**SUMMARY OF THE 2008 TERM OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT-FEDERAL APPELLATE PRACTICE SEMINAR**

Sponsored by the U.S. District Court
for the District of Puerto Rico
and the Hon. Raymond L. Acosta Puerto Rico Chapter
of the Federal Bar Association

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## I. ***Introduction***

This summary includes a compendium of First Circuit cases published during calendar year 2008 on issues of appellate procedure. I also discuss certain Supreme Court decisions of the 2008 term that interpret the Federal Rules of Appellate Procedure. I note First Circuit cases that resolve issues of first impression or identify conflicts amongst the courts of appeals.

During the 2008 Term, issues of waiver and strict adherence to procedural requirements figure prominently and are outcome-determinative in many decisions.

***Notable decisions:***

### ***A. Procedural issues with Substantive Implications***

#### **1.** ***Failure to file a separate motion precludes awarding attorney's fees on appeal.***

*In re Torres Martinez,* 397 B.R. 158 (1st Cir. BAP 2008)

The United States Bankruptcy Court for the District of Puerto Rico entered order dismissing Debtor's Chapter 13 case as having been filed in bad faith, and Debtor appealed on variety of grounds, including movant's alleged lack of standing to pursue dismissal motion after its proof of claim was disallowed. The appellate court affirmed the dismissal of the Chapter 13 case.

Appellee requested that Debtor be ordered to pay his attorneys' fees related to this appeal. Bankruptcy Rule 8020, which adopts Rule 38 of the Federal Rules of Appellate Procedure, provides:

"If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment or decree of a bankruptcy judge is frivolous, it may, *after a separately filed motion* or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee". Fed. R. Bankr.P. 8020.

A prerequisite to awarding sanctions under Bankruptcy Rule 8020 is that the movant meet the procedural requirements of that rule. *See Maloni v. Fairway Wholesale*

*Corp. (In re Maloni)*, 282 B.R. 727, 734 (B.A.P. 1st Cir.2002). Here, Appellee did not meet the procedural requirement of Bankruptcy Rule 8020 because he did not request attorneys' fees through a separately filed motion." Thus, the request was denied.

This is analogous to Fed.R.Civ.P. 11 incorporating a "safe harbor" provision requiring service to counsel of the motion for sanctions before filing a separate motion. Requesting sanctions in a motion to dismiss or brief does not comply with the safe harbor and separate filing requirements of Rule 11. *Ramallo Bros. Printing v. El Dia*, 2006 WL 2524222 (D.P.R. 2006)(Fusté,J.)(denied request for Rule 11 sanctions in a motion to dismiss though the complaint was frivolous as barred by *res judicata*). *But see Cytologistics v. Ventana, 513 F. 3d 271 (1st Cir. 2008)*(prevailing party on a motion to dismiss does not entitle to an award of fees under FRAP 38 when appellant's position is not "so frivolous").

***2. Allegations in a brief of facts that transpired during an "off the record" conference in the district court require supplementation of the record under FRAP 10(c).***

*Corujo v. Eurobank*, 2008 WL 4899486 (1st Cir. 2008) (not for publication)

District Court (Pieras,J.) dismissed the case *without prejudice* for plaintiff's failure to file an ISC memorandum prior to the conference. The court of appeals summarily affirmed.

Appellee argued that dismissal should have been *with prejudice*. It was not an abuse of discretion to dismiss the case without prejudice as there was no pattern of repeated violations of court orders. "The only instance of noncompliance identified by the district court was plaintiffs' failure to file a memorandum prior to the initial scheduling conference, as required by the court's initial scheduling conference order."

Rule 10(c) provides: " Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must

be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal."

Because there was no transcript of the scheduling conference in the record, and the appellant did not use the procedures of Rule 10(c) of the Federal Rules of Appellate Procedure to create a record of that proceeding, the court of appeals disregarded the various unsupported representations of the parties and the amicus as to precisely what transpired there. Accordingly, there was no evidence of repeated violations of an order to warrant a dismissal with prejudice.

