No. 17-35410

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. CARUSO,

Plaintiff-Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:17-cv-00003-RSM
Hon. Ricardo S. Martinez

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The District Court has jurisdiction under 28 U.S.C. § 1331, the Court of Appeals under 28 U.S.C. § 1291; the District Court entered its Order of Dismissal (ER 627, Dkt. #28) on May 11, 2017, and Judgment in a Civil Case (ER 636, Dkt. #29) on May 11, 2017. Filing of the Notice of Appeal took place on May 11, 2017. ER 637, Dkt. #30. The appeal is from a final order and judgment that disposed of all parties' claims.

ISSUES PRESENTED

The issues presented fall under two categories. The first concerns issues presented by the character of the case itself. The case is one of first impression. The issues therein presented have not been presented before.

The second concerns issues arising from Washington State Bar Association (WSBA) Defendants' Motion to Dismiss Plaintiffs'[1] Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. ER 506, Dkt. # 16. Defendants' Motion to Dismiss was the start of a fraud on the court by the lawyers for the WSBA which, being successful, resulted in the District Court's

[1] The Plaintiffs in the case are Robert E. Caruso and Sandra L. Ferguson. Ms. Ferguson has withdrawn from the appeal. Case 17-35410, Dkt. # 7. Except when "Plaintiffs'" is used in a title of a motion or other court document, "Plaintiff" shall refer to Appellant Robert E. Caruso.

Order Granting Motion to Dismiss. ER 639, Dkt. # 28. The issues presented are:

1. Whether Appellant Robert L. Caruso's (Caruso) First Amendment rights of non-association, speech, and expression under the First Amendment and Fourteenth Amendments are being violated by WSBA - an integrated association of legal professionals consisting of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

By a plurality opinion, the case of *Lathrop v. Donohue,* 367 U.S. 820 (1961) held a lawyer could be compelled to be a member of an integrated bar association; an association made up only of lawyers, without violating lawyers' First Amendment Rights. The holding of the case does not apply for the obvious reason; the WSBA is not now acting as an "integrated bar association." It is acting as an association of integrated lawyers, LPOs, and LLLTs.

2. Whether the lawyers for the WSBA perpetrated a fraud on the District Court.

3. Whether the District Court could decide WSBA's Motion to Dismiss in isolation of Plaintiffs' Motion for Summary Judgment (ER 274, Dkt. #8) and Motion for Preliminary Injunction (ER 495, Dkt. #15) saying they are "DENIED as MOOT."

4. Whether the District Court committed error in its Order Granting Motion

to Dismiss as to its

a. Dismissal of First Claim for Relief,

b. Dismissal of Second and Third Claims for Relief,

c. Dismissal of Fourth Claim for Relief, and

d. Dismissal of Fifth and Sixth Claims for Relief.

5. Whether the District Court committed error by making its dismissals with "prejudice," rather than with "leave to amend."

STATEMENT OF THE CASE

Facts

On December 31, 2016, the Washington State Bar Association (WSBA) ceased having the character of an integrated bar association limited to only lawyers admitted to the bar of the state Supreme Court.

On January 1, 2017, though continuing to use the name "Washington State Bar Association," began the new year in the character of an integrated association of lawyers admitted to the bar of the Supreme Court, Limited Practice Officers, and Limited License Legal Technicians. ER 106, WSBA Bylaws 115, Art. III, A.1. at 260.

On January 5, 2017, plaintiffs Robert E. Caruso and Sandra L. Ferguson filed their Complaint for Declaratory and Injunctive Relief against the WSBA and

others contesting the constitutionality of this multi-member integrated association. Plaintiffs retained Stephen Kerr Eugster as their attorney. ER 184, Dkt. # 1.

On February 21, 2017, Plaintiffs Caruso and Ferguson filed their First Amended Complaint For Declaratory and Injunctive Relief. ER 234, Dkt. # 4. The same causes of action and facts were the same except the class action provisions were deleted. *Id.*

Procedural History

After the amended complaint had been filed (ER 234, Dkt. # 4), the lawyers had a telephone conference on February 28, 2017. ER 705, Dkt. # 35-6 at 708. The amended complaint was discussed. The lawyers agreed to a stipulation and order regarding scheduling. On March 2, 2017, the Stipulation and Order for Briefing Schedule was entered. ER 492, Dkt. # 14,

The order was quite simple: plaintiffs were to file their pleadings by March 3, 2017. Defendants were to file their pleadings on March 21, 2017. On March 1, 2017, Plaintiffs filed their Motion for Summary Judgment. ER 274, Dkt. # 8, and related declarations, ER 298, Dkt. # 9; ER 484, Dkt. # 10; and ER 489, Dkt. # 11. On March 3, 2017, Plaintiffs filed their Motion for Preliminary Injunction. ER 495, Dkt. # 15.

On March 21, 2017, WSBA filed their Motion to Dismiss and Opposition to

Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. ER 518, Dkt. # 16.

