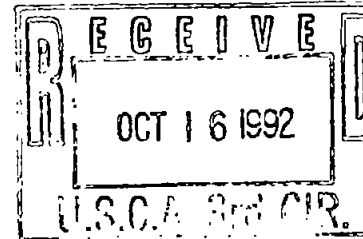


IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FOR THE THIRD CIRCUIT



NO. 92-7501

ALFRED BLASBAND, on behalf
of all others similarly situated,

Petitioner,

v.

STEVEN M. RALES, MITCHELL P. RALES
and JOHN DOE 1-10, and
DANAHER CORPORATION,

Respondents,

and

THE HONORABLE JAMES L. LATCHUM,
SENIOR JUDGE, UNITED STATES
DISTRICT COURT; THE HONORABLE
E. NORMAN VEASEY, CHIEF JUSTICE,
DELAWARE SUPREME COURT; THE
HONORABLE HENRY R. HORSEY; THE
HONORABLE ANDREW G. T. MOORE, II;
THE HONORABLE JOSEPH T. WALSH; and
THE HONORABLE RANDY T. HOLLAND,
ASSOCIATE JUSTICES, DELAWARE
SUPREME COURT,

Nominal Respondents.

BRIEF OF PETITIONER IN SUPPORT OF
HIS PETITION FOR A WRIT OF MANDAMUS

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. JURISDICTION OF THIS COURT

This Court has subject matter jurisdiction over this matter pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which authorizes all federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." No additional source of jurisdiction is necessary to issue injunctions against state officials under the All Writs Act where, as here, an exception to the Anti-Injunction Act is present.¹ In re Baldwin United Corp., 770 F.2d 328, 337 (2d Cir. 1985) (affirming injunction against 50 state attorney generals to prevent relitigation of claims involved in federal litigation).

A federal appellate court has jurisdiction to issue a writ of mandamus against a state supreme court when that is necessary to aid the appellate court's jurisdiction. Bucolo v. Adkins, 424 U.S. 641 (1976); Deen v. Hickman, 358 U.S. 57 (1958); see also Conover v. Montemuro, 477 F.2d 1073, 1100-01 (3d Cir. 1973) (en banc) (Gibbons, J., concurring) (lower federal courts as well as Supreme Court may issue mandamus to state courts). More generally, federal appellate courts may order states to take such actions as are necessary to effectuate appellate jurisdiction. Price v. Johnston, 334 U.S. 266, 278 (1948).

¹ "A court of the United States may not grant an injunction to stay proceedings in a state court except . . . where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. §2283.

This Court has personal jurisdiction over all parties. The jurisdiction of a Court of Appeals is at least as great as that of the District Court whose Order is under review. The District Court of Delaware indisputably has personal jurisdiction over all parties to this petition. In addition, although the situation rarely arises, a Court of Appeals may issue an order to any court within its geographic boundaries when that is necessary to effectuate its ruling. Hunt v. Bankers Trust Co., 799 F.2d 1060, 1070 (5th Cir. 1989).

In their Answer, the Rales Respondents asserted that this Court has no personal jurisdiction over the Justices of the Delaware Supreme Court. Any such objection has been waived by the Delaware Justices themselves, who have not raised this objection and have stated that they do not wish to raise any arguments in this Court. A.045.² Cf. In re Grand Jury Proceedings, 654 F.2d 268 (3d Cir. 1981) (affirming District Court's order that State Court judge meet with federal prosecutor; state court judge had waived any objection to personal jurisdiction). In any event, the Rales Respondents lack standing to assert the rights of parties who chose not to assert their own rights.

B. JURISDICTION OF THE DISTRICT COURT

The District Court has jurisdiction over the original parties to this action under 28 U.S.C. § 1332, and has the capacity

² Citations to "A.____" refer to pages of Petitioner's Appendix To Brief of Petitioner in Support of His Petition For a Writ of Mandamus.

to enter an order enjoining proceedings by the Delaware Supreme Court under its ancillary jurisdiction and under the All Writs Act, 28 U.S.C. § 1651. However, the District Court lacked jurisdiction to certify an issue already finally decided by this Court to the Delaware Supreme Court. The District Court acted in violation of this Court's mandate and outside of the jurisdiction of Delaware Supreme Court Rule 41(a).

