UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-175 Caption [use short title] Ransmeier v. UAL Corporation

Motion for: Reconsideration, vacating and modification of Order dated 6/14/13 (F.R.A.P. 27(b))

Set forth below precise, complete statement of relief sought:

Address and grand unaddressed portion of motion of 5/31/13 to recognize timely 5/29/13 filing of petition for rehearing en banc as to post-mandate sanctions ruling, applying equitable estoppel principles as necessary; vacate ruling and defer all decisions but filing decision to petition process upon proper characterization of motion of 5/31/13 and of petition (for en banc review only)

MOVING PARTY: Ellen Mariani
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: John Ransmeier / UAL Corporation

MOVING ATTORNEY: Bruce Leichty
[name of attorney, with firm, address, phone number and e-mail]
625-A 3rd Street
Clovis, CA 93612
(559) 298-5900
leichty@sbcglobal.net

OPPOSING ATTORNEY: P. Beeson/C. Capace/J. Ellis
Devine Millimet, 43 N. Main, Concord, NH 03301
(603) 226-1000, pbeeson@devinemillimet.com
Zimble & Bretler, 21 Custom House St., Boston, MA
(617) 732-2222, ccapace@zimbret.com
Quirk & Bakalor, 845 Third Ave., New York, NY 10022
(212) 319-1000, jellis@quirkbakalor.com

Court-Judge/Agency appealed from: SDNY, Hellerstein, Alvin K.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: this is post-argument motion

Signature of Moving Attorney: Date: 6/20/2013 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER, Case No. 11-175

Plaintiff-Appellee,

v.

UNITED AIRLINES, INC.
et al.,

Defendant-Appellee,

v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation

_____/

MEMORANDUM OF APPELLANT ELLEN MARIANI IN SUPPORT OF MOTION FOR ORDER VACATING ORDER OF 6/14/2013 AND FOR RECONSIDERATION AND MODIFICATION OF RULINGS DENYING RECOGNITION OF FILING OF PETITION [FRAP 27(b)]

Ellen Mariani, Appellant, together with undersigned counsel to the extent that the Court's prior orders affect him ("Appellant" or "Movant"), hereby submits the following points and authorities in support of her Motion, filed concurrently herewith ("Reconsideration Motion"), asking for the Court to vacate the Order of this Court issued 6/14/2013 ("6/14 Order"), and to

reconsider and modify the rulings in the 6/14 Order which effectively denied Mariani's request for recognition of her filing of a Petition for Rehearing En Banc for any purpose whatsoever.

This Reconsideration Motion is brought on the grounds that the Court did not rule on or explicitly address one crucial assertion made by Movant in the motion underlying the 6/14 Order [Motion for Order Overruling Notice of Defective Filing [and] Allowing Filing of Petition for Rehearing En Banc (etc.) ("Filing Motion")], or if the Court did rule on Mariani's assertion, it is not clear from the text of the order. Namely, Mariani asserted that even if untimely for review of a 2012 summary order altered by later order 5/15/13, Mariani's 5/29/13 petition for rehearing en banc had to at least be regarded as filed as to the sanctions imposed on 5/15/13, without need to recall the mandate, since the 5/15/13 order itself was issued without recalling the mandate.

The Reconsideration Motion is also brought on the grounds that the Filing Motion ought not to have been decided either by the Clerk who refused the filing of the Petition for En Banc Rehearing ("PFREB") or by the very judges whose order would be reviewable by way of the PFREB if its filing were allowed. Mariani also asserts that the two-judge panel decided issues that could be decided only in the context of a decision on the PFREB. Also, the 6/14 Ruling mischaracterizes the Filing Motion since Movant intentionally did not file a Petition for Rehearing, as distinct from a Petition for Rehearing En Banc; yet the Court stated in the 6/14 Order that it was ruling on the filing of a petition "for rehearing and rehearing en banc." Any misunderstanding that the PFREB included a petition for rehearing (i.e. a request directed to the original two-judge panel) may have been used as justification for the involvement of the two-judge panel as to the Filing Motion, whereas no such justification existed.

This Reconsideration Motion is based on the accompanying Motion Information Sheet, and the Declaration of Bruce Leichty attached hereto, and on the following points and authorities:

1. On June 14, 2013, this Court denied a motion filed by Movant styled Motion for Order Overruling Notice of Defective Filing, Allowing Filing of Petition for Rehearing En Banc, and For Recall of Mandate If Needed, which is hereinafter referred to as "Filing Motion." The 6/14 Order--misleadingly--provides in its entirety as follows: "IT IS HEREBY ORDERED that the motion by the appellant to recall the mandate and allow late filing of petition for rehearing or rehearing en banc is DENIED."

2. This Motion for Reconsideration is filed timely and properly pursuant to F.R.A.P. 27(b), which provides that "a party adversely affected by the court's or the clerk's, action may file a motion to reconsider, vacate, or modify that action." Local Rule 27.1(g) provides that such a motion must be filed within 14 days after the date of the order. The filing here, on June 20, is within six (6) days of the date of the subject order. No prior motion for reconsideration has been filed by Mariani in this appeal.

