No. _____

In The

# Supreme Court of the United States

DIANE S. TWEDT BLODGETT, pro se,
THOMAS LINGENFELTER, pro se,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I. Did the court of appeals err in this FTC Act Sect. 13(b) case in failing to apply Rule 60(b) at the pleading stage, by not analyzing the Motion and all Exhibits attached *cumulatively* – to find no clear and convincing evidence of "exceptional circumstances" – thus failing to apply controlling standards from this Court: *per Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 US 238 (1944); *Octane Fitness v. Con. Health & Fitness*, 134 S. Ct. 1749 (2014), as to pleading government conspiracy *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007); and from its own ruling in *Therasense v. Becton Dickinson*, 649 F. 3d 1276 (Fed. Cir. 2011 *en banc*) and *Boise Cascade Corp. v. United States*, 296 F. 3d 1339 (Fed. Cir. 2002) sufficient to push the December 2017 Rule 60(b) Motion over the threshold plausibility pleading stage?

II. Did the court of appeals err in finding: no contract; certain assets never turned over; no property rights of any kind including ERISA; and thus no Fifth Amendment "takings without just compensation" despite this Court's holdings in: *Lynch v. United States*, 292 US 571 (1934); *Loretto v. Teleprompter Manhattan ATV Corp.*, 458 US 419 (1982); *US v. ITT Continental Baking Co.*, 420 US 223 (1974); *Patterson v. Shumate*, 504 US 753 (1992) (ERISA); *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419 (2015) (Fifth Amendment "takings" when made to pay to stay in lawful business); *Thole v. US Bank*, 590 US ___ (2020) (ERISA defined benefit standing to sue fiduciary); *Liu v. SEC*, 591 US ___ (June 22,

**QUESTIONS PRESENTED** – Continued

2020) (Thomas, J., dissenting 1-4); *Boyle v. Zacharie, Turner*, 6 Pet. 648, 654 (1832); *Trump v. Hawaii*, 585 US ___ (2018) (Thomas, J., concurring at 3)?

## PARTIES TO THE PROCEEDINGS

Petitioners Diane S. Blodgett and Tom Lingenfelter were Plaintiffs in the district court, pro se and appellants in the court of appeals. with the "et al" including intended third party beneficiaries including TGM ERISA to the Sect. 13(b) INJUNCTION.

EMPLOYEES

Lost wages, ERISA *Per Patterson v. Shumate* and Other Benefits

Estate of Brano Stankovsky; Robert O'Neil; Jean DuBois; Sharon Rudenick; Carol Nee; Joann Trotocheau; Linda Butterfas.

BUSINESS PARTNERS

Interference with Domestic and International Business Diversification Opportunities

Newton Investment Management – London; Jon Golding – London; Michael Bloomberg (potentially 500+ color terminals, annually) NYC; Safrabank (CA); Republic Bank (NY); HSBC Bank; David Ganz; John Highfill; Scott Travers; Jay Parino; Estate of Mike Defalco; Sil DiGenova; Business Radio Network; Printing/direct mail company; PR entity; Institutional Investor Seminars (NY); Keys to History, Inc; Heritage Collectors Society/Tom Lingenfelter; Chris Elliot; Tom Gearty; FEDEX; Northwestern Bell Telephone; USPS; Steve Contursi; Pension Consultants (Jerry Smerker); Christies Auctions London; Spink & Sons, London.

**PARTIES TO THE PROCEEDINGS** – Continued

CLIENTS

ABP Pensions Netherlands orders of $100,000,000 and approximately $744,000,000 to follow; Oceanic Bank (Plato Family Trust); Billy Britt; Bill Hawkins; Dr. Clement; John Ryan; Estate of Eleanor Carlson; Warren & Jean Hartje; Robert Hughes; Mark Jaworski; Estate of Phil & Audrey Florence; Scott Florence; Randy Lubben; Dr. Carrol Knauss; Richard White; Tom Vickerman; Tom Richter; Paul Olson; Mike Busyn; Jack & Ruby Trice; Hautmaki's; Harry Bigelow; Estate of Cal Henninger; Walter Krysher; Richard Kyle; Murray; Soule; Zazlove; D. Gabbert; Mark Fox.

**RELATED CASES**

*FTC v. T. G. Morgan, Inc. and Michael W. Blodgett, Defendants, and non-party Spouse of Defendant*, Case No. 4-91-638 (D. Minn. 1991 Murphy, J.) (Sect.13(b))

*In re: T. G. Morgan, Inc.*, No. 4-92-0578 (Bankr. D. Minn. 1992 – 2009 Kressel, J.)

*Blodgett, Lingenfelter et al v. United States*, 101 F. 3d 713 (Fed. Cir. 1996) (Original 1994 Blodgett/Lingenfelter Tucker Act Complaint)

*US v. Michael W. Blodgett*, No. 3-92-123 (D. Minn. Kyle, J.) (Mr. Blodgett criminal)

*Blodgett v. Commissioner*, 86 T. C. 90 (2003)

**RELATED CASES** – Continued

*Blodgett v. Commissioner*, 394 F. 3d 1030 (8th Cir. 2005)

*Lingenfelter v. Stoebner,* (03-cv-5544 (JMR/FLN) (D. Minn. 2005) 2005 WL 1225950

*Stoebner, Conn v. Meshbesher*, 72 F. 3d 134 (8th Cir. 1995) (unpublished) (judicial estoppel adverse to Stoebner and Conn as to honoring the contract in bankruptcy)

*VanDesande v. United States*, 673 F. 3d 1342 (Fed. Cir. 2012) (discussing Blodgett, Lingenfelter et al)

and as to Sect. 13(b)

*Federal Trade Commission v. Credit Bureau Center LLC.* No 19-825 cert granted July 9, 2020 per Amy Howe Scotusblog cert. to the 7th Circuit – 13(b)

*AMG Capital Management LLC v. Federal Trade Commission* No. 19-508 cert to the 9th Cir. per Amy Howe Scotusblog 7/9/2020 – 13(b)

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OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Diane S. Twedt Blodgett and Tom Lingenfelter petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

*Blodgett, Lingenfelter et al v. United States*, Case No. 18-2398 (Fed. Cir. appears unreported) but is reproduced at App. 1.