II. STATEMENT OF THE CASE

On August 15, 1991, the District Court issued an opinion dismissing the instant case with prejudice based on Petitioner's asserted lack of standing. Blasband v. Rales, 772 F. Supp. 850 (D. Del. 1991). Petitioner duly appealed, and in an opinion dated July 31, 1992, a panel of this Court unanimously determined that the District Court erred in concluding the plaintiff lacked standing to bring the case. Blasband v. Rales, No. 91-3633 (3d Cir. July 31, 1992). A. 012 - 036. This Court held unambiguously that "Blasband has satisfied Delaware's statutory and common law standing requirements to maintain this derivative action." A.025 (footnote omitted).

Following an unsuccessful motion for a rehearing by defendants, this Court issued a certified judgment in lieu of a formal mandate on September 9, 1992. The judgment vacated the judgment of the District Court dismissing this action on the basis of lack of standing and remanded the case to the District Court "with leave to Blasband to move to amend his complaint to allege

demand futility and to add Easco as a party to this action. All of the above in accordance with the opinion of this Court." A.001.

On September 16, 1992, the District Court, purporting to act under the authority of Delaware Supreme Court Rule 41, sua sponte entered an order certifying the same question of law decided by this Court to the Delaware Supreme Court. A.003-006. The District Court certified the following question: "Does plaintiff Blasband have standing to bring a derivative stockholders suit on behalf of Danaher Corporation under the undisputed facts of this case?" A.005. The District Court acknowledged that this precise issue had been the subject of the ruling by this Court. Id.

The District Court's Order of Certification describes the opinion of this Court in exceptionally strong language that is, under any circumstances, inappropriate and injudicious:

6. The Court of Appeals . . . proceeded to ignore the mandate of 8 Del. C. §327 and to misconstrue the Delaware Supreme Court's opinion of Lewis v. Anderson, 477 A.2d 1040 (Del. 1984), and the Delaware cases cited in that opinion.

7. If the decision of the Court of Appeals is found to be contrary to Delaware law, the Delaware Supreme Court should make that determination promptly in order to avoid future confusion from a non-binding source and to neutralize a contaminating opinion relating to Delaware corporation law.

A.003-004 (emphasis added).

On September 22, 1992, the Delaware Supreme Court, acting through a panel consisting of Associate Justices Henry G. Horsey, Andrew G. T. Moore, II, and Joseph T. Walsh, issued an Order purporting to accept certification in this matter from the District

Court. A.037-038. The Order, signed by Mr. Justice Moore, indicated that the Supreme Court had decided the issue prior to briefing:

In view of the apparent failure of the United States Court of Appeals for the 3rd Circuit to follow the Delaware statutory and decisional law on the subject at issue there appear to exist important and urgent reasons for an immediate determination by this Court of the question certified.

A.037-a. Under Delaware Supreme Court Rules, the Rales Respondents are to file a brief in the Delaware Supreme Court no later than forty-five (45) days from the date of the Delaware Supreme Court's Order, with Petitioner Blasband's brief to follow thirty (30) days later.

The instant petition was filed on September 24, 1992 and served on all parties.³ On September 30, 1992, the Delaware Supreme Court ordered that in light of the pending Mandamus Petition in this Court, further proceedings at the Delaware Supreme Court would be stayed during the pendency of this mandamus action.

A.044-045.

