

**IN THE DISTRICT OF COLUMBIA COURT OF APPEALS**  
**Civil Division**

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RALPH NADER,

Appellant,

v.

LINDA S. SERODY, RODERICK SWEETS,  
RONALD BERGMAN, TERRY TRINCLISTI,  
RICHARD TRINCLISTI, BERNIE COHEN-  
SCOTT, DONALD G. BROWN AND JULIA  
A. O'CONNELL

Appellees.

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**No. 09-CV-906**

**APPELLANT'S PETITION FOR REHEARING EN BANC**

Pursuant to D.C. Ct. App. Civ. R. 35(b), Appellant Ralph Nader hereby petitions the Court for rehearing en banc of the Panel Opinion entered on May 10, 2012 ("Slip Op."), due to the exceptional importance of the following questions raised by this case:

- I. Do Principles of Res Judicata bar District of Columbia courts from deciding whether newly discovered evidence provides grounds to deny enforcement of a foreign judgment, where courts in the foreign jurisdiction neither addressed the evidence nor decided the issue?;
- II. Does the Full Faith and Credit Clause require that courts in the District of Columbia enforce a foreign judgment where:
  - A. The foreign judgment was obtained by means of a fraud upon the courts of the foreign jurisdiction, in proceedings that violated due process by denying the defendant any opportunity to be heard?; and
  - B. The parties seeking to enforce the foreign judgment violate the District of Columbia's Rules of Civil Procedure and fail to disclose such violations?

Rehearing en banc is needed because the Panel incorrectly answered each of these questions in the affirmative. Thus, while the Panel purported to "join the consensus of courts" in rendering its decision, Slip Op. at 10, in fact it set a dangerous new precedent that will have far-reaching

consequences if the Court permits the Panel's decision to stand. The Panel Opinion not only creates substantial confusion regarding the proper application of the Full Faith and Credit Clause and *res judicata* in proceedings decided under the Uniform Enforcement of Foreign Judgments Act, D.C. Code § 15-351 *et seq.* (2001), but also, it effectively establishes a "safe harbor," which permits parties who seek to enforce foreign judgments to violate the rules of the District of Columbia courts with impunity. Appellant therefore respectfully requests that the Court grant rehearing en banc, to correct the Panel's errors in resolving the foregoing questions, and to provide the lower courts with the guidance necessary to ensure the proper disposition of cases brought in the District of Columbia for the enforcement of foreign judgments.

### **ARGUMENT**

#### **I. The Panel Erred By Concluding That District of Columbia Courts Are Barred From Deciding Whether Newly Discovered Evidence Provides Grounds to Deny Enforcement of Appellees' Foreign Judgment, Because No Court Has Addressed That Evidence or Decided That Issue.**

The newly discovered evidence at issue on this appeal consists of testimony delivered under oath in a criminal proceeding in October 2008, more than a year after Appellees commenced this action for enforcement of their foreign judgment. R76-R94. The Pennsylvania Attorney General initiated the criminal proceeding in July 2008, when he filed a Grand Jury Presentment alleging that state employees illegally worked to prepare Appellees' litigation in the underlying proceedings at taxpayer expense. R67-R69. The testimony identifies, for the first time, the previously unnamed "law firm" referenced in the Presentment as Appellees' counsel Reed Smith, LLP, and further identifies Reed Smith partner Efreem Grail as "coordinating the effort" alleged in the Presentment. R68, R80-R85. Efreem Grail is the attorney who submitted the Bill of Costs by which Appellees procured their foreign judgment. R119.

Appellant contends the foregoing testimony constitutes newly discovered evidence that Appellees procured their judgment by committing a fraud upon the court. Specifically, in submitting their request for costs, Appellees failed to disclose that their lead counsel coordinated the effort of “a veritable army” of state employees who worked illegally to prepare Appellees’ litigation at taxpayer expense. R68, R80. The foregoing testimony thus raises an issue of fact – whether Appellees committed “extrinsic fraud” in the underlying proceedings – which is grounds for denying enforcement of their foreign judgment. *See* Slip Op. at 13 n.17.