***3. Failure to file a timely notice of appeal from an adverse order will not allow review in a related appeal. Related or consolidated cases remain separate for appeal purposes. "The lesson to be learned is that small omissions can have large consequences."***

*In re High Voltage Engineering Corp., 544 F.3d 315 (1st Cir. 2008)(Selya,J).*

In 2004, certain corporations filed a Chapter 11 bankruptcy petition that led to a Plan and a confirmation order. Following an unsuccessful reorganization, in 2005, the debtor and affiliates filed new Chapter 11 petitions. Each of the cases was separate though all were administered jointly by the same bankruptcy judge. In the 2005 cases, the appellant-trustee attempted to vacate professional fee orders entered in the 2004 case and filed a Rule 60(b) motion for relief from judgment *in both the 2004 and 2005 cases.* The Bankr. Ct denied both motions. *The trustee appealed only the denial order in the 2005 case*. The District Court dismissed the bankruptcy appeal on grounds of res judicata.

As the First Circuit wrote: "A seventeenth-century parable teaches that "[f]or want of a nail ... the kingdom was lost." Now, as then, the lesson to be learned is that small omissions can have large consequences. This appeal illustrates the point." The court held that trustee's misdirected notice of appeal warranted a dismissal of the appeal.

"It is an elementary principle that a notice of appeal cannot be filed in a desultory fashion but, rather, must specify a particular order or judgment and must be filed within the four corners of the case in which that order or judgment was entered." *See, e.g., Constructora Andrade Gutiérrez, S.A. v. Am. Int'l Ins. Co.,* 467 F.3d 38, 43-44 (1st Cir.2006); *United States v. Carelock,* 459 F.3d 437, 442-43 (3d Cir.2006); *see also Smith v. Barry,* 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992) (warning that "noncompliance [with Federal Rule of Appellate Procedure 3] is fatal to an appeal"). The trustee transgressed this principle: the orders of which he complained (the November 8, 2004 fee orders) concerned only the 2004 cases and were entered exclusively on the docket in those cases. Consequently, the challenge to them-the Rule 60(b) motion-had to be filed in those cases." The appeal from the denial of the Rule 60(b) motion in the 2005 case was a nullity *since the trustee did not file a notice of appeal in the 2004 case."*

"In all events, even if consolidation was a reality-and it is not-the general rule in this circuit is that consolidated cases remain separate and distinct for purposes of appeal. *See In re Mass. Helicopter Airlines, Inc.,* 469 F.2d 439, 441-42 (1st Cir.1972). That separateness would require the filing of a notice of appeal in the 2004 cases even if those cases had been consolidated with the 2005 cases."

"For the benefit of those to whom insistence upon such punctilio may seem hypertechnical, we repeat what we wrote several years ago in analogous circumstances:

*[T]he web of [procedural] rules exists for a purpose. If courts did not demand that litigants recognize and respect jurisdictional borders, the judicial system would be adrift in a sea of competing decrees and duplicative proceedings."*

***4. A writ of coram nobis to correct a judgment is appealable as a civil case.***

*Trenkler v. U.S., 536 F.3d 85 (1st Cir. 2008).*

The petitioner was a prison inmate, then serving a federal sentence. He confronted the district court with a

claim that more than ten years earlier it had illegally sentenced him to life imprisonment. Persuaded by this claim, the district court granted a writ of error coram nobis, vacated the original sentence, and proceeded to resentence the petitioner to a term of years.

"A writ of error coram nobis is a common-law writ through which a rendering court, subject to certain conditions, may correct its own judgment on the basis of some patent error affecting the validity or regularity of that judgment. In the modern federal system, use of the writ of error coram nobis is confined to criminal cases."

"The government protested this deployment of the writ, contending that the district court lacked jurisdiction to issue it." The court of appeals concluded that the district court had no authority to issue a writ of error coram nobis. Consequently, it reversed the order granting the writ and directed the district court to reinstate the original sentence.

Resolving an issue of first impression, "…the Federal Rules of Appellate Procedure explicitly provide that "[a]n appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case" and, thus, is subject to a 60-day filing period [for when the U.S. or an officer or an agency is a party]. Fed. R.App. P. 4(a)(1)(C); *see also* Fed. R.App. P. 4(a)(1)(B). This language was added to the Appellate Rules in 2002 to resolve a conflict in the courts of appeals regarding the time limits that applied to appeals from coram nobis orders. *See* Fed. R.App. P. 4 advisory committee notes. The amended rule controls here. Accordingly, the government's notice of appeal was timely even if, as the petitioner contends, the appeal period ran from February 20, 2007."