III. STATEMENT OF ISSUE PRESENTED AND OF RELIEF SOUGHT

1. Whether, on remand, the District Court had the authority to reject the ruling of the Court of Appeals on an issue

³ Prior to the Delaware Supreme Court's acceptance of the certified question, Petitioner had filed a Petition for a Writ of Mandamus naming only Judge Latchum as a nominal respondent. Blasband v. Rales, No. 92-7245 (2d Cir. Sept. 22, 1992). That petition was withdrawn when the instant petition was filed.

of Delaware law and certify the same issue to the Delaware Supreme Court; and if not, whether mandamus is appropriate

2. Whether this Court should issue a writ of mandamus to the Delaware Supreme Court prohibiting it from acting on the question certified to it by the District Court in order to protect its jurisdiction in this matter.

3. Whether this case should be reassigned to a different District Court judge.

Petitioner requests that this Court issue a Writ of Mandamus to the District Court, directing that its Order of September 16, 1992 be vacated and withdrawn, and, if necessary, a Writ of Mandamus to the Justices of the Delaware Supreme Court, prohibiting that body from ruling on the question certified by the District Court. Petitioner further requests that the Court of Appeals exercise its supervisory power to reassign further proceedings in this action to a different District Court judge.

IV. ARGUMENT

A. ALL OF THE CRITERIA GOVERNING MANDAMUS RELIEF ARE MET IN THIS CASE

A district court's failure to comply with the mandate of an appellate court is one of the limited situations where issuance of a writ of mandamus is proper. As the Supreme Court has held:

The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so.

Roche v. Evaporated Milk Assn., 319 U.S. 21, 25 (1943). See also, United States v. United States District Court, 334 U.S. 258, 264 (1948) (" It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment from a higher court."). While issuance of the writ is discretionary, a key factor to consider is whether the lower court's action "has thwarted or tends to thwart appellate review of the ruling." Id. at 26. This is clearly the situation here. The District Court has expressed its strong disagreement with this Court's ruling on the standing issue. Despite the fact that the defendants sought no further review, the District Court violated this Court's mandate and sought to overrule this Court by certifying the decided question to the Delaware Supreme Court. The District Court did not have the option to decide whether or not to go along with this Court's disposition of the appeal. When it took the unprecedented step of appealing this Court's ruling to the Delaware Supreme Court, it acted without any authority whatsoever.

This Court has recognized that although mandamus is an exceptional remedy and involves the exercise of discretion by an appellate court,

[n]onetheless, courts here consistently issued the writ when a district court has failed to adhere to an appellate court mandate. . . . To do otherwise would severely jeopardize the supervisory role of the courts of appeals within the federal judicial system.

Delgrosso v. Spang & Co., 903 F.2d 234, 237 (3d Cir.), cert. denied, 111 S. Ct. 428 (1990) (emph. added).

This Court will issue a writ of mandamus where: (1) no other means is available to attain the desired relief; and (2) the right to relief is "clear and indisputable." Haines v. Liggett Group, Inc., No. 92-5144, slip. op. at 20 (3d Cir. Sept. 4, 1992). The second prong is met where the trial court has committed a clear error of law. Cipollone v. Liggett Group, Inc., 822 F.2d 335, 340 (3d Cir.), cert. denied, 484 U.S. 976 (1987). Petitioner meets both prongs of this test. A writ of mandamus should therefore be issued.

B. THE DISTRICT JUDGE HAD NO AUTHORITY TO REFER AN ISSUE DECIDED BY THIS COURT TO THE DELAWARE SUPREME COURT

This Court reversed the District Court and clearly held that plaintiff has standing to pursue this action. Defendants' motion for reargument, on a different issue, was denied. No petition for certiorari was filed. Although the case was remanded for further proceedings consistent with this Court's opinion, the District Judge instead certified the issue of standing to the Delaware Supreme Court. The District Judge's order is without any basis in law for two reasons: first, it violates the mandate of this Court; and second, there is no basis in state law for certification of a question which has already been decided in the certifying court.

1. The District Court's Certification Order Violated This Court's Mandate

One of the most basic rules of a trial court is that it must follow the law as determined by the appellate courts. As this Court has stated:

It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed with the mandate and the law of the case as established on appeal. A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. "Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as complete as though the opinion had been set out at length."

Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949-50 (3d Cir. 1985) (citations omitted). Here, this Court unambiguously held that the Petitioner has standing to prosecute the claim set forth in his Complaint. No further inquiry concerning this issue by the District Court is permitted, and any re-examination is obviously inappropriate. This Court did not request the District Court to consider whether to certify any issues to the Delaware Supreme Court. Cf. FDIC v. Blue Rock Shopping Center, Inc., 599 F. Supp. 684, 685 (D. Del. 1984) (Latchum, J.) ("Blue Rock Shopping Center"), aff'd, 849 F.2d 600 (3d Cir. 1988) (case was remanded "to afford [the District] Court an opportunity to determine the propriety of certifying to the Delaware Supreme Court").⁴ Rather,

⁴ Indeed, no party ever suggested to either the District Court or to this Court that certification of the issue of standing to the Delaware Supreme Court was necessary or appropriate.

this Court found plaintiff had standing and remanded for further proceedings.

Judge Latchum's decision to certify an issue which has already been resolved by this Court to the Delaware Supreme Court represents a disturbing unilateral attempt to escape this Court's mandate, and has broad ramifications. Allowing a District Court, on remand, to use certification when it has been overturned on an interpretation of state law or when it disagrees with a Court of Appeals ruling on state law renders all decisions overturning district courts on state law issues subject to an additional layer of appeal in state courts. Any District Judge who is reversed could simply request certification, an act which potentially thwarts the appellate decision regardless of the outcome.⁵ Appellate rulings on state law issues would become final only if they affirmed the lower court. The Court of Appeals' de novo review of issues of state law, required by Salve Regina College v. Russell, 111 S. Ct. 1217 (1991), would be an exercise in futility.⁶

⁵ If the state court disagrees with the federal appellate court, a serious constitutional conflict emerges as to which decision is binding. If the state court agrees with the federal appellate court, the constitutional question remains as to which court's reasoning is given precedential value. Even if the state court adopts the federal appellate court's rationale, the certification procedure would still render the federal court opinion a merely advisory ruling.

⁶ A Federal District Court is not to be accorded special deference in deciding questions of state law based on any presumed expertise. The Supreme Court has rejected the view that district court judges have special expertise in the laws of their respective states as "founded fatally on overbroad generalizations" because "the bases of state law are equally communicable to the appellate judges as to the state law judge." Salve Regina College, 111 S. Ct. at 1225.

This procedure also unfairly discriminates against appellants who obtain a reversal on appeal but then must, in effect, win twice before they are granted the requested relief. The burden falls only on such appellants: no district court would order certification of an issue on which it had been affirmed. If the Rales Respondents had been successful in this Court, Petitioner Blasband could not then go back to the District Court and seek certification. That avenue was equally unavailable to Respondents once this Court's reversal became final.

2. Certification Was Not Available To The District Court Under Delaware Supreme Court Rule 41(a)

Certification by a Federal Court of a question of state law to the Delaware Supreme Court is authorized by Article IV, §11(9) of the Delaware Constitution. This provision grants jurisdiction to the Delaware Supreme Court

To hear and determine questions of law certified to it by other Delaware courts and the United States District Court for the District of Delaware where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it. The Supreme Court may by rules define generally the conditions under which questions may be certified to it and prescribe methods of certification.

The Delaware Supreme Court adopted Rule 41 to implement this provision. This rule provides:

Any state court and the United States District Court for the District of Delaware may, on motion or sua sponte, certify to this Court for decision a question of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question by this Court and

the certifying court has not decided the question in the case.

Rule 41(a) (emphasis added). Thus, by its very terms, Rule 41(a) is inapplicable here because the issue has been decided, and, as Judge Latchum himself has held in another case, the District Court's certification Order and the Delaware Supreme Court's acceptance order lacked authority. Blue Rock Shopping Center, 599 F. Supp. at 686. Absent a basis for jurisdiction under Rule 41, the District Court lacked the power to certify the issue of standing to the Delaware Supreme Court and the Delaware Supreme Court lacks jurisdiction to rule on the issue of standing.