The Panel’s conclusion that “principles of res judicata” bar it from deciding this issue is wrong both in fact and as a matter of law. Slip Op. at 14-15. To begin with the facts: no court has ever addressed the above-cited testimony, much less decided whether it provides grounds to deny enforcement of Appellees’ judgment. Neither the Pennsylvania courts, nor the Superior Court below, nor the Panel itself even acknowledge the testimony’s existence. Instead, when Appellant filed his petition to open the record in the underlying proceedings in August 2008, based solely on the allegations in the Presentment, Slip Op. at 4-5, the Pennsylvania court stayed discovery, disregarded Appellant’s motion for a hearing, and denied the petition in December 2008. *See In re Nomination Paper Nader*, No. 568 M.D. 2004 (Pa. Commw. Ct. Dec. 4, 2008) (unpublished) (stay entered Oct. 23, 2008). The Pennsylvania Supreme Court affirmed without opinion, and expressly denied Appellant’s motion for a hearing. *See In re Nomination Paper of Nader*, 982 A.2d 1220 (Pa. 2009). Thus, the Pennsylvania courts did not address the testimony at issue here, nor could they, because it did not exist when Appellant filed his petition. R76; Slip Op. at 4. The Panel is therefore factually incorrect that Appellant “raised” or “had the opportunity to raise” any issue regarding this testimony in the underlying proceedings. Slip Op. at 15.

The Panel is also wrong, as a matter of law, that Appellant is precluded from raising such issues now. The Panel errs by confusing and conflating the doctrines of claim preclusion and issue preclusion. *See Elwell v. Elwell*, 947 A.2d 1136, 1139-40 (D.C.2008) (claim preclusion bars “relitigation of the *same claim* between the same parties”) (citation omitted) (emphasis added); *Wilson v. Hart*, 829 A.2d 511, 514 (D.C.2003) (issue preclusion bars “relitigation of *issues* determined in a prior action”) (emphasis added). Despite the Panel’s repeated assertions that Appellant’s “claims” are precluded, Appellant does not now and never has asserted any claim in these proceedings. Slip Op. at 13-15. Rather, Appellant raises an issue of fact – whether the above-cited testimony demonstrates that Appellees committed a fraud upon the court – which no court has ever decided. As a matter of law, therefore, claim preclusion cannot bar Appellant from raising this issue. *See Carr v. Rose*, 701 A.2d 1065, 1073 (D.C. 1997) (fact issues not finally determined in prior proceeding are not precluded, even though the judgment may have claim preclusive effect).

Nor does issue preclusion bar litigation of the issue. Issue preclusion bars “relitigation” of an issue only “where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment.” *Wilson v. Hart*, 829 A.2d 511, 514 (D.C.2003). As the foregoing facts make clear, none of those conditions is present here. Because no court has ever addressed the above-cited testimony, Appellant has not had a full and fair opportunity to litigate whether it establishes that Appellees committed a fraud upon the court, and the issue has not been decided. Consequently, Appellant cannot be precluded from raising the issue now. *See Ali Baba Co. Inc. v. WILCO, Inc.*, 482 A.2d 418, 422 (D.C. 1984) (an

issue is “actually litigated” when it is “properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined”) (internal citation omitted).

The single decision of this Court cited by the Panel in support of its conclusion that Appellant’s “claims” are precluded only confirms its error. Slip Op. at 14 (citing *Carr*, 701 A.2d at 1074). In *Carr*, as the Panel observed, the Court gave claim preclusive effect to a judgment affirmed by the Supreme Court of Pennsylvania, and concluded that the judgment barred a plaintiff from asserting new *claims* in the District of Columbia courts, for breach of contract, which the plaintiff could have asserted in the prior Pennsylvania proceeding. *See Carr*, 701 A.2d at 1071, 1074. The Court did not conclude, however, that a party to the subsequent District of Columbia proceeding would be barred from raising an issue of fact in his defense, when that issue was neither addressed nor decided by the Pennsylvania courts. *See id.* On the contrary, the Court recognized the distinction between claim preclusion and issue preclusion, and expressly concluded that neither doctrine bars parties from raising issues of fact not finally decided in a prior proceeding. *See id.* at 1074 (construing D.C. and Pennsylvania law). The Panel’s reliance on *Carr* is therefore misplaced, and its conclusion that Appellant is precluded from raising a defense based upon the testimony cited herein was error.

## **II. The Panel Erred By Declining to Consider Whether Appellant Has Established Grounds For Relief From Appellees’ Foreign Judgment.**

If there were ever a case in which the Full Faith and Credit Clause did not mandate enforcement of a foreign judgment, this is it. And it is well-settled that such cases do exist – for example, where the foreign judgment was procured by a fraud on the issuing court, or in violation of due process, or where the party seeking to enforce the judgment engages in misconduct before the receiving court. All of these conditions are present here. Furthermore, Appellees abandoned this action in the proceeding below, after the newly discovered evidence

cited herein became available, by failing to oppose Appellant's motion to dismiss pursuant to D.C. Sup. Ct. Civ. R. 41(b). R95. The Panel therefore should have denied enforcement of Appellees' foreign judgment on multiple grounds, but instead, it declined to reach the merits of each one. Issues arising from Appellees' misconduct in the underlying proceedings are "precluded," the Panel reasoned, Slip Op. 13-15, while those arising from Appellees' misconduct in the proceeding below are "moot". Slip Op. 16-17. The Panel is wrong on all counts.