On April 6, 2017, Plaintiffs filed their Response to Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. ER 554, Dkt. # 18. The Response was together with a declaration by Stephen Eugster. ER 298, Dkt. # 9, App. 321. On the same day, a few hours after Caruso filed his Response, lawyers for the WSBA served a motion for attorney fees against pro se Eugster.

The WSBA Defendants filed their Reply to the Plaintiffs Response April 18, 2017, and filed their Reply to Response to Motion. ER 586, Dkt. # 21. On April 27, 2017, WSBA Defendants filed a Motion for Attorney Fees. ER 600, Dkt. # 22.

RULINGS PRESENTED FOR REVIEW

Order Granting Motion to Dismiss

On May 11, 2017, the Court entered its Order Granting Motion to Dismiss. ER 639, Dkt. # 28. The case closed on May 11, 2017. ER 648, Dkt. # 29. The record shows the Motion to Dismiss, so called by the WSBA, was not an isolated motion. It was a part of the Plaintiffs' Motion for Summary Judgment (ER 274, Dkt. # 8) and Plaintiffs' Motion for Preliminary Injunction. ER 495, Dkt. # 15.

The court did not look at Plaintiffs' Motion for Summary Judgment, Motion

for Preliminary Injunction, and Declarations of Stephen Kerr Eugster, Robert E. Caruso, and Sandra L. Ferguson. The court limited itself to the WSBA Motion to Dismiss. The Court said:

> On March 1, 2017, Plaintiffs filed a Motion for Summary Judgment. [ER 274], Dkt. # 8. On March 3, 2017, Plaintiffs also filed a Motion for Preliminary Injunction, making similar arguments in support of Plaintiffs' claims in this case. See [ER 495], Dkt. # 15. On March 21, 2017, Defendants filed a Motion to Dismiss, which the Court will address first. [ER 518], Dkt. # 16. ER 639, 641, Order Granting Motion to Dismiss, p. 3, lines 5-9.

Orders Regarding Attorney Fees

At that time, Defendant's Motion for Attorney Fees Against Stephen Eugster remained pending. On May 23, 2017, the Court rendered its order on Motion for Attorney Fees. ER 661, Dkt. # 33. Pro se Stephen Eugster filed his Notice of Appeal on June 22, 2017. Case No. 17-35529, ER 737. WSBA Defendants filed a Motion to Consolidate Appeals. Lead Case No. 35410, Dkt. # 12. Pro se Eugster filed his Response to Motion to Consolidate. Dkt. # 13-1. WSBA filed their Reply in Support of Motion to Consolidate Appeal. Dkt. # 14. The Court has not ruled on the Motion to Consolidate.

STANDARDS

Summary Judgment

A district court's decision to deny summary judgment or a summary

adjudication motion is reviewed de novo. *See, e.g., Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). A district court's decision on cross motions for summary judgment is also reviewed de novo. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011); *Travelers Prop. Cas. Co. of Am. III-68 2012 v. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008); *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002).

The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P.[2] 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

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[2] The Federal Rules of Civil Procedure will be referred to herein as "Rules" or "Rule."

Summary judgment may be appropriate when a mixed question of fact and law involves undisputed underlying facts. *See EEOC v. United Parcel Serv.,* 424 F.3d 1060, 1068 (9th Cir. 2005); *Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998). However, summary judgment is not proper if material factual issues exist for trial. *See Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003).

Rule 12(b)(6) Motion to Dismiss.

The Court reviews de novo the district court's dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010).

" [W]e begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. We disregard threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. After eliminating such unsupported legal conclusions, we identify well-pleaded factual allegations, which we assume to be true, and then determine whether they plausibly give rise to an entitlement to relief. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; that is, plaintiff must plead factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged. *Id.* (Citations, alterations and internal quotation marks omitted); *see Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009)." *Alvarez v. Chevron Corp*, 656 F.3d 925, 931-32 (9th Cir. 2011).

The district court's denial of leave to amend a complaint is reviewed for abuse of discretion. *See Telesaurus VPC, LLC*, 623 F.3d 998,1003 (9th Cir. 2010). *Alvarez v. Chevron Corp.*, 656 F.3d 925, 930-31 (9th Cir. 2011).

The Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) retired the "no-set-of-facts" test, explaining that dismissal does not require that it appear beyond doubt the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *Id.* (The "no set of facts" language "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009).

In *Telesaurus VPC, LLC*, 623 F.3d 998,1003 (9thCir. 2010), the court explained, "We review de novo the dismissal of a complaint for failure to state a claim." *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 384-85 (9th Cir. 1995). For purposes of our review, we begin 'by identifying

pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.' *Ashcroft v. Iqbal,* --- U.S. ----, 129 S. Ct. 1937 1950, 173 L. Ed. 2d 868 (2009). We disregard '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements. . . .' *Id.* at 1949. After eliminating such unsupported legal conclusions, we identify 'well-pleaded factual allegations,' which we assume to be true, 'and then determine whether they plausibly give rise to an entitlement to relief.' *Id.* at 1950. 'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face;' that is, plaintiff must 'plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Id.* at 1949 (internal quotation marks omitted); *see Evanns v. AT & T Corp.*, 229 F.3d 837, 839 (9th Cir. 2000)."