*Blodgett, Lingenfelter et al v. United States*, Case No. 17-2000C (Court of Federal Claims appears unreported) but is reproduced at App. 11.

*Blodgett, Lingenfelter et al v. US* is reported at 101 F. 3d 713 (Fed. Cir. 1996) and has the cover page of the December, 1994 original timely filed Tucker Act Complaint with the date of filing recorded by the clerk in App. 89.

*Hartje et al v. FTC*, Case No. 3-94-1288 appears to be unreported.

*Stoebner, Conn v. Meshbesher*, 72 F. 3d 134 (8th Cir. 1995) (unpublished) (judicial estoppel).

*Stoebner v. Parry Murray et al* is reported first at 91 F. 3d 1091 (8th Cir. 1996).

*In re: T. G. Morgan, Inc.*, Case No. 4-92-0578 (1992 – 2009) is mostly unreported, except for Aff'd

November 5, 1995 Doty, J approving the takings of the TGM ERISA on grounds prohibited by *Patterson v. Shumate and* the original INJUNCTION.

*Blodgett v. Commissioner* is reported at 394 F. 3d 1030 (8th Cir. 2005).

*US v. Michael W. Blodgett*, Case No. 3-92-123 (criminal) appears unreported.

## JURISDICTION

The Court of Appeals entered judgment of dismissal on December 3, 2019. The court denied rehearing en banc February 19, 2010. Petitioners three times applied for an extension of time in which to file the Petition. The clerk(s) notified Petitioners of a general Order entered providing for automatic approval for filing the Petition of up to 150 days due to COVID 19 related factors, which occurred herein. This Court has jurisdiction under *28 USC 1254(1).*

This case involves interpretation of statutes, Constitutional provisions, Federal Rules of Civil Procedure, and other authorities.

### Statutes

Tucker Act 28 USC section 1491(a)(1)

FTC Act 15 USC sections 41-56, 53(b)

ERISA 29 USC sections 1103(a), 1132(a)(1)(B), 502(a)(1)(B), 502(a)(2)

PACER JUDICIAL CONFERENCE

THE BANKRUPTCY CODE 11 USC sections 362(a)(7), 1366(d)(1), 1366(d)(2), 1366(d)(1)-(2), 11 USC 362(a)(7), 11 USC 553(a), 11 USC 704

THE INTERNAL REVENUE CODE 26 USC sections 108(a), (b), 61(a)(12)

**Constitutional Provisions**

FIFTH AMENDMENT "takings clause"

Separation of Powers under Article I, III

SIXTH AMENDMENT AS TO PUNISHMENT

**Rules Federal Rules of Civil Procedure**

Rule 1

Rule 2

Rule 3

Rule 8

Rule 9

Rule 10

Rule 12(b)

Rule 15(d)

Rule 60(b)

Rule 65(d)(2)(C)

Rule 201 Judicial Notice

Rule of Evidence 801(d)(2)(E)

16 C.F.R. section 2.32-2.35

## INTRODUCTION AND STATEMENT OF THE CASE

In February 1991 the FTC, in a prelude to enforcing Sect. 13(b) of the FTC Act, demanded Petitioner Blodgett, her husband and their Subchapter S rare coin business T. G. Morgan, Inc. ("TGM") comply with an FTC Civil Investigative Demand (CID), which the Blodgett's and TGM did. The FTC explained to TGM's attorney that the demand was 'routine' because TGM had used what was called the Salomon Brother's "Scorecard" that correctly reported that high quality, correctly graded rare American coins outperformed all other asset classes with less risk (volatility) albeit with less liquidity.

Despite knowing there was no probable cause as required under Sect. 13(b) of the FTC Act, as to actual or imminent harm to consumers because the targets, the Blodgett's and the Subchapter S TGM had already documented fully in the February 1991 FTC CID – the FTC initiated this case under FTC Act Sect. 13(b) by ex parte TRO and asset freeze in August 1991. The Blodgetts never recovered from that targeting. Ms. Blodgett is Petitioner here.

Despite knowing there was no probable cause that Defendant TGM or the Blodgett's were causing an iota of actual or imminent harm to consumers, which was the statutory requirement for the FTC to take a Sect. 13(b) shortcut in its consumer protection activities. (See Petitions for cert. granted in *AMG v. FTC and*

*FTC v. Credit Bureau* both granted 7/09/2020), the FTC went forward anyway.

Having realized there was no probable cause the FTC almost immediately shifted into consent settlement mode under 16 C.F.R. 2.32-3.25.

After creating and exploiting an actual conflict of interest with Blodgett's attorneys, interfering with Blodgett's access to $50,000 per month approved by the district court, the FTC and Blodgett's attorneys then set Blodgett's up to force appointment of a receiver and also to secretly prepare to charge Mr. Blodgett criminally – all while negotiating and finalizing a purported global consent settlement contract. The settlement was finally ready for Blodgett's to sign and fully perform on December 31, 1991, which they did.

The plain language of the consent settlement, construed as a contract per this Court's holdings in *U. S. v. ITT Continental Baking Co.*, 420 US 223 (1974) contained, as bargained for: no finding or admission of any wrongdoing and the promises that the Blodgett's would continue in all their money management diversification businesses domestic and international with their business partners as intended third party beneficiaries, and keep their ERISA and millions of $$ of other fully disclosed assets never turned over to fund the 13(b) 'restitution settlement'. The FTC later 'valued' that restitution at $38,046,524.00 in an involuntary bankruptcy the FTC conspired to file to overturn its own settlement which the FTC had by then realized was going to make the Blodgett's and their business partners even more successful by proving the

Blodgett's as having survived a full FTC investigation. App. 21, 72, 79, 58-66.