3. There are multiple problems with the short order issued June 14, 2013.[1] The most serious problem with the 6/14 Order, and the one that most justifies it being vacated, is that there is no clear indication that the Court considered the problem--indeed the inherent injustice--of disallowing what was

[1] Mariani cannot determine with any certainty whether the two judges whose names are shown at the top of the 6/14 Order actually deliberated and ruled on the Filing Motion, or whether the Clerk decided the Filing Motion on her own, as discussed in more detail in the accompanying Declaration and also in a motion filed concurrently herewith. Mariani assumes that the two-judge panel decided the motion, but the grounds for this motion exist even if the Clerk decided it.

a timely and not an untimely filing of a Petition for Rehearing En Banc by Movant *if the Petition could be regarded as relating not to a 6/26/12 summary order of a two-judge panel on the merits but to the 5/15/13 sanctions order of that panel arising from an OSC contained within the 6/26/12 order*. Movant had made it clear in her Petition for Rehearing En Banc (submitted for filing 5/29/13) that she was seeking an en banc rehearing primarily from the 5/15/13 sanctions order ("Sanctions Order") and then, if enough judges considering the petition deemed it appropriate, also from the 6/26/12 Summary Order ("Summary Order") because the Summary Order could be deemed to have been non-final and made final only when amended by the Sanctions Order. Movant filed the PFREB 14 days from the date of an order of this Court, meaning that it was timely pursuant to F.R.A.P. 35(c) and 40(a)(1) if Movant had the right to ask for a broader rehearing of any decision contained in that order at all.

4. Assuming arguendo that the PFREB was in fact filed "untimely" as to the Summary Order (but see discussion below), the fact that Movant had petitioned for rehearing en banc from not just the Sanctions Order but the Summary Order, or had appended more than just the Sanctions Order to the PFREB, should not have constituted grounds for failing to recognize its filing. In other words, if the Court on 6/14 denied the Filing Motion because the PFREB was "over-inclusive" as to orders from which a petition for en banc rehearing would lie, that is not a legitimate reason under the Federal Rules of Appellate Procedure to reject a filing. "The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice." F.R.A.P. 25(a)(4). There is no dispute that Movant presented the PFREB for filing as Petition for Rehearing En Banc. Movant therefore submits that the

Court declined to overturn the clerk's rejection of the PFREB only because the petition was not presented for filing in proper form; and the 6/14 Order must be vacated based on the erroneous premise that the Clerk had such authority.

5. What are the other possible reasons for the Court denying the Filing Motion, based on the sparse wording of the 6/14 Order? Movant concedes that under normal circumstances an appellant would not have the right to file a petition for rehearing en banc at all once the mandate had issued; and that the Court in the 6/14 Ruling did in fact refuse to recall the mandate. However, the circumstances in this case are decidedly not normal, and the abnormality resulted not from Movant's act but from the Court's act. It was the Court here which, after issuing the mandate in February 2013, then issued a ruling some 90 days later (on May 15, 2013). The Court itself did not recall the mandate before issuing its ruling on 5/15/13. Moreover, it cannot be determined if the Court here in denying appellant's motion to recall the mandate (a motion made only in the alternative) believed that appellant was asking for a recall only to permit an "untimely" petition from the Summary Order (issued in 2012). At a minimum, the Court needs to clarify that on 6/14/13 it refused to recall the mandate in order to deprive the Movant of the same rights that the Court itself enjoyed; e.g. the right to file papers in the case without recalling the mandate.

6. There is manifest injustice in refusing recall of a mandate where needed to petition timely after the Court has itself acted without recalling the mandate. Had the Court acted expeditiously to impose sanctions after the OSC was fully briefed in July 2012, the appellant would have had the right to petition the Court at that point, because a mandate would necessarily not have issued at least until petition rights had been exhausted. Movant showed in the Filing Motion that she has non-frivolous grounds for challenging the sanctions imposed

on her and her attorney. Perhaps the Court would assert that "if only" appellant would have asked for the mandate to be recalled prior to filing the PFREB, then the PFREB would not have been rejected as defective. However, that too would be requiring appellant to do something that the Court itself had not been required to do: obtain a recall of the mandate in advance. Courts may have some prerogatives that litigants do not, but their prerogatives ought not extend to utilizing a double standard for the recognition of a filing in their courts.

7. If the 6/14 Order were not vacated, this Court would be saying that it can control the reviewability of its own order by simply delaying its issuance, i.e. that it can insulate the order from a petition for rehearing (or rehearing en banc) simply by waiting until after the mandate is issued. The Court would be saying that it can file whatever it wishes to after the mandate is issued, but that the parties can file nothing--or at least they are without their rights to petition under either F.R.A.P. 35 or 40. If that is really the Court's position, it is accompanied neither by sufficient analysis or by due process or any semblance of fairness or justice, and the Court should not allow the rules of appellate procedure to be used to effectively give itself such absolutist powers. (Some might protest that a litigant faced with such a conundrum could still petition the Supreme Court for review, but that is not an adequate remedy when litigants normally have the right to petition both court of appeals and supreme court.)

