No. 17-35529

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION ET AL.,

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

Stephen Kerr Eugster, Pro Se
2418 West Pacific Avenue
Spokane, Washington 99201
Appellant

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INTRODUCTION

This appeal of pro se Stephen Kerr Eugster (Pro se Eugster) presents matters about the conduct of the Washington State Bar Association and their lawyers which are remarkable, astonishing, deeply troublesome, and wrong.

Pro se Eugster was retained by the Plaintiffs Robert E. Caruso[1] and Sandra L. Ferguson[2] in late December 2016 -- early January 2017. Each asked me to file a complaint on their behalf against the Washington State Bar Association and others. At the time both had been members of the WSBA for many years, and each was under imminent threat of discipline by the WSBA.

In their complaint Plaintiffs asserted the WSBA is an integrated "bar" association of lawyers, Limited Practice Officers, and Limited License Legal Technicians. Plaintiffs asserted their fundamental rights under the First, Fifth and Fourteenth Amendments to the United States Constitution were being infringed and thus violated.

Similar concerns were raised in cases brought by Pro se Eugster against the WSBA as it was prior to December 31, 2016. In each case, the WSBA was an

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[1] Herein "Appellant Caruso."

[2]Sandra Ferguson has withdrawn from this appeal. Dkt. # 7.

integrated bar association of lawyers only.

The WSBA Defendants and their lawyers were fully of aware the difference between the WSBA of the Pro se Eugster cases and the WSBA of the case by Robert E. Caruso and Sandra L. Ferguson. They also knew that the infringements of their fundamental constitutional rights would be tested under strict scrutiny, a test far different from the rational basis test used in *Lathrop v. Donohue*, 367 U.S. 820 (1961), a case involving the constitutionality of an integrated bar association; that is, an integrated bar association of lawyers only.

The WSBA Defendants and their lawyers would have none of it. They would try as they tried in the Pro se Eugster cases to prevent the court from entertaining jurisdiction so that the issues would not be decided.

To this end, WSBA Defendants and their lawyers concocted a story about Pro se Eugster and have succeeded in getting the District Court to go along with their story. They have also been successful in having the Trial Judge help them in their efforts. The conduct of the Trial Judge also made the case into a case of his own against Pro se Eugster.

The story about Pro se Eugster is centerpiece of the WSBA "Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." ER 518, Dkt. # 16. The story begins in the "**Introduction**" to the motion:

> 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. 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. 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. [Footnotes omitted.] ER 518, Dkt. # 16 at 1.
>
> The "**Conclusion**" to the motion ends with 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. *Id*. at 24-25.

The Trial Judge bought the argument about Pro se Eugster and his cases "hook line and sinker." What the lawyers have succeeded in doing to Plaintiffs Robert E. Caruso and Sandra L. Ferguson, and to Pro se Eugster, is the product of a successful perpetration of fraud on the Court. The story continues in the Argument below.

JURISDICTION

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 639, Dkt. # 28) on May 11, 2017, and Judgment in a Civil Case (ER 648, Dkt. # 29) on May 11, 2017. Filing of the Notice of Appeal took place on May 11, 2017 (ER 737, Dkt. # 47).

The District Court entered its Order Granting Motion [~~to Dismiss~~ sic] [for Sanctions Against Pro se Eugster] on May 23, 2017 (ER 661, Dkt. # 33), and its Order Granting in Part Defendants' Motion for Attorney Fees on June 19, 2017 (ER 730, Dkt. # 46). Pro se Eugster's Notice of Appeal was filed on June 22, 2017 (ER 737, Dkt. # 47).

ISSUES PRESENTED

Fraud on the Court, Conduct of Trial Judge

1. Whether the WSBA and its lawyers perpetrated a fraud on the court and defamed Pro se Eugster.

2. Whether the Trial Judge was complicit with the WSBA and its lawyers in the fraud and the defamation of Pro se Eugster.

