JAN 0 2 2012

No. 12-644

In The
Supreme Court of the United States

ELLEN MARIANI,
Petitioner,

v.

JOHN C. RANSMEIER and
UAL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner has presented compelling reasons to grant her Petition for Writ of Certiorari, where the thrust of her argument is that a Second Circuit Panel's Summary Order misapplied the "law of the case" doctrine to deny her request to intervene in this litigation.

II. Whether the Petitioner has presented compelling reasons to grant her Petition for Writ of Certiorari, where she fails to assert a decision that conflicts with any United States court of appeals rulings, fails to assert an important federal question that conflicts with a decision from a state court of last resort, and fails to assert a federal question that has not been, but should be, settled by this Court.

III. Whether the Second Circuit Panel's Summary Order, which found that the Petitioner's appeal constituted "vexatious litigation," departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the trial court, to warrant the exercise of this Court's supervisory power.

PARTIES TO PROCEEDING BELOW

John C. Ransmeier, Administrator of the Estate of Louis Neil Mariani

Plaintiff – Appellee

UAL Corporation; United Airlines, Inc.; Huntleigh USA Corporation; ICTS International NV; Global Aviation Services; Burns International Security Services Corp.; Securitas AB, Massachusetts Port Authority; The Boeing Company; Midwest Express Airlines, Inc.; Continental Airlines, Inc.; Midwest Airlines, Inc.

Defendants – Appellees

Colgan Air, Inc.; US Airways, Inc.; L 3 Communications Corporation Security and Detection Systems; L 3 Communications Corporation; L 3 Communications Holdings, Inc.; Invision Technologies, Inc.; Quantum Magnetics, Inc.; Heimann Systems Corp.; Air France; Delta Airlines; Swiss; Air Jamaica; Cape Air; Air Transport Association

Defendants

Ellen Mariani

Appellant

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INTRODUCTION

Under the rules of the Supreme Court, as well as for reasons unique to this case, this Petition should be denied.

This Court has emphasized that "a Petition for writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law." Supreme Court Rule 10. Ms. Mariani's primary argument is that a panel of the Second Circuit Court of Appeals misapplied the "law of the case" doctrine in this case. Petition at 13-27. Her title for her core argument is: "The 'Law of the Case' Doctrine Was Misapplied." Petition at 13. In short, Petitioner seeks precisely the type of error correction that the rules virtually always preclude.

Further, the Petition is not based on a conflict in the decisions of federal courts of appeal; does not purport to raise an important question of federal law that requires resolution by this Court; and cannot credibly argue that other more common grounds for granting certiorari are present. Rather, Petitioner seeks to find support in Rule 10(a) by an accusation that "both of the underlying courts departed so far from the accepted and usual course of judicial procedure that this Court's review and supervision are required," Petition at 11. This assault on two federal courts has no meaningful evidentiary support in the record.

The Petition fails to meet the Court's demanding standards for several other reasons.

Ms. Mariani and her attorney ask this Court to accept an appeal from a Summary Order of a panel of the Second Circuit. Rulings by Summary Order in the Second Circuit do not have the force of legal precedent. They can be cited. *See* Federal Rule of Appellate Procedure 32.1 and U.S. Ct. of App. 2d Cir. Rule 32.1.1. However, they will never govern the outcome of another case. As such, they have no jurisprudential significance beyond the case at hand.

Further, Petitioner has taken this appeal directly from a panel ruling to this Court, without taking advantage of additional opportunities for review within the Second Circuit. This would have been a more direct and efficient approach to resolve Petitioner's most significant argument: that one panel of the Second Circuit did not understand the holding of another panel of the Second Circuit. Petition at 18-22.

Finally, and most fundamentally, Ms. Mariani's Petition comes to the Supreme Court from a Summary Order that has characterized the appeal underlying this Petition as "vexatious litigation," Pet. App. at 9a; and that describes abusive litigation tactics before the trial court, and on appeal, that are documented by the record. *Id.* at 8a-9a. These findings resulted in a separate order that the Petitioner and her attorney show cause why they should not be sanctioned for their conduct. *Id.*

The Mariani Petition is not eligible for, or worthy of, consideration by the United States Supreme Court.