8. Movant is aware of no authority saying there is never a right to petition for rehearing en banc from an order imposing sanctions. Movant is also aware of no authority for the proposition that the Court is allowed to refuse to even file a petition for rehearing en banc (or reject it for asserted defects) when filed timely after the issuance of an otherwise reviewable order. All Movant asked for in the Filing Motion was one thing: to allow a filing, which was

precluded because the Clerk made legal determinations that were not within her province. Movant explicitly directed that the Court in deciding the Filing Motion should not stray into issues presented by the PFREB itself. Any explanation for the 6/14 Order that one can think of necessarily means that the panel did in fact overreach, i.e. that it determined some of the merits of the PFREB, in ruling on the Filing Motion. To call the filing untimely as to all orders, for example, means that the Court ventured into deciding that it was all right for the court to operate by a double standard when it comes to recalling the mandate. To call the filing "untimely" for purposes of review of the Summary Order means that the panel necessarily made a legal determination that the Sanctions Order did not constitute an amendment of the Summary Order that rendered the Summary Order final only when the Sanctions Order was decided. Legal authority was cited in the PFREB for the proposition that the Court could recognize that the Summary Order was final only after issuance of the Sanctions Order, and that authority was not argued (nor did it need to be) in the Filing Motion. The Court needs to reconsider the 6/14 Order based on this overreaching of the two-judge panel (or Clerk) as well, and vacate it and issue a modified order that refrains from venturing into territory that a broader group of judges is entitled to decide for itself upon review of the PFREB.

9. Moreover, the 6/14 Order mischaracterizes the Filing Motion in at least two says. First, the Filing Motion was not primarily a motion to recall the mandate; instead recall of the mandate was asked for only "if necessary" to give appellant Mariani the right to petition for en banc review of the Sanction Order, which Mariani did not believe was necessary (and still does not believe is necessary based on authority submitted and the points made above). Second, the Filing Motion did not involve a "Petition for Rehearing" contrary to the text

of the 6/14 Order. At no time was a petition for rehearing sought. The PFREB filed 5/29/13 on its face is only a petition for rehearing en banc. If the Court elected to treat it as a petition for rehearing only because it was docketed under a general docket title "Petition for Rehearing and Petition for Rehearing En Banc," the Court should realize that electronic filers are not given the option by the Clerk's office to choose only one of those titles. A docket title cannot be viewed as dispositive in any event, but particularly to supersede the literal terms of the document filed. Movant is concerned that by treating the PFREB as a "petition for rehearing," a pleading which is necessarily directed to the same panel that ruled on the merits (and here on a related sanctions issue), the Clerk or the Court believed it was justified in referring a motion that would otherwise have been regarded as a wholly procedural motion (to be decided by the Court generically, whether in the form of three-judge panel or a single circuit judge), to the same two judges who had a vested interest in denying and discrediting it. No such justification existed if that was the logic employed, because Movant simply did not seek rehearing by the panel; and Movant believes that reconsideration of the 6/14 Order by a different panel will necessarily lead to a conclusion that the Filing Motion--concerned only with the Clerk's power to reject a paper--ought to have been reviewed by a panel other than the two-judge panel whose ruling had been challenged, and that the Filing Motion should have been granted on that basis and/or based on the other reasons shown above.

10. Movant submits that there are additional compelling reasons why the two-judge panel which decided the Summary Order of 2012 and the Sanctions Order of 2013 should not and could not have ruled on the Filing Motion, and that the 6/14 Order must be vacated on this basis as well. As argued in more detail in what Movant has called the "Court Process Motion" filed concurrently

herewith, 2nd Circuit Internal Operating Procedure E(b) does not allow a two-judge panel to decide a "matter" unless there has been a recusal of a third judge after the matter has been assigned. The Filing Motion was a new matter, since (as noted above) it asked for only a single procedural remedy, overturning an improper notice of defect and rejection of a paper by the Clerk. There is no possible justification for anyone having regarded the Filing Motion, except by prejudgment, as part of a matter previously assigned to the panel of Judges Carney, Hall and the third circuit judge who recused himself on the eve of oral argument. Therefore, since it was improper for the matter (i.e. the Filing Motion) to even be assigned to Judges Carney and Hall, their 6/14 Order has to be vacated for that reason as well. (It is not necessary for Movant to argue here, as he did previously, that Judges Carney and Hall did not have the authority to impose sanctions since they were authorized only to decide the "matter" consisting of the appeal. Movant assumes for the sake of this motion that they did have such authority, but contends nonetheless that their authority could not extend so far that they be assigned new matters--i.e. procedural motions--not intrinsically related to the appeal they had already ruled on.)

11. Finally, Movant also invokes considerations of equity, policy and fairness in support of her motion to vacate and for reconsideration and modification. Assuming for the moment that two judges did act erroneously with regard to a merits decision or a sanctions decision, it would quite obviously not be in the interests of justice for those same two judges (or the Clerk) to be able to prevent other judges from correcting their error. Thus, irrespective of whether the reviewers here believe that the two-judge panel acted correctly, there are bigger implications to the handling of certain post-merits motions such as the Filing Motion, and the Court ought to find that the Filing Motion was

wrongly assigned to Judges Carney and Hall for that reason alone. This Court must not let an unusual two-judge panel issuing an unusually late sanctions order decide on its own whether a petition for rehearing en banc may be filed as to that post-mandate order without the mandate being recalled, and this Court has an interest in whether judges who issue a controverted order will be allowed to effectively insulate their post-mandate ruling from en banc review by precluding the only procedural step possible (recall of the mandate). Movant reminds the Court that she and her attorney were effectively found to be "anti-Semitic" in the context of the Sanctions Order, which Movant has vigorously disputed (both in the PFREB and in the context of the Filing Motion), and the Court can already determine for itself that Movant has raised non-frivolous objections to such treatment and the serious consequences thereof if there were no opportunity for redress permitted in this Court--which is precisely the situation unless the 6/14 Order is vacated and the Court recognizes the PFREB as properly filed.