These next 29 years have been a fight to enforce the plain language of the Sect. 13(b) INJUNCTION of March 4, 1992, as a contract against breach in an actual conspiracy of the FTC and DOJ, so as to obtain money damages for Petitioners here. Unfortunately for Petitioners, no court wanted to believe anything Petitioners pled, ever, despite having acquired voluminous direct and circumstantial "proof" in Exhibits Petitioners attached to their pleadings under Rules 10 and 15(d), rendering them plausible and indeed the *sole* plausible explanation for the government's actions. App. 72 ff, 79, 84, 89, 91.

The damages here were originally in 1994, and again now are claimed under Rule 60(b)(6) under the Tucker Act grant of exclusive jurisdiction in the Court of Federal Claims, for violation of the duties of good faith and fair dealing and Fifth Amendment takings without just compensation.

To prevail all this time the government has pled and the courts have adopted a false standard, namely that a waiver of *all the claims* contained in the INJUNCTION meant no contract, no property rights and thus no breach and no per se takings. But see: *Lynch v, United States*, 292 US 571 (1934); *Horne v. Dept of Agriculture*, 135 S. Ct. 2419 Part C (2015); *Loretto v. Teleprompter Manhattan CATV*, 458 US 419 (1982) (per se takings are usually so obvious); *Patterson v. Shumate*, 504 US 753 (1992) (ERISA with anti-alienation clause not property of a bankruptcy estate).

However, more than 200 years of jurisprudence by this Court and other courts as detailed below under 'WAIVER" shows that waivers in bilateral contracts are not enforceable where the government's breaches remove any consideration, rendering the waiver unenforceable, and in fact a Fifth Amendment 'taking'.

## The Waiver by Its Terms Could Never Have Applied to Assets and Property Rights Never Turned Over or to Claims for Fifth Amendment "Takings"

The settlement was explained and understood to be analyzed by Blodgetts under *US v. ITT Continental, as a contract* as *then* just recently decided in *SEC v. Levine*, 881 F. 2d 1165 (2nd Cir. 1989 FTC as amicus).

The settlement fell apart after the FTC's setting up the false appointment of a receiver, the FTC and DOJ hosted what would be a series of secret meetings to plan how to breach the fully performed on one side (Blodgett's) non-executory contract and to alienate the TGM fully funded, fully vested ERISA defined benefit pension plan, to file an involuntary bankruptcy against TGM and then to get a false criminal conviction against Mr. Blodgett. All engineered by the same AUSA's who hosted the secret meetings and took the fully funded, fully vested TGM ERISA in the involuntary bankruptcy. *Patterson v. Shumate, supra.* App. 72 ff, 79, 84, 89, 91.

## FTC Gets the Courts to Put The Cart Before the Horse

To cover up their violations of Sect. 13(b) and other misconduct, the FTC and DOJ engaged in what has become and was pled under Rule's 8 and 9 as an actual conspiracy. Namely to put "the cart before the horse". That is to relegate the consent settlement formed on December 31, 1991 as modified under duress on February 18, 1992 that merged into the FINAL ORDER Sect. 13(b) INJUNCTION of March 4, 1992 as happening *after* all the subsequent events, instead of being a binding consent settlement as res judicata or estoppel predating all the subsequent events including the false criminal conviction. See App. 21

In addition to the assets turned over in the settlement which the FTC claimed in the involuntary bankruptcy involved $38,0946,524.00 (FTC Claim) the courts below erred in allowing the additional takings of all the assets *never* turned over, in approving violations of the promises in the settlement and per se takings of property rights without just compensation in the 17-year involuntary bankruptcy including the ERISA pension and all the businesses. See App. 21, 68, 72, 79, 84, 91.

In 1994 after Mr. Blodgett was (falsely) convicted, the Blodgett's obtained a copy of Armen Vartian's 1993 deposition that had been suppressed by the prosecution and Blodgett's lawyers, and also copies of communications between Blodgett's lawyers and the FTC and DOJ to: create the false FTC Receivership; plan and

have a private bankruptcy lawyer carry out the filing and prosecution of an involuntary bankruptcy that violated Rule 65(d). App. 72.

The involuntary bankruptcy operated for 17 years breaching the duties of good faith and fair dealing and involved "takings" of $$ millions more in Blodgett assets and property rights between 1992 to 2009 – beyond the initial $38,046,524 – including the ERISA assets and destroying all the businesses while the bankruptcy was kept open.

Blodgett has: never gotten her fully funded, fully vested ERISA pension; but few of her income tax refunds for turning over in the 13(b) proceeding her half of marital personal property the FTC claimed as $38,046,524.00 (See App. 84), or any set off or offset or indemnifications. All are property rights taken by the FTC.

Even though Mr. Blodgett cannot be a plaintiff unless and until he gets his conviction overturned, clearly because as pled of the conspiracy – liability inures to the Government – courts since 1992 have cleverly granted 'by stealth' summary judgments to the Government or their associates without ever addressing such evidence of "exceptional circumstances" including breach of the original consent settlements, involuntary bankruptcy by secret meetings violating Rule 65(d), and ERISA takings by secret meetings. App. 72, 79, 84

## REASONS FOR GRANTING THE PETITION

To comply with Rules 1, 2, and 15(d), so as to do substantial justice under Rule 60(b) and Rule 65(d). Rule 10(a).

To address government and court violations of separation of powers under FTC Act Sect. 13(b) where finality was falsely obtained.

To clarify 200+ years of rulings by this Court and other courts that breach of a bilateral contract by the government renders any purported "waiver" unenforceable.

To address the circuit split between the 7th Circuit and the Federal Circuit and other circuits over 13(b).

To vindicate the Rule of Law, and Congressional policies as to PACER, the Tucker Act and ERISA. To encourage lower courts to follow this Court whenever it says "what the law is".

To help promote public trust in the judicial machinery. To coordinate with the two other Sect. 13(b) cases granted cert., *AMG v. FTC and FTC v. Credit Bureau.* To make sure that those who come into equity come with clean hands.

## ANALYSIS AND ARGUMENT

I. The Federal Circuit affirmed dismissal at the pleading stage which is considered a harsh remedy, only justified when there are no facts plausibly pled entitling a litigant to proceed to discovery. *Boise*

*Cascade Corp. v United States*, 296 F. 3d 1339, 1343-44 (Fed. Cir. 2002):

> "In reviewing dismissal for failure to state a claim, we must assume all well-pled factual allegations as true and indulge in all reasonable inferences in favor of the non-movant."