STATEMENT OF THE CASE

I. Facts Material to Consideration of the Petition for Writ of Certiorari

A. The Profoundly-Divided Mariani Estate

Of the ninety-one (91) wrongful death lawsuits brought to recover damages occasioned by the September 11, 2001 terrorist attacks, all but one have been resolved by negotiated settlements approved by United States District Court Judge Alvin Hellerstein of the Southern District of New York. The settlement review process has been guided by a protocol developed by the parties and the Court in 2006. Jt. App. 20.46-48.[1] This Petition for Writ of Certiorari relates to the sole surviving wrongful death action (the "Mariani Litigation"), brought on behalf of the estate of New Hampshire resident Louis C. Mariani (the "Estate").

The Mariani Litigation was settled more than five years ago, for the sum of $3,750,000.00.[2] The case was removed from the trial docket along with thirteen others, by order issued on September 17, 2007 by Judge Alvin K. Hellerstein. Jt. App. 4.1.[3]

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[1] The Joint Appendix from the underlying appeal is cited as "Jt. App." Orders and other materials in the Appendix to the Petition for Writ of Certiorari are cited as "Pet. App."

[2] The ultimate settlement included an additional $10,000 in interest, bringing the total settlement amount to $3,760,000.00.

[3] The wrongful death case settled by Administrator Ransmeier appears on this court order under the caption of *Peters v. UAL Corp. et al.*, Case No. 03 Civ. 7084 (AKH). The case was originally filed by Lauren Peters, Mr. Mariani's natural

Since 2007, however, one Estate beneficiary (the Petitioner herein) and her attorney have prevented the execution of the settlement, and disbursement of the settlement proceeds, through protracted and repetitive federal court litigation that culminated in the recent Second Circuit panel decision in which the Court issued an order to show cause why sanctions should not be imposed against Petitioner and her lawyer for, among other things, pursuing a frivolous appeal.

There are two beneficiaries to the Mariani Estate: Lauren Peters, the deceased's natural daughter by his first marriage, and the Petitioner Ellen Mariani, the deceased's second wife. Lauren Peters has always supported the Estate settlement and Mr. Ransmeier's management of Estate affairs, and with the assistance of her own lawyer has sought to achieve closure of the Estate and disbursement of Estate assets. Jt. App. at 38.43-47. Ms. Peters' attorney has rejected allegations of the administrator's conflict of interest and has also sought, unsuccessfully, to bring Ms. Mariani's post-settlement litigation efforts to a close. Jt. App. at 38.52-60.

By contrast, Petitioner Ellen Mariani has always opposed settlement of the Mariani Litigation. As described by her own counsel, she is a "litigant

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daughter. Mr. Ransmeier replaced Ms. Peters as plaintiff when he assumed the role of Estate administrator in 2004 (replacing the Petitioner). All 9/11 litigation was assigned to one trial court under procedures established by Congress in the Air Transportation and Safety System Stabilization Act, 49 U.S.C. §40101. Judge Hellerstein received this assignment.

who always wanted a trial to get to the truth...unfiltered by news media interests and now-discredited 9/11 Commission statement." Petition at 33. And while the nature of the "truth" Ms. Mariani seeks has not been articulated in this litigation, the pending Petition contains a strong suggestion of a conspiratorial relationship between Israel and the 9/11 attacks.

This includes a twice-repeated reference to a purportedly meaningful statement of Israeli Prime Minister Netanyahu, Petition at 9 and 34, n.9; an allegedly well-recognized "tide of discontent with the 'official' version of the 9/11 incident...growing in the United States," Petition at 33; and an unexplained but self-assured reference to Israel as "the main state beneficiary of the 9/11 terror attacks," Petition at 31.

In short, in the eight years that have passed since Mr. Ransmeier replaced Ms. Mariani as administrator for the Mariani Estate in December, 2004, Pet. App. at 79a, he has acted as fiduciary for a profoundly-divided Estate; has worked with trial counsel to pursue and ultimately achieve a strong settlement for the Mariani Estate; and, for the last five years, has sought to end the protracted opposition of one beneficiary and return the settlement proceeds to New Hampshire for disbursement in accordance with a Probate Court's instructions.

B. Ms. Mariani's Post-Settlement Federal Court Litigation

Key events in this Estate's lengthy history are summarized in the Second Circuit's Summary Order of September 30, 2009. Pet. App. at 34a to 49a. This Order, which was issued after the first of Petitioner's three appeals to the Second Circuit Court, affirmed Judge Hellerstein's November 5, 2007 order denying Ms. Mariani's motion to intervene following the announcement of the Mariani Litigation settlement. Pet. App. at 50.

In the 2009 Summary Order, the Second Circuit rejected Ms. Mariani's argument that she had an interest in the litigation, in the form of a personal loss of consortium claim, that warranted her intervention under Fed. R. Civ. P. 24(a). The 2009 Summary Order in turn became the basis for the June 26, 2012 Summary Order that Ms. Mariani seeks to reverse through the instant Petition.