WHEREFORE, Movant requests that the Court vacate the 6/14 Order, reconsider the Filing Motion, and rule at a minimum that Movant's PFREB must be filed and distributed to the Court's judges pursuant to the normal procedures on a petition for rehearing en banc; and secondarily that those judges shall be entitled to make a decision as to whether the petition on the facts here is cognizable without recall of the mandate, and as to which appended orders the petition is cognizable; and for just other relief as is just and proper.

/s/ Bruce Leichty

Bruce Leichty, #132876
625 Third Street, Suite A
Clovis, California 93612-1145
(559) 298-5900
(559) 322-2425 (fax)
180OMPA.620
Attorney for Ellen Mariani,
Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN RANSMEIER,

Plaintiff-Appellee,

v.
UNITED AIRLINES, INC.
et al.,

Defendant-Appellee,

v.

ELLEN MARIANI,
Proposed Intervenor/
Party in Interest-
Appellant

_____/

In re Sept 11 Litigation
_____/

Case No. 11-175

DECLARATION OF BRUCE LEICHTY IN SUPPORT OF MOTION FOR ORDER VACATING 6/14 ORDER

I, Bruce Leichty, declare as follows:

1. I am the attorney of record in this case for Appellant Ellen Mariani. I have represented Mrs. Mariani throughout this appeal. I was admitted to the State Bar of California in 1987, and I have had a private civil litigation practice in state and federal courts for the last 25 years, the last 20 of which have been as the owner and sole proprietor of my own law practice. I am admitted to practice before the United States Supreme Court and three courts of appeal other than this court (for the 3rd, 6th and 9th circuits). I represent Mrs. Mariani in all matters pertaining to her rights and interests in connection with the Estate of deceased husband, Neil Louis Mariani, No. 318-2002-ET-00051 pending in Rockingham County, New Hampshire, and in this appeal.

2. I make this declaration without waiving any applicable privileges or

rights of my client, including but not limited to the attorney-client privilege or the rule protecting attorney work product. Any statements made here containing or consisting of information that would otherwise be protected by the attorney-client privilege may not be deemed a waiver of that privilege as to the content of any other protected communications.

3. I prepared the accompanying Memorandum which supports a motion to vacate the order of this Court dated 6/14/2013. All factual statements made therein that are self-evidently based on my personal knowledge are true and correct.

4. I am unable to confirm with 100 per cent certainty the correctness of my assumption that Judges Carney and Hall actually participated in the ruling on the 5/31/13 motion I filed on behalf of Mrs. Mariani and myself. Those judges' names are at the top of the order issued by the Court 6/14/13, but that order was of course signed by the Clerk. The 5/31 motion filed by Movant was not formally opposed by an appellee, so I am not sure whether that could be taken by the clerk as license to decide the motion herself pursuant to Local Rule (allowing a Clerk to decide a motion when it is "not opposed"). However, I have assumed throughout the accompanying motion that Judges Carney and Hall issued the 6/14 Order, and the motion would be the same even if only the Clerk was involved in that ruling.

5. I do not believe it would be appropriate for this motion for reconsideration itself to be determined by Judges Carney and Hall, for the legal reasons noted in the accompanying Motion. I am here seeking reconsideration not of the merits, but of a procedural ruling. I am <u>not</u> suggesting that either judge must recuse himself or herself, and not suggesting intentional impropriety on the part of either judge, but rather only that post-merits motions that are not

motions for reconsideration of the appeal itself (or of a substantive determination) and that are not petitions for rehearing would not and should not be assigned to a panel that decided the merits of the case particularly where that panel was reduced by a member through recusal.

6. When I filed a Petition for Rehearing En Banc on behalf of Mrs. Mariani on 5/29/13, I did so primarily as to the Sanctions Motion issued 14 days earlier (5/15/13) that is appended thereto. I stated as much in the Petition, a true and correct copy of which is attached hereto as Exhibit 1 (without its own attachments, which were as represented). (Since the Petition has been rejected for filing as of this point, I am not sure about its availability to the reviewers of the accompanying motion).

7. The Petition was also filed exclusively as a Petition for Rehearing En Banc. I did the electronic filing of the Petition personally. I did not file a Petition for Rehearing. If the petition was identified on the docket as a Petition for Rehearing and a Petition for Rehearing En Banc, that was only because of the absence of any other option in the choices presented to the electronic filer. At no time did I seek or intend rehearing by the same panel that had decided the Summary Order in this case (6/26/2012) or the Sanctions Order (5/15/13).

8. I am not filing this motion for any improper purpose. I am not filing to cause vexation or harassment. Both of the motions I am filing today, June 20, 2013, are part of a final effort to protect my client's interest and my own interest in having at least an opportunity for some disinterested review--short of U.S. Supreme Court review--of the highly damaging order issued by Judges Carney and Hall 5/15/13. I have explained in the motion (decided by the 6/14 Order) why the order is damaging and why it is inaccurate.

Pursuant to 28 U.S.C. Section 1746 I declare under penalty of perjury

under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on June 20, 2013 at Escondido, California.