If support exists in the record, a dismissal may be affirmed on any proper ground. *See Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir. 2002). Review is generally limited to the contents of the complaint. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's

claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."). If matters outside the pleadings are considered, the motion to dismiss under Rule 12(b)(6) is treated as one for summary judgment. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 921-922 (9th Cir. 2004). If matters outside the pleadings are considered, the motion to dismiss is to be treated as one for summary judgment. *See Keams v. Tempe Technical Institute, Inc*., 110 F.3d 44, 46 (9th Cir. 1997). A grant of summary judgment is reviewed de novo. *See Waste Action Project v. Dawn Mining Corp*., 137 F.3d 1426, 1428 (9th Cir. 1998). *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). A motion to dismiss made under Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56 if either party to the motion to dismiss submits materials outside the pleadings in support or opposition to the motion, and if the district court relies on those materials. Rule 12(b)(6); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 n. 4 (9th Cir.1989) ("The proper inquiry is whether the court relied on the extraneous matter."); *cf. North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir.1983) ("[A] motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the court and not expressly excluded.").

Fraud on the Court

The standards and elements of fraud on the court will be found in Argument under Fraud on the Court, which commences below at 15.

SUMMARY OF ARGUMENT

First, on January 1, 2017, as a result of amendments to the bylaws of the WSBA adopted by the WSBA Board of Governors on September 30, 2016, the WSBA ceased acting as an integrated association of Washington lawyers. ER 106. When it did, the Washington State Bar Association (now a misnomer) became an integrated association of "licensed legal professionals" consisting of lawyers admitted to the bar and licensed to practice law, Limited Practice Officers and Limited License Legal Technicians. ER 106, 115, Bylaws III, A.

Second, Caruso will show that under the law today, his fundamental rights under the First, Fifth and Fourteenth Amendments to the United States Constitution cannot be infringed unless the infringements meet the test of strict constitutional scrutiny.

Third, the trial court must be reversed in whole because the Order Dismissing was the result of the perpetration of a fraud on the trial court by the lawyers for the WSBA.

Fourth, Caruso will show that the District Court acted in error in its Order

Granting Motion to Dismiss - lawyers for the parties conferred by telephone on February 28, 2017, and agreed to a scheduling order for dispositive motions. ER 492, Dkt. # 14. The hearing date was set for April 21, 2017. The hearing did not take place; court did not consider Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction and related supporting declarations. Instead, the court decided WSBA's Motion to Dismiss in isolation of its also being "Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction."

Fifth, the District Court Order Granting Motion to Dismiss was in error because each of the dismissals was in error.

Sixth, each dismissal "with prejudice" was in error; Caruso must be given "leave to amend."

ARGUMENT

I. CARUSO'S FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE UNCONSTITUTIONALLY INFRINGED BY THE WSBA

Lawyer Caruso is compelled to be a member and pay dues to the WSBA to practice law. He is also the "respondent" in a discipline action brought against him by of the WSBA. Caruso claims his fundamental rights of freedom non-association and freedom of speech under the First and Fourteenth Amendments of United States Constitution are unconstitutionally infringed by the WSBA. Caruso also

claims his rights of procedural due process of law under the Fifth and Fourteenth Amendments of United States Constitution are being unconstitutionally infringed by the WSBA.

The Caruso and Ferguson action against the WSBA was purposely filed after January 1, 2017. This is when the WSBA became an integrated association of lawyers, Limited Practice Officers, and Limited License Legal Technicians. To practice their legal profession, the members of each class are compelled to be members of the association, to pay dues to the association, and be subjected to discipline by the association.

II. STRICT SCRUTINY IS THE TEST USED TO MEASURE WHETHER CARUSO'S RIGHTS ARE VIOLATED

Ever since *NAACP v. Alabama*, 357 U.S. 449 (1958), freedom of association has been a fundamental right deserving of First Amendment protection. Correspondingly, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The fundamental First Amendment right of association or non-association is not absolute: "Infringements on that right may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (Footnote omitted.)

This is strict scrutiny.

Not long ago, the strict scrutiny test was described in *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012) ("mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms'").

Today, since January 1, 2017, the WSBA administers an integrated association of legal professionals made up of lawyers, Limited Practice Officers, and Limited License Legal Technicians. To practice his profession as a lawyer, Caruso is compelled to be member and pay dues to the WSBA. He must also submit to a discipline system of this multi-member integrated association of lawyers,Limited Practice Officers, and Limited License Legal Technicians.

Lawyer Robert Caruso does not want to be member of the WSBA, he does not want pay dues to the WSBA, and he does not want to be subject to the Disciplinary system of the WSBA. He asserts that his fundamental constitutional rights cannot be infringed because the infringements cannot be sustained under strict constitutional scrutiny.

