

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

GARY LYNN MCDUFF,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I WHETHER A DIVIDED APPELLATE COURT PANEL ON THE ISSUE OF *IN FORMA PAUPERIS* (IFP) STATUS PRECLUDES A FINDING OF FRIVOLITY?

- II THE PANEL DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE ISSUE OF STATUTORY INJUNCTIONS AND THE ELEMENTS REQUIRED TO BE PLED AND PROVED. THIS PANEL DECISION REMOVES THE REQUIREMENT OF A PLEADING AND A FINDING BY THE COURT OF A "LIKELIHOOD OF FUTURE CONDUCT" FROM S.E.C. STATUTORY INJUNCTIONS.

- III WHETHER A TRIAL COURT MAY COMPLY WITH FED.R.APP.P. 24(a)(2), EXPLAINING ITS REASONS FOR CERTIFYING DENIAL OF IFP STATUS SIMPLY BY "INCORPORATION BY REFERENCE" OF A DEFAULT JUDGMENT AND/OR OTHER MOTIONS AND ORDERS?

- IV WHETHER A DEFAULT JUDGMENT CAN, UNDER FED.R.CIV.P. RULE 9, BE SUSTAINED UNDER THE WELL-PLEADED COMPLAINT RULE WHEN THE PLEADINGS AND SUPPORTING DOCUMENTATION ARE MATERIALLY INCONSISTENT WITH EACH OTHER?

CERTIFICATE OF INTERESTED PERSONS

The undersigned Petitioner hereby certifies, to the best of his belief and knowledge that the following listed persons have an interest in the outcome of this case:

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CITATION TO OFFICIAL JUDICIAL OPINION & ORDERS

02/09/2018

ON PETITION FOR REHEARING - Opinion USCA5 16-10691; Document: 00514343125 [DENIED] See Appendix "A".

09/18/2017

PANEL OPINION - USCA5 16-10691 Fifth Circuit Court of Appeals. Gary L. McDuff Appellant's Appeal from the United States District Court for the Northern District of Texas USDC No. 3:08-cv-526-L; 697 Fed.Appx. 393; 2017 U.S. App. LEXIS 10875 [DENIED] IFP Denied; Appeal Dismissed; Sanction Warning Issued. See Appendix "B".

10/17/2016

ORDER - USDC N.D. Tex 3:08-cv-00526-L; Document 75 PageID 1278-79; USCA5 16-10691, ROA.1272-73; Motion to Set Aside Void Judgment for Defective Service of Process Under Rule 60(b)(4); 2016 U.S. Dist. LEXIS 143121 [DENIED] Court certifies that any appeal would not be taken in good faith. See Appendix "C".

10/05/2016

ORDER - USDC N.D. Tex 3:08-cv-00526-L; Document 74 PageID 1276; USCA5 16-10691, ROA.1270-71; Application to Proceed Without Payment of Fees on Appeal. [DENIED] Certifies that any appeal would not be taken in good faith. See Appendix "D".

09/20/2016

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE - USDC N.D. Tex 3:08-cv-00526-L; Document 72 PageID 1263-68; USCA5 16-10691, ROA.1270-71; on Motion to Set Aside Void Judgment for Defective Service of Process Under Rule 60(b)(4); 2016 U.S. Dist. LEXIS 143411 [recommending DENIAL]. See Appendix "E".

08/17/2016

RECOMMENDATION REGARDING IN FORMA PAUPERIS ON APPEAL - USDC N.D. Tex 3:08-cv-00526-L; Document 71 PageID 1261-62; USCA5 16-10691, ROA.1261-62; on Motion to Proceed *In Forma Pauperis* On Appeal; 2016 U.S. Dist. LEXIS 138460 [recommending DENIAL and certify that appeal is not taken in good faith]. See Appendix "F".

08/17/2016

ORDER OF REFERENCE - USDC N.D. Tex 3:08-cv-00526-L; Document 70 PageID 1259-60; USCA5 16-10691, ROA.1259-60; Motion to Set Aside Void Judgment for Defective Service of Process, under Rule 60(b)(4). See Appendix "G".

04/07/2016

ORDER - USDC N.D. Tex 3:08-cv-00526-L; Document 59 PageID 1194; USCA5 16-10691, ROA.1194; Motion to Alter Judgment, under Rule 59(e) and 60(b)(6) [DENIED]. See Appendix "H".

10/01/2015

ORDER - USDC N.D. Tex 3:08-cv-00526-L; Document 51 PageID 883; USCA5 16-10691, ROA.883; on Motion for Leave to File Supplemental Evidence in Support and Motion Pursuant to Rule 60(b),(d), to Grant Relief from and Vacate a Final Default Judgment [DENIED]. See Appendix "I".