/s/ Bruce Leichty
Bruce Leichty

Respectfully submitted,

/s/ Bruce Leichty
Bruce Leichty, #132876
625 Third Street, Suite A
Clovis, California 93612-1145
(559) 298-5900
(559) 322-2425 (fax)
180ODBL.620
Attorney for Ellen Mariani, Appellant

Exhibit 1

11-175

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN C. RANSMEIER, administrator of
the Estate of Louis Neil Mariani, deceased,

Plaintiff-Appellee,

and

COLGAN AIR INC., a Virginia
corporation, US AIRWAYS INC.,
a Delaware Corporation,
[continued]

---/

PETITION FOR REHEARING EN BANC

Bruce Leichty
Law Offices of Bruce Leichty
625-A 3rd St.
Clovis, CA 93612
(559) 298-5900
Attorney for Ellen Mariani,
Appellant

L 3 COMMUNICATIONS CORPORATION SECURITY AND DETECTION SYSTEMS, a Delaware corporation, L 3 COMMUNICATIONS CORPORATION, a Delaware corporation, L 3 COMMUNICATIONS HOLDINGS, INC., a Delaware corporation, INVISION TECHNOLOGIES, INC., state of incorporation unknown, AIR FRANCE, a French corporation, DELTA AIRLINES, a corporation, SWISS, a Swiss corporation, AIR JAMAICA, a Jamaican corporation, CAPE AIR, Air Transportation Association, a trade organization,

Defendants.

UAL CORPORATION, an Illinois Corporation, UNITED AIRLINES, INC., and Illinois corporation, HUNTLEIGH USA CORPORATION, a Missouri corporation, ICTS INTERNATIONAL NV, a Netherlands business entity of unknown form, GLOBAL AVIATION SERVICES, a Delaware corporation, BURNS INTERNATIONAL SECURITY SERVICES CORP., Delaware Corporation, SECURITAS AB, a Swedish business entity of unknown form, MASSACHUSETTS PORT AUTHORITY, a government entity, THE BOEING COMPANY, and Illinois corporation, MIDWEST EXPRESS AIRLINES, INC. A Wisconsin Corporation, CONTINENTAL AIRLINES, INC., a corporation, Does 1 through 100, inclusive, MIDWEST AIRLINES, INC.,

Defendants-Appellees,

v.

ELLEN MARIANI, Proposed Intervenor,

Appellant.

I. PRELIMINARY STATEMENT SUPPORTING PETITION [F.R.A.P. 35(b)(1)]

ELLEN MARIANI, Appellant ("Mariani"), widow of 9/11 victim Louis Neil Mariani, hereby petitions for rehearing en banc from the order of the 2nd Circuit dated 5/15/2013 ("5/15/13 Order"); and from the order denying motion of 6/26/12 ("Motion Order") and from the Summary Order dated 6/26/12 ("Summary Order"), both as finalized or amended by the 5/15/13 Order; under both the conflicts and exceptional importance provisions of F.R.A.P. 35(b)(1), based on the unusual act of two (2) jurists in sanctioning the undersigned attorney and his client for having truthfully disclosed connections of a federal judge's son to affiliates of 9/11 aviation security defendants appearing before him. Although not the central issue in the underlying appeal, Mariani and her counsel were excoriated despite having submitted to this Court a memorandum detailing the connections and explaining their relevance in the context of one of the main issues on appeal, namely the failure of the same judge to act on the dual loyalties of a plaintiff appearing before him. For the latter reason Mariani is also petitioning for en banc review of the Summary Order as well, especially if the 5/15/13 order was within the jurisdiction of the Court (disputed below), since the Summary Order would be deemed to have become final only now or to have been amended (Local Rule 35.1).[1]

---

[1] Mariani believes that the failure of the panel to label the 5/15/13 order as an amendment to the 2012 Summary Order is not dispositive as to its nature, and

The above-referenced panel decisions conflict with decisions of both this Court and the U.S. Supreme Court as follows: Ostrer v. United States, 584 F.2d 594 (2nd Cir. 1978) (5/15/13 Order re: jurisdiction); Johnson v. Holder, 564 F.3d 95 (2nd Cir. 2009) (Summary Order--application of law of the case doctrine); Marino v. Ortiz, 484 U.S. 30 (1988) (Summary Order--intervention); and Marshall v. Marshall, 547 U.S. 293 (2006) and Lefkowitz v. The Bank of New York, 528 F.3d 102 (2nd Cir. 2007) (Summary Order--limits of the probate exception). En banc consideration is necessary to secure uniformity of the court's decisions.

The proceeding involves multiple questions of exceptional importance including one of first impression: may a federal court of appeals exercise jurisdiction concurrently with a district court after issuance of its mandate, sufficient to impose sanctions? In addition to those noted above, other questions of exceptional importance are raised by (1) the chilling effect of this type of discipline arising out of even the most disparaged disclosure of judicial connections, implicating the even-handed administration of justice in the federal courts (notably in a prominent terrorism-related case), and (2) the fact that a 9/11 widow has been denied the right to protect her property interests rendered vulnerable by fiduciary conflict of interest, and in sub-part as follows:

---

the Summary Order has in fact been amended to confirm that no sanctions are justified based on Mariani's second bid for intervention.