3. Whether the Trial Judge made the case against Pro se Eugster into his own, thus depriving himself and the Court of jurisdiction to decide matters concerning Pro se Eugster. 28 U.S.C. § 455(a).

Jurisdiction Issues, Cause of Action

4. Whether the claims against Pro se Eugster can be made since they are the

product of fraud on the Court.

5. Whether the claims against Pro se Eugster violate public policy because they are based upon the intentional violation of the Washington Rules of Professional Conduct.

6. Whether the claim against Pro se Eugster is based is a fabricated res judicata claim.

Issues of Procedure

7. Whether the trial judge could decide Defendants' Motion to Dismiss "first" and later not consider Appellant Caruso's Motion for Summary Judgment and Motion for Preliminary Injunction.

Errors in the Orders of the Court

8. Whether the trial judge applied proper standards in the consideration of the Motion to Dismiss.

9. Whether the decisions of the Court as to dismissing claims were erroneous.

Rule 11

10. Whether the trial Court violated the Safe Harbor Rule of Rule 11.

11. Whether there was proper evidentiary proof for Rule 11 Sanctions.

12. Whether the Court's sanctions against Pro se Eugster were excessive.

Leave to Amend

13. Whether leave to amend should have been granted to Pro se Eugster and Appellant Caruso.

STATEMENT OF FACTS

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 Supreme Court of Washington.

On January 1, 2017, amendments to the WSBA Bylaws which were adopted by the Board of Governors of the WSBA on September 29 - 30, 2016, went into effect. The WSBA then became a "bar" association whose mandatory members include, not just Washington lawyers, but also, 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 causes of action and facts were the same except that the class action provisions were deleted. *Id.*

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 Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. ER 518, Dkt. # 16. In the motion, the lawyers for the WSBA Defendants made Pro se Eugster personally the base argument of their motion:

> 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. 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. 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. [Footnotes omitted.] ER 518 Dkt. # 16 at 1.

The "Conclusion" to the motion ends with 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. *Id*. at 24 - 25.

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. The lawyers for the WSBA Defendants again made Pro se Eugster the focus of their

reply. In the **Introduction** to the Reply, the lawyers state:

> Plaintiffs' claims against Defendant the Washington State Bar Association ("WSBA") and its officials have been rejected in prior lawsuits and likewise should be rejected here. As explained in the WSBA's Motion to Dismiss ("Motion"), Plaintiffs' counsel Stephen K. Eugster ("Eugster") has brought the same challenges to bar requirements and to the lawyer discipline system in prior suits, without success. In the effort to seek yet another round of judicial review, Eugster now brings his claims on behalf of the named Plaintiffs and asserts that the Court should decide the claims because the WSBA is a new organization due to recent bylaws amendments. But Plaintiffs' claims fail as a matter of law. Regardless of the bylaws amendments, mandatory bar membership and fees remain constitutional, the WSBA still has disciplinary authority, and Washington's lawyer discipline system continues to satisfy due process. Additionally, this Court should abstain from deciding Plaintiffs' claims due to ongoing discipline proceedings against the named Plaintiffs, who also should have raised their discipline-related claims in prior proceedings. Plaintiffs' due process claim also should be dismissed because it is overly abstract and unripe. Finally, the WSBA should be dismissed from this case because it is immune from suit.

ER 587, Dkt. # 21.

On April 27, 2017, WSBA Defendants filed a Motion for Attorney Fees. ER 600, Dkt. # 22.

Prior to this, the lawyers for the WSBA Defendants, on April 6, 2017 a few hours after the Pro se Eugster's Response was filed with the Court via ECF, the lawyers served Pro se Eugster with an unfiled copy of the Motion for Attorney Fees. ER 600, Dkt. 22. The lawyers said:

> On April 5, 2017, the WSBA served this Motion on Eugster, 21 days

in advance of filing the Motion in compliance with Rule 11(c)(2). *See* attached Certificate of Service. *Id.* at 4, lines 11-12.