On the merits the government argued that the district court had no power to issue the writ because the motion was a successive 2255 petition and that the writ is unavailable to a prisoner in federal custody.

Petitioner argued that the government failed to oppose the motion below and the arguments were waived on appeal. First, the court ruled that the government's arguments were jurisdictional and could not be waived. *"This is important because parties cannot confer subject-matter jurisdiction on a district court by sloth or acquiescence." See United*

*States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *Espinal-Dominguez v. Puerto Rico,* 352 F.3d 490, 495 (1st Cir.2003). "Second, these arguments were raised, albeit belatedly, in the district court. That court chose not to treat them as waived but, rather, seemingly rejected the government's motion for reconsideration on the merits (thus effectively rejecting the preclusion argument contained therein). The court made no comment about the timeliness vel non of the government's proffer. *Where a trial court chooses to overlook the belated nature of a filing and adjudicate the tardy claim or defense on the merits, that claim or defense may be deemed preserved for purposes of appellate review." See Negrón-Almeda v. Santiago,* 528 F.3d 15, 26 (1st Cir.2008).

***5. Generally, a defense or claim asserted in the courts below does not preserve for appellate review a defense or claim that rests on a different ground.***

*Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (U.S. 2008).*

The Court (Souter, J) vacated the Ninth Circuit's order that reduced the District Court's punitive damages award in a suit arising from the 1989 oil spill in Alaska.

Exxon raised pre-trial preemption arguments to foreclose punitive damages that the District Court rejected. After a jury verdict and 13 months after the motions deadline, Exxon raised the preemption arguments in the District Court but on a *different ground- based on the Clean Water Act*. [This was not permitted under FRCP 50(b)]. DCT denied that motion. Exxon renewed the *new preemption* argument on appeal and the Ninth Circuit found that the preemption defense was not waived because of the "massive significance" of the question presented, but found no preemption.

Although the Court agreed there was no preemption, the Court disagreed with the Ninth Circuit's reasons for reaching the question- but did not find an abuse of discretion. "*Statutory preemption (and the allegation of unconstitutionality) are not a license to rely on newly cited statutes anytime [a party wishes]".*

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," *Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct.

2868, 49 L.Ed.2d 826 (1976), when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *id.*, at 121, 96 S.Ct. 2868. We have previously stopped short of stating a general principle to contain appellate courts' discretion, see *ibid.*, and we exercise the same restraint today."

*"…But the complexity of a case does not eliminate the value of waiver and forfeiture rules, which ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression. "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." Poloquin v Garden Way, 989 F.2d 527, 531 (C.A.1 1993).* The District Court's sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect."

***6. Courts may not sua sponte alter or amend a judgment in favor of the party that failed to file an appeal or a cross-appeal.***

*Greenlaw v. U.S., 128 S.Ct. 2559 (U.S. 2008).*

"This case concerns the role of courts in our adversarial system. The specific question presented: May a United States Court of Appeals, *acting on its own initiative*, order an increase in a defendant's sentence?"

Court of Appeals for the Eighth Circuit enlarged the defendant's sentence *by 15 years* although the Government had not filed an appeal or a cross-appeal from the sentence imposed by the District Court. The Court vacated the judgment holding that absent a government appeal the appellate court had no power to alter or amend the judgment to benefit a nonappealing party.

*"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present….[As] a general rule, "[o]ur adversary system is*

*designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."*

"In increasing Greenlaw's sentence by 15 years on its own initiative, the Eighth Circuit did not advert to the procedural rules setting deadlines for launching appeals and cross-appeals. Unyielding in character, these rules may be seen as auxiliary to the cross-appeal rule and the party presentation principle served by that rule. FRAP 3(a)(1) provides that "[a]n appeal permitted by law ... may be taken *only by filing a notice of appeal* ... within the [prescribed] time." (Emphasis added.) Complementing Rule 3(a)(1), Rule 4(b)(1)(B)(ii) instructs that, when the Government has the right to cross-appeal in a criminal case, its notice " *must be filed* ... within 30 days after ... the filing of a notice of appeal by any defendant." (Emphasis added.) The filing time for a notice of appeal or cross-appeal, Rule 4(b)(4) states, may be extended "for a period not to exceed 30 days." Rule 26(b) bars any extension beyond that time.