III. FRAUD ON THE COURT

A. <u>The Start of the Fraud</u>.

The lawyers for the for the WSBA have committed a fraud on the District Court. The court was deceived by the fraud and acted on it. The Order Granting Motion to Dismiss (ER 639, Dkt. # 28) was a product of the fraud and must be dismissed in its entirety.

The fraud began when the lawyers for the WSBA realized that this case is one of first impression. It is not a case about the First and Fifth Amendment rights of a lawyer who is compelled to be a member and dues payer of an "integrated bar association," that is, an association of lawyers only. This case is about such rights of a lawyer who is compelled to be a member and dues payer of an "integrated association" of legal professionals consisting of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

Plaintiffs Caruso and Ferguson filed their Motion for Summary Judgment along with Declaration of in Support on March 1, 2017. Plaintiffs filed their Motion for Preliminary Injunction on March 3, 2017. On April 6, 2017, WSBA filed its Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction.

The lawyers' fraud on the Court began in the WSBA's "Motion to Dismiss." ER 518, Dkt. # 16. It began with the motion's "Introduction" and ended with its "Conclusion." See below at 18. The fraud was addressed in Caruso's Response to

Motion to Dismiss. ER 554, Dkt. #18, pages 6 - 13.

B. Fraud on the Court Can Be Raised on Appeal for the First Time.

Fraud on the court may be raised for the first time on appeal. In *Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 1000 (9th Cir. 2014), the court, considering perpetration of a fraud on the district court, said "we are free to consider this argument for the first time on appeal." *Id.*

C. The Elements of Fraud on the Court.

" 'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 60.33 at 515 (2d ed.1978).

Fraud on the court consists of conduct:

> 1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court. Petitioner has the burden of proving existence of fraud on the court by clear an

Johnson v. Bell, 605 F.3d 333, 339 (6th Cir. 2010). *See also,Williamson v. Recovery Ltd. P'ship*, 826 F.3d 297, 302 (6th Cir. 2016).

D. Conduct Making up the Fraud.

A showing of fraud on the court requires "clear and convincing evidence" of the elements of the fraud. *England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960). The facts which establish the elements of fraud on the court are clear and convincing.

Here is what the lawyers for the WSBA said in the Motion to Dismiss.

> I. INTRODUCTION
>
> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior pro se lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage. [1] This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.[2] These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims.
>
> 1 In addition to this lawsuit, Eugster also recently filed yet another lawsuit against the WSBA and its officials in Thurston County Superior Court. *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017).
>
> 2 *See Eugster v. Wash. State Bar Ass 'n*, No. C15-0375JLR, 2015 WL 5175722, at *2, 5-8 (W.D. Wash. Sept. 3, 2015) (dismissing objections to mandatory

bar membership and fees and rejecting misreading of case law).

Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA.

Contrary to these assertions, Washington law expressly authorizes the WSBA to adopt rules relating to the practice of law in the state, including rules relating to bar membership and limited-license practices. The WSBA remains the same organization Eugster repeatedly has sued over the past two years. Accordingly, cutting through the irrelevant rhetoric, the First Amended Complaint raises only three core claims: first, that requiring bar membership and payment of license fees to practice law in Washington violates plaintiffs' constitutional rights of speech and association; second, that the WSBA lacks authority to discipline lawyers as a result of the bylaws amendments regarding membership in the WSBA; and third, that the WSBA 's discipline system fails to provide adequate procedures to satisfy constitutional due process requirements. These claims are meritless and should be dismissed, for five independent reasons.

The Conclusion of the Motion said this:

This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice.

ER 518, Dkt. # 16

1. The Conduct of the Fraud was "on the Part of an Officer[s] of the Court."

The lawyers for the WSBA, the Executive Director of the WSBA, and all of the other named defendants are officers of the court. *United States v. Dillon*, 346 F.2d 633, 638 (9th Cir. 1965) ("a lawyer is an officer of the court"). The WSBA lawyers prepared and filed the Motion to Dismiss with its fraudulent matters – conduct advanced by the lawyers.

2. The Motion to Dismiss was "Directed to the Judicial Machinery Itself."

The conduct, the Motion to Dismiss was addressed to the court, to the judge of the court.

3. The Conduct Included That Which is "Intentionally False, Willfully Blind to the Truth, or is in Reckless Disregard of the Truth."

4. The Conduct Includes "Positive Averment[s]" or "Concealments" Which "one is Under a Duty to Disclose."

What follows is Caruso's analysis of the lawyers' conduct which falls into the categories of paragraphs 3 and 4:

1. The lawyers for the WSBA made a false claim against pro se Eugster, who was not then a lawyer for Caruso, claiming that because of pro se Eugster, Caruso's case must be dismissed. There is no possible right to use the lawyer of Caruso as a basis for dismissal of Caruso's claims because the lawyer litigated pro se for himself in questioning the constitutionality of the WSBA.