**A. The Panel Should Have Denied Enforcement of Appellees' Foreign Judgment Because It Was Obtained By Means of a Fraud Upon the Court, in Proceedings That Violated Due Process By Denying Appellant's Right to Present Evidence and Be Heard.**

It is a matter of settled law that courts should deny enforcement of foreign judgments procured by "fraud on the court" or in "proceedings lacking in essential due process safeguards." Slip Op. at 10-11 (citing *Jones v. Roach*, 575 P.2d 345, 348 (Ariz. App. 1977); *Carr v. Bett*, 970 P.2d 1017, 1024 (Mont. 1998); *Fungaroli v. Fungaroli*, 280 S.E.2d 787 (N.C. Ct. App. 1981); *Schwartz v. Schwartz*, 173 N.E.2d 393 (Ohio Ct. App. 1960)). In this case, the foreign judgment was obtained both by a fraud on the court *and* in violation of Appellant's right to due process. But while the Panel purported to "join the consensus" established by *Jones*, *Bett*, *Fungaroli*, *Schwartz* and other cases, Slip Op. at 10, in fact it set a dangerous new precedent, by holding that a defendant can be precluded from raising such issues, even if they arise from newly discovered evidence that was not and could not have been addressed in the prior proceeding.

Had the Panel properly considered, rather than disregarded, the above-cited testimony implicating the attorney who submitted Appellees' Bill of Costs, it would have recognized that this case involves a quintessential example of the "extrinsic fraud" that constitutes grounds to deny enforcement of a foreign judgment, "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent." *Fidelity*

*Storage Co. v. Urice*, 12 F.2d 143, 144 (1926) (citation omitted). Appellees’ fraud or deception lies in their lead counsel’s failure to disclose, when he submitted Appellees’ Bill of Costs, R119, that he had “coordinat[ed] the effort” of “a veritable army” of state employees who worked illegally to prepare Appellees’ litigation at taxpayer expense. R80; R68-R69. Appellees’ failure to disclose such facts constitutes extrinsic fraud because it prevented Appellant from raising a valid defense – namely, that parties who finance their litigation by means of a criminal conspiracy to misappropriate taxpayer funds and resources are not entitled to an award of litigation costs. *See In re Delaney*, 819 A.2d 968, 981 n.4 (D.C. 2003) (extrinsic fraud “refers to the manner in which a judgment is obtained”).

The Panel correctly recognized that every state must give a foreign judgment “at least the res judicata effect” it would have in the state that rendered it. Slip Op. at 14 (citation omitted). Contrary to the Panel’s conclusion, however, Appellant is not “precluded” from raising the issue of Appellees’ extrinsic fraud in this proceeding, Slip Op. at 13-15, because Appellant would not be barred from raising that issue in a Pennsylvania court, based upon the testimony cited herein. *See Mahallati v. Williams*, 479 A.2d 300, 305 (1984) (“newly discovered evidence” is properly raised if it was not and could not have been discovered during the prior proceeding, and if it is not merely cumulative, but would be likely to produce another result); *see also Carr*, 701 A.2d at 1070 (res judicata principles of Pennsylvania and District of Columbia are substantially similar). The Pennsylvania court found the criminal misconduct by the parties who prepared Appellees’ litigation to be “serious” and potentially “deserving of criminal prosecution,” but concluded that such misconduct was “extraneous” to the merits of the judgment awarding Appellees costs. *In re Nomination Paper of Ralph Nader*, No. 568 M.D. 2004 (Pa. Commw. Ct. Dec. 4, 2008) at 8. The Pennsylvania court reached that conclusion without the benefit of the testimony implicating

Appellees' counsel, however, and expressly limited its analysis to "the information contained in the Presentment and the fact of the filing of criminal charges." *Id.* at 5. In a new proceeding, therefore, a Pennsylvania court could and should reach a different result if it were presented with newly discovered evidence that Appellees' lead counsel "was coordinating the effort" alleged in the Presentment. R80.