02/22/2013

FINAL DEFAULT JUDGMENT - USDC N.D. Tex 3:08-cv-526-L; Document 41 PageID 489-93; USCA5 16-10691, ROA.489-93; Final Default Judgment in favor of the Securities and Exchange Commission against Gary L. McDuff [GRANTED]. See Appendix "J".

02/22/2013

ORDER - USDC N.D. Tex 3:08-cv-526-L; Document 40 PageID 486-88; USCA5 16-10691, ROA.486-88; The court GRANTS Plaintiff's Motion for Default Judgment as to Gary L. McDuff. See Appendix "K".

STATEMENT OF BASIS FOR JURISDICTION

On September 18, 2017, the United States Court of Appeals for the Fifth Circuit entered its order denying *in forma pauperis* (IFP) status; dismissing the appeal; and issuing a sanction. On February 9, 2018, the United States Court of Appeals for the Fifth Circuit denied the petition for rehearing without comment. Review is sought pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

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

15 U.S.C. §77t. Injunctions and prosecutions of offenses (in relevant part)

(b) Action for injunction or criminal prosecution in district court. Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title [15 USCS §§17a et seq.], or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title [15 USCS §§77a et seq.]. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus

or security complained of begins, or in the district wherein such prospectus or security is received.

[]

(d) Money penalties in civil actions.

(1) Authority of Commission. Whenever it shall appear to the Commission that any person has violated any provision of this title [15 USCS §§77a et seq.], the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 8A of this title [15 USCS §77h-1], other than by committing a violation subject to penalty pursuant to section 21A of the Securities Exchange Act of 1934 [15 USCS §78u-1], the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty.

(A) First tier. The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) \$5,000 for a natural person or \$50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as result of the violation.

(B) Second tier. Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) \$50,000 for a natural person or \$250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier. Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) \$100,000 for a natural person or \$500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if --

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

15 U.S.C. §78j. Manipulative and deceptive devices (in relevant part)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. §78u. Investigation and actions (in relevant part)

(a) Authority and discretion of Commission to investigate violations.

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title [15 USCS §§78a et seq.], the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated.

15 U.S.C. §80b-3. Registration of investment advisers (in relevant part)

(a) Necessity of registration. Except as provided in subsection (b) and section 203A [15 USCS §80b-3a], it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means of instrumentality of interstate commerce in connection with his or its business as an investment adviser.

17 CFR §240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails or of any facility to any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

28 U.S.C. §1915 Proceedings in forma pauperis (in relevant part)

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

[]

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

42 U.S.C. §1997e. Suits by prisoners (Prison Litigation Reform Act)(PLRA)(in relevant part)

(a) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

Fed.R.App.P. Rule 9. Pleading Special Matters (in relevant part)

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed.R.App.P. Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (in relevant part)

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed.R.App.P. Rule 24. Proceeding *in Forma Pauperis* (in relevant part)

(a) Leave to Proceed *in Forma Pauperis*.

(1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

[]

(4) Notice of District Court's Denial. The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal *in forma pauperis*;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed *in forma pauperis*.

(5) Motion in the Court of Appeals. A party may file a motion to proceed on appeal *in forma pauperis* in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion

must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

Fed.R.App.P. Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Fifth Circuit Rule 42.2. Voluntary Dismissal (in relevant part)

42.2. Frivolous and Unmeritorious Appeals. If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

Fed.R.Civ.P. Rule 59. New Trial; Altering or Amending a Judgment (in relevant part)

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed.R.Civ.P. Rule 60. Relief from a Judgment or Order (in relevant part)

(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 representatives 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.

[]

(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.

STATEMENT OF THE CASE

McDuff moved to proceed *in forma pauperis* (IFP) in an appeal from the district court's order denying his motion under Federal Rules of Civil Procedure 59(e), 60(b)(d), in which McDuff raised newly discovered evidence, fraud, misrepresentation by the S.E.C., and defective service. McDuff sought to alter or amend a default judgment. McDuff's IFP appeal is a challenge to the district court's certification that his appeal is not taken in good faith.

McDuff established his financial ability to proceed IFP. The panel, in a split decision (Justice Haynes dissents and would grant the IFP, retain the case on the docket) affirmed the trial court's decision. (See Appendix B.)

McDuff moved for reconsideration which was denied without comment. (See Appendix A.)

REASONS FOR GRANTING THE WRIT

I. WHETHER A DIVIDED APPELLATE COURT PANEL ON THE ISSUE OF IFP STATUS PRECLUDES A FINDING OF FRIVOLITY?

In 1892, Congress enacted the *in forma pauperis* (IFP) Statute, which is codified at 28 U.S.C. §1915, "to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). In 1996, Congress enacted PLRA, which modified the IFP to respond to a sharp rise in prisoner litigation and to filter out the bad claims [filed by prisoners] and to facilitate

consideration of the good. See *Woodford v. Ngo*, 548 U.S. 81, 84 (2006), *Coleman v. Tollefsan*, 575 U.S. ___, ___, 135 S.Ct. 1759 (2015) (quoting *Jones v. Bock*, 549 U.S. 199, 204 (2007)) (internal quotations omitted).