"*The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality.* Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence. And if the Government files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence. Given early warning, he can tailor his arguments to take account of that risk. Or he can seek the Government's agreement to voluntary dismissal of the competing appeals, see Fed. Rule App. Proc. 42(b), before positions become hardened during the hours invested in preparing the case for appellate court consideration."

"*The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal.* In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased until the appeals court so decreed. In this very case, Greenlaw might have made different strategic decisions had he known soon after

filing his notice of appeal that he risked a 15-year increase in an already lengthy sentence."

The Court also held that plain error review under FRCrim.P 52(b) is not a substitute for a timely appeal.

### *7. A party that obtains a favorable judgment may not challenge a subsidiary finding in a cross-appeal.*

*National Union Fire Ins. Co. Of Pittsburgh, PA v. West Lake Academy, 548 F.3d 8 (1st Cir. 2008)*

Affirming the district court's orders and a jury verdict denying insurance coverage, First Circuit determined that the insurer's cross-appeal on an issue of causation was improper. "A cross-appeal is generally not proper to challenge a subsidiary finding or conclusion when the ultimate judgment is favorable to the party cross-appealing. *See United States v. Moran,* 393 F.3d 1, 12 (1st Cir.2004) ( "A cross-appeal normally is improper when taken by a defendant from a favorable judgment."); *Neverson v. Farquharson,* 366 F.3d 32, 39 (1st Cir.2004) ( "[R]espondents here do not seek to alter the judgment of the district court. On the contrary, the district court granted all of the relief that respondents requested.... Under these circumstances, a cross-appeal would have been improper."); *Harding v. Fed. Nat'l Bank,* 31 F.2d 914, 918-19 (1st Cir.1929) (explaining that plaintiff's cross-appeal from a decree in the plaintiff's favor was "improperly taken").

On another point, appellant waived an objection of an improper closing argument (e.g., that plaintiff was greedy for refusing to accept a settlement offer). "We review allegations of trial misconduct forfeited due to the lack of any timely objection only for plain error." *See Fonten Corp. v. Ocean Spray Cranberries, Inc.,* 469 F.3d 18, 21-22 (1st Cir.2006); *Smith v. Kmart Corp.,* 177 F.3d 19, 25 (1st Cir.1999) ("[W]hen no timely objection is made, claims of improper closing argument are forfeited, not waived, and thus amenable to review for plain error."). And, the court found no plain error.

***8. No extraordinary circumstances shown to supplement record under FRAP 10(e)(2) with evidence not presented to district court.***

*Mississippi Public Employees v. Boston Scientific, 523 F.3d 75 (1st Cir. 2008).*

First Circuit reversed an order granting a motion to dismiss a securities fraud class action. In reviewing a motion to dismiss under Rule 12(b)(6), courts ordinarily will consider only documents attached to the complaint, but have made exceptions "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; [and] for documents sufficiently referred to in the complaint." *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); see also New Jersey Carpenters v. Biogen, 537 F.3d 35 (1st Cir. 2008)*(undisputed public documents utilized by each side and considered by the district court).

However, court refused to permit supplementation of the record on appeal with three transcripts that were not before the district court but were mentioned in the appellate briefs and attached to the appendix to the brief. "We held that plaintiff had not demonstrated the "extraordinary circumstances" necessary to invoke this court's power to supplement a record under Federal Rule of Appellate Procedure 10(e)(2)(permitting court of appeals to supplement record if anything material is omitted from or misstated by record or accident). *US v. Muriel, 412 F. 3d 9, 12 (1st Cir. 2005).*

***9. The filing of an amended complaint supersedes the original complaint. "The time of filing rule" to determine subject matter jurisdiction does not apply when the amended complaint adds a federal question dropping diversity jurisdiction.***

*Connectu LLC v. Zuckerberg, 522 F.3d 82 (1st Cir. 2008).*

In a case of first impression at the federal appellate level, the case "presents a jurisdictional enigma that requires us to decide whether an amended complaint that switches the basis of the district court's subject matter jurisdiction from the existence of diversity of citizenship, 28 U.S.C. § 1332(a)(1), to the existence of a federal question, *id.* § 1331, should be given effect *when*

*filed as of right* before any jurisdictional challenge has been mounted."