Petitioner filed a motion for rehearing from the 2009 Summary Order, which was unsuccessful, and the Mariani Litigation returned to the district court. The anticipated settlement review and approval process was deferred, however, when Ms. Mariani's attorney filed his second motion seeking *pro hac vice* admission on January 21, 2010. Jt. App. at 16.1. (The first had been filed and denied in October, 2007, prior to Petitioner's first motion to intervene.)

The Court (Hellerstein, J.) again denied the motion. Pet. App. at 20a. In the same order, however, Judge Hellerstein established procedures that would allow Ms. Mariani to comment on the proposed settlement. The Court ruled that "when the parties file a motion to approve the settlement, Mr. Ransmeier shall notify Mrs. Mariani and express to the Court any objections she has." Pet. App. at 25a. Petitioner and her lawyer took their second appeal from this second denial of *pro hac vice* status. The appeal was dismissed in August, 2010 for want of jurisdiction due to the ruling's interlocutory nature.

On October 25, 2010, in accordance with the protocol established for the review and approval of settlements of 9/11 litigation, Jt. App. at 20.46-48, counsel for the underlying defendants filed the papers required for Judge Hellerstein's review of the proposed settlement. Jt. App. 23.1-25.26. In accordance with Judge Hellerstein's earlier order, Mr. Ransmeier simultaneously provided the Court with a summary of Ms. Mariani's objections to the settlement, Jt. App. at 38.37-41.[4] While not required by Judge Hellerstein's order, Mr. Ransmeier included the extensive comments of Ms. Mariani's attorney, Bruce Leichty, Jt. App. at 38.62-67; and the comments of Lauren Peters, the second beneficiary, and her attorney Janine Gawryl. Peters and Gawryl

[4] Mr. Ransmeier also advised Judge Hellerstein of the conflicts of interest, negligence and dereliction of duty alleged by Ms. Mariani and her attorney about Mr. Ransmeier and the law firms that had advised him during the Mariani Litigation and/or settlement process. Jt. App. at 38.39-41.

both supported and urged its expeditious approval. Jt. App. at 38.43-60.

Ms. Mariani filed her second motion to intervene the following day. Jt. App. at 27.1-12. She purported to file the papers as a "*pro se*" litigant. In fact, the motion and its extensive supporting documents, Jt. App. at 27.1-30.9, were drafted by her attorney, Mr. Leichty, despite two prior orders of the court denying his *pro hac vice* admission. Jt. App. at 32.1.

Judge Hellerstein reviewed the Mariani settlement in the context of prior 9/11 settlements - - as anticipated by the settlement protocol--and on November 15, 2010 ruled that the settlement negotiated by Mr. Ransmeier and his attorneys was "fair and reasonable." Jt. App. 32.1-2. In the same order, he denied Ms. Mariani's second motion to intervene:

> Ellen Mariani's motion to intervene under Federal Rule 24(a) is denied. I have already ruled that Ms. Mariani has no interest to justify intervention because her complaints belong before the New Hampshire Probate Court....The Second Circuit affirmed....Mrs. Mariani's new motion suffers the same fatal flaw. (Internal citations omitted.)

Jt. App. 32.2. Petitioner took her third appeal from this order.

C. The Second Circuit's June 26, 2012 Summary Order

On June 26, 2012, the panel of the Second Circuit, which heard Ms. Mariani's third appeal (a panel different from the panel which had heard her first appeal and issued the 2009 Summary Order), issued a second Summary Order again denying intervenor status for Ms. Mariani. The ruling was based on the law of the case doctrine. Pet. App. at 1a-10a.

In addition to the trial court's denial of intervention, Ms. Mariani also sought to appeal from several other rulings of the trial court relating primarily to Judge Hellerstein's approval of the administrator's $3,750,000.00 settlement as "fair and reasonable" and elements of the settlement approval process. The Second Circuit did not reach these issues, holding that "because we affirm the district court's order denying Mariani leave to intervene, she has no standing as a non-party to challenge the settlement." Pet. App. at 4a, n.3. Ms. Mariani's Petition devotes substantial space to these issues. Because the Second Circuit did not reach these issues, Mr. Ransmeier will not address the Petitioner's arguments in these areas.