Also included in its 1996 modifications (PLRA), Congress provided a safety-valve provision to ensure that the fee requirements imposed on §1915 would not bar a prisoner's access to the courts. "In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." §1915(b)(4).

The Fifth Circuit Rules of Appellate Procedure Rule 42.2 reads: "Frivolous and Unmeritous Appeals. If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the Court that the appeal is frivolous and entirely without merit, the appeal will be dismissed." The Fifth Circuit Rule 42.2 is not replicated in any other circuit.¹

In *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997), the Fifth Circuit held: "In instances in which we uphold the trial court's determination that the appeal is not taken in good faith and the prisoner persists in taking an appeal on the merits,

¹ 5th Circuit Rule of Appellate Procedure Rule 34 is immaterial with the issue at hand. Fed. Cir. Rule of App. P. Rule 42 is voluntary dismissal only; D.C. Cir. Rule 42 is voluntary dismissal -- Rule 42.2 refers the reader to 27(g) "Dispositive motions; 1st Cir., 2nd Cir., 4th Cir., 6th Cir., 7th Cir., 8th Cir. Rule 42 is voluntary dismissal; 3rd Cir. no Rule 42; 9th Cir. Rule 42 is voluntary dismissal, Rule 42.1 failure to prosecute, pay default fee, Rule 42.2 termination of bail; 10th Cir. Rule 42 voluntary dismissal, Rule 42.1 failure to prosecute, Rule 42.2 reinstatement; 11th Cir. Rule 42 voluntary dismissal, Rule 42.1(a) unopposed dismissal, (b) failure to prosecute, 42.2(a) applicability, (b) Due date for filing brief (c) DWOP, (d) Extend time to file, (e) remedy default, (f) Appellate date.

payment of the full appellate filing fees and costs, less what has already been collected, must be paid within 30 days or the appeal will be dismissed for want of prosecution. fn 24."

Baugh v. Taylor, 117 F.3d 197, fn. 24 reads: "Of course, nothing prevents the appellate court from *sua sponte* dismissing the case on the merits pursuant to 5th Cir. R. 42.2. when it is apparent that an appeal would be meritless." Since *Baugh v. Taylor's* pronouncement in 1997, the Fifth Circuit has denied IFP and dismissed more than 1,391 cases in this manner, *sua sponte*.² No other circuit has so aggressively hindered indigent defendants.

In *Jones v. Bock*, 549 U.S. 199 (2007), this Court determined that the Sixth Circuit's additionally imposed rules are not required in the PLRA, and crafting such rules [regarding exhaustion of administrative remedies] exceeds the proper limits of the judicial role. The Fifth Circuit's *sua sponte* dismissal spree on more than 1,391 cases many, if not most, instances without substantive briefing also exceeds the proper limits of the judicial role.

Various courts have addressed the concept of "frivolous" in multiple contexts. For example, in the Fed. R. Civ. P. Rule 11 context, it's noted that "A legal claim is frivolous if no reasonably competent attorney could conclude that it has any 'reasonable chance of success' or is a reasonable argument to change existing law."

² McDuff's calculation is of published cases on the BOP LEXIS system. Inclusion of the non-published system would most likely increase that number substantially.

World Wide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996); *Cf Jones v. Int'l Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995); *McGregor v. Board of Comm'rs of Palm Beach County*, 956 F.2d 1017, 1022 (11th Cir. 1992).

A factual claim is frivolous if no reasonably competent attorney could conclude that it has a reasonable evidentiary basis. *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990).

The test for frivolous focuses on "what a reasonably competent attorney would believe..." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988).

Under the *Strickland v. Washington*, 466 U.S. 688, 694 (1984) context, the Court applied the "reasonably competent attorney" standard. *C.f. Bronson v. Higgins*, 708 F.2d 1353, 1356 (8th Cir. 1983); *Monow v. Parratt*, 574 F.2d 411, 412 (8th Cir. 1978).

In the Anders Brief context, the standard is a "reasonably competent attorney" would have found one nonfrivolous issue...See *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Frivolous is perhaps most studiously discussed by this Court in *Coppedge v. United States*, 369 U.S. 438 (1962), the IFP requirements were not to be used to

discriminate against paupers. "Appeals at this stage of the proceedings are generally inadequate for passing for the [Appellant's] application." *Id* at 446.

"Since our statutes and rules make an appeal in a criminal [and now civil] case a matter of right, the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity," *Id.* at 447, and not the Court. See also §28 U.S.C. §1915(b)(4).

"It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately." *Id.* at 448.

