process protections to corporations*; 1898 *Smyth v. Ames*: gov. can't take corporation's property without due process; 1907 *Chambers v. Balt-Ohio Rail:* Access to justice is a fundamental right, etc; so, are Constitutional Rights of these & millions of poor corporations, and the persons comprising them, violated when they are denied the above constitutional rights, after filing an Answer & complying with discovery, they are defaulted for lacking money [to continue] to pay lawyers, & the Corporations & officers named are held guilty & liable for all claims in Complaints - when evidence exists to prove the claims false & perjury, without a trial or fair hearing - resulting in severe penalties & harm to the corporations, named officers & persons comprising them – without notice, issuance or entry of a Default Judgment or Final Judgment in compliance with Rules 55 & Rule 58, resulting in the denial and loss of Defendant's (1 illiterate) rights to appeal?

PARTIES

1) Mary Grace *pro se* Defendant, Appellant.

2) Tamio Saito *pro se*, Defendant, Appellant.

3) Mary Grace *pro se* as CEO of e-Smart Technologies, Inc., Defendant, Appellant.

4) Tamio Saito *pro se* as CTO of e-Smart Technologies, Inc. Defendant, Appellant.

5) Mary Grace *pro se* as CEO of Intermarket Ventures, Inc., Defendant, Appellant.

6) Tamio Saito *pro se,* as CTO of Intermarket Ventures, Inc., Defendant, Appellant.

7) Mary Grace pro se, CEO IVI Smart Technologies, Inc.(renamed e-Smart International, Inc., Defendant, Appellant

8) Tamio Saito pro se, as CTO of IVI Smart Technologies, Inc. (renamed e-Smart International Inc.), Defendant, Appellant

9) Securities and Exchange Commission, Plaintiff, Appellee

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See Notes of Advisory Committee on Rules, 1963 Amendment, following Fed. R. Civ. P. 58 ("The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum—

REFERENCES:

1.) *Fordham International Law Journal – Volume 24, Issue 6, Article 5 'Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies. Justice Earl Johnson Jr.*

2.) *Brennan Center for Justice – The History of Corporate Personhood*

3.) *Louisiana Law Review Vol 55 Number 2. November 1994: The Essentials of the Equal Access to Justice Act*

4.) *Penn State Law Review: Defining Due Process*

5.) *Equal Access to Justice and the Courts – Santa Clara University*

6.) *Equal Justice Under the Law – Santa Clara University*

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinions of the Court of Appeals (Pet. App. A-10; A-11; A-12). The Opinions of the District Court (Pet App B-1; B-10; B-12; B-16).

JURISDICTION

The DC Circuit entered Judgment on 01/31/2017 (Pet.App A-10, A-11 & A-12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS

The Constitutional Provisions, Statutes and Regulations listed in Table of Authorities.

STATEMENT OF THE CASE

It is time-long past time for the United States to join the growing international consensus that words like due process, fair hearing, equal protection of the laws, and equality before the law, all express a universal fundamental principle – a right to equal justice for all. The U.S. national rhetoric is replete with guarantees that the United States provides equal justice. The U.S. Constitution guarantees "due process" and "equal protection of the laws" to all. The entrance frieze of the U.S. Supreme Court building bears the promise of "Equal Justice Under the Law". The Pledge of Allegiance that children start reciting in Kindergarten says that the United States is a country " with...justice for all,"[1] - not just those who can afford lawyers.

[1] Fordham International Law Journal, Volume 24, Issue 6, Article 5, *Equal Access to Justice: Comparing Access to Justice in the United States to Other Industrial Democracies.*

It is a tragedy of the present in all things related to justice in the U.S., that our system of justice today discriminates and denies this precious right to certain targeted parties - the millions of poor, under-capitalized small business/corporations that are denied equal access to the courts because they can not afford a lawyer. The Equal Access to Justice Act [EAJA] was enacted by Congress in 1980 as a means of equalizing the playing field in cases between the federal government and small business corporation litigants. EAJA was predicated on the assumption that the gross disparity in available financial resources placed small businesses in a uniquely vulnerable position, subjecting them to potential abuse by regulatory agencies. The sponsors of EAJA were concerned with the difficulties that small businesses face in contesting

unwarranted government interference. Congress found that small businesses may be deterred from defending against unreasonable government action because of the excessive litigation expense. The EAJA goals included (1) to enable victims of abusive governmental conduct to seek vindication of their rights despite financial limitations, and (2) to reduce the incidence of governmental abuse. Indeed, the EJLA committee report referred to "*evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate.*" This pattern of targeting poor, undercapitalized small businesses tempts and rewards government counsel with quick & easy wins without having to produce any evidence or prove its case, because the entry of default against a defendant establishes the defendant's liability, even when evidence proves claims false,

as in this case. Default judgment is a windfall to plaintiffs and a serious detriment to defendants. Due to the harshness with which the rule operates, defendants have an interest in the certainty of the rule's interpretation and application. And, there is a catch 22 to Defaults. As in this case, out of 112 claims in the Complaint won by Default , the CEO and CTO, the only 2 employees of the small business corporate defendants at that time, were listed in 70 of the claims. The government is granted by default, that all the allegations of the Complaint *shall be accepted as and deemed true by the Court*, and *the validity of the Judgment cannot be challenged*, so the case against not only the corporations, but also their officers is over before it begins. It doesn't matter what the officers plead, they are already liable for the allegations accepted and deemed as true [by default] and they cannot challenge them. Perhaps that is why a hearing was never

held – because with a
Default – a trial or fair hearing doesn't matter. The government has already won without a trial or a fair hearing even though a hearing is recognized as a fundamental and constitutional right that "*Some form of hearing is required before an individual is finally deprived of a property interest* [or liberty]." *"Parties whose rights are to be affected are entitled to be heard." The notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision."* But in this case, and in millions of cases where the targeted small business/ corporation cases are Defaulted, there is no hearing at all, or fair and meaningful hearing to call witnesses and experts who could support Defendants' cases and prove conflicting testimony and the government's claims false.