The Second Circuit's Summary Order did extend into one other area, however: the conduct of the Petitioner and her attorney, Bruce Leichty. The panel noted its concern regarding the appellant's "'frivolous conduct in pursuing this appeal'"; Leichty's continued generation of motions "allegedly

filed *pro se*" despite his lack of *pro hac vice* status; the "vexatious" and "specious" nature of motions and arguments reflected in the record; and "Mariani's and Leichty's defiant motion to supplement the (appellate) record" with "deeply troubling personal slurs against Judge Hellerstein and his family." Pet. App. at 8a-9a and n.5. (Citation omitted.) Based on the foregoing and other factors described in the Summary Order, the Court issued an order to show cause that has been briefed and remains pending.

In addition to other relief sought, Mr. Leichty now asks this Court to "rebuke" the conduct of the Second Circuit panel.

II. Misstatements of Fact and Law in the Petition

Supreme Court Rule 15 admonishes counsel "that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the Petition." The most important misstatements follow.

A. Alleged Conflict of Interest

Petitioner alleges that while prosecuting and ultimately settling the Mariani Litigation, Mr. Ransmeier had undisclosed loyalties to defendants United Airlines and UAL Corporation, Petition at 6, 8, 16 and 34; that he was therefore "playing both sides of the aisle while...obtaining an objectionable settlement," Petition at 4; that the record establishes a "grotesque spectacle of a carefully-engineered

insider settlement...." that mandates the Supreme Court's attention, Petition at 10; and that the allegations of conflict must be accepted by the Second Circuit (and implicitly the trial court) because they were uncontroverted. Petition at 16.

Since 2007, when Ms. Mariani retained her current attorney and began her battle to intervene, both have manifested an irrepressible need to impugn members of the judiciary and challenge the ethics of professionals involved in her case. In her first motion to intervene she alleged that her first three lawyers failed to provide "loyal and effective counsel" and that her fourth lawyer committed malpractice. Jt. App. at 7.1-8.17. She refused to work with the Court-appointed mediator due to Ms. Birnbaum's alleged conflicts of interest. Jt. App. at 38.40-41. She found conflicts in each of the lawyers who represented Mr. Ransmeier in pursuing and resolving the wrongful death litigation. Jt. App. at 38.40-41. And ultimately, her allegations of conflict reached Judge Hellerstein due to his "deep empathy" for the nation of Israel and his "Tel Aviv-based attorney son" whose law firm allegedly represented "affiliates or partners" of some of the settling defendants. Petition at 9.

Further, Ms. Mariani simply misstates the record when she characterizes her allegations of Mr. Ransmeier's "conflict of interest" as uncontroverted. Petition at 16. Counsel for Lauren Peters, the second Estate beneficiary, advised Judge Hellerstein that the conflict allegation is "baseless," Jt. App. at 38.44. More importantly, Mr. Ransmeier advised Judge

Hellerstein that "comprehensive" factual and legal rebuttals to Ms. Mariani's allegations were part of the record in New Hampshire probate court. Jt. App. at 38.41. Because of Judge Hellerstein's decision to defer to the New Hampshire probate court to resolve allegations of misconduct brought by one beneficiary against a New Hampshire administrator, pleadings from the New Hampshire proceedings did not become a part of the federal court record.

Finally, while it is true that the administrator's law firm opened and closed two cases for airlines named in the Mariani Litigation between Mr. Ransmeier's court appointment as administrator and the September, 2007 settlement[5], Mr. Ransmeier did not learn of these cases, which were unrelated to the 9/11 attacks, until after the 2007 settlement,[6] Jt. App. at 38.40-41; and "(he) can be confident that they had no impact" on the settlement, that he and his lawyers negotiated, Jt. App. at 38.40; and that Judge Hellerstein subsequently found to be "fair and reasonable".[7]

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[5] Mr. Ransmeier explained these events in his submission to Judge Hellerstein on the day the settlement approval process began. Jt. App. at 38.40-41.

[6] In these unrelated cases, filed after Mr. Ransmeier became administrator, Mr. Ransmeier's firm represented Delta and U.S. Airways - - neither of which were notoriously identified as parties in the Peters litigation. One matter involved injuries caused by baggage on a conveyor belt in the Manchester airport and the other involved airline delay that caused a plaintiff to miss a scheduled cruise.

[7] In the instant Petition, Mr. Leichty states repeatedly that these airlines were United Airlines and UAL Corporation. Petition at 6, 8, 16 and 34. This is wrong, as indicated in Mr. Leichty's past sworn filings with the trial court. Mr.

B. The Scope of the Settlement Release

Ms. Mariani states that the "Confidential Release" negotiated by Mr. Ransmeier and his attorneys is drafted in a manner "whereby Mariani personally would be deemed to have released all claims against settling defendants notwithstanding her lack of participation in and consent to the settlement." Petition at 8-9.