"Indigent appeals from criminal [and now civil judgments] cannot be used as convenient valve for reducing the pressures of work on the courts." *Id.* at 450.³

"The statutory safeguard against overindulgence in free frivolous appeals cannot be allowed to impinge upon the fundamental right of any litigant, rich or poor, to equal consideration before the courts." *Id.* at 456. (*J. Stewart* concurring)

"This attempted conversion of the proceedings to determine good faith into a truncated substitute for appeal distorts the purpose of §1915, and if accepted, would raise serious questions of due process." *Id.* at 457. (*J. Stewart* concurring)

³ "Since the same rules and statutes apply to and govern petitions to proceed on appeal *in forma pauperis* both from civil and criminal cases, we believe that the *Coppedge* standard is appropriately applied to civil cases such as this one. See generally 9 *J. Moore, Federal Practice* P 224.02 (2d ed. rev. 1975)." *Tate v. Werner*, 68 F.R.D. 513, 519 (E.D. PA 1975).

More recently in an analogous setting a F.R.C.P. Rule 60(b)(6) petition, seeking to reopen a COA, this Court reversed the Fifth Circuit in 2017. This Court noted:

"The COA inquiry...is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" Citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). *Buck v. Davis*, 580 U.S. ____, 137 S.Ct. 759, 197 L.Ed. 2d 1 (2017).

This is exactly what Justice Haynes urged in her dissent. There is no question that Justice Haynes is a jurist of reason.

The PLRA was targeted against frivolous §1983 claims. This is not such a claim. Justice Haynes would have granted IFP status and docketed the case. It cannot be reasonably disputed that Justice Haynes is a "reasonably competent attorney." For purposes of frivolous analysis under the IFP and PLRA this Court should adopt a per se rule that when an appellate panel is divided on the issue of IFP that a determination of frivolity is not applicable to such cases. Each justice must be afforded a "reasonably competent attorney" status and deemed to be a "jurist of reason" if we are to inscribe confidence into our judicial system.

II. THE PANEL DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE ISSUE OF STATUTORY INJUNCTIONS AND THE ELEMENTS REQUIRED TO BE PLED AND PROVED. THIS PANEL DECISION REMOVES THE REQUIREMENT OF A PLEADING AND A FINDING BY THE COURT OF A "LIKELIHOOD OF FUTURE CONDUCT" FROM S.E.C. STATUTORY INJUNCTIONS.

The Fifth Circuit Panel Decision is in conflict with the decisions of other United States Courts of Appeal on the issue of statutory injunctions and the elements required to be pled and proved. This panel decision removes the requirement of a pleading by the Plaintiff and a finding by the court of a "likelihood of future conduct" from S.E.C. Statutory injunctions.

There are three different types of injunctions a federal court may issue: (1) The first is a "traditional" injunction which must be based on a cause of action for certain breaches of common law, statutory, and constitutional rights. (2) The second type of injunction is a "statutory injunction," which is to enforce the statute [S.E.C. injunctions]. (3) The third type is under the All Writs Act...*Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233 (5th Cir. 2006) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004).

This panel decision disagrees with the following panel decisions: *S.E.C. v. Commonwealth Chemical Securities, Inc., et al.*, 574 F.2d 90 (2d Cir. 1978); *S.E.C. v. UniFund Sal., et al.*, 910 F.2d 1028 (2d Cir. 1990); *S.E.C. v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998); *Smith v. S.E.C.*, 653 F.3d 121 (2d Cir. 2011), *S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980); *S.E.C. v. Bonastia*, 614 F.2d 908 (3rd Cir. 1980); *S.E.C. v. Karacorp. Indus.*, 575 F.2d 692 (9th Cir. 1978); *S.E.C. v. Gann*, 565 F.3d 932 (5th Cir. 2009); *S.E.C. v. Zale Corp.*, 650 F.2d 718, 721 (5th Cir. 1981); *S.E.C. v. Caterinicchia*, 613 F.2d 102 (5th Cir. 1980); and *S.E.C. v. Blatt*, 583 F.2d 1325 (5th Cir. 1978).

The S.E.C. sought a statutory injunction individually against McDuff. It is axiomatic that agencies are creatures of statute which rely on congressional language in the statute for their authority. *Bayshore*, 471 F.3d at 1233. In these statutory injunctions (along with disgorgement and civil penalties), which dispense with the usual requirements (posting bond, proving irreparable harm, etc...) the agency need only prove wrongful conduct and a reasonable likelihood that the wrong will be repeated. *S.E.C. v. Management Dynamics, Inc.*, 515 F.2d 801, 807-809 (2d Cir. 1975) (...there must be some indication that a[n] [alleged] wrong connected with fraud or misconduct...is to be repeated).