But a hearing is denied in this and these cases because Defendants have been declared guilty and liable by default. The Decisions in this case and other like cases result in widespread, deleterious effects on small business corporations nationwide. Small businesses repeatedly face the issues and the abuse cited in the EAJA analysis in this and millions of other cases, as they have in the past, and will continue to in the future without this Court interpreting the law so it is applied equally and justly to all. The issues in these cases have generated directly conflicting rulings by federal courts of appeals and/or state supreme courts. These conflicts undermine the desired uniformity of federal law and merit resolution by the Supreme Court, because, absent such a review, they will persist. This little known, but longstanding and widely practiced rule is a national problem, because of the severe injustice to the millions of small business corporations, and their millions of

employees & shareholders, who as the persons the corporations consist of, all suffer irreparable harm by losing property, liberty to do business, their jobs, and all the money they invested. As many as 15 million different types of small business corporations comprise the main targeted parties. Inexplicably, this rule does not apply equally to approximately 25 million other small businesses: those operating as sole proprietorships, partnerships, and associations no matter how many employees they may have. They are not required to have a lawyer represent them in court, but they are allowed equal access to the Courts, and have the right to self represent. Associations have the right to self represent and to represent the persons that comprise the associations in Administrative Law courts and other courts that are not courts of record. But the poor, small, corporations, who cannot afford lawyers, are Ordered by courts to have a lawyer represent them, or are denied due

process and equal access to the courts. Either the poor, small or undercapitalized corporations cannot afford a lawyer to appear and they are defaulted; or a lawyer represents them in the beginning, and files an Answer and vigorously complies with discovery requests, court conferences, depositions, and finally the small business corporations run out of money, and the lawyers have to withdraw. The Court then orders the small corporate litigants to retain another lawyer, though Defendants have informed the Court they have run out of money to pay lawyers. Defendant's in good faith desperately try to get a lawyer pro bono. Government cases are long and expensive, as this one (10 years in this case), which makes it impossible. Then, the government files a motion for default and misrepresents that the poor corporations refused to retain a lawyer and thus violated a court order to retain another lawyer, a knowing impossibility [explained to the Court] because of lack of

finances. The Court grants a Default citing the government's allegation as the basis, though it is not true. Without a lawyer, the poor small corporation is not allowed to oppose or defend against the false allegations. Poor corporations are the only group who are punished by Courts because they cannot afford a lawyer. They are punished by a cruel and unusual punishment. The targeted poor and small business corporations are denied the fundamental rights to due process and equal protection under the law that have been guaranteed to all corporations for almost 200 years - since before: 1886[County of Santa Clara v. Southern Pacific Railroad] affirmed the question whether corporations were protected by the Equal Protection Clause of the Fourteenth Amendment; 1893 [*Noble v. Union River Logging Railroad Co*] & 1905 [*Lochner v. New York]* extended due process protections to a corporation; and, 1907 [*Chambers v. Baltimore*

& Ohio Railroad] the Supreme Court, though badly split, unanimously agreed that access to justice was a fundamental right for all (both rich and poor). This case, and the other cases involving vulnerable, poor, undercapitalized, and small business/corporations are about discrimination – by the government and the Courts –discrimination between rich, large corporations, and poor, small corporations. The rich corporations can afford to hire the best, brightest and most expensive lawyers. The poor undercapitalized, small business corporations can not. Justice Hugo Black wrote in the plurality opinion, *"a State can no more discriminate on account of poverty than on account of religion, race or color."* This applies to both criminal and civil cases. There can be no equal justice where the kind of trial a man [or corporation] gets depends on the amount of money they have. The systems fault is that it treats corporate defendants with money

differently than it treats poor small business corporate defendants without money. The line is crossed to unfairness, and unconstitutionality when the government discriminates among economic classes, denying poor undercapitalized corporations a fair opportunity to obtain adjudication on the merits and denying due process. Equal protection is denied when the State and government treats a class of defendants, poor ones, differently from rich ones. This is an important question of constitutional and federal law that has not been, but should be settled by this Court. The Substantive Right of Access to Courts affirms: In recent times numbers of courts have based their opinions on the premise that right of access to the courts is basic to our system of government and is one of the fundamental rights protected by the Constitution, [Article 4, Section, 2 Clause 1, and the First, Fifth and Fourteenth Amendments]. They hold that this right must be adequate,

effective and meaningful, and urge that interference with right of access to the courts gives rise to claims for relief under the civil rights statutes. In doing so they collect and rely upon dozens of United States Supreme Court and lower federal court cases, many of them decided in recent years. The federal courts of appeal and the state supreme courts are in disagreement over these issues, and only the Supreme Court can resolve the conflict. A review and resolution by the Supreme Court can resolve these issues on a nationwide basis, making it impossible or unlikely that a conflict among the lower courts can continue to arise. Such a decision would have far reaching impact on all poor, undercapitalized, small business corporations, and on how government agencies treat them in regard to the issues the EAJA was enacted to resolve. The conflicting, adverse effects of default were demonstrated at a taped deposition where one of the government's

younger lawyers asked the government's senior lawyer a question, and on the tape it is heard him say nervously "*What about... (whispers)*", and the senior lawyer laughed and said "*Don't worry – we got a default -it doesn't matter*". But – it does matter – it seriously matters to the millions of aggrieved and irreparably harmed persons that comprise the poor, small business/corporation litigants, and millions who rely on the corporations for their jobs - and millions of low or middle income persons who have invested their money in these corporations. It matters that the Court, keeps the promise on the entrance frieze of the U.S. Supreme Court building that *"Equal Justice Under the Law"*, is for all, including poor corporations that cannot afford lawyers, and the persons that comprise them. There are compelling reasons for this Honorable Court to review the important questions of constitutional and federal law set forth herein that have not been,

but should be settled by this Court, that are a national problem for approximately 15 million poor, under-capitalized corporations which will continue to be denied equal access to justice without settlement by this Court.
In addition to the compelling post answer default question, this case also presents compelling & recurring issues on the applicability & operation of Rule 58 Fed. R. Civ. P.