As to the two-step approach to takings claims:

> "First a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, i. e. whether the plaintiff possessed . . . a stick in the bundle of property rights. If so the court proceeds to the next stage, determining if the government's actions constituted a 'taking' of that stick."

Blodgett argued that the court below never applied its own formulation of law, let alone this Court's legal rulings. The Tucker Act provides for waiver of sovereign immunity and jurisdiction of the Court of Federal Claims over:

> " . . . claims founded upon an Act of Congress, an express or implied contract, the Constitution . . . "
>
> 28 USC s 1491

The Federal Circuit determined there was no contract due to a purported waiver. The court determined there were no property rights because of the waiver and the specific assets listed for turnover in the FINAL ORDER FTC Act Section 13(b) INJUNCTION of

March 4, 1992, ignoring all the assets never turned over. App. 21, 79

The court determined that the December, 2017 Motion under Rule 60(b), was untimely under the Tucker Act's six-year statute of limitations. The court determined that Blodgett lost under res judicata, because for example of a 2005 decision in the district court of Minnesota by Judge James Rosenbaum. The court determined there were no Fifth Amendment per se takings without just compensation.

The court determined that there were no intended third-party beneficiaries because there was no contract involving all the Blodgett businesses being preserved. Or the FTC's duties under the March 4, 1992 INJUNCTION (Murphy, J. Case 4-91-638 D. Minn. 1991 ff) to deliver specific "coins to be shipped", partnership coins, and/or PCGS replacement coins that the FTC had frozen, to their owners, despite as Blodgett argued the FTC was obligated to do so under the explicit terms of the INJUNCTION that J. Murphy had CLARIFIED on April 24, 1992 had to be construed as a contract. App. 68. The court ruled that the Court of Federal Claims had no jurisdiction over claims for income tax refunds or setoff or offset as damages and, making Blodgett a banned filer, that it would not entertain any further filings w/o permission of the Chief Judge.

**Approving Summary Judgment at the Pleading Stage**

The court made all these determinations because it found under a sub-silentio presumption of regularity "no exceptional circumstances" as required to trigger re-opening of the December, 1994 Tucker Act complaint under Rule 60(b). App. 1.

## NO EXCEPTIONAL CIRCUMSTANCES

Rule 60(b) itself in (6) does not precisely define all "exceptional circumstances" but this Court requires one or more such circumstances to re-open a prior judgment. *Hazel-Atlas Glass Company v. Hartford Empire Glass*, 322 US 238 (1944); *Liljeberg v. Health Services Acq. Corp.,* 486 US 847 (1982); *Octane Fitness v. Con. Health & Fitness*, 134 S. Ct. 1748 (2014) (defining exceptional circumstances} as would be relevant here.

Blodgett argued that the court below should consult a dictionary just as this Court did in *Octane Fitness v. Con. Health & Fitness, Id.*. There the Court to determine the plain meaning 'borrowed' definitions from multiple dictionaries:

> "We hold then that an exceptional case is simply one that stands out from others with respect to the substantive strength of a party's litigating position considering both the governing law, the facts of the case, or the unreasonable manner in which the case was litigated."
>
> *Octane Fitness, Id.*

The court below never applied any definition in finding no exceptional circumstances, not even its own definition from *Therasense v. Becton Dickinson*, 649 F. 3d 1276 (Fed. Cir. en banc 2011) ("exceptional circumstances" require plausibly pleading *either* egregious affirmative schemes *or* sea-changes in decisional law since the prior decision). The court below never applied any two-step takings analysis and never presumed the truth of well-pled factual allegations, or made any inferences in favor of Plaintiff Blodgett.

## THE CONTRACT

Blodgett pled under Rules 60(b)(6), 3, 8, 9 and attached exhibits under Rule 10, 15, 65(d) and 801(d)(2)(E) detailing the INJUNCTION as a contract fully performed by Blodgett prior to the government's January 1992 secret meeting as testified in terminated FTC Receiver Vartian's 1993 deposition. See, *US v. ITT Continental Baking Co., supra; SEC v. Levine*, 881 F. 2d 1165 (2nd Cir. 1989) (FTC as amicus) (See Vartian depo excerpts). And breached by conspiracy evidenced in that 1993 deposition in violation of the duties of good faith and fair dealing, all as exceptional circumstances. See *Bell Atlantic Corp. v. Twombly, infra.*

Blodgett attached the CLARIFYING ORDER of April 22, 1992 of the Article III court of Judge Diana Murphy, which ruled that the FTC Act Sect. 13(b) INJUNCTION had to be construed as a contract under Minnesota state law. *Carl Bolander Sons v. United Stockyards*, 215 N. W. 2d 473 (Minn. 1974). App. 68, 79, 84, 89.

Blodgett argued that was res judicata adverse to the government, but not adverse to her.

The court below never addressed the CLARIFYING ORDER or Vartian's deposition with his admissions against penal interest, despite *Bell Atlantic v. Twombly* being the controlling conspiracy pleading plausibility case. App. 68, 72.

**THE WAIVER**

Blodgett had argued as to the purported waiver, which does appear in the text of the FTC Sect. 13(b) INJUNCTION App. 21: that it was crafted by her attorneys' laboring under an actual conflict of interest created and exploited by the FTC as part of an FTC Section 13(b) 30 year scam (see FTC admissions in *FTC v. Credit Bureau, current* Petition for cert to violate separation of powers; depended in the bi-lateral contract on consideration of all the other government promises, such that when one or more government promise was broken as to retention of ERISA, or the filing of an involuntary bankruptcy violating Rule 65(d) and the duties of good faith and fair dealing, each rendered the waiver unenforceable.

Further that the waiver applied per its language only to state law "reversionary rights", not to federal rights or to claims for "future damages". And finally, that a waiver of state law reversionary rights itself effects a Fifth Amendment "takings". *Ladd v. United States*, 630 F. 3d 1015 (Fed. Cir. 2010). The court did not address any of these factors.