As this case was decided by default judgment the pleadings are taken as true when applying the well-pleaded complaint rule. The operative statutes pled in the trial court by the S.E.C. are: §20(d) of the Securities Act [15 U.S.C. §77t(d)]; §21(d) of the Exchange Act [15 U.S.C. §78u(d)] and §203(e) of the Investment Advisors Act [15 U.S.C. §80b-3(e)]. In these statutes and the case law interpreting these statutes, a "proper showing that defendant is engaged or is about to engage" in violation of securities laws is required to obtain an injunction and impose sanctions (disgorgement and civil penalties). See *S.E.C. v. Gann*; *S.E.C. v. Zale Corp.*; *S.E.C. v. Bonastia*; *S.E.C. v. Caterinicchia*; *S.E.C. v. Blatt*; *S.E.C. v. Commonwealth Chemical Securities, Inc.*; *S.E.C. v. Unifund Sal., et al.*; *S.E.C. v. Cavenagh*; *Smith v. S.E.C.*; *supra*.

For example, in *Zale*, quoting *Blatt, supra* at 1334 n.29, the Court discussed the "reasonable likelihood analysis" that the conduct will be repeated. *C.f. Murphy*,

626 F.2d at 665; *Bonastia*, 614 F.2d at 912. In these cases and others, the courts looked at the nature of past violations, defendant's present employment, objective constraints on (or opportunity for) future violations of security laws. (Factors include the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's recognition of the wrongful nature of his conduct, and the likelihood the defendant's occupation will present an opportunity for future violations.) Here, the S.E.C. took a punitive approach because McDuff did not unconditionally capitulate, but rather tried to defend against the charges, albeit in an ill advised manner.

A contextual analysis of the S.E.C. cases from different circuits cited herein, seeking injunctive relief and civil penalties and/or disgorgement demonstrate a temporal relevance that is absent from the McDuff case. The S.E.C. in its petition alleged fraud and other conduct from the 2003-2005 timeframe. The S.E.C. filed its case in 2008. The default judgment was granted in 2013, eight years post alleged conduct and after the case was closed in 2010, and subsequently reopened in 2012 raising jurisdictional questions as well. Moreover, the alleged improper conduct involves a separate lawsuit, *S.E.C. v. Megafund Corp., et al.*, 2008 U.S. Dist. LEXIS 54512 (N.D. Texas) not involving McDuff; however, the S.E.C. incorporates it throughout its pleadings. The affidavits in support of the default reference conduct allegedly in the Megafund lawsuit in which McDuff was not a defendant or a party to in any way, nor was McDuff alleged to be in some conspiracy involving anyone in the Megafund lawsuit.

The Security Act speaks of enjoining "any person [who] is engaged or about to engage in any acts or practices" which constitute or will constitute a violation. The language requires pleadings [in a default judgment] and findings [there were none in this default judgment nor any actual allegations of future conduct] of a "likelihood" or a "propensity" to engage in future violations. See *Chris-Craft Ind. v. Piper Aircraft Corp.*, 480 F.2d 341, 394 (2nd Cir. 1973). In *S.E.C. v. Bausch Lomb, Inc.*, 565 F.2d 8, 18 (2nd Cir. 1977), the Court noted that "The commission cannot obtain relief without positive proof of a reasonable likelihood that past wrong-doing will recur." See comment, *Scienter and S.E.C. Injunctive Series*, 90 Harv. L. Rev. 1818, 1026 (1977); Note, *S.E.C. Enforcement Actions to Enjoin Violations of Section 10(b) and Rule 10b-5: The Scienter Question*, 5 Hofstra L. Rev. 831, 834-36 (1977).

15 U.S.C. §77t(b) and §21(d) of the Securities Act provide:

"Whenever it shall appear to the commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of [the Securities Act]...the Commission may, [] bring an action in any district court...to enjoin such acts or practices..." See also 15 U.S.C. §78u(d)(1).

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Collectively, the Statutes and cases from other circuits addressing the issue, contrasted with the panel decision here, all hold that statutory injunctions are different from purely equitable injunctions. Courts, in order to issue injunctions, are called on to predict future violations based on the totality of the circumstances [in

this case, the pleadings must demonstrate] involving a particular defendant in relationship to past violations.

In this case, there are no pleadings to support the finding required under statutory injunctions of "likelihood of future conduct." Every other circuit, noted herein, and the statute noted herein require such pleadings, proof, and findings. The Fifth Circuit in this case so deviates from the statute and differs from the other circuits that this Court is called upon to use its supervisory powers and to correct this material split in the circuits.

III. WHETHER A TRIAL COURT MAY COMPLY WITH FED.R.APP.P. 24(a)(2), EXPLAINING ITS REASONS FOR CERTIFYING DENIAL OF IFP STATUS SIMPLY BY "INCORPORATION BY REFERENCE" OF A DEFAULT JUDGMENT AND/OR OTHER MOTIONS AND ORDERS?