Judge Latchum himself has provided the most compelling explanation of the impropriety of his own order. In Blue Rock Shopping Center, he considered whether to certify an issue to the Delaware Supreme Court following a remand in which the Third Circuit ordered him to consider the propriety of a certification. He refused to certify an issue on which he had already ruled:

Certification is a "procedure by which a Federal Court abstains from deciding a state law question until the highest court of the state has had an opportunity to rule on the question so certified by the Federal Court." Black's Law Dictionary (5th ed. 1979) (emphasis added); see 1A, Pt. 2 Moore's Practice ¶0.203[5] (2d ed. 1983); 17 Wright, Miller & Cooper, Federal Practice and Procedure, §4248 (1978). This Court cannot abstain from deciding the question; it has already decided it. And, having been decided, the question cannot now be "certified." Putting it to the Delaware Supreme Court now would be in effect an appeal from this Court, something the state court clearly does not have the jurisdiction to entertain.

Blue Rock Shopping Center, 599 F. Supp. at 686 (emphasis added).

In this case, the Delaware Supreme Court has announced its

intention to consider an appeal from this Court, and the absence of jurisdiction could not be more apparent.⁷

The Delaware Supreme Court, in its own Rule 41, has recognized that it cannot review the decisions of federal courts. Rather, Rule 41 authorizes the Delaware Supreme Court to issue rulings interpreting undecided issues of state law which may arise in the federal courts or in the lower state courts. The issue of standing in this case is not undecided. To the contrary, it has been definitively resolved by this Court. Rule 41 is therefore inapplicable.⁸

The Delaware Supreme Court, in its Order of September 22, 1992, stated that "a final judgment has not yet been entered in this matter in the United States District Court." A.037-a (emphasis added). This, however, is insufficient to vest jurisdiction in the Delaware Supreme Court under Rule 41; Rule 41 provides jurisdiction only if "the certifying court has not decided the question in the case" (emphasis added). Here, the question has been finally decided. A state court may not rule on a certified question from a federal court if it lacks the constitutional or

⁷ After the Delaware Supreme Court accepted the certified question, Petitioner filed a motion to dismiss based on the absence of jurisdiction. A.039-043. The Delaware Supreme Court has stayed all proceedings in this matter pending this Court's disposition of the instant mandamus action. A.044-045.

⁸ Petitioner had initially assumed that although the District Court ignored the limits of Rule 41 and its prior decision in Blue Rock Shopping Center, the Delaware Supreme Court would not accept a certified question that was so clearly beyond the scope of Rule 41. This assumption was apparently ill founded. Thus, it has been necessary to include the Justices of the Delaware Supreme Court as nominal respondents herein.

legislative authority to do so. See Weaver v. Marine Bank, 683 F.2d 744, 747 n.3 (3d Cir. 1982).

The Delaware Constitution, standing alone, does not provide jurisdiction for the District Court or the Delaware Supreme Court to exceed the limits of Rule 41(a). The Constitution specifically provides for its implementation by rules. The Delaware Supreme Court has chosen to issue such a rule (Rule 41) and, in 1987, amended said rule to require that the certified question not have been decided by the certifying court. Having set these limits for itself, the state court cannot simply choose to discard Rule 41 or apply it selectively. Nor does the District Court have the authority to certify a decided question in the face of the limits set by Delaware Supreme Court Rule 41(a).