2. The lawyers for the WSBA knew full well that the constitutional issues raised in the case, raised after the WSBA began the operation of an integrated association of different classes of legal professionals – lawyers, Limited Practice Officers, and Limited License Legal Technicians. The WSBA, up to December 31, 2016, was an integrated bar association – an association limited to lawyers which self-controlled the system of Washington lawyer Discipline.

3. The lawyers for the WSBA have created a legal fiction that the decision in the case they refer to as Eugster III is governed by that case and that *Lathrop v. Donohue* should be applied to the facts of the case. The United States Supreme Court did not grant pro se Eugster's Petition for Writ of Certiorari. It was denied on June 26, 2017. ER 1, Petition for Writ of Certiorari. The facts here are different, obviously from the facts in *Lathrop.*

4. The lawyers for the WSBA knew or should have known *Lathrop* was not apposite.

5. The lawyers for the WSBA intentionally failed to disclose that the WSBA no longer operated an integrated association limited only to lawyers.

6. The lawyers know they cannot pursue the dismissal of the case by arguing that pro se Eugster's personal experience with the WSBA prior to this action and prior to the WSBA becoming an integrated association of multiple

members on January 1, 2017, should impact Caruso. They know their arguments are intentionally false and baseless.

7. The lawyers for the WSBA say pro se Eugster, has in this case, enlisted Plaintiffs Robert Caruso and Sandra Ferguson so as to use them to bring the same claims pro se Eugster has brought before, knowing full well claims or issues were not the same.

8. Pro se Eugster did not enlist his clients to bring this case. ER 484, Dkt. # 10, Declaration of Robert E. Caruso and ER 289, Dkt. # 11, Declaration of Sandra L. Ferguson.

9. The lawyers for the WSBA say Eugster's pro se cases were all dismissed at the pleading stage. What they do not say is that in each case the dismissal was on the basis of jurisdiction not merit. The lawyers well know or should well know, res judicata does not happen unless an action was on the merits.

10. Eugster IV was dismissed because the court held it did not have jurisdiction. ER 81, Notice of Appeal and Order Appealed From.

10. Eugster V was dismissed on the basis of the order of dismissal in Eugster IV. ER 88, Notice of Appeal with Order.

11. The lawyers bring pro se Eugster into the case as a party who is a foil for their desperate motion to dismiss. Pro se Eugster is not a party to this

action.

12. What pro se Eugster is or is not is entirely irrelevant to the issues in the case.

13. The facts of this case are different from the facts of the pro se Eugster cases, the case does not involve a bar association whose only members are lawyers; it is an association of different members who provide professional services.

14. The lawyers say:

> In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system.

Pro se Eugster is not disgruntled. There is no proof in the record he is. And even so, what of it.

15. Pro se Eugster is not on a crusade and the cases which he is the pro se party to are not meritless.

16. The lawyers say many of the arguments Caruso makes here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf. This is not true. The arguments in this case involve the WSBA as an integrated association of multiple legal professions.

17. They say "[t]hese arguments have no more merit when brought on

behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims." This is not true. The arguments are not the same, and even if they were Caruso would have a right to make the arguments. The fact he has hired Stephen Eugster would make no difference.

18. The lawyers have defamed pro se Eugster in order to play upon court and to have the Court think ill of him.

5. The Conduct "Deceive[d] the Court."

The following table will show what the lawyers for the WSBA said in their Motion to Dismiss and what the court did in the Order Granting Motion to Dismiss.

> First, Plaintiffs' claims fail as a matter of law because (a) compulsory bar membership and fees have been repeatedly upheld as constitutional requirements to practice law; (b) the by laws amendments do not eliminate the WSBA's authority to administer the Washington Supreme Court's lawyer discipline system, and (c) the numerous protections provided under the discipline system have been recognized as sufficient to satisfy due process.
> Motion 1-2.

The following table shows the success the lawyers gained in deceiving the court. The lawyers gained exactly what they deceived the court in doing.

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The Motion to Dismiss	The Order Granting Motion
Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA.	"B. [ ]. The Court agrees with Defendants' legal analysis above and does not recognize "WSBA 1933" and "WSBA 2017" as distinct entities. The WSBA has statutory authority to amend its bylaws. Plaintiffs offer no argument against Defendants' reasoned analysis, above, and the Court cannot imagine any valid argument. Accordingly, the Court will ignore the false distinction between the "WSBA 1933" and "WSBA 2017," and Plaintiffs' Fourth Cause of Action, based entirely on the WSBA becoming a new entity, fails as a matter of law and is
First, Plaintiffs' claims fail as a matter of law because	
(a) compulsory bar membership and fees have been repeatedly upheld as constitutional requirements to practice law; and	The Court agrees withDefendants. Plaintiffs' counsel, Stephen K. Eugster, has previously raised these same constitutional claims in this District and been sharply rebuked by the Honorable James L. Robart for "mischaracterization of case law" and making "nonsensical" arguments. See Eugster v. Washington State Bar Ass'n, No. C15-0375JLR, 2015 WL 5175722, at *5-6 (W.D. Wash. Sept. 3, 2015), aff'd, No. 15- 35743, 2017 WL 1055620 (9thCir. Mar. 21, 2017).