A. THE DISTRICT COURT PROCEEDING
Rule 58 *requires that every judgment, in order to enjoy legal effect, be set forth on a "separate document".* This Court's Decisions conflict with the opinion in this case. A precedent is from a case in the D.C. Circuit - *Daniel Diamond, by His Mother Justine Diamond v. Floretta Mckenzie,* et al., Appellants, 770 F.2d 225 (D.C. Cir. 1985) **U.S. Court of Appeals for the District of Columbia Circuit (1985).**

The circumstances set forth in Court's Opinion in Diamond are almost a carbon copy of the circumstances in this case being presented. In the Diamond case, the D.C. Appellate Court ruled that an Order, intended by the District Court to be a Final Judgment, was not. The Opinion states: *We hold that Rule 58's mechanical test, as elucidated by the United States Supreme Court, was not satisfied by the District Court's order in this case.* It is not satisfied by the District Court's order in this case. The only difference in this case and *Diamond,* is that in *Diamond* **the Opinion** acknowledges that the Order was intended by the District Court to be a Final Judgment: "*... that this intent is evidenced by the District Court's statement that "this Order shall constitute the final order of the Court." id. (quoting District Court order).* In this case, in the Order of 01/14/2016 (Dkt.839 Pet.App.B-12)

there is no mention that "this Orde
\kkr shall constitute the final order of the Court". There
is no mention in the Order that it is a Final Order, or Final Judgment. The Memorandum that followed the Order (Dkt.840) states in 3 places that: "*The* Court *'will'* (the definition expresses future tense) *issue a Final Judgment*", and the Final Judgment *will* incorporate... and, again, that the Court "*will enter a final judgment*". The *Diamond Opinion* could be written almost verbatim in this case, and it should be, which Appellants respectfully request. The Dismissal should be reversed and the case should be allowed to go forward in the Appellate Court. *This view comports with the Mallis instruction, that Rule 58 should be interpreted to prevent the loss of the right of appeal in Bankers Trust Co. v. Mallis*, 435 U.S.(1978) (*per curiam*). Diamond Per Curiam:

Diamond: This case presents recurring issues on the applicability & operation of Rule 58.. That provision of the Federal Rules

requires that every judgment, in order to enjoy legal effect, be set forth on a "separate document We hold that Rule 58's mechanical test, as elucidated by the United States Supreme Court, was not satisfied by the District Court order in this case.

Rule 58's mechanical test was not satisfied in this case.

Diamond: Where more than a monetary judgment is granted Rule 58 contemplates that the District Court "shall promptly approve the form of the judgment" but, again, on a separate document. Since, as we have seen, more than a monetary award was granted in this case, this second procedure was the appropriate course to follow.

In this case, neither the Court Order or Memorandum approved the form of the Judgment on a separate document as it did on the Default and Entry. (Pet.App. B-1-B-2).

> *Diamond: In the case before us, appellees do not contend that a separate document within the meaning of Rule 58 was ever set forth in this case. Indeed, they state flatly that "there still has been no separate judgment filed [by the District Court]." Reply to Appellants' Response to Show, Cause Order at 3 Diamond v. McKenzie...*
>
> *Rather, they argue that the December 21, 1984 order was final in its effect, that the District Court intended it to be final, and that this intent is evidenced by the District Court's statement that "this Order shall constitute the final order of the Court (quoting District Court order). Appellees approach, however, directly contravenes the requirement that Rule 58 be mechanically applied.*

Appellees' approach in this case is the same. However they lack the argument that the Order in this case did not say "*this Order shall constitute the final order of the Court*". Nowhere in this case's Order, or in its title, or Memorandum Opinion, did it say it was, or was intended to be the Final Order or Final Judgment. *Pro se* defendants, with no legal experience or expertise, one illiterate in English cannot know that an Order, of which there were many, is supposed to be a Final Judgment if the Order does not say it is a Final Judgment, as the 3 other Final Judgments in this case do.

> Diamond: Even if appellees did not *concede that no separate document was entered in this case, we would be convinced by the unique course of the*

> *District Court proceedings and the contents of the order and subsequent memorandum opinion that Rule 58 has not been satisfied. At the outset,*

> *we conclude that the mere fact that the December 21, 1984 order stated that it constituted "the final order of the Court" does not resolve the Rule 58 problem. The question whether an order is a final order is separate from the question whether a separate document setting forth the judgment has been properly entered.*

In this case there was no separate document setting forth a judgment that was entered in compliance with Rule 58. The Order does not mention the word final judgment or judgment.

> *Diamond:* *We further observe at the outset that, although not critical to our determination, the form of the December 21, 1984 order does not conform to the model forms provided in the Federal Rules.*

The form of the 01/14/2016 Order in this case does not conform to the model forms provided by the Federal Rules. (Pet.App B-2 and B-3)

> *Diamond: Most critically, the District Court's order did more than render judgment; ... this action further suggests that the December 21, 1984"order" was in fact a "decision of the court, as opposed to a judgment within the meaning of Rule 58. Communications Workers of America v. United Telephone Co. of Ohio 491 F.2d 207, 208 (6th Cir.1974) (distinguishing "decisions" from "judgments").*

a.) The Order at issue of 01/14/2016 (Dkt.839) stated that: (Pet.App B-12).

> " [Decisions] *As set forth in the accompanying Memorandum Opinion and the Court's Memorandum Opinion of October 13, 2015, ECF 785 and 786, ...*

b.) The Memorandum that followed (Dkt.840; affirms that the Court had:

"*...asked the parties to file supplemental submissions ...* and in the last paragraph
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stated that the Court "'*will' issue a Final Judgment*" and that "*the Final Judgment 'will' incorporate..." the supplemental submissions decisions.* (The definition of '*will*' "expresses the future tense".)