Petitioner's statement regarding the reach of the Release is wrong. In his brief to the Second Circuit, Mr. Ransmeier stated that "(t)he Release by its terms did not undertake to settle or release any consortium claim independent of those that were part of the Estate claim." Appellee John Ransmeier's Opening Brief, *Ransmeier & Colgan Air et al. v. Ellen Mariani, Proposed Intervenor, Appellant*, Case No. 11-175, (United States Second Circuit Court of Appeals) at p. 13, n.10. This is confirmed by the language in the Release itself, Jt. App. at 25.15, which includes the following limitation on the matters that Mr. Ransmeier--acting in his capacity as Estate administrator--does (and can) release:

> JOHN C. RANSMEIER, acting in his capacity as Administrator of the Estate of LOUIS NEIL MARIANI ("ESTATE")

Ransmeier's firm (not Mr. Ransmeier) had represented United and UAL in a limited number of unrelated cases that were opened and closed between 1981 and 1997. Therefore, the most recent was seven years before he was appointed the administrator for the Mariani Estate. Jt. App. at 30.4.

> and Plaintiff in the above referenced litigation, and on behalf of the ESTATE and all persons, heirs and next of kin of LOUIS NEIL MARIANI, including Ellen Mariani and Lauren Peters, *having an interest in the ESTATE and to the extent of their interests in the ESTATE*, (referred to hereinafter as RELEASOR); (Emphasis added.)

Mr. Ransmeier negotiated a Release document that was consistent with, but no greater than, the authority that he has as a New Hampshire Administrator. Accordingly, when the Release is executed, he will release only claims that are brought in the name of, or represent an interest in, the Estate of Louis Neil Mariani.

C. The Peters Complaint

Since 2007, Ms. Mariani has argued that the federal complaint filed by co-beneficiary Lauren Peters in 2003; and pursued by Mr. Ransmeier as plaintiff/Administrator under the terms of the beneficiaries' December 1, 2004 agreement, Jt. App. 29.9; contains both a wrongful death claim brought on behalf of the Estate *and* a personal loss of consortium claim brought on behalf of Ms. Mariani individually.[8] *See generally*, Petition at 18-21. She

[8] In light of the disagreement between Ms. Peters and Ms. Mariani regarding the appropriate goals of Estate litigation, Ms. Peters filed a separate wrongful death complaint in 2003. Jt. App. at 9.1. Pursuant to the probate court's order in December, 2004, Pet. App. at 79a, Mr. Ransmeier assumed the role of plaintiff in the Peters litigation.

uses the alleged individual loss of consortium claim in the Peters complaint in an effort to satisfy Fed. R. Civ. P. 24(a)(2)'s requirement that a proposed intervener have an "interest" in the litigation.[9]

In fact, the federal complaint prosecuted by Mr. Ransmeier and his attorneys does not contain a "personal" or "individual" loss of consortium claim on behalf of Ms. Mariani that stands apart from the wrongful death claim brought on behalf of the Estate.[10] Nor is there any evidence in the record that explains why Lauren Peters--whose profound differences with her stepmother are well documented, Jt. App. at 38.43-60--would nevertheless have drafted a complaint seeking unlimited loss of consortium damages for Ms.

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[9] The administrator readily acknowledges that New Hampshire's wrongful death statute, RSA 556:12, would allow a consortium award to Ms. Mariani of up to $150,000.00 as part of the wrongful death claim brought *on behalf of* the Estate. The parties differ as to Petitioner's claim that she has an independent cause of action, unlimited in amount and separate from the Estate's wrongful death claim.

[10] The only reference to loss of consortium damages in the Peters complaint is found in Paragraph 53 of the complaint, Jt. App. at 9.24, which seeks damages on behalf of "beneficiaries, survivors, and heirs"--not on behalf of Ms. Mariani. Ms. Mariani's statement at page 21 of her Petition--which asserts that her "individual claim" was "concededly" "memorialized in the complaint prosecuted by Ransmeier"--relies on this same paragraph 53, and misstates the record. She also references Jt. App. 9.16, the introductory part of the complaint that describes the PARTIES. However, there is no reference to a claim brought on behalf of Ms. Mariani individually. Rather, the only reference to Ms. Mariani is as one of the known "beneficiaries, survivors and heirs".

Mariani that would reduce the recovery under the Estate's wrongful death claim.