The Motion was served so that it addressed the Response to the Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction.

The Motion for Attorney Fees said this:

> This lawsuit is part of one previously disciplined lawyer's ongoing campaign against the Washington State Bar Association ("WSBA"). In response to multiple grievance investigations against him and resulting sanctions for established misconduct, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has repeatedly advanced frivolous, meritless, and harassing claims against the WSBA in court. Just within the last three years, Eugster has filed five pro se suits against the WSBA and its officials. Four were dismissed at the pleadings stage; the fifth was recently initiated before the Thurston County Superior Court and is schedule for a dispositive motion hearing in May 2017. In this case, Eugster has enlisted two other disciplined lawyers as named plaintiffs, in order to submit his same frivolous arguments for yet another round of judicial review. The WSBA, for the first time amidst this seemingly endless series of lawsuits, requests payment of its fees and expenses for defending against Eugster. *Id.* at 2.

At the end of the next section, the lawyers state:

> In sum, this lawsuit is part of a series of meritless lawsuits Eugster has brought against the WSBA. This time, Eugster simply has substituted the Plaintiffs for himself, in order to litigate the same issues that have already been rejected by this Court and others. In light of the frivolity of his arguments and the harassing nature of this suit, Eugster should be required to pay the WSBA's reasonable attorney fees and other expenses. Rule 11(c)(1), (4). *Id.* A 8, lines 1 - 6.

Rulings Presented for Review

1. Order Granting Motion to Dismiss, May 11, 2017.

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.

2. Order Granting Motion [for Attorney Fees], May 23, 2017.

On May 23, 2017, the Court rendered its order on Motion for Attorney Fees. ER 661, Dkt. # 33.

3. Order Granting in Part Defendants' Motion for Attorney Fees, June 19, 2017.

On , 2017, the Court rendered its order "Granting in Part Defendants' Motion for Attorney Fees." ER 730, Dkt. # 46.

Notice of Appeal

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 did not rule on the Motion to Consolidate.

SUMMARY OF ARGUMENT

The lawyers for the Washington State Bar Association, led by Paula Littlewood, the WSBA Executive Director who is also a Washington lawyer, have perpetrated a fraud on the District Court. The fraud completely deceived the Court. Moreover, the Trial Judge actually became a participant in the fraud and became so involved, he made the case against Pro se Eugster his own case. The fraud was the basis for every order entered by the Court. All of the orders in the case are void.

The Second set of reasons for reversal of the Court's orders have to do with jurisdictional reasons and cause of action concerns. The District Court did not have subject matter jurisdiction nor personal jurisdiction to render the orders in the

case.

In the Third set of reasons for overruling the orders have to do with material procedural failures. The parties agreed to a stipulated scheduling order for the presentation and timing of dispositive motions by the parties. In compliance with the order, Plaintiffs filed their Motion for Summary Judgment, Motion for Preliminary Injunction, and related Declarations in support of the Motions. The WSBA Defendants and their lawyers then filed their Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. The Court did not consider Plaintiffs' Motions or the Declarations of support. Instead, it considered the Motion to Dismiss "first" and declared the Plaintiffs' motions for Summary Judgment and Preliminary Injunction to be "moot" and they were thus denied.

Also, as another procedural aspect, the Court wrongly and inexplicably did not use the proper standards to be used in addressing the Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Summary judgment standards were to have been used. The orders proceed from the error of the District Court in its use of Rule 12(b)(6) standards only.

The Fourth category of reasons to overrule have to do with District Court errors and other shortcomings of specific claim dismissals stated in Order

Granting Motion to Dismiss.

The Fifth category focuses errors of Court about its application of Rule 11(b) to the conduct of Pro se Eugster. The Safe Harbor Rule of Rule 11(c)(2) was obviously violated. Furthermore, there was no evidence nor law to support the orders against Pro se Eugster as required by Rule 11(b) (1), (2), and (3).