Further that the Contract was bilateral, such that each promise or legal duty was consideration for all the others. As a matter of law the government's pervasive repeated breaches of contract rendered the purported waiver unenforceable in accord with a long line of this Court's controlling precedent and as consistently interpreted by other circuits and courts. Here is just a sampling of such authority:

> *Puckett v. US*, 556 US 129 (2009); *Palmer v. Connecticut Railway & Lighting Co.*, 311 US 544 (1941); Restatement (First) of Contracts Sect 367; 1 Richard Lord, Williston on Contracts, at 4 (4th ed. 1992); *Willard Sutherland & Co. v. US*, 262 US 489 (1923); *Meurer Steel Barrel Co., Inc. v. Martin*, 1 F. 2d 687 (3rd Cir. 1929); *Hale v. Finch*, 104 US 261, 268 (1881); *Williston on Contracts* (1920) Sect. 20; *US v. Purcell Envelope Co.*, 249 US 313 (1919); *Roehm v. Horst*, 178 US 1 (1900); *EI Dupont De Nemours & Co. v. Clairborne-Reno Company*, 64 F. 2d 224 (8th Cir. 1933).

The Court of Claims in a different case even applied this rule of law correctly but refused to do so here despite urging by Petitioner Blodgett. In that càse the Court of Claims ruled, with emphasis in the original:

> **"The Modification's Statement of Release is Without Legal Effect Given the Government's Failure to Perform"**

The courts below refused to address any bilateral contract analysis as to breach, waiver or the unenforceability of the "waiver clause".

## STATUTE OF LIMITATIONS

Blodgett argued that it was very troubling that the court would refer to the INJUNCTION and the purported waiver, but not to *Blodgett, Lingenfelter et al v, United States*, 101 F. 3d 713 (Fed. Cir. 1996) the first Tucker Act complaint in which any such 'waiver' was timely challenged. Or to the controlling authority of *Henderson v. United States*, 517 US 654 (1996) n's 2 & 6. (Federal service is complete under Rule 3 (App. 89) as to notice when the complaint is delivered to the clerk of federal court). *Henderson* is distinguished in the filings in *John R. Sand and Gravel v. US*, 552 US 130 (2008) the otherwise controlling Tucker Act statute of limitations case.

The court ignored *Henderson, supra* and *Blodgett, Lingenfelter, supra.*, despite *Blodgett, Lingenfelter* excerpts being attached to the December, 2017 Rule 60(b) Motion and the entire December 1996 *Blodgett* opinion being attached by reference as dismissed under the authority of *U. S. v. Swift & Co.*, 286 US 106 (1932) (judicial FTC Injunction not a contract).

And despite *Blodgett, supra.* being analyzed in *VanDesande v. United States*, 673 F. 3d 1342 (Fed. Cir. 2012) (App. 103-104) in which the Federal Circuit revealed in 2012 that *Swift & Co. Id.* was not the real reason for the dismissal in 1996 in *Blodgett Id.* 101 F. 3d 713 (Fed. Cir. 1996) but never stating the real reason.

## NO PROPERTY RIGHTS AND NO TAKINGS

This Court's classic definition of property rights includes: Rights to possession, use, and disposition of the property, which includes personal property and contract rights. See *Horne v. Dept. of Agriculture, supra and Loretto v. Teleprompter Manhattan CATV, supra.* Blodgett argued that of course she had multiple "property rights" at all times material and lots of "sticks in those bundles". That some sticks were turned over, against which listing in the Sect 13(b) INJUNCTION the FTC claimed at $38,046,524.00 in the involuntary bankruptcy it had initiated in violation of its duties of good faith and fair dealing and Rule 65(d). App. 84.

Blodgett argued that the INJUNCTION as court order or contract preserved her property rights in every asset *never* turned over, e. g. all her domestic and international businesses, her ERISA, her MN and SD homesteaded properties, her rights to setoff or offset, to income tax refunds, and to be indemnified by the FTC which had a duty to obtain such documents from any customer or other entity being compensated under the settlement. App. 21, 68, 79.

## NO PROPERTY RIGHTS OF ANY KIND

Yet the court below found no property rights of any kind. *See*, *Patterson v. Shumate*, 504 US 753 (June 15, 1992) (as to ERISA issuing right after the Sect. 13(b) INJUNCTION); *Estate of Trompeter*, 111 T. C. 57 (1998) (as to 1991-1992 valuations), as collateral estoppel adverse to the government valuing extremely rare

American coins for income tax purposes at almost the exact same time period in 1991-1992 that the FTC was (falsely) alleging Blodgett actual or imminent harm to consumers under Sect. 13(b).

Blodgett urged, see also, *e. g. US v. Winstar*, 518 US 839 (1996) here contract rights such as ERISA not to be denied by congressional repudiation; *Horne v. Dept of Agriculture*, 135 S. Ct. 2319 Part C (2015) (Fifth Amendment takings by requiring payments to government to stay in lawful business); *Lynch v. United States*, 292 US 571 (1934) (government breach of contract as Fifth Amendment takings); *Loretto v. Teleprompter Manhattan ATV Corporation*, 458 US 419 (1982) (*per se takings* are usually so obvious).

## RES JUDICATA IN THE COURT OF FEDERAL CLAIMS

Blodgett argued there was no res judicata adverse to the December, 2017 Motion, despite J. Rosenbaum's 2005 decision, because of Restatement (Second) of Judgements Sect. 26(1)(c), as the exception used in *Cunningham v. US,* 748 F. 3d 1172, 1178 (Fed. Cir. April 2014) (the authority of prior court's lacking jurisdiction under the Tucker Act to address damages under the Tucker Act).

The courts below never addressed *Cunningham Id.* as applied to this case.