This Memorandum Opinion (Dkt.840) also clearly states that in its opening that the Opinion marks the final 'chapter' – not the 'end' of the final chapter.

Diamond: Even though the District Court may well have intended the December 1984 order to be the final order in the case, the question is not beyond dispute, in light of the considerations we have just reviewed. It is precisely this kind of uncertainty about whether the District Court intended to enter a final order that warrants the mechanical application of Rule 58. By mechanically applying this

rule, as the Supreme Court has taught us to do, a court may avoid speculation as to whether an appellant should or should not have known that the time for appeal had begun to run.

C.I.T. Financial Service v. Yeomans, 710 F.2d 416, 417 n. 5 (7th Cir. 1983) (indicating that Rule 58 is intended to give notice to losing party); Gregson & Associates Architects v. Government of the Virgin Islands, 675 F.2d 589, 592-93 (3d Cir. 1982) (holding that, even where appellant had actual notice that order was final, Rule 58 must be mechanically applied).

In Diamond the Court found; We hold that Rule 58's mechanical test, as elucidated by the United States Supreme Court, was not satisfied by the District Court's order in this case.

The Order in this case differs from that contemplated by Forms 31 and 32 in the Appendix of Forms to the Federal Rules of Civil Procedure in at least two significant respects. First, the

01/14/2016 Order is entitled "Order" rather than "Judgment," as contemplated by Forms 31 and 32. No where in the Order does it say it is the Final Judgment or even a Judgment, or a Final Order.

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The January 14, 2016 Order provides the decision on the supplemental submissions, and references the First Order and Memorandum which states that the Court will first consider and render a decision on the supplemental filings – the Jan. 14, 2016 Order is clearly the decision – and then the Court *will* incorporate the Order and decision on the supplemental filings into a Final Judgment that will be an appealable Final decision in this case. That was never done. In addition to setting forth the decision on the supplemental filings, the Jan. 14, 2016 Order, rules on a separate pending Motion and a pending request, whereas Forms 31 & 32 embody only the judgment to be

entered. The significance of these facts is apparent as demonstrated in Diamond:

> *By labeling a separate document as a "judgment," the District Court may clearly signify its intent to finally dispose of a case. Similarly, by eliminating any reference to any other issues except the*

> *Judgment, the court avoids any possibility of creating a combined memorandum opinion and order.*

This entire case is based on the Appeal being untimely because of the claim that the 3 page 01/14/2016 Order (Dkt. 839; Pet.App B-12), that does not say it is a Final Judgment, and grants another Motion and request, is claimed after the fact, to be a Final Judgment, and claimed to be entered in compliance with Rule 58. However, there was no separate document filed by the Clerk affirming Judgment was entered.

1.) The Orders referenced above: The first Order

decided certain issues and ordered supplemental submissions, followed by a Minute Order that instructed on the supplemental submissions. And the third Order set forth the decision on the supplemental submissions after review.

2.) a.) The First Order (Dkt.785; Pet.App B-10) Ordered the parties to file supplemental submissions and stated in the last paragraph:

> 9. *After considering and rendering a decision upon the parties' supplemental filings, the Court will incorporate this Order into a Final Judgment that will be an appealable final decision in this case.*

b.) The Order (01/14/2016 (Dkt.839; Pet.App B-12) set forth the decision on the supplemental submissions.

> *As set forth in the accompanying Memorandum Opinion and the Court's Memorandum Opinion of Oct. 13, 2015, see ECF 785 & 786,*

...the Court"... *asked the parties to file supplemental submissions ...*

And, in the Jan.14, 2016 Order the last paragraph stated that the Co*urt "'will' issue a Final Judgment*" and that "*the Final Judgment 'will' incorporate....*" (The definition of '*will*' is future tense.)

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Neither the Order or Memorandum said that the Order was the Final Judgment or that it was an Appealable Order – only that a Final Judgment *will be issued.* At the point in this case, when the Order was issued, there were still hearings expected to be held and motions filed to be ruled on. [*Note: The District Court granted Defendants leave to file a Motion for improprieties of the government on 09/22/2015, and previously granted the right to file the motion in minute orders on 8/13/2014 after discovery had ended, and had granted the right to seek remedies 12/11/2014. Defendants requested the right to a hearing to present*

evidence and call witnesses 04/13/2015. Defendants never appeared in Court. The Court never even saw Defendants or their product that was ruled by Default not to exist, because no hearing to present the product, evidence and defense was ever held. A motion for leave to file the motion for sanctions had been

filed four months prior to the 01/14/2016 Order, on 09/22/2015 when the Court stated that Defendants could file a Motion for Sanctions. At the time the 01/14/2016 Order was issued, the government had just filed their opposition to the Defendant's Motion on 01/12/2016, the date the Court Ordered; and the Court had Ordered that Defendants file the Reply on 01/26/2016, which was due about a week after the 01/14/2016 Order was issued.]

3.) The 01/14/2016 3 page Order was the decision rendered on the supplemental filings. The

(proposed) Order (Dkt.725-4), which incorporates decisions in the First Order of 10/13/2015 with the decisions to be ruled upon and to be filed as the Final Judgment is 12 pages. The 01/14/16 Order is 3 pages. In *Diamond v. McKenzie* this Court concluded, as it should in this case, that:

> *Diamond: This action further suggests that the December 21, 1984 "order" was in fact a "decision" of the court, as opposed to a judgment within the meaning of Rule 58 Communications Workers of America v. United Telephone Co. of Ohio, 491 F.2d 207, 208 (6th Cir. 1974) (distinguishing "decisions" from "judgments").*

4.) In this case 4 (proposed) Final Judgments were filed, but only the 3 below were issued & entered by the Court, entitled:

a.) *Final Judgment As To Defendant George Sobol (Dkt.56-2; Pet.App. B-7)*

b.) Final Judgment As To Defendant Kenneth Wolkoff (Dkt/56-4; Pet.App. B-8)

c.) Final Judgment As To Defendant Robert J Rowen (Dkt. 793-2; Pet.App. B-9)

The 4th, the (proposed) Final Judgment for Defendant-Appellants – *The Final Judgment As To E-Smart, Mary Grace, Tamio Saito, IVI and Intermarket* (Dkt.725-4) was not issued or entered by the Court on 01/14/2016 nor has it been executed or entered until now.