The last concern is the failure of the District Court to grant the Appellant Caruso and Pro se Eugster leave to amend the pleadings in the case.

ARGUMENT

I. FRAUD ON THE COURT

A. Fraud on the Court May Raised on Appeal.

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

B. Standards

Fraud on the court is fraud which defiles the court so the court cannot perform its function impartially.

> 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" which has the following elements: 1) [Conduct] 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. [Citations omitted.]

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).

One who seeks to establish fraud on the court has the burden of proving existence of fraud on the court by clear and convincing evidence. *Id.*

C. Beginning and Purpose of the Fraud

The purpose of the fraud on the court by the lawyers for the WSBA Defendants was to cause the Court to dismiss the case brought by Plaintiffs Robert E. Caruso and Sandra L. Ferguson and to cause the Court to order Pro se Eugster to pay substantial attorney fees to the WSBA.

The beginning of the "conduct" of the fraud is found the "Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." ER 518, Dkt. # 16. The lawyers for the WSBA Defendants and the Court and its Trial Judge refer to the motion as "Defendants' Motion to Dismiss" or "Motion to Dismiss." The conduct of the fraud is the subject of Defendants the "Motion to Dismiss." The lawyers for the WSBA Defendants introduce the fraud in the **Introduction** to the motion, first

paragraph. *Id*. The paragraph, broken into separate, numbered parts, is as follows:

> [1] 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.
>
> [2] 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]
>
> [3] 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.
>
> [4] 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]
>
> [5] 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. [Footnotes omitted.] *Id*. Dkt. # 16 at 1.
>
> The lawyers for the WSBA Defendants end the motion with this

Conclusion which is again broken into parts:

> [6] 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.
>
> [7] Enlisting other lawyers to serve as named plaintiffs does not change the outcome.
>
> [8] As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice. *Id*. Dkt. # 16 at 24.

The lawyers and the WSBA Defendants, by virtue of the fraud, (1) obtained dismissal of all Appellant Caruso's claims, and (2) obtained Orders against Pro se Eugster for significant attorney's fees.

D. Fraud Elements: Things Said, Things Not Said, Things Which Should Have Been Added to What Was Said.

Two of the parts of the Conduct making up the fraud will be discussed in this part. The are "3) [Conduct which] is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth" and "4) [Conduct which] is a positive averment or a concealment when one is under a duty to disclose." See Elements 3 and 4 *supra* at page 14. These two conduct elements are addressed here:

> [1] 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.

The purpose of the foregoing is that the lawyers for and of the WSBA is to paint Pro se Eugster in a bad light, as an enemy of the WSBA, who is engaging meritless crusade against the WSBA "bar system." The lawyers hope to play on notions that a lawyer who has been disciplined on "multiple occasions" which is not true, it was only twice, and each time the discipline process used against Pro se Eugster was in violation of Eugster's right to due process of law under the Fifth and Fourteenth Amendments.

The lawyers suggest to the court that Pro se Eugster is a materialist and that

his material purpose is to "upend" the WSBA and the WSBA discipline system. This is grossly wrong. Pro Se Eugster did not bring the actions for purposes of destruction of the WSBA. They were brought for the purposes of advancing his fundamental constitutional rights; they were brought for the purposes of justice.

The cases were not brought for the gratification of a mean materialist purpose. Absolutely not, they were brought because such efforts are what Pro se Eugster has always tried to do, to fulfill the responsibilities of a Washington lawyer. The "Preamble: A Lawyer's Responsibilities" of the Washington Rules of Professional Conduct includes the following:

> [1] [Washington revision] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.
>
> [5] . . . A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
>
> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . .

Pro se Eugster has devoted a substantial part of his career and his personal income and assets to the efforts to advance and preserve public interests, the public trust, and the advancement of his duties as an officer of the court. EUGSTER

LAW OFFICE, *Some of Steve Eugster's Past Efforts and Involvements*.[3]

The lawyers of the WSBA Defendants led by WSBA Executive Director, also a lawyer, have defamed Pro se Eugster. Indeed, they defamed not only Pro se Eugster, they, by their conduct, have defamed the practice of law in Washington. They profane the lofty purposes and ideals of the WSBA itself.

> [2] 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. [Footnote omitted.]

The lawyers spend a section in the motion on Pro se Eugster's prior lawsuits involving the WSBA. They fail to mention the WSBA, at the time of the lawsuits and still today, in those lawsuits, is an integrated bar association whose only members are lawyers admitted to the bar of the Supreme Court of Washington. It was this sort of bar association, an integrated bar association which the subject of *Lathrop v. Donohue,* 367 U.S. 820 (1961).

The four prior suits filed in the last two years the court is talking about – the lawsuits which they say were "meritless and dismissed at the pleadings stage," are discussed below.

It is a great fraud on the court and defamation of Pro se Eugster for the

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[3] http://eugsterlaw.com/?page_id=38. Retrieved 2017_10_17.

lawyers for WSBA Defendants to claim the were dismissed at the pleading stages of the actions and that the issues which were raised were held by the court to be without merit. The lawsuits though "dismissed at the pleading stage" were not dismissed because they were meritless, but instead dismissed on jurisdictional grounds of each court. The dismissals were not based on merit, they were based on non-merit reasons, jurisdiction, and false res judicata conclusions.

1. Eugster III. [4]

This case was not meritless and it was not dismissed because it was meritless. It was dismissed because but because Pro se Eugster's request to overrule *Lathrop v. Donohue, supra,* was denied.

Pro Se Eugster advanced, in essence, that *Lathrop* had been over time, overruled. The argument advanced was similar to that advanced in *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1989)**.**

This Court said it could not overrule *Lathrop* because it was a decision by the Supreme Court and that the Court could not overrule the Supreme Court. Pro se Eugster petitioned the Supreme Court for a writ of certiorari. ER 1, continuing at 14. The writ was not granted.

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[4] *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III") at 4.

2. Eugster IV.[5]

Eugster IV was not meritless and was not dismissed because it was meritless. ER 81, Notice of Appeal with Order. Eugster IV was dismissed because the Trial Judge said the court did not have jurisdiction. See the Order ER 83-86.

This case is not over. It was appealed to Division III of the Court of Appeals. The court held the Superior Court had jurisdiction. *Eugster v WSBA*, # 34345-6-III, May 2, 2017. A Petition for Discretionary Review to the Washington Supreme Court has been filed concerning other actions of the Court of Appeals on a point which was in excess of the court's appellate jurisdiction. No decision has yet been made.

3. Eugster V.[6]

Eugster V was not meritless and it was not dismissed because it was meritless. ER 88, Notice of Appeal and Order. Eugster V was dismissed because the Trial Judge took it upon himself to say, using the order of dismissal in Eugster IV. *Id*. at ER 91.

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[5] *Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("Eugster IV").

[6] *Eugster v. Littlewood,* No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("Eugster V").

4. Eugster VI.[7]

This case was certainly not meritless. The court did not say it was meritless. They say it was dismissed at the pleadings stage. But, that is not true. It was not dismissed; Pro se Eugster filed a non-suit. The non-suit was filed pursuant to Rule 41(a)(1)(A)(I) ("Voluntary Dismissal" "without court order" with "notice of dismissal before the opposing party serves either an answer or motion for summary judgment"). The Trial Judge does not decide anything regarding the notice of dismissal. The non-suit was not subject to a trial judge act.

> [3] 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.

This is false. There is nothing in the record which says Pro se Eugster enlisted the Plaintiffs so that they were "named plaintiffs" for Pro se Eugster. This has been denied in declarations by Pro se Eugster, Plaintiff Caruso and Plaintiff Ferguson. Respectively, ER 625, Dkt. # 24, ER 635, Dkt. # 25 and ER 637, Dkt. # 26.