II. THERE ARE MULTIPLE GROUNDS FOR EN BANC REHEARING

At least six issues are raised upon the exceptional import of a 5/15/13 decision of a two-judge panel of the Second Circuit to impose sanctions on an attorney and his client and to make unprecedented findings branding them "anti-Semitic" for disclosing late-discovered Israeli-related connections of the settlement judge, relating back to an OSC in a 6/26/12 Summary Order denying Petitioner's appeal, and a separate order issued that same day denying the connections motion:

1. Did the panel without expressly retaining jurisdiction still have jurisdiction to impose sanctions, almost 11 months after issuing an Order to Show Cause, where it is clear under 2nd Circuit authority that the jurisdiction of a court of appeals terminates upon issuance of the mandate and where this Court had issued the mandate to the lower court already three months earlier?

2. In the absence of express authorization to do anything other than decide an appeal pending before them, did a reduced panel consisting of only two (2) appellate jurists even have authority to impose sanctions?

3. If the Court of Appeals did retain jurisdiction to impose sanctions after the issuance of its mandate, did the piecemeal rendering of judgment deprive the Petitioner of a clear remedy to petition for writ of a certiorari because of the absence of finality in a single indivisible order, unless that remedy still exists?

4. Even if the motion of Mariani regarding judicial connections to defendants' affiliates was misguided, was the sanction and "public reprimand" and its obvious chilling effect on dissenting speech disproportionate to the offense?

5. Were sanctions for filing the connections motion proper and had proper notice been given to the at-risk parties where there was no finding made of frivolousness in the Motion Order and where the panel OSC--and the ensuing rebuttal of Mariani and counsel--was devoted mostly to other allegedly frivolous acts, namely trying to intervene in the district court a second time, which attempt the panel then ultimately found was not sanctionable in its 5/15/13 Order?

6. Since the panel found in its 5/15/13 Order that there was no indisputable law of the case precluding a second intervention motion by Mariani, or even irrespective of that finding based on the absence of finality until 5/15/13, is rehearing not necessary because the panel incorrectly found in its Summary Order that the appeal had to be denied not on its merits but because of law of the case?

III. THE PANEL ACTED IN EXCESS OF ITS JURISDICTION

Initially, en banc review is proper because the Court of Appeals had already lost jurisdiction by the time it imposed sanctions on the undersigned counsel and his client, having issued the mandate without retaining jurisdiction.

The standard authority cited by the 2nd Circuit itself on the effect of issuance of the mandate is Ostrer v. United States, 584 F.2d 594 (2nd Cir. 1978). In that case the Court stated, "The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum from whence it came." Neither the Ostrer court or any other has used less than categorical language or stated exceptions, and it is clear from this court's utterance that the issue is jurisdictional.

An extensive discussion of issuance of the mandate including in other jurisdictions is also found in United States v. Rivera, 844 F.2d 916 (2nd Cir. 1988). That court summarizes by quoting Ostrer and stating, "Simply put, jurisdiction follows the mandate." Accord United States v. Dilapi, 651 F.2d 140 (2nd Cir. 1981) ("The issuance of the mandate from this Court terminated this Court's jurisdiction").[2]

Although there is Second Circuit authority stating that federal courts can rule on collateral matters even in the absence of jurisdiction, see Schlaifer Nance &

---

[2] Dilapi goes on to state that filing of a petition for rehearing "did not revest jurisdiction in this Court;" however, the case also suggests that this court can recall the mandate if a petition for rehearing is presented. Mariani would be in the kafkaesque position of having no satisfactory legal remedy as to an ultra vires order of this court if the court then refused to consider a claim of absence of jurisdiction because it lacked jurisdiction. Accordingly, Mariani asks that the Court recall the mandate sua sponte if necessary to rule on this petition.

Company v. Estate of Warhol, 194 F.3d 323 (2nd Cir. 1999), that case pertained to the exercise of jurisdiction by a district court over a sanctions motion after the appellate issuance of the mandate, and Mariani has discovered no cases approving of a similar exercise of jurisdiction by a court of appeals which--after all--would be inconsistent with jurisdiction having been returned to the district court, since a district court and a court of appeals cannot simultaneously have jurisdiction in a case. See U.S. v. Jacobson, 15 F.3d 19 (2nd Cir. 1994) (recognizing need for overt act to restore appellate jurisdiction after mandate has been issued).

Thus this petition raises a question of first impression. Moreover, an issue not just of error but of exceptional importance is raised when a panel acts contrary to the precedent of its own Circuit -- and does so in the manner done here.

III. A TWO-JUDGE PANEL LACKED AUTHORITY TO SANCTION

Mariani counsel pointed out to the two-judge panel in responding to its OSC, Docket No. 407, note 4, and it remains true, that under the literal terms of their express authority two judges could not impose sanctions in the absence of a third jurist because a two-judge panel can act at all only because found in 2nd Circuit Operating Procedure E(2), which allows a two-judge panel to "decide the matter." Issuing an OSC and imposing sanctions thereon nostra sponte are not part of

"deciding the matter." In the context of an even more unusual situation such as this where only two judges are deciding on the reputation and indeed the career of a lawyer appearing before them,[3] restraint should already be called for, but Mariani believes that because it was necessary for an operating procedure to be adopted to confer any authority at all on a two-judge panel, that authority should be construed narrowly, consistent with a maxim generally applicable to public authorities, namely, "that which is not permitted is forbidden." Such a rule would not tie the hands of two judges left in the lurch by the last-minute recusal of a colleague in a case involving genuine grounds for sanction, since a hobbled panel also has a ready mechanism for bringing in a third panel member to hear a tape of oral argument or even reschedule oral argument, and to review the briefs.