(b) the bylaws amendments do not eliminate the WSBA's authority to administer the Washington Supreme Court's lawyer discipline system	See B. above.
(c) the numerous protections provided under the discipline system have been recognized as sufficient to satisfy due process.	The Court finds that Plaintiffs' due process and constitutional scrutiny claims fail under the law cited by Defendants. Plaintiffs make no effort to argue otherwise, instead devoting nearly all of their brief to addressing tangential issues raised by Defendants. The Court is not required to accept as true a "legal conclusion couched as a factual allegation," and the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. Plaintiffs have failed to meet this standard by making only vague claims of bias without specific facts. Plaintiffs have given the Court no reason to believe they are capable of alleging facts sufficient under the law, given that Plaintiffs have previously amended their Complaint and given their counsel's familiarity with the law surrounding this issue. Accordingly, the Court will dismiss Plaintiffs' Fifth and Sixth Causes of Action with prejudice.

The foregoing, clearly and convincingly, shows that the lawyers for the WSBA have been successful in getting the Court to act favorably toward the WSBA and dismiss the case against it on the basis of their defamations and other

fraudulent conduct.

IV. THE COURT CANNOT LIMIT ITSELF TO THE MOTION TO DISMISS

The Scheduling Order made sure all the parties' dispositive motions were before the Court for hearing at the same time on the setting date assumed under the order. Subsequent pleading captions designate the date "Hearing Date: April 21, 2017," "Note on Motion Calendar: April 21, 2017." ER 492, Dkt. # 14. The order also provided, "In light of the above, Plaintiffs have agreed that Defendants will not file an answer to the complaint, if at all, until after the Court has ruled on the dispositive motions." *Id.* at page 2, lines 13 - 14.

The WSBA motion to dismiss was also a response to Caruso's Motion for Summary Judgment and Preliminary Injunction. Here is the actual title "Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." ER 518, Dkt. # 16. The court did not consider the motions nor the declarations filed with respect of the motions by their attorney, Stephen Eugster, Robert Caruso and Sandra Ferguson. ER 9, Dkt. # 9, ER 298, Dkt.# 10 and ER 489, Dkt. # 11.

The court isolated WSBA's "Motion to Dismiss." It said it would consider that motion first from Plaintiffs motions. In addition, the court isolated the motion from its character as "Opposition to Plaintiffs' Motions for Summary Judgment and

Preliminary Injunction."

The court limited itself to the WSBA Motion to Dismiss. The Court identified the other motions and then said “Defendants filed a Motion to Dismiss, which the Court will address first.” Not only did it consider the motion to dismiss first, it did not consider the other motions in the consideration of the motion to dismiss and did not consider the declarations in support of the motions. After it finished with the Motion to Dismiss, on its basis, dismissed all of Caruso’s claims. It labeled the motions as “moot” and “denied” them.

The court did act to dismiss the claims, there was no motion. The court did not analyze whether its decisions pertaining to the Motion to Dismiss as also deciding the issues presented by the motions. It just labeled the motions as moot.

All of the summary motions of the parties, together with supporting materials, were before the court under the terms of the Scheduling Order. The Motion to Dismiss was in opposition to Caruso’s motions, it addressed them.

The court acted arbitrarily in isolating defendants’ motion to dismiss. It then acted arbitrarily in considering it first. And finally it acted arbitrarily in saying the other motions were "moot" and dismissed each. In labeling the motions “moot” the court did not explain why. The court was in fact saying it has decided the issues in the decision on the Motion to Dismiss and that it will not consider the other

motions.

The court is in error here because the other motions were not moot, nor were they found to be moot, and they had not been removed from consideration of the Motion to Dismiss.

The Court did not exercise discretion. It has simply exercised arbitrary power. No discretion was exercised. The Court's action was not an abuse of discretion, it did not exercise discretion.

V. EACH DISMISSAL IN THE "ORDER GRANTING MOTION TO DISMISS" WAS IN ERROR

The Motion to Dismiss was treated as a Rule 12(b)(6) motion. It said it was using the standards applicable to Rule 12(b)(6) motions. This was error because the Rule 12(b)(6) motions were to be considered along with the Motions for Summary Judgment and Preliminary Injunction. The consideration of each claim dismissal should have been under summary judgment standards.

In fact, not only did the Court address the Motion to Dismiss first, it only addressed the Motion to Dismiss. It did not address and did not consider the Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, nor the related materials which were filed in connection with the two motions.