> [4] "Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster

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[7] *Eugster v. Wash. State Bar Ass'n,* No. 2:16-cv-01765 (W.D. Wash.) ("Eugster VI").

brought them on his own behalf."

The arguments Pro se Eugster made and Plaintiffs have made are not "exactly the same arguments the Court previously rejected as meritless." This is false and obviously absurd. The arguments are not the same. ER 184, Dkt. # 1, Complaint, and ER 234, Dkt. # 4, Amended Complaint. They are not the same because the arguments in the instant case are directed to the WSBA as an integrated association of lawyer, Limited Practice Officers and Limited License Legal Technicians. In the Pro Se Eugster cases, defendant was the WSBA, which was then an integrated association of lawyers only.

> [5] These arguments have no more merit when brought on behalf of others.

The arguments are not the same. The case at hand is one addressing the constitutionality of a "bar association" which is not a single member association. It is a multi-member association. The arguments are not the same because the facts are not the same.

> [6] This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims. [Footnotes omitted.] Dkt. # 16 at 1.

This is false; what is alleged in this case are claims which are not the same. In addition, the claims in the Pro Se Eugster cases were not meritless. They were not dismissed because the claims lacked merit. The were dismissed because the courts said the court did not have jurisdiction. See discussion above.

Conclusion of the Motion to Dismiss

> [7] "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."

See the discussion above beginning a page 17..

> [8] "Enlisting other lawyers to serve as named plaintiffs does not change the outcome."

It is a lie to say Pro se Eugster enlisted other lawyers. See [3] above.

> [9] "As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice."

This is certainly not true. The Complaint and Amended Complaint establish the claims presented in this case are not meritless. See [4] above.

E. Elements of Fraud on Court Are Met.

Fraud on the court consists of "conduct" which has the following elements:

1. "1) [Conduct] on the part of an officer of the court."

The lawyers for, and of the WSBA, are officers of the court.

2. "2) is directed to the judicial machinery itself."

The fraud is found a critical pleading filed as part of an agreement by the court and the parties to consider dispositive motions. The WSBA's pleading was Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction. Further, the Trial Judge of the Court further assisted in advancing the fraud.

3. "3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth"

See above beginning at page 17 and following.

4. "4) is a positive averment or a concealment when one is under a duty to disclose"

See above beginning at page 17 and following.

5. "5) deceives the court"

The conduct deceived the Court. The actions of the lawyers and the Trial Judge serve as a basis for the orders issued by the court.

F. Actions of the Trial Judge Compound and Establish the Extent of the Fraud.

Some of the actions the Trial Judge took in this regard are discussed in the following paragraphs.

1. Isolation of Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction.

The Trial Judge erroneously isolated the WSBA Motion to Dismiss, considered it "first." ER 639, Dkt. # 28 at 3, lines 8-9. And, then the judge ignored the Plaintiffs' Motions which were scheduled for hearing on the same day as the Motion to Dismiss, all part of the scheduling order plan. ER 492, Dkt. # 14. See further discussion of this at 36, *infra*.

Next, after ruling on the Motion, he "denied" Plaintiffs' Motion for

Summary Judgment and Motion for Preliminary Injunction, saying (only saying, as there was no analysis or reckoning with the motions and their related supporting materials), the motions were "moot." ER 639, Dkt. 281 and 9.

The judge, in effect, dismissed the motions. The dismissals worked to the advantage the WSBA and its lawyers. As we shall see below, the dismissals were in error. *See* discussion at 41.

2. Order Granting Motion to Dismiss, May 11, 2017.

The Trial Judge's Order Granting Motion to Dismiss is replete with evidence the fraud deceived the Court.

a. "Motion to Dismiss?"

The Court uses the term "Motion to Dismiss" for the motion. It failed to tell us the motion was not simply a motion to dismiss. The name of the motion is this: "Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction."

b. Legal Standard Used.