IV. THE PANEL ERRED IN ITS PIECEMEAL DECISION-MAKING

This Court should also provide a remedy based on the inordinate delay that occurred between the OSC issued in the Summary Order (the OSC was combined

---

[3] Judges Hall and Carney obviously intended that their reprimand be "public," and their decision along with multiple quotes was duly reported by the New York Times (where Judge Carney's husband Lincoln Caplan is an editorial page editor). Irrespective of that curious connection, an unprecedented appellate opinion calling a lawyer is "anti-Semitic" is presumptively ruinous to a career in the United States, where anti-Semitism has for many decades now been one of the worst things one can be accused of.

with a ruling on the merits in a single document) and the ultimate rendition of judgment imposing sanctions 5/15/13, especially if the Court does not strike the latter judgment as ultra vires.

Under one proposition, what that delay caused was a premature submission of a petition for writ of certiorari to the Supreme Court, because Mariani was concerned that if she waited for a clear signal of finality to the Summary Order she might be faulted for an untimely petition and thereby deprived of meaningful review (see Docket No. 424); and only now is she finally made aware that her petition was premature, forcing her to file a new petition (unless this Court provides a complete remedy). No explanation was provided for the denial of Mariani's initial certiorari petition, nor is an explanation commonly given; therefore it is just as likely that the denial was based on a procedural flaw as anything else. The denial of a petition for certiorari does not constitute law of the case. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n. 1 (1973).

Under the alternative proposition, the Court's delay created the need for two different post-judgment proceedings, namely not just proceedings on the merits which petitioner had already initiated, but now proceedings on the imposition of sanctions. Piecemeal review is inimical to the Supreme Court, and presumably the Court of Appeals also, and steps should ensue so that parties are not prejudiced.

V. NOTICE OF GROUNDS FOR SANCTIONS WAS INADEQUATE

There is one more serious procedural flaw which should prompt the Court to vacate the 5/15/13 order of the two judges imposing sanctions if the Court does not agree that sufficient grounds are already stated: the two judges did not give adequate notice to the undersigned counsel or his client of the prospect that they could be sanctioned for a single motion directed to connections of Judge Hellerstein (or for elements of that motion), and/or they were not given proper opportunity to respond, by allotment of only 10 pages each to address the OSC.

Mariani counsel notes that he explicitly addressed the ambiguity of the OSC in his rebuttal, Docket No. 407. Mariani quotes from that pleading:

> "....Moreover, counsel should not be at risk of sanctions for statements made during briefing or argument without those statements being clearly identified in the OSC, which--with one possible exception--they are not.
>
> ....Counsel sees one act of misconduct alleged with specificity: that he filed a "series" of "vexatious motions" despite the "clear res judicata effect" of this court's prior decision []....Counsel also notes that there are references in the OSC to "ad hominem attacks" and "bombastic challenges" in the papers filed below (and on appeal); but no examples have been cited and counsel cannot possibly speculate in such short space about all instances throughout [] briefing three motions and various oppositions [] where [] this Court might have taken issue with what counsel believed was permissible comment within the bounds of zealous advocacy....

> This Court has also suggested that Appellant's frivolousness might be located in her motion regarding the connections of Judge Hellerstein ("Motion to Supplement Record" or "MSR") (the OSC states that "this all" culminated in the filing of that motion); however, this Court did not make a finding in its order on that motion, Docket No. 400, that the MSR was frivolous or filed in bad faith, and counsel submits that such a finding in that order would have been necessary for the Court to now say that Respondents' frivolousness occurred in or ripened with that motion. As a general principle, counsel cannot be expected to respond regarding an act that might have supported sanctions. Nuwesra v. Merrill Lynch et al., 174 F.3d 87, 92 (2d Cir. 1999) (per curiam).
>
> In any case counsel notes that here again, he has not been given adequate space to brief the merits of the MSR; counsel can only note that he denies making "personal slurs" against Judge Hellerstein. The MSR was, after all, about connections of a judge's family member to parties suggesting absence of impartiality, not an inherently impermissible subject for a lawyer to raise in a tribunal, and particularly so where [] the issue of "connections" was one of the central issues on appeal; and the use of the word "slurs" is a loaded term suggestive of pretext that counsel completely disclaims. The careful documentation in the MSR of Judge Hellerstein's connections to defendants Boeing and Huntleigh through his son's law firm--regardless of what one might conclude about them in the context of the appeal--are a far cry, for instance, from the allegations about judge and trustee made by the sanctioned attorney in In re 60 East 80th Street Equities, supra.

As noted, Mariani counsel could not have shown in the space of 20 pages

that he proceeded in good faith in both the "Hellerstein motion" and in the litigation as a whole, and thus he devoted his space to the only ground for sanction that appeared to be unequivocally stated--the intervention litigation as a whole--believing that there was no possible basis for sanctioning him or his client for "slurs" against Judge Hellerstein because neither he nor his client had not used any slurs (which he did point out, but in a necessarily cursory fashion). Mariani counsel submits that it is self-evident that he and his client made optimum use of their 10 pages each (Docket No. 407). Indeed, Mariani counsel apparently caused the two judges to change their mind about sanctioning him (and his client) for litigating Mariani's second bid to intervene, through a showing that "there was no indisputable 'law of the case' preventing Ellen Mariani from bringing a second intervention motion...." (5/15/13 Order, p. 6).