Three Harvard undergrads came up with the idea of creating a social networking website for college students. The Founders, who lacked the necessary expertise or skills, asked defendant to complete the website's source code and aid its development. Defendant stole the idea and launched the website that later became known as *Facebook.*

Plaintiff, a limited liability company associated with the Founders, sued under state law for alleged misappropriation and unauthorized use of the confidential source code and business plan. Plaintiff invoked diversity of citizenship jurisdiction. Before the filing of a motion or responsive pleading, plaintiff amended the complaint as of right dropping diversity jurisdiction, invoking federal question jurisdiction from having registered the source code, and asserting claims of copyright infringement and supplemental claims.

Defendant moved to dismiss for lack of subject matter jurisdiction under 12 (b)(1) asserting that, *at the time the action was commenced, the parties were not diverse*. Two principles clashed and only one controls in this case; first, that under the "time of filing rule", jurisdiction is determined at the time of instituting the action, and second, that the amended complaint supersedes the original pleading and that federal question exists.

The district court dismissed the complaint. The court first rejected an argument that the appeal was moot because plaintiff's successor in interest had filed an *identical action in the district court.* The court found it was not moot because the outcome of the court's decision, if allowed to stand, could have a materially adverse impact over the new action and the tolling of the statute of limitations period. *Horizon v. Mass., 391 F. 3d 48, 54 (1st Cir. 2004); Friedman v. Shalala, 46 F. 3d 115, 117 (1st Cir. 1995).* Second, "the law is pellucid that an action is not automatically rendered moot by the mere existence of a similar pending action. *See, e.g., Pieczenik v. Dyax Corp.,* 265 F.3d 1329, 1332 (Fed.Cir.2001); *Patriot Cinemas,* 834 F.2d at 215-16; *see also* 13A Wright et al., *supra* § 3533.2, at 244 ("[T]he mere pendency of parallel actions seeking the same relief does not of itself moot either action."). While we have cautioned that a party should not file

duplicative lawsuits in the same court, *Sutcliffe Storage & Ware. Co. v. United States,* 162 F.2d 849, 851 (1st Cir.1947), there are extenuating circumstances here. This is important because "[t]he complex problems that can arise from multiple federal filings do not lend themselves to a rigid test, but require instead that the [court] consider the equities of the situation when exercising its discretion." *Curtis v. Citibank, 226 F.3d 133 (2d Cir. 2000).*

As to the jurisdictional issue, the court found that the argument that the complaint was a *supplemental* pleading (based on new facts) and could not be amended as of right was waived. "And because the amended complaint dropped any allusion to diversity as a jurisdictional predicate for the action, a conventional application of the rules of pleading and practice would seem to have required the district court to direct its jurisdictional inquiry not toward diversity but, rather, toward federal question jurisdiction (specified in the amended complaint as the sole basis for federal court jurisdiction)."

The court held that the time of filing rule, which originated in diversity cases from concerns of forum-shopping, was inapposite in these circumstances and especially in a federal question case. The amended complaint controls to determine jurisdiction. Thus, the court of appeals reversed the order dismissing the case for lack of complete diversity.

***10. Even if raised at summary judgment, the failure to raise a defense in a FRCP 50(a) motion after the close of all the evidence waives that defense when made in post-trial motions and appeal.***

*Parker v. Gerrish, 547 F.3d 1 (1st Cir. 2008). Accord Monteagudo v. AEELA, 2009 WL 161868 (1st Cir. Jan. 26, 2009).*

A jury awarded $111,000 in damages to plaintiff on his claim that defendant, a police officer, violated his constitutional rights by using a Taser volt gun during an arrest. The case went to the jury only on the claim of excessive force against the officer. The officer orally moved for judgment as a matter of law under FRCP 50(a), though the motion did not refer to qualified immunity or "clearly established law" as grounds for a defense. The

district court denied both that motion and a renewed motion at the close of all the evidence. In a post-verdict Rule 50(b) motion, defendant argued there was no excessive force and that he was entitled to qualified immunity.