In what is believed to be a case of first impression, the Court is requested to determine whether a trial court, in its compliance with the notice provisions of F.R.A.P. 24(a)(2) (which provides in part, "...If the district court denies the motion [to proceed IFP], it must state the reasons in writing." F.R.A.P. 24(a)(2)) may simply "incorporate by reference" prior orders, dockets, motions, or filings without offending the notice provisions of the due process clause of the United States Constitution.⁴

The Fifth Circuit's split Panel decision denying McDuff permission to proceed *in forma pauperis* is against its own long-standing precedent. This Court's

⁴ The Supreme Court discussed such similar practices under 18 U.S.C. §3582 wherein the court must explain its decisions. See *Chavez-Meza v. United States*, No. 17-5639 issued in this court on April 23, 2018.

"considerations Governing Review on Certiorari" (Supreme Court Rule 10) squarely addresses the compelling reasons for this Court to grant review, that is, the Fifth Circuit has entered this decision that conflicts with the similar decisions in sister circuit courts of appeal, and the Fifth Circuit's decision departs from the accepted and usual of judicial proceedings so as to call for an exercise of this Court's supervisory powers.

In an anomaly, the Fifth Circuit in *Baugh v. Taylor*, 117 F.3d 197 (5th Cir. 1997), has short circuited the IFP process on more than 1,300 occasions by reference to two footnotes. Footnotes 21 and 24. Footnote twenty-four was addressed *supra*. In footnote 21, the Fifth Circuit provides that:

"To comply with [F.R.A.P.] Rule 24 in this regard [stating its reasons for denial of IFP], it often may suffice for the district court to incorporate by reference its decision dismissing the prisoner's complaint on the merits with or without supplementation, as the trial court deems appropriate, to fully appraise us of the reasons for its certification."

This circuit's internally grafted ability to provide notice for the reasons denying certification of IFP under F.R.A.P. 24(a) by "incorporate by reference" is believed to exist only in the Fifth Circuit (no case has been located by McDuff outside of the Fifth Circuit). Reliance upon *dicta* in footnotes to deny Indigents' appeals circumvents 28 U.S.C. §1915 language and intent. See *Coppedge*, 369 U.S. at 446-450.

Reliance upon *dicta* in footnotes to deny Indigent's appeals imposes a "more stringent test of merit." *Id.* at 455 (*J. Stewart* concurring). Encourages "courts of

Appeal [] to think of these preliminary proceedings as tantamount to appeals on the merits..." *Id.* at 456.

As Justice Stewart warned, the truncated substitute for appeal under §1915 distorts the actual purpose of §1915, "and, if accepted, would raise serious questions of due process. The filing of memoranda in support of an application for leave to appeal is not on appeal. The merits of the ultimate issues are not logically involved at this point, but only the weight of those issues."

[]

"For all these reasons the interim proceeding permitted by §1915 cannot itself be deemed to constitute the appeal..."

Id. at 457 (*J. Stewart* concurring).

The Court noted in *Coppedge*, in reliance on *Ellis v. United States*, 356 U.S. 674, 675 (1958) that the "good faith" requirement cannot be transferred into some greater burden. ("The only statutory requirement...is applicant's good faith.") 28 U.S.C. §1915. In the absence of some evidently improper basis, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. The good faith test "...cannot' be converted...into a requirement of a preliminary showing of any particular degree of merit." (Citing *Farley v. United States*, 354 U.S. 521 (1957).)

Here, by permitting the trial court to "incorporate by reference" its reasons for denying IFP status, the petitioner is sent on a fool's errand to divine the basis for the trial court's decision. This is just the sort of preliminary "imposition," and

"dissipation of energy and time in preliminary skirmishing" that this Court warned against in *Coppedge*, 369 U.S. at 357.

To this extent a claimant's "good faith" standard for permission to proceed *in forma pauperis* under 28 U.S.C. §1915 et seq., the threshold inquiry in the Fifth Circuit is established by thirty-five (35) year old precedent enunciated in *Robinson v. King*, 707 F.2d 215, 1983 U.S. App. LEXIS 26679 (5th Cir. 1983) holding:

"Under 28 U.S.C.S. §1915(a), a federal court may refuse to certify an appeal for *in forma pauperis* status if it is not taken in good faith. Fed.R.App.P. 24(a). Good faith is demonstrated when a party seeks appellate review of any issue not frivolous. An investigation into the *in forma pauperis* movant's objective good faith, while necessitating a brief inquiry into the merits of an appeal, does not require that probable success be shown. The inquiry is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Id.* The panel decision ignores this precedent.

In the pleading context, "incorporate by reference" allows for special exceptions, discovery inquiries, summary judgment on particular issues and other methodology to divine what specifically is being pled. Further, orders denying IFP status should not be afforded the vagaries of the liberal pleading practice of the Fed.R.Civ.P. In particular, petitioners, under constitutional due process, are entitled to notice as to the trial court's rationale so that a cogent attack may be made at the appellate court. This is especially so when the petitioners are not learned counsel but simple (often times simple-minded) laypersons seeking relief from a denial of IFP determinations. To permit trial courts, as the panel decision does, to "incorporate by reference" its reasons for denial of IFP from a series of orders and motions, is patently unfair, particularly *vis-a-vis pro se* inmates, and reinstates the prohibited conduct

this Court sought to ban in *Coppedge*. The court should bar the use of "incorporate by reference" as a means of putting the IFP petitioner on notice of their burden under Fed.R.App.P. 24(a), exercising its supervisory role.