D. Petitioner's Mischaracterization of a New Hampshire Supreme Court Ruling

Finally, Ms. Mariani erroneously contends that a decision of the New Hampshire Supreme Court confirms the existence of her stand-alone and personal loss of consortium claim; and accuses the Second Circuit panel of "dishonor(ing) the New Hampshire Supreme Court order." Petition at 21. The New Hampshire Supreme Court decision can be found at Pet. App. 72a and is characterized by the Petitioner with the following language:

> The import of the New Hampshire Supreme Court decision, in fact, was quite the opposite: that Court held flatly that Ransmeier *did not* have the authority to unilaterally settle Mariani's claim for loss of consortium. (App. 72a).

Petition at 19.

> If Mariani never abandoned her individual claim (as recognized by the New Hampshire Supreme Court) . . .

Petition at 20.

> After all, the New Hampshire Supreme Court had already overturned the probate court on the issue of whether the administrator himself had the authority to settle her spousal loss claim unilaterally.

Petition at 23.

Contrary to Petitioner's repeated claims above, however, the New Hampshire Supreme Court did *not* reverse the probate court because it found that Ms. Mariani had an "individual" loss of consortium claim; or because there was a claim in the lawsuit that the administrator could not settle "unilaterally." Rather, the Supreme Court ruled, based on choice of law provisions in the federal law governing 9/11 wrongful death actions, that "it would be premature for us to rule upon the applicability, if any, of New Hampshire law to appellant's loss of consortium claim contained within the wrongful death action," Pet. App. at 77a. The New Hampshire Supreme Court deferred to the federal court to review the choice of law issue in the first instance; and vacated the probate court's order that the administrator could settle the entire case not because it was wrong on the merits, but because the choice of law issue needed to be addressed before the issue could be reached.[11]

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[11] In the first Summary Order issued by the Second Circuit two months later, the panel reviewed the New Hampshire Supreme Court decision; did not find that it supported the Petitioner's argument for intervention based on an independent loss of consortium claim; and noted -- consistent with Mr. Ransmeier's understanding--that under New Hampshire law the administrator can seek loss of consortium *damages* for the

E. The December 1, 2004 Agreement

The Petitioner states:

> Under the 12/1/2004 agreement, successor Ransmeier was to prosecute not just the wrongful death claim of the Estate but Mariani's own claim for loss of society, consortium and similar losses.

Petition at 6.

The 12/1/2004 Agreement discussed above by the Petitioner can be found at Pet. App. 79a or, in its original handwritten form, at Jt. App. 29.9. There is no language in the Agreement that supports Petitioner's characterization quoted above.

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Ms. Mariani's litigation has been contentious and has triggered many areas of disagreement and "perceived misstatements" that are not discussed above. These include Ms. Mariani's claim that an "objectionable" settlement was negotiated by the administrator and his trial counsel, Petition at 4; her obscure suggestions of an undiscovered "truth" surrounding the 9/11 terrorist attacks that permeate her Petition; and her accusation that the trial court improperly "usurped" probate court powers in

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surviving spouse limited to $150,000.00 and *as part of* the wrongful death action brought by the administrator. Pet. App. at 48a, n. 1.

supervising the award of attorneys' fees in this and dozens of other wrongful death actions reviewed under uniform protocols developed by the parties. Jt. App at 20.46-48.

FURTHER REASONS FOR DENYING THE PETITION

In addition to the reasons for denial of the Petition as set forth above, Ms. Mariani's Petition should be denied because the Second Circuit's Summary Order was correct.

I. The Second Circuit's Application of the Law of the Case Doctrine Was Appropriate

As properly stated in the June 26, 2012 Summary Order, the law of the case doctrine "requires a trial court to follow an appellate court's previous ruling on an issue in the same case." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). A second prong of this rule states that an appeals court will generally follow its own earlier ruling on an issue in later stages of a litigation unless "cogent and compelling reasons militate otherwise." *Id.* (internal quotation marks omitted). The Second Circuit properly applied this rule here, ruling that its 2009 Summary Order--in which the panel determined that "Mariani no longer possessed a sufficient interest to justify intervention as of right under Fed. R. Civ. P. 24(a)," Pet. App. at 7a--governs the denial of Ms. Mariani's request for intervention now.

The district court denied Ms. Mariani's first Motion to Intervene in its November 5, 2007 Order, stating that "Ms. Mariani has no legal status in this action." Pet. App. at 50a. In its 2009 Summary Order, the Second Circuit panel upheld the district court's intervention denial. In its detailed and comprehensive 2009 order, the Second Circuit noted that the New Hampshire probate court had previously dismissed Ms. Mariani's argument that she could pursue any individual loss of consortium claim in her own action. It also noted the probate court's conclusion that Mr. Ransmeier had authority to settle the Mariani Estate case, and that any loss of consortium damages referenced in the complaint were not part of Ms. Mariani's alleged loss of consortium claim but rather were part of the Estate's wrongful death action.