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d.) The last paragraph of all 4 Final Judgment Orders states that:

> *IX. There being no just reason for delay pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.*

The last paragraph of the 01/14/2016 Order demonstrates it is not a Final Judgment, as it gives no Order to the Clerk to enter it as in the Final Judgment. Instead it rules on a separate pending motion as follows:

> *(8.) Plaintiff's [811] Motion to Seal is GRANTED, the documents having*

already been filed under seal pursuant to Plaintiff's Motion for Summary Judgment, ECF No. 324, Attachment Nos. 13 & 15.

According to this Court in *Diamond*:

If a judge issues a single order that simultaneously disposes of several motions, only some of which are

subject to the separate-document requirements, as in Supply Chain Inc. v. Neoforma Inc, 508 F. 3d 572, 575 (10th Cir. 2007) the 10th Circuit ruled that each order must be considered separately for compliance with Rule 58.

5.) The entry of the 01/14/2016 Order (3 pages) as a separate document judgment did not satisfy *Rule 58's mechanical test, as elucidated by the United States Supreme Court.* A copy of the form that the Clerk enters in civil cases, entitled *Judgment in a Civil Case*, was not entered as the separate document affirming judgment. (Dkt.119

Pet.App. B-3) . It is a simple judgment, on one page, that is the separate document form for Judgments in civil cases, which if a Final Judgment was entered in this case, should have been the form entered by the Clerk. Example:

UNITED STATES DISTRICT COURT
for the District of Columbia
U.S. SECURITIES AND
EXCHANGE COMMISSION
Plaintiff

v.

E-SMART TECHNOLOGIES, INC., et al.,
Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):
___the plaintiff (name)_____
recover from the defendant (name)_____
the amount of dollars _____ ($____),
which includes prejudgment interest at the rate of_%, plus post judgment interest at the rate of_____ %, along with costs.

___the plaintiff recover nothing...
___other:
This action was (check one):
___ tried by a jury with Judge presiding, and the jury has rendered a verdict.
___tried by Judge without a jury and the above decision was reached.
____decided by Judge _____ on a motion for_____.
Date: _____

CLERK OF COURT

6.) Default Judgment and Separate Document.

In this case a Default was issued and entered. (Dkt.118; Pet.App B-1) Immediately after the Court ruled, the Clerk entered a separate document (Dkt.120 (below); Pet.App B-2) required for Defaults - a separate one page document entitled DEFAULT that was entered in accordance with the Rules 58.

Default - Rule 55A (CO 40 Revised-4/2011)

UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF COLUMBIA

U.S. SECURITIES AND EXCHANGE COMMISSION
Plaintiff(s)

v.

E-SMART TECHNOLOGIES, INC. et al
Defendant(s)

RE: DEFENDANTS: E-SMART TECHNOLOGIES,INC.,IVI SMART TECHNOLOGIES,INC. and INTERMARKET VENTURES, INC.
Civil Action:11-cv-00895-JEB
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DEFAULT

It appearing that the above-named defendant(s) failed to plead or otherwise defend this action though duly served pursuant to order filed on 5/7/13, and an affidavit on behalf of the plaintiff having been filed, it is this 7th day of May 2014, defendants(s) is/are in default.

ANGELA D. CAESAR, Clerk
/s/ T. Davis
By: Deputy Clerk

Diamond describes the correct forms as the (above) forms contemplated :

> *The order in this case differs from that contemplated by Forms 31 and 32 in the Appendix of Forms to the Federal Rules of*

Civil Procedure in at least two significant respects. First, the December 21, 1984 order is entitled "order" rather than "judgment," as contemplated by Form 31 and 32. Second, the December 21, 1984 order contains citation of authority and at least preliminary explanations of the court's reasoning, whereas Forms 31 and 32 embody only the judgment to be entered. 35

The significance of these two facts is apparent. By labeling a separate document as a "judgment," the District Court may clearly signify its intent to finally dispose of a case. Similarly, by eliminating any reference to the court's rationale or authority, the court avoids any possibility of creating a combined memorandum opinion and order. [Notes of Advisory Committee on Rules, 1963 Amendment following Fed. R. Civ. P. 58] ("The amended rule eliminates these uncertainties")]

7.) Final Judgment & Defendants Appeal as of Right

Whenever a district court issues a dispositive decision or order (i.e., an order from which an appeal lies) but fails to enter its judgment in a separate document, the appeal period begins to run 150 days from the docket entry of the decision or order. Fed. R. Civ. P. 58(c), Fed. R. App. P. 4(a). Given the usual 30-day time limit for filing an appeal, Rule 58 thus creates an outside limit of 180 days to file an appeal.

Therefore, under the rules, the Appeal in this case, was timely filed, because the Court did not issue a separate document entering judgment for the 01/14/2016 Order. The Notice of Appeal was filed on May 29, 2016, which was 60 days after the March 30, 2016 Order, which was the last Order issued in this case (B-16), 30 days after the last Motion for Reconsideration filed (B-12), 137 days after the 01/14/2016 Order and 13 days before the 150 day deadline to file a Notice of Appeal in cases where Judgment had not yet been issued in compliance with Rule 58.

8.) Defendants were waiting for the Final Judgment that both the Order and following Memorandum on 0/14/2016 promised "*will be issued*". Defendants were also waiting for a hearing to be set, which they requested, and which is a right guaranteed before persons are deprived of liberty, by bars preventing them from doing business, & deprived of property over $20 million, and other severe penalties.

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9.) Defendants did not receive notice of the 01/14/2016 Order for 66 days. On 03/30/2016 the Court issued an Order (B-16) denying the Motion first filed 5 months prior on 09/22/2015, that in a Minute Order on the same day, the Court granted could be filed. It was not a post-judgment motion.