As to qualified immunity, plaintiff argued that defendant waived the defense. "A motion under Fed.R.Civ.P. 50(a) must 'specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed.R.Civ.P. 50(a)(2). The motion "must be sufficiently specific so as to apprise the district court of the grounds relied on in support of the motion." *Zachar v. Lee,* 363 F.3d 70, 73 (1st Cir.2004) (citing *Correa v. Hosp. San Francisco,* 69 F.3d 1184, 1196 (1st Cir.1995)). Such a motion "preserves for review only those grounds specified at the time, and no others." *Id.* (quoting Correa, 69 F.3d at 1196). In this appeal we review the district's denial of Gerrish's renewed motion for judgment as a matter of law under FRCP 50(b). But "[a]s the name implies, a renewed motion for judgment as a matter of law under FRCP 50(b) is bounded by the movant's earlier Rule 50(a) motion." *Correa,* 69 F.3d at 1196. "*The movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict." Id. Consistent with this general framework, we have held that even if a defendant raises qualified immunity at summary judgment, the issue is waived on appeal if not pressed in a Rule 50(a) motion. Isom v. Town of Warren, 360 F. 3d 7, 9 (1st Cir. 2004).* ("But the defendants did not raise immunity as an issue at the time of their Rule 50 motion, and so they have waived that defense as grounds for the motion.").

Defendant admitted that he did not use the term qualified immunity, but contends that he "addressed every prong of the qualified immunity analysis." The court disagreed. It found that defendant only addressed the excessive force argument. "Gerrish did not specify qualified immunity as the legal basis for his motion or give the district court judge adequate notice that he was renewing that claim in this context." *See United States v. Samboy,* 433 F.3d 154, 161 (1st Cir.2005)("To raise an argument on appeal, a party must 'spell out its arguments squarely and distinctly ... or else forever hold its peace.' " (quoting *Rivera-Gómez v. de Castro,* 843 F.2d 631, 635 (1st Cir.1988))). Accordingly, his qualified immunity defense is waived [and it found no plain error]."

### *B. Procedural Mishaps, Forfeiture and Waiver*

***11. Failure to cite to the record below waives an argument on appeal.***

*Enica v. Principi, 544 F.3d 328 (1st Cir. 2008).*

Appellant failed to point to any evidence on record to support an inference of retaliation under Title VII. *Citing*, *Conto v. Concord Hosp., Inc.,* 265 F.3d 79, 81 (1st Cir.2001) (noting that the Federal Rules of Appellate procedure require that appellants, rather than the court, ferret out and articulate the record evidence considered material on appeal).

***12. A FRAP 28(j) letter will not preserve arguments that should have been made in the briefs.***

*U.S. v. Ayala, 2008 WL 3965505 (1st Cir. 2008)(not for publication).*

"The two additional arguments that defendant raised in his *pro se* post-briefing letter under Rule 28(j) of the Federal Rules of Appellate Procedure are deemed waived for failure to raise them in defendant's counseled or pro se brief." *United States v. Coplin,* 463 F.3d 96, 102 n. 6 (1st Cir.2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 1320, 167 L.Ed.2d 130 (2007)(arguments raised for the first time during oral argument are forfeited when not presented to the district court and briefed on appeal).

***13. In a multi-party appeal, adoption by reference of arguments made by another party is not permitted where the position of the parties and alleged conduct differ.***

*Gagliardi v. Sullivan, 513 F.3d 301 (1st Cir. 2008)*

In a multi-party civil rights case, district court granted a motion to dismiss with respect to all defendants and the court of appeals affirmed. Two of the appellees did not appear for oral argument and wrote a letter to the circuit to "formally adopt" as their own the brief of another appellee. The court would have none of it. "An appellee cannot, however, simply adopt the arguments of another appellee without making some effort at explaining how those arguments apply to its case, particularly in the

present circumstances where [the appellee's] position and alleged conduct differ in several important respects from those of [the appellee who did not file the brief]. *See United States v. Casas,* 425 F.3d 23, 30 n. 2 (2005)[ "Adoption by reference ... cannot occur in a vacuum; to be meaningful, *the arguments adopted must be readily transferable from the proponent's case to the adopter's case*." *United States v. David,* 940 F.2d 722, 737 (1st Cir.1991) (citing *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990))]. We decline the invitation to scour [the brief] in search of arguments that might be availing to [the other appellees]".