The Court said:

This matter comes before the Court on the Motion to Dismiss filed by

> Defendants Washington State Bar Association ("WSBA") and WSBA officials. Dkt. #16. Plaintiffs Robert E. Caruso and Sandra L. Ferguson oppose this Motion. Dkt. #18. For the reasons stated below, the Court GRANTS Defendants' Motion, dismisses Plaintiffs' claims without leave to amend, and DENIES as MOOT Plaintiffs' other pending motions."

ER 639, Dkt. # 28 pages 16- 21.

The standard by which the dismissals are reviewed is de novo.

A. Dismissal of First Claim for Relief "Declaratory Judgment."

The Court said it "will dismiss Plaintiffs' First Cause of Action, a request for declaratory judgment, as there is no remaining case or controversy given the above." ER 639, Dkt. # 28 at 8. In fact there was, and there remains, a case or controversy under the court's power to render declaratory judgments.

B. Dismissal of Second and Third Causes of Action - "Constitutionality of Mandatory Bar Association Membership and Dues."

The dismissal of Caruso's Second and Third Causes of action are reviewed de novo.

The court's dismissal is entirely in error. First, the dismissal was on the basis of the fraud perpetrated by the lawyers for the WSBA. The dismissal is void.

Second, the decision was based on a complete lack of understanding of the most critical fact of the case. The Court assumed the WSBA was still an association which managed an integrated bar association, an association limited to

lawyers. This was obviously not true. The association after January 1, 2017 was an integrated association of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

Eugster v. Washington State Bar Ass'n, No. C15-0375JLR, 2015 WL 5175722 and *Lathrop v. Donohue*, 367 U.S. 820 (1961) cannot be applied to decision in the case at hand. The facts of this case are decidedly different.

C. Fourth Claim, Fourth Cause of Action.

The District Court dismissed Caruso's Fourth Claim for Relief because it was mesmerized by the WSBA's fraud on the court. Implicit in the fraud was that the WSBA was not different today than it was in 1933. The court said the WSBA was not a new entity. But, it was not and is not. It is still the WSBA but now the WSBA heads up a an integrated association of multiple members; lawyers, Limited Practice Officers and Limited Legal Technicians. The association regulates and disciplines lawyers and the other members.

The point of the Fourth Cause of action is tied to the preliminary injunction Caruso sought. At the time of the filing, the WSBA had commenced a discipline action against Caruso. The discipline system being used was that of the Washington Rules for Enforcement of Lawyer Conduct (ELC). The WSBA was designated as the discipline agency, but the WSBA of the ELC was an integrated

bar association. The ELC was not amended to make the WSBA of the ELC an integrated association of the multiple legal professionals, the WSBA after January 1, 2017.

The argument Caruso was making in his complaint, that the WSBA of the ELC is not the WSBA of this action, was argued in detail in Caruso's Motion of Preliminary Injunction the opposition to which is part of the Motion to Dismiss and thus for this and other reasons a matter which was a part of the hearing on the motion under both summary judgment standards and Rule 12(b)(6) standards.

The court misread Caruso's complaint. The Court said, "Plaintiffs' Complaint asserts that the WSBA ceased to exist and was born anew on the afternoon of September 30, 2016, when the WSBA enacted certain bylaw amendments." ER 234, Dkt. #4 at 9. ER 639, Dkt. 28.

In the Terminology part, the amended complaint sets forth these facts:

> 1. Washington State Bar Association 1933 (WSBA 1933). As used herein, WSBA 1933 shall refer to the Washington State Bar Association created by the State Bar Act, Wash. Sess. ch. 94, 1933 and prior to the amendments made to its Bylaws by the WSBA 1933 Board of Governors the afternoon of September 30, 2016.
>
> 2. Washington State Bar Association 2017 (WSBA 2017). As used herein, WSBA 2017 shall refer to the Washington State Bar Association created by amendments made to Bylaws of the WSBA 1933 by the WSBA 1933 Board of Governors on September 30, 2016.
>
> 3. Washington Lawyer Discipline System (Discipline System). As

> used herein, Washington Lawyer Discipline System (Discipline System) means the discipline system being implemented by the WSBA 1933 as set out in the Rules for Enforcement of Lawyer Conduct (ELC) effective until September 30, 2016, when WSBA 2017 came into being.

The court did not know the point Caruso was making in this claim. The system the WSBA was using is that contained in the ELC. The Court did not amend the ELC to make it possible for the WSBA after January 1, 2017 to use the ELC. The court did not understand this. ER 234, Dkt. # 4, Fourth Claim pages 34 -35

Furthermore, this was also explained in the Motion for Preliminary Injunction. It is surprising the court did not consult this motion. The subject whether the WSBA should be enjoined from pursuing the disciplinary action, that was, the action by the WSBA under the ELC.

A part of the question regarding the constitutionality of an integrated bar association must do with the so-called aspect of "self-discipline" by lawyers. After January 1, 2017, a new system is said to have come into existence.

Bylaws - I. FUNCTIONS

> 7. Administer admissions, regulation, and discipline of lawyers, Limited License Legal Technicians (LLLTs), and Limited Practice Officers (LPOs) in a manner that protects the public and respects the rights of the applicant or member;

II, B, Specific Activities Authorized.