10.) The 03/30/2016 Order on the Motion for Sanctions stated that: "*The Court issued a separate Memorandum and Order entering judgment on 01/14/2016*". As stated above, the

Order did not say it was a Final Judgment, or that it was appealable as set forth in the First Order – (B-10)(nor did the Order of January 01/14/2016 Order the Clerk to enter it, as the 3 Final Judgments of 3 other defendants in this case did.

11.) The 03/30/2016 Order was the first notice sent to defendants that noticed them that the Court's promise in the first Order (B-10)

& Memorandum that the Court "*will issue a Final Judgment*" was not going to be kept, but was changed, without Notice to Defendants. A Motion for Reconsideration was filed (Dkt. 846-847, Pet.App B-17 and was denied in 2 days with a Minute Order, without an Opinion.

12.) Four Months after the Notice of Appeal was Filed and transferred to the Appeals Court, the District Court first expressed uncertainty as to the timeliness of the appeal.

> *MINUTE ORDER: In responding to Defendants' Emergency Motions, the Court ORDERS that the SEC should*

address whether Defendants have even filed a timely appeal. Signed by Judge James E. Boasberg on 9/26/2016.

While the Court of Appeals, of course, may take different tack upon its review (in the event the appeal is deemed timely) ...(Dkt.862).

13.) Neither the Court, nor the government noted untimeliness of the Appeal at the time the

Notice of Appeal was filed by pro se Defendants and transferred to the Appeals Court (Dkt.852 05/31/2016)– which if there had been uncertainty, and Defendants had been noticed, it would not have denied Defendants the right to request an extension of time to file a motion for lack of notice in order to preserve their Appeal as of Right.

14.) Defendant's Notice of Appeal was filed according the Appellate Rules (Dkt.850 & Dkt.851). As the Appeals Court had noted in denying jurisdiction for the interlocutory

appeals filed by defendants in this case, an appeal may only be filed after all last motions have been ruled upon, and there is nothing left for the Court to do but sign a Final Judgment. Pro se Defendants followed the instructions of the Appeals Court. The Notice of Appeal was timely. A Final Judgment in compliance with Rule 58 was not and has not been filed.

B. THE APPELLATE COURT PROCEEDING

The government's Motion to Dismiss misleads the Court regarding the wording in the 01/14/2016 Order and the Memorandum. In the Motion to Dismiss the government misrepresents to the Court that the 01/14/2016 Order was a *Final Order,* a *Final Judgment Order* and the *Final Judgment*, and that the judgment was entered on a separate document - in compliance with Rule 58. The government Motion to Dismiss in the Court of Appeals knowingly misrepresents that the 01/14/2016 Order was a

'Final Judgment', 'the Final Judgment' and 'the Final Judgment Order' 28 times, and 44 times in the governments Reply to Appellant's Opposition– a total of 72 times it is misrepresented that there was a Final Judgment issued in this case, and entered on a separate document · in compliance with Rule 58.

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This evokes an infamous quote from the annals of evil, "*If you tell a lie big enough and keep repeating it, people will eventually come to believe it.*" When the government tells the Appellate Court 72 times that a Final Judgment was issued and entered on a separate document, the Court believed the government's 77 affirmations, in spite of the fact that it is improbable that Defendants would miss their <u>final</u> right to appeal if they had notice of a Final Judgment being issued, considering the number of times Defendant's timely appealed (6 times)

on or before the deadlines, desperately seeking justice in this case. It is indefensible for the government to knowingly make misrepresentations to mislead the Court in order to deprive poor, small business/corporation officers their right to Appeal as of Right (FRAP Rule 3). This supports the other evidence in the Motion for Sanctions (Dkt.812; Dkt.846) demonstrating the presentation of false and perjured testimony to

the District Court in this case that also violated Defendants right to due process. This is an example of the evidence of abuse cited in the EAJA analysis being perpetrated by the government against small business corporations that do not have resources to afford a lawyer. This should not be allowed to continue. It denies due process and equal protection under the law, and equal access to justice to millions of small business corporations and the persons that comprise them. Without a review by this Court this abuse of the millions of small business

corporations, their officers, employees and shareholders will continue to persist.

WHY THIS PETITION FOR CERTIORARI SHOULD BE GRANTED

(A.)

This Case Presents A Recurring Question of Exceptional Importance Warranting the Court's Immediate Resolution

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1a) How the Courts of Appeals Have Interpreted and Applied Rule 55 :

Defaults under Rule 55:

The federal circuit courts have adopted different interpretations of Rule 55's exhortation to "plead or otherwise defend." Some circuits interpret this phrase narrowly, requiring the defendant to make attacks only on service of process or to file responsive pleadings. As long as the defendant answers the complaint, the defendant is not in default, and the plaintiff must prove its case on

the merits before judgment can be entered for the plaintiff. Other circuits require much more from the defendant, recognizing a post-answer default whereby the defendant cannot escape default merely by answering the complaint. These courts hold that a defendant who withdraws from the suit at any point has defaulted, and the plaintiff can then win a default judgment without having to prove its case on the merits.

Circuits are split on post-answer defaults. In May 2011, the Second Circuit Court of Appeals in *City of New York v. Mickalis Pawn Shop, LLC*, highlighted a growing split among the federal circuit courts as to exactly what Rule 55 requires of defendants.