The Delaware Supreme Court's clarification of Rule 41(a) to exclude certification jurisdiction over questions already decided in the particular case makes eminent sense in the context of a Federal Court diversity action. The absence of such a rule would allow the Delaware Supreme Court to act as an appellate tribunal on all questions of Delaware law decided by the federal judiciary. This would wreak havoc in diversity cases.⁹ No

⁹ It is important to recognize the limited scope of the certification jurisdiction under Rule 41. Many corporations headquartered throughout the United States are chartered in Delaware. Litigation involving such companies often occurs in the court where the company's primary place of business is located, rather than in Delaware. Rule 41, however, only provides for certification from the Delaware District Court. Had plaintiff filed this action in Federal court in Maryland, certification of the decision of the Maryland District Court to the Delaware Supreme Court would not be available under Rule 41. Federal courts around
(continued...)

decision of the federal courts in such a case would ever be final until this avenue of collateral attack is exhausted. The certification process, as this Court has noted, is an example of "cooperative federalism." Weaver v. Marine Bank, *supra*, 683 F.2d at 748. The District Court here, by its order of September 16, 1992, has turned certification into a contest between sovereigns.

Delaware Supreme Court Rule 41(a) properly recognizes the roles played by the state and federal judiciary. Just as there are rules limiting the role of the federal judiciary in ongoing state court litigation, Rule 41(a) is a limit on the state judiciary in ongoing federal court litigation. This delicate balance would be upset if the state courts had the powers ascribed to the Delaware Supreme Court by the District Court's Order of September 16, 1992. Because the issue of standing was addressed and decided by the federal courts, the District Court had no authority, power or discretion to certify that decided issue to the Delaware Supreme Court.

C. A WRIT OF MANDAMUS SHOULD ISSUE TO THE DELAWARE SUPREME COURT IF IT IS NECESSARY TO EFFECTUATE THIS COURT'S MANDATE

A federal court should properly be reluctant to issue a writ of mandamus to the state judiciary. Clearly, the federal

⁹(...continued)
the country have, indeed, interpreted Delaware law. See, *e.g.*, RCM Securities Fund, Inc. v. Stanton, 928 F.2d 1318 (2d Cir. 1991). This limited certification jurisdiction undercuts any argument that Delaware has a compelling interest in having its laws interpreted only by its courts.

courts do have the power to issue such a writ. Chick Kam Choo v. Exxon Corp., 486 U.S. 137, 150-151 (1988); Bucolo v. Adkins, 424 U.S. 641 (1976); Deen v. Hickman, 358 U.S. 57 (1988); Conover v. Montemuro, 477 F.2d 1073, 1100-1101 (3d Cir. 1973) (en banc) (Gibbons, J., concurring).

Because of the procedural posture of this case and the Delaware Supreme Court's acceptance of jurisdiction pursuant to its Order of September 22, 1992, A.037-038, it may become necessary for this Court to issue such a writ of mandamus. However, in the interest of comity, Petitioner respectfully suggests that, if this Court is inclined to grant relief, a writ should issue to the District Court ordering him to vacate his Order of September 16, 1992. A.003-006. Once that occurs, the Delaware Supreme Court will then have the opportunity to dismiss the certification action on its own. Under this scenario, no writ from this Court to the Delaware Supreme Court would be necessary. This is similar to the action by the United States Supreme Court in Bucolo, supra, wherein the Court issued an opinion allowing the filing of a writ to the Florida Supreme Court but did not issue the writ on the assumption that the state court "will conform to the disposition we now make." Bucolo, supra, 424 U.S. at 644.

On the other hand, the Delaware Supreme Court may decide to retain jurisdiction even after the District Court, pursuant to this Court's writ, vacates its order of certification.¹⁰ Under

¹⁰ The Delaware Supreme Court may, for example, reason that once it accepts certification, the vacation of the certification order does not divest it of jurisdiction.

those circumstances, a writ to the Justices of the Delaware Supreme Court would be necessary to effectuate this Court's order of July 31, 1992 and its judgment and mandate of September 9, 1992.¹¹ Because a writ of mandamus is generally issued only when other remedies are ineffective, Haines v. Liggett Group, Inc., *supra*, slip op. at 30, Petitioner suggests that this Court issue a writ only to the District Judge at this time and keep these proceedings open, with the Justices of the Delaware Supreme Court remaining nominal respondents, to see if further relief is necessary. If the Delaware Supreme Court continues to exercise jurisdiction, then this Court should issue a writ of mandamus to the Justices of that court.¹²