> 6. Administer an effective system of discipline of lawyers, LLLTs, and LPOs, including receiving and investigating complaints of misconduct, taking and recommending appropriate punitive and remedial measures, and diverting less serious misconduct to alternatives outside the formal discipline system; ELC used for LPO's and LLLTs.

ER 106, 111- 112.

D. Dismissal of Fifth and Sixth Causes of Action -- "Due Process and Constitutional Scrutiny of WSBA Disciplinary Procedures."

The dismissal of these claims is reviewed de novo. Again, the court is mesmerized with the falsehood implicit in WSBA's fraud, that the WSBA administers an integrated bar association. Under the constitutional law of today, infringements upon a lawyer's fundamental constitutional rights must be tested under strict scrutiny. That means that WSBA's administration is that of an integrated multiple member legal professionals association. The compulsion of Caruso to be a member to practice law, to pay dues to the association to practice law, to submit to the WSBA's multiple member discipline system is subject to strict scrutiny.

In the Fifth Claim, Caruso alleges the discipline system violates strict scrutiny because of the facts of the system and because of the law of strict scrutiny:

Caruso's Fifth Claim for Relief said that the WSBA Discipline System violated Caruso's right to due process of law under the Fifth Amendment. Specific

facts about the System are laid out in the amended complaint Dkt #4 paragraphs 66 through 151. Claim 190 and 191.

VI. DISMISSAL WITH PREJUDICE

When a court dismisses a complaint pursuant to Rule 12(b)(6), denial of leave to amend "is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991).

The Court said:

> Where a complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber, supra*. The Court finds that Plaintiff cannot allege different facts, consistent with the challenged pleading, which could survive dismissal and that therefore leave to amend will not be granted in this matter.

ER 639, Order at 8 lines 21 - 26.

The court said it was making a finding “that Plaintiff cannot allege different facts, consistent with the challenged pleading, which could survive dismissal and that therefore leave to amend will not be granted in this matter." There is no such finding. And, there could not be such a finding.

As shown above, the dismissal of each claim would not have taken place had the court consulted the record, especially, Caruso's Amended Complaint. ER 234,

Dkt. # 4. Perhaps all which needs to be done would be Caruso to amend the complaint, not so much to amend from a factual standpoint, but reorganize what was said and explain it in a different way.

But of course, the Court is in error. All the Court had to do was read and understand Plaintiffs' Amended Complaint. One wonders what might have had a hand in bringing this decision about. It does not make sense on its own.

In any event, the Amended Complaint could easily be edited, revised or explained in another way to assist understanding. With such changes, there could be no misunderstanding of the case, the claims being made, the bases supporting the claims, and the results desired (prayed for). Saying that no changes can be made is wrong.

CONCLUSION

On January 1, 2017, Appellant Robert E. Caruso, a Washington state lawyer, found himself compelled to be a member of a WSBA which administers an integrated "bar association" of lawyers, Limited Practice Officers and Limited License Legal Technicians. Appellant Caruso does not want to be compelled to be a member, pay dues and be disciplined by this multi-member association. His constitutional rights are being infringed. Whether they can be infringed depends upon the application of strict constitutional scrutiny. Under this standard,

"mandatory associations are permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms'." *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012).

The facts are not in dispute; Caruso's fundamental rights are being infringed. They can only be infringed they survive the strict scrutiny test. It is this test, which will be applied when the District Court dismissal is reversed, and the case remanded to the trial court for declaratory judgment and further action in line with the Court's decision.

September 20, 2017.

Respectfully submitted,

EUGSTER LAW OFFICE PSC

s/ Stephen Kerr Eugster

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using WordPerfect X6 and Times New Roman 14-point font.

September 20, 2017.

EUGSTER LAW OFFICE PSC

s/ Stephen Kerr Eugster

Stephen Kerr Eugster
Attorney for Appellant
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STATEMENT OF RELATED CASES PENDING IN THE NINTH CIRCUIT

Eugster v. WSBA et al., Case: 17-35529. This case is about the attorney fee the District Court imposed upon pro se Eugster.

Eugster v. Littlewood et al., Case: 16-35542. The lawyers for the WSBA say the court in this case dismissed a claim Eugster had made concerning the constitutionality of the discipline system the WSBA – then an association of lawyers only. The lawyers said the dismissal was on the merits. It was not, it was based, improperly so, on an order of the Spokane County Superior wherein the case was dismissed because the court did not have jurisdiction.

September 20, 2017.

EUGSTER LAW OFFICE PSC

s/ Stephen Kerr Eugster

Stephen Kerr Eugster
Attorney for Appellant
Robert E. Caruso

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that on September 20, 2017, by previous agreement of counsel, I emailed, the preceding document including its Appendix (which follows this Proof of Service to counsel listed below at their respective e-mail addresses.

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