Accordingly, in its 2009 Summary Order, the Second Circuit definitively ruled that (a) Ms. Mariani entered a 12/1/04 Agreement, agreeing to the dismissal of her Federal Complaint, including any individual or personal claims, with prejudice; and to cooperate in the Peters litigation; (b) Mr. Ransmeier alone has the authority to pursue the surviving wrongful death action, including the recovery of possible loss of consortium damages for the benefit of the Estate beneficiaries; (c) the Peters complaint includes a claim for loss of consortium damages as part of the Estate claim; and (d) Ms. Mariani therefore has no right to intervene and no legal status in this case.

This 2009 Summary Order was upheld on Ms. Mariani's motion for rehearing. It is the law of the

case and operates to deprive Ms. Mariani of the legal status needed for her to satisfy the interest requirement of Rule 24(a)(2) intervention. The Second Circuit has now twice ruled that Ms. Mariani has no interest, no right to intervene, and no legal status in this action. She holds no interest required by Rule 24(a) that would be impaired if she were denied the right to intervene in these proceedings.

II. Denial of Intervention Was Appropriate for Other Reasons Not Addressed By the Second Circuit

Intervention under Rule 24(a)(2) is granted only when four conditions are met: (1) the applicant asserts an interest relating to the subject of the action; (2) the motion is timely; (3) the applicant is so situated that without intervention, disposition of the action may impair or impede the ability to protect the interest; and (4) the applicant's interest is not adequately represented by the other parties. *MasterCard Int. v. VISA Int. Service Ass'n.*, 471 F.3d 377, 390 (2d Cir. 2006). Failure to satisfy any one of these requirements mandates denial of intervention status. *Id.*

By applying the law of the case doctrine, the Second Circuit appropriately relied on its 2009 Summary Order to preclude the assertion of any new "interest" justifying intervention.

Her alleged "interest" argument fails for another reason. Despite Ms. Mariani's repeated assertions that she has a separate loss of consortium claim that she should be allowed to pursue, in fact no such free-standing loss of consortium claim exists.

No such claim could be brought under any potentially governing state law (New Hampshire or New York).[12]

Under New York law, a wrongful death loss of consortium claim cannot be brought by an individual under common law, and damages for loss of consortium are not even available through an estate action. *N.Y.E.P.T.L.* § 5-4.1; *Liff v. Schildkrout*, 49 N.Y.2d 622 (1980); *see also* 2009 Summary Order, Pet. App. at 48a, nt. 1.

Likewise, under New Hampshire law, a surviving spouse does not have an independent cause of action for loss of consortium for a spouse's wrongful death, although loss of consortium damages sustained by a surviving spouse are recoverable, subject to a $150,000 cap, *through an estate's wrongful death proceeding*. N.H. RSA 556:12 (II). Accordingly, Ms. Mariani's persistent assertion that she must be allowed to assert her individual loss of consortium claim, independent of the Estate's claim, is wholly unsupported in the law, and cannot satisfy the "interest" element of Rule 24(a)(2).

Further, not only does Ms. Mariani fail to satisfy the "interest" requirement under Rule

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[12] The Air Transportation and Safety System Stabilization Act provides that although the cause of action governing this case is federal, the law of the state in which the crash occurred shall be the law for the decision, in both its choice of law and its substantive aspects. 49 U.S.C. §40101(b)(1 and 2). Under the seminal case and test set forth in *Neumeier v. Kuehuer*, 31 N.Y. 2d 121 (1972), arguments exist for the application of either New York or New Hampshire law to the circumstances of this case and to the loss of consortium claim.

24(a)(2), she likewise cannot satisfy the "timeliness" requirement. The timeliness of a motion to intervene is subject to the district court's discretion. *In Re: Bank of New York Derivative Litigation*, 320 F.3d 291, 300 (2d Cir. 2003). A court should consider "(1) how long the applicant had notice of the interest before it made the Motion to Intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Ms. Mariani agreed to resign as administratrix of her husband's estate pursuant to the 12/1/04 Agreement. Pet. App. at 79a. The New Hampshire probate court's March 22, 2005 Order (rejecting her argument that she might be able to pursue an individual claim in her own action) thereafter dismissed any notion Ms. Mariani could have reasonably held that she might be able to continue any claims of her own against the defendants. Yet, Ms. Mariani waited over two and one-half years to file her first Motion to Intervene (October 31, 2007). Her second Motion to Intervene was not filed until October 25, 2010. Under any definition, this type of delay can only be considered untimely. Because the timeliness requirement of Rule 24(a)(2) cannot be met, the district court's denial of intervention was appropriate for this reason as well.