1. Before The Delaware Supreme Court Issues A Final Ruling, This Court Has The Power To Determine The Preclusive Effect Of Its Own Judgment Under Federal Law

The preclusive effect of this Court's ruling in a diversity action is usually considered to be a question of federal, not state law. See e.g., Johnson v. SCA Disposal Services of New

¹¹ The Delaware Supreme Court's order staying all proceedings before it pending the outcome of this mandamus action, A.044-045, may indicate its willingness to terminate jurisdiction if the September 16, 1992 District Court Order is vacated.

¹² While Petitioner is reluctant to urge a bifurcation, this is the prudent course of action given the considerations of federalism and comity. It is certainly preferred if the state court would act on its own rather than under federal court compulsion. If a writ is issued to the District Court only, this Court's order could direct Petitioner to report to this Court on any action taken by the Delaware Supreme Court.

England, 931 F.2d 970, 974 (1st Cir. 1991), and cases cited therein. As that Court noted, "it would be strange doctrine to allow a state to nullify the judgment of federal courts constitutionally established and given power also to enforce state-created rights." Id., quoting Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962). See also, Lubrizon Corp. v. Exxon Corp., 929 F.2d 960, 962-63 and n.1 (3d Cir. 1991) (declining to decide whether to apply federal or state law, but noting majority rule and citing Kern with approval). Thus, this Court's precedents, and not the Delaware Supreme Court's rules, determine that this Court's ruling precludes relitigation of the standing issue.

An injunction against state court proceedings is proper to prevent relitigation of issues on which a final judgment has been entered, even if other aspects of the same controversy have not been decided. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 150-51 (1988). Indeed, the injunction must be issued at the earliest possible moment in the litigation in the interest of judicial economy. It is clearly in the best interest of both the Court and these litigants that the ruling in this Court be final. The interests of neither the state nor the federal court are served by relitigation of issues that have determined with finality. Therefore, courts have granted injunctions against relitigation of issues that have already been issued as a matter of course, without further consideration of equitable factors. Browning Debenture Holders Committee v. DASA Corp., 605 F.2d 35, 40 (2d Cir. 1978);

In re National Student Marketing Litigation, 655 F. Supp. 659, 663-64 (D.D.C. 1987).

2. If The Requested Writ Is Not Issued, This Court's Judgment May Lose Its Binding Effect

This Court's power and authority to protect its judgment may be lost if it is not exercised before the Delaware Supreme Court rules. Respondents' Answer asserts that the District Court will remain bound by this Court's judgment even if the Delaware Supreme Court issues an inconsistent ruling. However, the Full Faith and Credit Act, 28 U.S.C. § 1738, may require the District Court to give the same effect to any final ruling by the Delaware Supreme Court that a Delaware trial court would give. This may throw into question the effect of this Court's ruling. See, Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986).

Thus, until a contrary ruling is issued by a state court, this Court's ruling is final as to all parties, its preclusive effect is determined by federal law, and its finality may be protected by Mandamus. After the state court issues a ruling, the Full Faith and Credit Act raises complex issues as to which ruling is to be given preclusive effect.

The Respondents' answer that "The District Court has done nothing to interfere with this Court's Judgment" is simply wrong. This Court's mandate conclusively determines that the Petitioner has standing to pursue this claim, and explicitly grants the Petitioner the right to file a new Complaint. By seeking a second

opinion from a different tribunal, the District Court has sought to thwart this Court's ruling and mandate. Delgrosso, supra, 903 F.2d at 237; Citibank, N.A. v. Fullam, 580 F.2d 82, 90 (3d Cir. 1978).