IV. WHETHER A DEFAULT JUDGMENT CAN, UNDER F.R.CIV.P. RULE 9, BE SUSTAINED UNDER THE WELL-PLEADED COMPLAINT RULE WHEN THE PLEADINGS AND SUPPORTING DOCUMENTATION ARE MATERIALLY INCONSISTENT WITH EACH OTHER?

The well-pleaded complaint rule, as defined by Black's Law Dictionary, is:

"An original or initial pleading that sufficiently sets forth a claim for relief--by including the grounds for the court's jurisdiction, the basis for the relief claimed, and a demand for judgment--so that a defendant may draft an answer that is responsive to the issues presented."

Id. 10th Ed. p.345

A substantive portion of the federal law on the well-pleaded complaint rule deals with the caveat to the well-pleaded complaint rule, that in federal court the well-pleaded complaint rule must raise a controlling issue of federal law or else the court will not have jurisdiction over the lawsuit.

But that is not the nature of the well-pleaded complaint rule, it is rather an application thereof. In the context of a default judgment, as with all filings in federal court, the plaintiff is the master who frames the issues and posits the question before the court. See *Caterpillar, Inc., v. Williams*, 482 U.S. 386, 392 (1987). The well-pleaded complaint rule requires the plaintiff's pleading to be self-contained, non-contradictory, and supportive of federal court jurisdiction. If any of these three elements [self-contained, non-contradictory, non-jurisdictional] are missing a default

judgment based solely on the pleading is unsupported. See *Dinney v. Nokia, Inc.*, 402 F.3d 430,441 (4th Cir. 2005) (...the well-pleaded complaint rule demands that we confine our inquiry to the "plaintiff's statement of his own claim...")

Under these paradigms in the default judgment context, facts which are contradicted in the pleadings are not established by the pleadings, and are not well-pleaded and cannot support a default judgment. See *Nishimatsu Construction, Co., v. Hansen National Bank*, 515 F.2d 1200 (5th Cir. 1975). On appeal, McDuff, although he may not challenge the sufficiency of the evidence, is entitled to contest the sufficiency of the complaint and its allegations to support the judgment. *Id.* at 1206. (internal citations omitted). *Thompson v. Wooster*, 114 U.S. 104 (1885); 9 Moore's Federal Practice para 203.06, at 730 (2d ed. 1975); *Danning v. Lavine*, 572 F.2d 1386 (9th Cir. 1978). See also *Whittlesey v. Weyerhaeuser Co.*, 640 F.2d 739, 742 (5th Cir. 1981) (*per curiam*), c.f. *Alan Newman Productions, Inc., v. Albright*, 862 F.2d 1388, 1392 (8th Cir. 1988) (The allegations are...entirely general...defect is fatal under Fed.R.Civ.P. 9(b) which requires that fraud pleadings be stated with particularity).

Here, the petition claims an assortment of conduct ascribed cumulatively to the Megafund lawsuit, Lancaster, Reese, and McDuff (not individually). Lancaster and Reese agreed to injunctions the day the petition was filed. McDuff was living in Mexico, having moved there on June 7, 2006, prior to the suit being filed in 2008. The petition alleges that they engaged in a collective effort. (ROA.13-17 ¶¶9-19).

What the SEC prosecutors knew, but did not disclose to the Court at the time of the filing of the petition in 2008, was that Lancaster was, in fact, the whistle-blower on the Megafund case. (See Lancaster's deposition, cover pages, ROA.537 and ROA.561; relevant disposition pages 52:23 - 53:8 and page 297:17-20 at Tab 3). Julia Huseman, S.E.C. prosecutor, deposed Lancaster in 2005 wherein he noted that he was the whistle-blower. Lancaster was also the star witness who provided prosecution testimony against Stanley Leitner (Megafund owner) and Robert Tringham. See Lancaster's sentencing transcript. (Tab 4, p.3:14 - 5:9; 9:2 - 10:19; 39:25 - 40:25).

The S.E.C. also knew to be true, but did not disclose at the time of the default judgment (the complaint alleges aiding and abetting and other conspiratorial conduct), that Reese had committed suicide long before 2013. (Duty to correct prior filings⁵.)