In affirming the district court's entry of default judgment, the Second Circuit recognized conflict between its own interpretation of Rule 55 and the interpretation embraced by the Fifth and Eleventh Circuits, which do not recognize a

"post-answer default" under Rule 55. The Fifth Circuit Court of Appeals decision in Bass v. Hoaglund is the leading case for the minority approach, which interprets Rule 55 much more narrowly. Bass appeared by counsel and filed an answer. Bass's counsel then withdrew from the case, but did not withdraw the appearance or answer. On appeal, the Eleventh Circuit affirmed. It explained that

default judgment can be entered against a defendant who fails to appear or answer a complaint, because "in such circumstances the case never has been placed at issue." However, "if the defendant has answered the complaint but fails to appear at trial, issue has been joined, and the court cannot enter a default judgment." In such circumstances, the court may proceed to trial without the defendant, and the plaintiff can win a favorable judgment only if the plaintiff proves its case. The court found that Bio-Energy had met its burden in the pleading stage, and

the issue had been joined. Thus, the Eleventh Circuit found that the lower court's order could not have been a default judgment, and therefore the reinstatement order could not be vacated under Rule 60(b). The minority view as advanced by Bass and Solaroll also has support from Charles A. Wright and Arthur Miller. They explain that the phrase "otherwise defend" refers to 'challenges to such

matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in absence of a responsive Pleading." Wright and Miller agree with Solaroll that "a defendant who has participated throughout the pretrial process and has filed a responsive pleading, placing the case at issue, has not conceded liability." In such a situation, the plaintiff must present evidence supporting liability, in addition to damages..."
Under the majority approach, a plaintiff with a case weak on the merits can obtain a favorable

judgment while meeting a minimal burden, with the minority approach, plaintiffs do not win so easily. A defendant who has responded to the complaint has forced the plaintiff to win on the merits, with the same preponderance of evidence burden of proof as plaintiff would have at trial. Although proving a case on the merits is arguably much easier without the active participation from

a defendant, the difference between the minimal burden of proof under the majority and minority approaches is substantial. The minority rule is more consistent with the plain language, history and policy objectives of Rule 55, as well as with the federal courts' preference for resolving cases on the merits. Because Post-Answer Defaults constantly recur and irreparably harm millions of small business corporations, and the millions of persons that comprise these corporations there is an urgent need for this Court's supervisory power to consider how the uncertainty created by

the circuit split so adversely affects poor, small business corporation defendants, and for the Court to resolve Rule 55's interpretation and application and achieve uniformity.

The pattern for default in these cases is the same for all small business corporations targeted. They either can not afford a lawyer to appear and they are defaulted, or, they can

afford a lawyer to appear, and file an Answer and vigorously comply with discovery, but after being bombarded with subpoenas and discovery requests, sometimes for years as in this case 4 years before the suit was filed, it can easily amount to hundreds of thousands - to millions of documents and dollars, causing legal fees to skyrocket (in this case charges of $4 million). The small business corporations run out of money to continue to pay lawyers to represent them, and the lawyers are forced to withdraw for lack of payment, which is the most frequent occurrence of post-answer default. When the

lawyers withdraw, the Court Orders, as in this case, that "*the corporate Defendants shall have attorney(s) enter appearances on their behalf, or Plaintiff may move for the entry of default*". The small corporations' officers, as in this case, and the others, in good faith desperately seek and negotiate with lawyers to represent the small corporations pro bono, but because of the length

of time and expense to defend against the government (as in this case that began in 2007 and has lasted 10 years) it is not possible to do quickly, if at all. Defendants informed the court: (i) the lawyer will not agree to represent the corporation pro bono; & (ii) their intent to seek other counsel (pro bono). This wouldn't delay the proceedings, for before the lawyers withdrawal, they had filed answers for all 3 corporations and the 2 officers, and had answered the interrogatories, produced all that had been subpoenaed and requested for discovery from the corporations [Defendants produced hundreds of

thousands of documents, and voluntarily produced scans of defendants computer hard drives with millions of documents sorted in files, and voluntarily produced multiple models of defendants product –the core issue at the heart of the case – biometric smart cards. The lawyers had filed all answers, answered all interrogatories, and voluntarily produced for

deposition the CTO – (the chief inventor, a recognized expert and lead inventor of over 500 patents (for Toshiba, etc.) and expert on the technology) where he produced another 116,000 technical documents. The lawyers had vigorously complied with discovery, including having participated in all conferences with the court. There were 82 events on the docket when the lawyers (3 firms) withdrew; they had completed discovery for the corporations and at the time of withdrawal; and were working with defendants officers responding to interrogatories and additional discovery requests to them personally,

and the case was proceeding without delay. Not withstanding the foregoing the Court ruled:

> *"As the corporate Defendants still have no counsel, the SEC may move for a default judgment against them."*

The government filed a Motion for Default Judgment citing the one sentence as the reason:

> *"Because Corporate Defendants have failed to retain counsel, they should not be allowed to proceed in this matter. A default judgment should be awarded on all claims, and a permanent injunction should be entered against them."*

The Court granted Default. The Order affirmed:

> *"As Corporate Defendants have no counsel...entry of Default is appropriate".*

c.) "*The entry of a default judgment against a party litigant is a harsh and drastic action, invoked only in extreme situations* (4 AM.. 2D *Judgments* § 235 (2011); H.F. Livermore Corp. v. Aktiengesellschaff Gebruder Loepfe, 432 F.

(D.C. Cir. 1970) ("[*D*]*efault judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party.*") Defendants were not unresponsive. Defendant corporations officers had actively continued to seek pro bono

counsel for the corporations while continuing to respond to discovery requests, and were not unresponsive, and not intentionally delaying the proceedings. The lawyers had already complied with all discovery requests for the corporate defendant's before they withdrew. The proceedings were advancing with discovery from the two officers, which the government wanted supplemented at that time. In the 5 months following the withdrawal of the lawyers, there were 43 events docketed by the officers acting *pro se*. The 82 events were docketed before, from May 2011 until January 2013 by 3 law firms.

There was no delay in the proceedings. There were less severe sanctions that should have been considered, such as transferring the case to the SEC Administrative Law Court, where the poor, small corporations officers could have presented the evidence for the corporation and themselves – as the other 25 million small business sole proprietorships, partnerships

and associations are allowed, and thus granted due process in their cases. Defendants were denied due process and equal access to courts, & equal protection under the law in this case. The evidence that related to the irreparable harm to the Corporation was not even allowed to be considered, though the harm to the Corporation was irreparable to Defendants, and Defendant was held joint and severally liable with the Corporations.