Mariani counsel believes he would have been able to do the same thing as to the connections motion, had he been properly notified and had he been given sufficient space to rebut the suggestion that he had improperly disparaged a judge with anti-Semitic slurs, or that he was motivated by the judge's "Jewish" religion. Mariani counsel was blindsided by those findings since neither "anti-Semitic" or "Jewish" were terms used in the OSC or his moving papers, and moreover he was sanctioned for papers filed in support of the motion that allegedly contained "raw

and ugly" anti-Semitic speech, but those papers were likewise not identified in either the OSC or the 5/15/13 Order. Counsel simply was not warned that either those papers or specific arguments or speech in the motion appeared sanctionable.

VI. THERE IS NO BASIS FOR FINDING "ANTI-SEMITISM" OR FOR SANCTIONS IRRESPECTIVE OF ITS ABSENCE

One of the numerous anomalous features of an opinion which finds attorney "anti-Semitism" in a "raw and ugly form" is the absence of any quotation in the opinion from what the targeted attorney actually wrote or appended. In the absence of raw quotes, therefore, there are only two premises possible for the conclusions reached by Judges Hill and Carney in imposing sanctions on the undersigned and his client: Either there could be no explanation other than anti-Semitism for seeking judicial notice of late-discovered connections of a judge's son to Israeli affiliates of 9/11 defendants appearing before him, or there could be no explanation other than anti-Semitism for certain unidentified comments about the judge's Israeli ties made in the course of an otherwise permissible attempt to attract notice to the connections. Although the panel suggests that it has adopted both premises, neither stand up to examination when given objective scrutiny--in the same way that the panel's original OSC charging frivolous litigation could not stand (as confirmed in the 5/15/13 Order) when the panel gave it closer scrutiny.

It is fallacious, to begin with, to suggest that critique of a judge's Israeli loyalties amounts to anti-Semitism. But the cruel irony here is that the undersigned counsel was not even critiquing support for Israel on the part of Judge Hellerstein (or any of his family members). Rather, Mariani counsel was describing; he was anticipating doubt over whether Judge Hellerstein was aware of connections of his Tel Aviv-based lawyer son, and Mariani counsel believed--whether rightly or wrongly, he genuinely believed--that a showing of the degree to which Judge Hellerstein and his wife were actively involved in Israeli causes would tend to show that the judge was at least on inquiry notice of his son's Israeli clients (some prominent in the defense and security industries) and their connections to 9/11 defendants. Most litigants would be concerned to know that a judge's son represented another litigant, and Mariani genuinely believed that the representation by the judge's son of persons that were effectively the owners of these companies was relevant to the appearance of partiality, and to the judge's seeming lack of concern with the even more egregious demonstration of dual loyalties of Mariani's fiduciary, John Ransmeier, whose law firm was representing other defendants (airlines and insurance companies) at the same time he was litigating against and settling with them.

No references to Judge Hellerstein or his son or wife were disparaging--

certainly there were no slurs--but they were necessarily personalized to make the legal point. Revson v. Cinque & Cinque, 221 F.3d 71 (2nd Cir. 2000). This is a distinction that federal appeals court judges should be able to and must make. Contrary to the 5/15/13 Order, recusal was not sought and counsel never used the term "bias" or "biased." This is not the first time that judges have faced scrutiny for their children's links. See In re Aetna Surety & Casualty, Inc., 919 F.2d 1136 (6th Cir. 1990). Moreover, even if Mariani counsel engaged in illogical thinking (he believes he did not), the branding and reprimanding are disproportionate, considering the chilling effect on those who genuinely believe that there has been a miscarriage of justice influenced by a judge's connections.

Much more could be said about the vituperative statements directed toward the undersigned, but counsel simply note that even the fact of an "Israel" link was incidental to the motion: Mariani and her counsel would have filed the same motion if the connections of the judge's son had been Saudi or Dutch instead.

VII. THE COURT SHOULD ORDER REHEARING OF THE WHOLE APPEAL

Finally, although there is not space to fully make the argument because of the operative 15-page limit, the Court should order rehearing of the entire appeal and ultimately reverse and remand, either because only now (5/15/13) has an

indivisible order become final or amended, or because of the implications of the 5/15/13 Order suggesting the error in the Summary Order. If the 5/15/13 errors are not enough to rehear a case arising from the biggest domestic terror incident in U.S. history, then the Court should at least take due note of the implications of a settlement judge acting with willful ignorance regarding a lawyer plaintiff entering into a multi-million dollar settlement with his own client defendants.

In issuing the Summary Order, the panel failed to follow Johnson v. Holder, 564 F.3d 95 (2nd Cir. 2009), which provides for manifest injustice exceptions to law of the case (which did not even operate preclusively to begin with, as can be implied from the 5/15/13 panel concessions); and Marino v. Ortiz, 484 U.S. 30 (1988), which expressly states that the (only) remedy of a non-party affected by a settlement is to intervene; and Marshall v. Marshall, 547 U.S. 293 (2006), which expressly provides that the so-called "probate exception" does not always require a litigant to resort to a state probate court, and should have not have done so here.

WHEREFORE, the Court should grant the petition for rehearing en banc.

Date: 5/28/13

BRUCE LEICHTY, Attorney for Ellen Mariani,
Appellant and Petitioner
625 Third St., Suite A
Clovis, California 93612-1145
(559) 298-5900 (phone)/(559) 322-2425 (fax)
leichty@sbcglobal.net