***14. "Cut and paste brief" does not comply with FRAP 28.***

*Rusli v. Mukasey, 2008 WL 2553310 (1st Cir. 2008)*

In an immigration case, "[t]he brief filed by petitioners' counsel, Yan Wang, is a "cut and paste" affair that appears *to present the facts of another case*-notably for a person of a different gender than Rusli, who had different experiences, in different years, and appeared before a different immigration judge."

"This substantive failure to comply with Federal Rule of Appellate Procedure 28 [contents of the brief] alone justifies dismissal. *See generally Ramírez v. Debs-Elías,* 407 F.3d 444, 446 n. 1 (1st Cir.2005). Further, the brief, by definition, offers no developed argument directed to petitioners' claims, with the necessary consequence that the claims are waived. *See Jiang v. Gonzales,* 474 F.3d 25, 32 (1st Cir.2007) (citing *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990))."

***15. Adoption by reference of arguments made in the district court will not preserve issues for appellate review.***

*Costa v. Marotta, Gund, Budd & Dzera, LLC, 281 Fed.Appx. 5 (1st Cir. 2008)(not for publication).*

In the context of permissive intervention, court of appeals held that appellant had waived arguments not raised below and affirmed an order denying intervention.

"Arguments omitted from an opening brief on appeal ordinarily are deemed waived." *Credit Francais v. Bio-Vita, 78 F.3d 698, 709 (1st Cir. 1996).*

"Adopting by reference memoranda filed in the district court is a practice that has been consistently and roundly condemned by the Courts of Appeals." *Gilday v. Callahan,* 59 F.3d 257, 273 n. 23 (1st Cir.1995) (internal quotation marks omitted); *accord, e.g., Northland Ins. Co. v. Stewart Title Guar. Co.,* 327 F.3d 448, 452-53 (6th Cir.2003) (collecting cases). Among other problems, advancing an argument in this fashion violates the requirement in Fed. R.App. P. 28(a)(9)(A) that a brief contain the party's contentions and reasoning, *see, e.g., Rhode Island Dep't of Env. Mngmt. v. United States,* 304 F.3d 31, 48 n. 6 (1st Cir.2002), and enables a party to circumvent the page/word limits in Fed. R.App. P. 32(a)(7), *see, e.g., Exec. Leasing Corp. v. Banco Popular de Puerto Rico,* 48 F.3d 66, 67 (1st Cir.1995). This court ordinarily regards such an "incorporated by reference" argument as forfeited. *See, e.g., Sleeper Farms v. Agway, Inc.,* 506 F.3d 98, 104-05 (1st Cir.2007), *cert. denied,* --- U.S. ----, 128 S.Ct. 2428, 171 L.Ed.2d 229 (2008); *Rhode Island Dep't of Env. Mngmt,* 304 F.3d at 48 n. 6; *Exec. Leasing Corp.,* 48 F.3d at 68. An appellant's pro se status provides no exemption. *See, e.g., Yohey v. Collins,* 985 F.2d 222, 224-25 (5th Cir.1993."

***16. Without a certified English-language translation of case law or evidence on the record or a stipulation by the parties accepting the translation, District Court has no discretion to consider foreign materials in its decision.***

*Puerto Ricans for Puerto Rico v. Dalmau, 544 F.3d 58 (1st Cir. 2008)*

"Under 48 U.S.C. § 864, "[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language. We have enforced the rule where the Spanish language document or matter is key to the outcome of the proceedings in the district court."

"In *González-De-Blasini v. Family Department,* we held that "[t]he district court should not have considered any

documents before it that were in the Spanish language." Violations of the English requirement "will constitute reversible error whenever the appellant can demonstrate that the untranslated evidence has the potential to affect the disposition of an issue raised on appeal." US v. Rivera, 300 F.3d 1 (1st Cir. 2002). By contrast, where "it is crystal clear that none of [the Spanish language documents] bears on any of the issues that the [district] court found dispositive in adjudicating," the presence of untranslated documents will not constitute reversible error. *Dávila v. Corporación De P.R. Para La Difusión Pública,* 498 F.3d 9, 13 (1st Cir.2007).