III. Ms. Mariani Raises Several Arguments Now For The First Time

Ms. Mariani spends a significant amount of time in her Petition on several doctrines and arguments that were never argued below -- that have been raised now for the first time in her Petition. Because Ms. Mariani failed to preserve these arguments, they should not form the basis of her Petition.

It is the settled practice of this Court that where questions presented have not been raised below, this Court will exercise the authority of its appellate jurisdiction only in exceptional cases. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Here, several arguments were not pressed below and no exceptional circumstances exist to address the issues for the first time now.

For example, Ms. Mariani implores this Court to apply a "manifest injustice" exception to the application of the law of the case doctrine, maintaining that the Second Circuit had a duty to analyze whether "manifest injustice" would result upon the doctrine's application. Petition at 14. Ms. Mariani asserts that the Second Circuit failed to engage in this analysis, warranting Supreme Court review. Of course, at the outset, such a request is nothing more than an alleged mis-application of a properly stated rule of law (which pursuant to Rule 10 is rarely sufficient as grounds for review). What is more, Ms. Mariani never requested that the

Second Circuit engage in the "manifest injustice" exception analysis.

Ms. Mariani likewise now argues that the Second Circuit ruling upholding the denial of intervention contravenes her asserted "Probate Exception Doctrine"--a rule that "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court," (*Lefkowitz v. The Bank of New York*, 528 F.3d 102 (2d Cir. 2007)), but does not bar a federal court from adjudicating other probate related matters. *See* Petition at 27-29. The theory is simply not applicable to the circumstances of this case, where the issue is one of the application of intervention rights and whether Ms. Mariani has any independent rights to assert--which she does not. In addition, Ms. Mariani's assertion of this doctrine merely questions whether this stated rule of law was correctly applied. In any event, as Ms. Mariani failed to raise this argument before the Second Circuit, it should not be addressed now.

This Court also should not address Ms. Mariani's argument that her "beneficial interest" as a beneficiary of the Mariani Estate suffices to give her an "interest" as an intervenor. Petition at 22. Although Ms. Mariani argued before the district court and the Second Circuit that she was a real party in interest with an individual loss of consortium cause of action that should allow intervention, she did not argue that her status as a *beneficiary* of her husband's estate should, in and of itself, provide her with intervenor status. Nonetheless, she now argues that this beneficial

interest status is a species of interest that can in fact be vindicated by Fed. R. Civ. P. 24. In addition to being a wholly unsupported legal theory to provide an intervention "interest," like the above-referenced arguments, Ms. Mariani failed to articulate this argument before the Second Circuit and has not preserved this argument for appeal to this Court. It should not be considered.

IV. The Petitioner's Appeal to this Court for Relief from Ongoing Sanctions Proceedings in the Second Circuit Court of Appeals has no Legal or Factual Justification

In the final section of her Petition, Ms. Mariani asks this Court to "rebuke" the Second Circuit for alleged "deleterious effects" caused by the panel's initiation of sanctions proceedings based on her pursuit of a frivolous appeal and on a well-documented history of abusive litigation tactics before the trial court as well as the Second Circuit. Any "deleterious effects" were of Petitioner's and her lawyer's own making. *See* Fed. R. App. P. 38 (authorizing sanctions for a frivolous appeal); *see also* 28 U.S.C. §1927 (authorizing sanctions against counsel for the unreasonable and vexatious multiplication of proceedings). Further, her decision not to pursue rehearing or rehearing *en banc* before the Second Circuit was not compelled by the pending sanctions issue; it was a reasoned, if ill-advised, decision by counsel on how to litigate his case.

Finally, it is significant that Ms. Mariani and her attorney, while asking this Court to "rebuke" the

Second Circuit panel, make no effort to demonstrate that the detailed findings of the Second Circuit panel regarding the abusive tactics used regularly in this case were erroneous, or lacked substantial support in the record.

The order to show cause was well-deserved and provides no basis for granting this Petition.

CONCLUSION

The Petitioner has failed to establish any compelling reasons to grant her Petition. John C. Ransmeier, Administrator of the Estate of Louis Neil Mariani, respectfully requests that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,

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