**ERISA**

Blodgett argued that under *Tibble v. Commonwealth Edison*, 133 S. Ct. 1823 (2015) her two demand letters of December 2016 and January 2017 sent to the FTC and pled and attached to the December 2017 Motion retriggered her ERISA Defined Benefit claims against the FTC as fiduciary per FTC Receiver Vartian's uncontested 1993 deposition. App. 72 ff. That this claim was both timely under *Tibble v. Commonwealth Edison*, 133 S. Ct. 1823 (2015) and made now by a person with standing as a vested beneficiary of an ERISA defined benefit plan where as pled the government elected to become the fiduciary, was arguably just confirmed by this Court in *Thole v. US Bank,* 590 US ___ (2020) at p. 3 as there to the bank as fiduciary:

> "If Thole and Smith had not received their vested benefits, they would of course have Article III standing to sue and a cause of action under ERISA Sect. 502(a)(1)(B) to recover the benefits due them.
>
> See 29 USC Sect 1132(a)(1)(B)."

Blodgett also argued under *Patterson v. Shumate*, 504 US 753 (June 15 1992) that the involuntary bankruptcy court had no jurisdiction over the TGM ERISA as ERISA assets protected by the IRS required anti-alienation clause, which the TGM plan had at Section 13.04, could *not* be property of a bankruptcy estate. And that the trustee and his attorney (the same one from the secret meeting who planned the involuntary bankruptcy and ERISA takings) were violating Rule

65(d)(2)(C), judicial estoppel, and thus breaching the contract/INJUNCTION in the involuntary bankruptcy.

Blodgett argued under *Luis v. United States*, 578 US ___, 136 S. Ct. 1083 (2016) that denying her access to the untainted assets in her ERISA plan caused damages, under the Fifth and Sixth Amendment and as a breach of the duties of good faith and fair dealing.

## INCOME TAX REFUNDS

Blodgett argued that of course the court had jurisdiction over claims for income tax refunds. Case law reveals such claims and no less an authority than J. Loren Smith said so in an article in Geo. Wash. L. R. "*Why a Court of Federal Claims*", at 773-776 (2003) n. 34.

Blodgett argued that ERISA, indemnification, setoff or offset (*Citizens Bank of Maryland v. Strumpf*, 516 US 16 (1995)) and denial of income tax refund claims *Gitlitz v. Comm'r*, 531 US 206 (2001) were ongoing breaches of the duties of good faith and fair dealing by the government as fiduciary. See, Raby, J. W. and Raby, William, Tax Analysts. LawProfessorsblogs.com/taxprof/linkdocs/2005-1179-1pdf *"Bludgeoning Blodgett"* in which because the dispositive 11/18/1999 Order of J. Kressell paying out $3,701,000 in Sub. S TGM administrative expenses was suppressed until 2015 by the Chief Counsel's Office, Blodgett could never prove up her claims to refunds carried back to 1997 and forward to 2019, under *Gitlitz infra.*

Blodgett argued that the failure to recognize basis and NOL as flowing to Subchapter S shareholders from the orders of the bankruptcy court was *plausible precisely* by reference attached to bankruptcy Judge R. Kressell's November 18, 1999 response to an October 18, 1999 Motion, where Kressell ordered payouts of those administrative expenses of $3,701,000 which administrative expenses could only be paid out of Subchapter S assets. Under *Gitlitz v. Comm., infra* (2001) (pass through of basis as NOL flows through to Subchapter S shareholder's personal tax returns). Per the IRS Regs those NOL's could be carried back to 1997 and forward 20 years to 2019, which is what Blodgett elected to do.

The court refused to address *Gitlitz Id.* or the attached Order of Judge Kressell which was pled as suppressed from two Tax Court proceedings until 2015, further damaging Blodgett by denying the NOL and basis necessary under *Gitlitz v. Commissioner, supra.*

## THE SETTLEMENT AS CONTRACT

Blodgett pled that based on controlling law from this Court the consent settlement as a Section 13(b) INJUNCTION had to be construed as a contract. *See, e. g., US v. ITT Cont. Baking*, 420 US 223 (1974); *SEC v. Levine*, 881 F. 2d 1165 (2nd Cir. 1989) (FTC as amicus) (citing to *ITT Continental*). App. 68.

The Federal Circuit never mentioned any such controlling authorities.

To reach its conclusion, the Opinion of the Federal Circuit reveals that court never considered at the pleading stage but few of the facts pled or exhibits proffered, and certainly not cumulatively, while applying affirmative defenses foreclosed by the pleadings and Exhibits. Thus the Federal Circuit never determined the issue of jurisdiction by cumulative analysis, but instead by violating this Court's otherwise controlling precedents.

## NO ACTUAL OR IMMINENT HARM TO CONSUMERS MEANT NO VIOLATIONS OF SECT. 13(b) AND ARGUABLY NO ONGOING JURISDICTION OF THE DISTRICT COURT UNDER SEPARATION OF POWERS

Blodgett pled collateral estoppel from Judge Renner (D. Minn.) in the FTC case *FTC v. Security Rare Coin & Bullion and William Ulrich, Defendants* 1989, US District Court Minn. Lexis 15958 1989 WESTLAW 13402 because Defendant coin dealer Ulrich handled PCGS/NGC independently graded and sealed rare American coins. That decision is collateral estoppel against the FTC. Further in response to the FTC 1991 Civil Investigative Demand (CID), Blodgett's fully disclosed that they had switched exclusively to PCGS/NGC graded and certified rare American coins in 1985-86. And in fact were voluntarily replacing all prior coins sold by T. G. Morgan, Inc. (TGM) with equivalent quality, rarity, value and demand PCGS/NGC coins at no cost to TGM clients. That TGM PCGS Replacement Program was costing Blodgetts substantial $$ out of

their personal assets as the Subchapter S could not accumulate assets.

Thus the FTC's affidavits as to actual or imminent harm to consumers were knowingly false causing the FTC to shift gears away from a Sect. 13(b) complaint and Due Process to consent settlement mode, 16 CFR Sect 2.32 – 3.35, under duress. Because of the actual conflicts of interest also pled and proffered with Exhibits, no timely challenges were ever mounted by Blodgett' defense counsel, despite directions to do so, not even for the ERISA assets. See modifications to FINAL ORDER App. 58, 60, 62, 64, 66, 68, 79. This meant that almost from the beginnings of this case 29 years ago no court, and certainly not the government attorneys ever applied Rule 65(d) as to the duties of good faith and fair dealing to honor the settlement/INJUNCTION, per *US v. ITT Continental Id.* that a fully performed federal consent settlement, approved by a federal judge, has to be construed basically as a contract, and not as the FTC might have decided if the FTC had prevailed in litigation instead of settling by consent.