Further, if the Pennsylvania judgment is construed to preclude Appellant from raising any issue relating to the above-cited testimony, as the Panel has done, then the Pennsylvania proceedings constitute a clear violation of Appellant's right to due process. The testimony in question did not exist when Appellant filed his petition to reopen the Pennsylvania proceedings in August 2008. R76. The Pennsylvania courts denied that petition after staying discovery and denying Appellant's motions for oral argument, in direct violation of his rights under the Pennsylvania Rules of Civil Procedure. Pa. R. Civ. P. 206.7(c) (granting petitioner right to "take depositions" regarding "disputed issues of material fact"); Pa. R. Civ. P. 211 (granting "any party or the party's attorney...the right to argue any motion"). The Panel's conclusion that Appellant is now precluded from raising newly discovered evidence in his defense, which was not and could not have been raised in the prior proceeding, is tantamount to a complete denial of due process. It binds Appellant to a judgment without permitting him to oppose it, regardless of the evidence that arises. Not even the Full Faith and Credit Clause requires such an absurd result, and the Panel was wrong to conclude it does. *See Jones*, 575 P.2d at 348; *Bett*, 970 P.2d at 1024; *Fungaroli*, 280 S.E.2d 787; *Schwartz*, 173 N.E.2d 393.

**B. The Panel Should Have Denied Enforcement of Appellees' Foreign Judgment Because Appellees Violated the District of Columbia Courts' Rules and Failed to Disclose Such Violations.**



Appellees' misconduct before the District of Columbia courts also constitutes grounds to deny enforcement of their foreign judgment, which are wholly independent from Appellees' misconduct in the underlying proceedings. There can be no doubt that Appellees violated D.C. Sup. Ct. Civ. R. 62(a), by executing on a judgment condemning the funds in Appellant's bank account less than ten calendar days after it was executed. R98-R102. Further, Appellees failed to disclose their violation for more than a year, despite making numerous filings as they continued to press their claims and Appellant continued to oppose them. R102. The Panel nonetheless declined to reach the merits of this issue, too, reasoning that it was rendered "moot" by the Panel's decision to accord Appellees' foreign judgment full faith and credit. Slip Op. at 16. Once again, the Panel erred.

None of the cases the Panel cites hold that the Full Faith and Credit Clause deprives receiving courts, in proceedings for the enforcement of foreign judgments, of the power to sanction misconduct, including by dismissal. *See* D.C. Sup. Ct. Civ. R. 41b (authorizing dismissal where plaintiff fails to comply with court's rules or orders). On the contrary, as this Court has expressly recognized:

policy considerations may require dismissal of a second action even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

*Carr*, 701 A.2d at 1071. Dismissal is therefore proper under Rule 41(b), even in a proceeding for enforcement of a foreign judgment, where the plaintiff engages in "long and continuing disobedience" of a rule or court order, *LaPrade v. Lehman*, 490 A.2d 1151, 1155 (D.C. 1985) (citations omitted), where a plaintiff shows "gross indifference to rules of court and to fair treatment of defendant," *Rothberg v. Quadrangle Dev. Corp.*, 646 A.2d 309, 315 (D.C. 1994), or where the violation of a rule is "the culmination of a protracted course of...improper behavior in

litigation.” *Gardner v. United States of America*, 211 F.3d 1305, 1309 (D.C. Cir. 2000) (citation omitted).

In sharp contrast to the foregoing decisions, the Panel absolves Appellees for their violation of Rule 62(a) and their failure to disclose that violation for more than a year – *i.e.*, for engaging in precisely the sort of conduct this Court has found to warrant dismissal – based on its finding that Appellant “has not been harmed.” Slip Op. at 17. Even if that finding were correct, it disregards the Court’s interest in imposing the proper sanction of dismissal where, as here, a party’s “entire course of conduct throughout the lawsuit evidences bad faith and an attempt to perpetrate a fraud on the court.” *Chambers v. NASCO*, 501 U.S. 32, 50-51 (1991). Rather than establishing such a “safe harbor” for parties who seek to enforce foreign judgments in the District of Columbia, the Court should grant the proper sanction of dismissal, by granting Appellant’s unopposed motion to dismiss under Rule 41(b). *See* D.C. Sup. Ct. Civ. R. 12-I(e) (permitting courts to treat unopposed motions as conceded).

\* \* \*

Among the most coercive powers of the state is the power of the judiciary to seize the personal funds of one citizen and pay them over to another. Such power should not be exercised on behalf of parties who do not and cannot dispute direct evidence that they have perpetrated a fraud on the courts and engaged in a pattern of misconduct. The Full Faith and Credit Clause does not require it, and justice cannot abide it. Indeed, “to aid a party in such a case would make the court the abetter of iniquity.” *Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254, 1263 (D.C. 1986). Rehearing en banc should be granted.

**CONCLUSION**

For the foregoing reasons, Appellant's Petition for Rehearing En Banc should be granted.

Date: May 24, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2012, I served a copy of the foregoing Appellant's Petition for Rehearing En Banc electronically, or by first class mail, upon the following parties:

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