3. Petitioner Has Not Consented To The Jurisdiction of The Delaware Supreme Court

Respondents argue that because Petitioner effectuated service of the Complaint under a procedure designed by the Delaware legislature, he has accepted jurisdiction of the Delaware Supreme Court. This argument is based on an incorrect premise. Service of process was accomplished by operation of federal law, not state law. Fed.R.Civ.P. 4 (c)(2)(C)(i) incorporates state law governing service of process into the federal law, and accordingly, Petitioner filed affidavits with the District Court demonstrating that the state procedures had been followed in this case in order to comply with federal law. The method of service of process no more creates jurisdiction by a Delaware state court in this diversity case than it would in an antitrust case (where federal jurisdiction is exclusive).

Nor did plaintiff "create the situation of which he now complains," as the Answer unfairly states. Petitioner exercised the constitutionally-created right to a federal forum for an action between citizens of diverse citizenship. U.S. Const. Art. III, §2. This right was codified in the Judiciary Act of 1789, and remains a statutory right to this day. 28 U.S. C. § 1332(a)(1). Litigants have a right to present their diversity claims before federal courts and appellate courts have a duty to hear the diversity cases

that come before them. Meredith v. City of Winter Haven, 320 U.S. 228 (1943) (Court of Appeals may not abstain from hearing appeal in diversity case because of uncertainty concerning state law issue); Salve Regina College v. Russell, 111 S.Ct. 1217 (1991) (Court of Appeals must review district court's determination of state law issue de novo). The Petitioner has done no more than exercise the rights afforded to him by the Constitution and statute, and the Court of Appeals has an obligation to enforce those rights.

D. THIS CASE SHOULD BE REASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE

Petitioner requests that this Court exercise its supervisory power to order that this case be reassigned to another District Court judge. This Court has the authority and the duty to remove a judge from a case when his rulings demonstrate a lack of "impartiality or the appearance of impartiality." Haines v. Liggett Group, Inc., supra, slip. op. at 50-53; Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.), cert. denied, 459 U.S. 880 (1982).

By acting contrary to this Court's opinion and mandate, by ignoring the limits of Rule 41(a), by acting contrary to his own clear understanding of Rule 41(a) as set forth in Blue Rock Shopping Center, and by describing this Court's opinion as "ignor[ing]" Delaware statutory law and "misconstru[ing]" Delaware decisional law, Judge Latchum has demonstrated his strong belief that Petitioner should not succeed in this action. Given this

display of partiality,¹³ it would be completely inappropriate to throw Petitioner back into Judge Latchum's court for any further proceedings in this case. Judge Latchum's future rulings would be subject to question and would raise the specter of partiality because of his actions to date as described above. For these compelling reasons, this case should be reassigned on remand.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court issue a Writ of Mandamus ordering Respondent, the Honorable James L. Latchum, Senior District Court Judge for the District of Delaware, to immediately withdraw and vacate his Order Certifying a Question of Law to the Delaware Supreme Court. Petitioner further requests that this Court retain jurisdiction over this matter to determine whether it is necessary to issue a writ to the Justices of the Supreme Court of Delaware.

¹³ Petitioner makes no assertion whatsoever that Judge Latchum's partiality is based on anything other than his belief that Petitioner lacks standing under Delaware law. This, still, is partiality.

Finally, Petitioner respectfully requests that this Court order that this case be reassigned to another District Court Judge.

Dated: October 16, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen A. Whinston, Esquire, hereby certify that on this 16th day of October, 1992, true and correct copies of the foregoing Brief of Petitioner In Support of His Petition For a Writ of Mandamus were served upon the below listed parties in the following manner:

BY U.S FIRST CLASS MAIL:

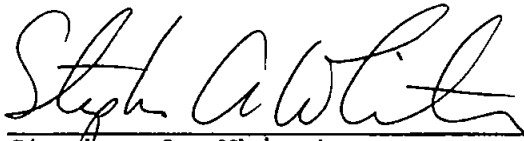
The Honorable E. Norman Veasey
The Honorable Henry R. Horsey
The Honorable Andrew G. T. Moore, II
The Honorable Joseph T. Walsh
The Honorable Randy J. Holland
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