## EXCEPTIONAL CIRCUMSTANCES

Blodgett's Appeal identified multiple specific errors of fact and law meeting the standard of exceptional circumstances in the pleadings and Exhibits as defined by the Federal Circuit in *Therasense v. Becton Dickinson* and this Court in another context per *Octane Fitness Id.* and *Twombly* as to pleading conspiracy.

## ERROR AS TO PRESUMPTION OF REGULARITY

The court below erred in not assessing plausibility because it could not bring itself to avoid any presumption of regularity, no matter how plausible. Of course, the revelations coming out of FBI and DOJ misconduct in matters re: Trump and Michael Flynn arguably make Blodgett claims and proffered evidence even more plausible, not less. In addition FTC Act Section 13 (b) cases pending cert contain admissions against interest by the FTC as to judge shopping and some FTC staff warning that enforcing Sect. 13(b) violated separation of powers, that again cumulatively more than push the pleadings over the plausibility threshold as to takings and punishments. See *Liu v. SEC*, supra (dissent of Justice Thomas).

## ARTICLE I COURT CANNOT OVERRULE ARTICLE III COURT

Blodgett pointed out that an Article I court cannot overrule an Article III court, especially on the dispositive factual and legal issue of a FINAL ORDER as contract. *Boise Cascade Corp. v. United States, supra.*. The CLARIFYING ORDER of April 23, 1992 held that the Section 13(b) FINAL ORDER injunction had to be construed as a contract. App. 68.

To get around the controlling authority of the Article III court, the Federal Circuit said no problem, because of a waiver in the bilateral contract.

## ANY WAIVER WAS UNENFORCEABLE

Blodgett argued that any such waiver referred only to state law reversionary interests, and was unenforceable, because breach of a bilateral contract by the government removed any and all consideration for the purported waiver, rendering any waiver unenforceable. See citations collected above identifying more than 200 years of controlling law.

## BREACH PROVED UP FIFTH AMENDMENT "TAKINGS"

Blodgett argued that breach of contract by the government constituted a Fifth Amendment takings requiring just compensation. *Ladd v. United States, supra.; Lynch v. United States, supra.* (breach of contract by government as Fifth Amendment takings) (1934).

## STATUTE OF LIMITATIONS

Blodgett argued original December 1994 Tucker Act Complaint was timely under *Henderson v. United States,* rendering the December, 2017 Rule 60(b) Motion timely under Rule 15. Blodgett attached as an Exhibit, and pled, that the dated cover sheet *Blodgett, Lingenfelter et al v. United States*, 101 F. 3d 713 (Fed. Cir. 1996) proved up timely filing of the Tucker Act Complaint in December, 1994 under *Henderson v. United States, Id.* esp. n's 2 & 6.

Blodgett filed for rehearing and rehearing en banc. The Federal Circuit denied both, App. 70, Blodgett filed

for mandatory judicial notice as to petitions then pending in this Court for cert as to FTC Act Sect. 13(b) claims, which claims Blodgett had been asserting pro se since December, 1994 per *Blodgett, Lingenfelter et al v. United States*, 101 F. 3d 713, and more than 100 times in the December, 2017 Motion. The Federal Circuit denied the Motion for mandatory judicial notice. Blodgett renewed moving for posting all the required materials onto PACER, which posting had never happened at the Court of Federal Claims either, despite Blodgett's attachment of the Amicus Brief of Retired Federal Judges and a special request to the Chief Judge. Has a PACER posting yet occurred?

## JURISDICTION OVER INCOME TAX REFUND CLAIMS

Blodgett renewed her income tax refund claims, citing to the Tucker Act and the Georgetown Law R. article by Judge Smith, noting and quoting Tucker Act Court of Claims jurisdiction over claims for income tax refunds. The Federal Circuit affirmed dismissal of the tax refund claims, despite pleading and proof that the dispositive Bankruptcy Court Order of November 18, 1999 had to be read with the trustee's request of October, 1999 stating the amount ($3,701,000) and payee's of Subchapter S administrative expenses – where the November 1999 Order was kept hidden from Blodgett until 2015 and all the trustee's form 1120S were pled as fraudulent for 17 years. Blodgett pled that interfered with her *Gitlitz* claims for refunds.

## ERISA CLAIMS AGAINST UNITED STATES AS FIDUCIARY

Blodgett renewed her ERISA defined benefit pension claims against the US as fiduciary, under *Patterson v. Shumate, supra.* as timely under *Tibble v. Commonwealth Edison, supra.* The Federal Circuit denied relief under a 2001 amendment to the Tucker Act. But see, *Thole v. US Bank*, *infra* denying standing where the defined benefit assets exceed liabilities, but confirming standing to sue where the ERISA defined benefit plan has no assets or insufficient assets due to fiduciary misconduct. (See Vartian deposition excerpts App. 72, 78). See also *U. S. v. Winstar, infra* Congress cannot remove remedy where contract rights have already vested.

## RULE 65(d) AND THE INVOLUNTARY BANKRUPTCY

Blodgett argued that the bankruptcy court had little if any jurisdiction due to Rule 65(d) because the attorney who filed the involuntary bankruptcy had no standing due to their intimate ties to the FTC as evidenced by the pre-bankruptcy secret meeting transcript of FTC Receiver Vartian deposition. App. 72-78.

## SECT. 13(b) AND "NO PROBABLE CAUSE"

Blodgett argued that the FTC had no evidence other than false affidavits that Blodgett or T. G. Morgan, Inc. was causing any actual or imminent harm to consumers and that the FTC shifted into settlement

mode (under duress) in days instead of filing an actual complaint within the required 20 days. This tactic violated separation of powers and Due Process.

In Any Event Blodgett Sought No Overturning of the Involuntary Bankruptcy, But Solely Money Damages by Reopening the December, 1994 Tucker Act Complaint – claims for money damages do not require re-opening of prior proceedings . . . thus no Article I overruling Article III issues.