In the Motion for Default "Statement of Facts," the S.E.C. alleges a series of events, and while some are factually inaccurate, but at least initially (not waiving fraud upon the Court) under *Nishimatsu Const. Co.*, they are unassailable (the Court would always have authority to look behind facially fraudulent pleadings).⁶

⁵ See *State of Texas, et al., v United States*, 2016 U.S. Dist. LEXIS 79546 (S.D. Tex 2016) citing *In re Dresser Industries, Inc.*, 972 F.2d 540, 543-44 (5th Cir. 1992) and *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992) (U.S. Attorneys required to comply with State Bar Rules.) (Duty of candor and honesty to the court includes a lawyer's duty to not allow a court to be misled by half-truths or statements which, while technically honest, are calculated to mislead.) *Id.* *9

⁶ *Margolis v. Nazareth Fairgrounds and Farmers Mkt.*, 249 F.2d 221 (2d Cir. 1957) cited in *Pepper v. Litton*, 82 B.R. 200, 217-18 (Bankr. S.D.N.Y. 1987) (Court's equity power to look behind the judgment for collusion or fraud).

The alleged facts include "Lancaster and Reese" had already agreed to injunctions, Lancaster had surrendered his securities license in 2006, Lancorp Fund was closed down, and McDuff was in Fannin County Jail pending trial.

Interestingly, Ms. Magee, S.E.C. counsel, incorrectly alleged in her Motion for Default, "Additionally, the PPM falsely stated that Lancaster was 'an investment adviser registered with the Commission under the Investment Advisors Act of 1940, as amended.'" Ms. Magee's statement was wholly false and misleading.

Lancaster was licensed with a Series 6, 7, 63, and 65, and the S.E.C. so alleged in its complaint (Compare ROA.397 lines 5-6, and ROA.12 ¶6). In the complaint the S.E.C. alleges "[Lancaster]... the central person [refuting McDuff as the "mastermind"] of the Lancorp Financial Fund Business Trust and Lancorp Financial, LLC." Lancaster was a "registered representative, most recently with American Fidelity Securities, Inc., from March 2006 through July 2006. Previously, Lancaster was registered with Sloan Securities Corporation from July 2005 through October 2005, and with The O.N. Equity Sales Company from March 2004 through January 2005. Lancaster held Series 6, 7, 63, and 65 licenses (ROA.537-538). On September 5, 2006, the NASD barred Lancaster from association with any NASD member in any capacity." (ROA.12 ¶6)⁷

⁷ In a series of cases (21 cases before various U.S. district courts around the United States) various investors had sued Lancaster and O.N. Equity Sales Company (ONESCO). In these cases, also not disclosed to the United States District Judge by the S.E.C., the U.S. district judges all made materially different findings on issues directly related and indirectly related to the allegations in this case, in effect making the allegations in this case patently false. There are 21 ONESCO CASES. See Appendix L. Also cited in the instant case as: USDC N.D. Tex 3:08-cv-00526-L; Document 42 PageID 581-82; USCA5 16-10691, ROA.581-82.

The Court, who did not have a factual hearing, must now accept multiple pleadings that materially contradict each other under the "well-pleaded" complaint rule. Under the "well-pleaded complaint" rule, the pleadings must be consistent.

The inconsistencies do not end, there are several. Another example, see the Complaint itself, ROA.12 ¶6, and ROA.14 ¶11). Both contain the same language noted *supra*. The complaint notes that "no funds were paid to investors" and that "funds were paid to investors." (ROA.17 ¶19 vs. ROA.416-17 ¶8.).

The term "well-pleaded allegation" or "well-pleaded complaint" is a "term of art." See *T.W.A. v. Hughes*, 449 F.2d 51, 63 (2d Cir. 1971) ("For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation").

Failure to notify the Court of the change in circumstances, in the Motion for Default, (Reese's suicide) is significant as the S.E.C. actually allege "By reason of the foregoing, Lancaster, McDuff and Reese have violated, and unless enjoined, will continue to violate..." The failure to note that Lancaster was the whistle-blower in the Megafund case, the star witness in the Stanley Leitner trial (Megafund founder), Reese's suicide, (all years prior to McDuff's default in 2013) substantially misled the Court regarding the facts in this case and are materially in conflict with each other internally. Because the underlying case is a default judgment, the court did not make a factual analysis -- accepting some facts -- discarding others, but rather had to take them (without a hearing) wholesale as true.

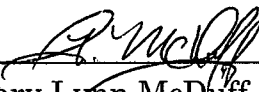
In any event, the "well-pleaded complaint" does not contain a single factual allegation how McDuff will continue to aid or abet a dead Reese or Lancaster, the government's star witness in multiple cases, making the S.E.C.'s "well-pleaded complaint" somewhat frivolous at the time of default.

Because of the substantial deviation from the Fifth Circuit's long established precedent, and in keeping with this Court's Rule 10, this Court should exercise its supervisory role enforcing the rule that the well-pleaded complaint rule, requires consistency internally and in the pleadings and documents in support of a default judgment.

CONCLUSION

McDuff respectfully requests that Writ of Certiorari be granted. McDuff prays for any other relief consistent with this Court's rules and precedent and that is supported by this petition.

Respectfully submitted,



Gary Lynn McDuff, *pro se*