"Here it is "crystal clear" that the Puerto Rico Supreme Court opinion, which was not translated from the Spanish, provided the very basis for the dismissal of the action on both grounds. The defendants relied on the untranslated opinion both to make their *Rooker-Feldman* argument and their res judicata arguments. Where a party makes a motion to dismiss based on a decision that was written in a foreign language, the party must provide the district court with and *put into the record an English translation of the decision*." "[A]nd the failure of defendants to provide a translated copy of a critical decision alone warranted denial of their motion."

### C. *Selected cases of first impression during the 2008 Term*

**17.** ***Cases of first impression in the circuit on various substantive issues:***

*U.S. v. Hernandez, 541 F.3d 422 (1st Cir. 2008).*

(Defendant entered guilty plea to one count of conspiracy to distribute heroin; defendant's criminal history revealed a state court conviction for driving under the influence. Government recommended enhancement of the sentence. Because defendant committed the offense while under the state criminal sentence, the federal sentencing guidelines required enhancement).

*U.S. v. Beatty, 538 F.3d 8 (1st Cir. 2008).*

("This case presents an issue of first impression in this circuit regarding the effect of a 2003 congressional amendment to the federal sentencing guidelines governing reductions for acceptance of responsibility." Joining other circuits, court held that the award of a § 3E1.1(b) reduction is contingent on the government's decision to file a motion requesting the reduction).

*U.S. v. Borrero-Acevedo, 533 F.3d 11 (1st Cir. ), cert. denied, __U.S.__(2008)*

(Applying plain error standard to unpreserved claims of violations of FRCP 11 requiring defendant's understanding that acceptance of a guilty plea waives the right to appeal or collaterally attack the sentence. Defendant did not move to withdraw his plea after he was not informed that he would waive his right to appeal the sentence. Appeal dismissed).

*U.S. v. Vazquez-Botet, 532 F.3d 37 (1st Cir. 2008)*

("We think that the best interpretation of "benefit ... *to be received* in return for the payment" [in the sentencing guidelines] is the benefit a person in the defendant's position at the time of the extortion would reasonably have expected the victim to receive by paying him the money he demanded.").

*Sourcing Unlimited, Inc. v. Asimco Intern., Inc., 526 F.3d 38 (1st Cir. 2008)*

(Reversed order denying motion to compel international arbitration; a corporate signatory to a written partnership agreement that requires arbitration of commercial disputes may not escape arbitration of such disputes by naming as defendants two non-signatories when the issues are intertwined; identifying a circuit split, First Circuit held that it has jurisdiction under 9 USC Sec. 16(a)(1)(c) to review an interlocutory appeal by a non-signatory of an order refusing to compel an international arbitration).

*Alexander v. Brigham and Women's, 513 F.3d 37 (1st Cir.), cert. denied, _U.S._ (2008).*

(District Court held that plans fell within ERISA's exemption for "top-hat" deferred compensation plans and dismissed action; First Circuit affirmed. In a case of first impression under ERISA, court held that relevant group, in determining whether plans satisfied "select group" requirement of top-hat exemption, included those surgeons who earned sufficient net practice income to actually contribute to plans and applicability of top-hat exemption did not hinge on implicit requirement that affected employees possess individual bargaining power sufficient to influence terms of their plan).

*Cerqueira v. American Airlines, 520 F.3d 1 (1st Cir. 2008), cert. denied, __U.S.__(2008)*

(An airline passenger sued the carrier asserting that his removal from flight violated 42 USC Sec. 1981 to be free of race discrimination in contracting. A jury found for plaintiff. Carrier argued that federal law allows the carrier permission to refuse to transport a carrier when inimical to safety. District Court erred by failing to give instruction on carrier's discretion to refuse to transport passenger. *"The omitted instructions were required as a matter of substantive law, were not substantially covered in the charge as a whole, and were essential to the case."* After finding sufficient evidence that carrier was justified to exclude passenger from flight, court reversed the court's denial of the carrier's post-judgment motion and directed entry of judgment dismissing action).

*U.S. v. Godin, 534 F.3d 51 (1st Cir. 2008)*

(Reversing a conviction for aggravated identity theft; finding statutory definition of "knowingly" to be ambiguous, in a probable circuit conflict, court applied rule of lenity and reversed conviction requiring government to prove that defendant knew that the false information belongs to a real person, and there was insufficient evidence of *mens rea* to meet that requirement).