II. Did the court below further err by not finding any Fifth Amendment "takings without just compensation" due to its failure to apply the law as determined by this Court requiring it to correctly identify property rights before, at the time of the contract, and afterwards?

Blodgett urged that at a minimum, her property rights included as fully disclosed to the FTC under the February 1991 CID:

> ___ ERISA defined benefit pension, vested and funded @ approximately $1,000,000 with the IRS required and approved anti-alienation clause at Section 13:04;

___ 50% as marital property in Rare American coins held in a *personal* account at SafraBank in Encino, CA.

___ Multiple domestic and international business interests, including direct mail, radio, seminars;

___ Minnesota and South Dakota homesteaded real estate and other Florida real estate;

___ Various vehicles, a family boat and furniture;

___ Goodwill from her business interests;

___ Her success as a fast-follower of Peter Drucker in penetrating the Institutional Investor marketplace as to diversification by large institutional funds where she would have been one of the first female chief executives of a financial management partnership firm.

**THE FTC SECT. 13(b) INJUNCTION INITIALLY TOOK ASSETS VALUED APPROXIMATELY AT $38,046,524.00**

Blodgett urged that was the first "takings" deserving of just compensation as those assets were turned over to stay in lawful businesses with no finding or admission of wrongdoing and no taint on any of the assets. App. 21, 68. *Horne v. Dept of Agriculture*, 135 S. Ct. 2419, Part C (2015); *Loretto v. Teleprompter Manhattan*, 458 US 419 (1982); *First English Evangelical*

*Lutheran Church v. Cnty of Los Angeles*, 482 US 304 (1987); *Binghampton Bridge*, 70 US 51, 74 (1865) 3 Wall 51; *US v. Winstar*, 518 US 839 (1996).

**THEN AFTER FULL PERFORMANCE BY BLODGETT OF THE DECEMBER 31, 1991 NON-EXECUTORY CONTRACT – THE GOVERNMENT PER VARTIAN'S UNCONTESTED DEPOSITION HOSTED A SECRET MEETING TO BREACH THE CONTRACT IN VIOLATION OF RULE 65(d), ALIENATE THE ERISA PENSION AND INSTITUTE THE FILING AND PROSECUTION OF AN INVOLUNTARY BANKRUPTCY THAT ULTIMATELY LASTED 17 YEARS**

Blodgett urged that was an actual conspiracy, and that her pleadings of an actual conspiracy were not just plausible, but virtually forced her pleadings over the plausibility threshold. *See, e. g., Twombly, Id.*; *Swierkiewicz v. Sorema N. A.*, 534 US 506, 514 (2002); *Skinner v. Switzer*, 562 US 521, at 529-30 (2011). The Court recognized that – under *Iqbal* – "facts" alleged in a complaint must be "assumed to be true". Further in *Skinner*, this Court explained:

> "Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was not whether Skinner will ultimately prevail on his procedural due

process claim, but whether his complaint was sufficient to cross the federal court's threshold" *Id.* at 529-30.

**RIGHTS PLED AS CREATED BY THE FULLY PERFORMED CONTRACT**

___ Return of all ERISA assets;

___ Retention of all domestic and international businesses and business partnerships;

___ Retention of MN and SD homestead;

___ Retention of millions of dollars of goodwill;

___ Rights implied under the contract:

___ FTC/DOJ duties of good faith and fair dealing;

___ Rights protected under Rule 65(d);

___ Income tax claims for refunds;

___ Rights to setoff or offset;

___ No false criminal prosecutions;

___ No actual conflicts of interest created or exploited by the FTC/DOJ;

___ No FTC schemes to violate Sect. 13(b) or the separation of powers;

___ No further takings as punishment;

___ No false claims or judgments in an involuntary bankruptcy entered in a court without jurisdiction due

to Rule 65(d) and *Patterson v. Shumate, supra*, and honoring judicial estoppel;

___ That the FINAL ORDER must be construed as written, not as it might have been written *IF* the FTC had prevailed on its legal theories in litigation instead of settling by consent;

___ Not to have the FTC/DOJ declare all the assets were tainted;

___ Not to have the FTC/DOJ destroy the value of the (extremely limited) legal defense funds;

___ Not to have the FTC/DOJ interfere with untainted ERISA assets necessary for Blodgett legal defense;

## THE COURT OF APPEALS FURTHER ERRED WHEN, FINDING NO CONTRACT, THEY ALSO FOUND NO PROPERTY RIGHTS AND THEREFORE NO "TAKINGS WITHOUT JUST COMPENSATION".

Blodgett urged money damages because of her property rights taken as part of the FTC's Sect. 13(b) scheme violating separation of powers, @ $38,046,524.00 to stay in lawful businesses *Horne v. Dept. of Agriculture, Id.* (Fifth Amendment takings).

And then further by Government interference with reasonable investment-backed business expectations including with sophisticated business partners both domestic and foreign as exempted from turnover with no finding or admission of any wrongdoing and no taint on any assets.

And then further by the Government's breach of contract, as Fifth Amendment takings *Lynch v. United States, infra.* and the 'waiver of state law reversionary rights' as a Fifth Amendment taking *Ladd v. United States, infra.*

And then further and still ongoing takings of her ERISA defined benefit pension by the FTC as fiduciary *Patterson v. Shumate, Id. and Thole v. US Bank, infra.*, and denial of payment of her income tax refunds under *Gitlitz, id.* She is – and as are the intended third party beneficiaries – owed money damages as just compensation.

## JUDICIAL ESTOPPEL

The court below erred in not considering cumulatively the judicial estoppel findings against Stoebner and Conn who were acting in active concert or participation with the FTC and DOJ, violating Rule 65(d)(2)(C) and taking the South Dakota homestead, abrogating the Homestead Act of 1862.

## CONCLUSION

It is respectfully requested of this Honorable Court that the petition for cert. should be granted to review the judgment of the Court of Appeals for the Federal Circuit.

Dated this 17th day of July, 2020.

Respectfully submitted,

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