(B.) Review Is Warranted Because of Conflicts in the Circuits Opinions On These Issues:

Corporations Have Constitutional Rights, And Persons Who Comprise Corporations Have Constitutional Rights

In the 1819 landmark corporate rights case, Dartmouth College v. Woodward, Chief Justice Marshall explained that corporations are formed by individuals and those individuals have constitutional rights. "Corporations receive

constitutional protection, as Dartmouth did, in order to protect the constitutional rights of the individuals behind the entity"... In 1886, the Supreme Court established what would later become known as "corporate personhood" in the case of Santa Clara v. Southern Pacific Railroad. One of the arguments was that corporations are persons within the meaning of the Fourteenth Amendment. Corporations and other types of organizations have long exercised a range of constitutional rights, including those found under the Contracts Clause, Due Process

Clause, Fourteenth Amendment Equal Protection Clause, First Amendment, Fourth Amendment, Fifth Amendment Takings and Double Jeopardy Clauses, Sixth Amendment, and Seventh Amendment.

The laws of the United States hold that a legal entity (like a corporation) shall be treated under the law as a person except when otherwise noted.

This rule of construction is specified in 1 U.S.C. §1 which states: In determining the meaning of any Act of Congress, unless the context indicates otherwise—the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

As a matter of interpretation of the word "person" in the Fourteenth Amendment, U.S. courts have extended constitutional protections to corporations. The basis for allowing corporations to assert such protections under the

U.S. Constitution is that they are organizations of people, and the people should not be deprived of their constitutional rights when they act collectively. A corporation is a legal "person" for purposes of the constitutional guarantees of all persons to EQUAL PROTECTION OF LAWS And Due Process Of Law.

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That a corporation is a legal person is not new. There is a 200-year-long line of giving businesses the same rights as humans rulings. The rationale behind the decisions—that expanding constitutional rights to businesses is necessary to "protect the rights of people associated with the corporation"—is far from novel. The timeline of the corporations' human evolution includes:

1803 (*Marbury v. Madison*) *determined a person had a right, and if he has a right, and that right has been violated, that his country must afford him a remedy.*

1819 (*Dartmouth v. Woodward),* "Corporations receive constitutional protection, in order to protect the constitutional rights of the individuals behind the entity".

1844 (*Louisville, Cincinnati, and Charleston Railroad v. Letson*): *ruled corporations were "citizens" of the states where they incorporated.*

1853 (*Marshall v. Baltimore and Ohio Railroad*): *The Supreme Court upheld that corporations were citizens, for the purposes of court jurisdiction.*

1886 *(County of Santa Clara v. Southern Pacific Railroad): the court declared that "corporations are persons within the provisions of the Fourteenth Amendment.*

1893 *(Noble v. Union River Logging Railroad Co.) first extended due process protections to a corporation – For the first time corporations have a claim to the Bill of rights.... nor be*

deprived of like, liberty or property, without due process of law.

1898 (*Smyth v. Ames*): *ruled the government could not take a corporation's property without due process—a violation of its 14th Amendment rights.*

1905 *(Lochner v. New York), Held that limits to working time violated the Fourteenth Amendment. The Fourteenth Amendment forbids depriving "any person of life, liberty, or property, without due process of law." The text refers to property without specifying the kinds of property.*

1906 (*Hale v. Henkel*): *found that corporations, like people, are protected from unreasonable searches and seizures under the Fourth Amendment.*

1907 *(Chambers v. Baltimore & Ohio Railroad) 207 U.S. 143 The Supreme Court unanimously agreed that access to justice was a fundamental right.*

1931 *(Russian Volunteer Fleet v. United States): ruled that even foreign corporations are protected from unlawful government seizures under the Fifth Amendment.*

1977 (United States v. Martin Linen Supply Co.): ruled that a second trial violated the companies' rights to be tried only once.

2010 (Citizens United v. FEC): *ruled campaign donations are a protected form of speech and corporations and people enjoy the same legal rights.*

2014 (Burwell v. Hobby Lobby): *Ruled corporations are legally people with the right to free speech, and can assert the religious rights*

of their owners, greatly expanding the power of shareholders.

Corporations, like any other associations of people, are entitled to constitutional rights in order to protect the rights of individuals who have an interest in them. The rhetorical tactic of conflating a right with the means used to exercise it is just that. Individuals standing together as a group should not be stripped of

rights that would be constitutionally guaranteed to them standing alone. Whether or not one accepts the notion of the corporate person, however, the result is the same: corporations are entitled to certain constitutional rights.

> *"If you accept a corporation as a separate person then taking its property violates its rights. But if you reject that, as a means of arguing that the corporation should lack rights, then taking its property violates its owners' rights."*

Either way, the result is the same: The Constitution – the Takings Clause in the 5th Amendment, applies to protect the rights of the individuals affected. Either way, does not alter the results. Therefore, the specific rights at issue are the rights of the individuals who own and operate the corporation, not the rights of the corporation itself.

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Thus, when there is injury to a corporation, the corporation does not feel it, the persons that comprise the corporation do. It is both the corporation as a person, and the persons who comprise the corporation whose constitutional protections are violated. They suffer irreparable harm if a corporation (person) is denied due process, denied equal protection under the law, denied equal access to justice, and is not allowed to defend against economic and other harm and injury, but are declared

liable & guilty by Default if they can't afford lawyers. 62

CONCLUSION

Defendant/Appellants respectfully request this Honorable Court, in its mercy, to grant this Petition for a Writ of Certiorari, and to reverse the DC Circuit's Decision. Appellants respectfully inform the Court that they will do everything possible to get a lawyer to present this case to the Honorable Supreme Court Justices, and believe they can because of the critical national importance of the issues in this case that affect millions of like small and poor

business corporations, and the millions of persons that comprise them.

Dated the 9th day of September, 2017

Respectfully submitted,



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