The Trial Judge used standards for a Rule 12(b)(6) motion. ER 638, Dkt. # 28 at 3. This was quite an advantage to the WSBA Defendants. The standards which should have been used are those for summary judgment. The Court has no right to use Rule 12(b)(6) standards because the Trial Judge selected to consider

the Motion to Dismiss Plaintiffs Claims and Motions. There was no intention to apply any other standards such as those applicable to summary judgments and motions for preliminary injunction. After all, the court said the Motion to Dismiss would be considered "first."

The standards were actually those for summary judgment. All the motions were heard at the same time. The motion to dismiss was not a discrete motion to dismiss as the judge would have us believe. It was opposition to the Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction. All of the motions were before the court for hearing.

3. Court Refused to Consider Plaintiffs' Response to Defendants' Motion to Dismiss.

The judge did not consider the Plaintiffs' response to statements about Pro se Eugster in the WSBA's Motion to Dismiss, etc. The judge wrote:

> The Court will not address tangential facts and arguments raised by the parties and will focus instead on the key legal questions in Defendants' entirely dispositive Motion to Dismiss. [Emphasis added.]

The Trial Judge ignores what Pro se Eugster said in Plaintiffs' Response to the Motion to Dismiss. The judge shows he is not going to let considerations and argument on the points rise to his consciousness because the "tangential issues" so called were the very grounds upon which the judge was making his decisions.

The fact of the matter is this: The Plaintiffs clearly and with significant

specificity described at length in their Complaint and Amended Complaint, the unfairness of the discipline system. ER 184, Dkt. # 1, ER 234, Dkt. # 4.. Furthermore, there was significant discussion of the law of strict scrutiny and how it applied to the various infringements of Plaintiffs' fundamental constitutional rights. See, e.g., Amended Complaint.

These matters were also discussed in the Motion for Summary Judgment and Motion for Preliminary injunction. ER 274, Dkt. # 8.

What the foregoing establishes is that the trial judge was assisting in the fraud of the court perpetuated by WSBA and its lawyers. The foregoing also shows the trial judge was "making the case his own case" – that his involvement was personal toward Pro se Eugster. More of this personal involvement is seen in the judges orders directed against Pro se Eugster.

4. Order on Fees, May 23, 2017.

In the "Background" section of the Order, the judge said:

> The Court was able to dismiss all of Plaintiffs' claims based on these arguments without further analysis. See *Id*. As to Plaintiffs' remaining claims that Defendants' actions violated procedural due process and constitutional scrutiny, the Court found that "Plaintiffs' due process and constitutional scrutiny claims fail under the law cited by Defendants," that "Plaintiffs make no effort to argue otherwise," and that instead Plaintiffs devoted "nearly all of their brief to addressing tangential issues raised by Defendants."

ER 631, Dkt. # 33 at 4.

The Court found that dismissal with prejudice was warranted because "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." *Id*.

The judge took it upon himself to say he "was able to dismiss all of Plaintiffs' claims without further argument." This shows a bias toward Pro se Eugster. *Id*.

That "Plaintiffs make no effort to argue otherwise," and that instead Plaintiffs devoted "nearly all of their brief to addressing tangential issues raised by Defendants."*Id*.

5. Order of June 19, 2017.

The assertions in the Motion to Dismiss were picked up in this order. The court simply agreed with what the WSBA and its lawyers said about Pro se Eugster in their Motion. These statements were not true then and they are not true in the order. The court said it was ignoring them, but it was not; it had adopted them and considered Pro se Eugster's response to be irrelevant. ER 730, Dkt. # 46.

6. Safe Harbor Rule of Rule 11(c)(2).

See discussion below at 46.

G. All of the Orders of the Court must Be Reversed.

All of the orders of the District Court must be dismissed. The fraud on the court makes them void. *See, Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 1000 (9th Cir. 2014).

II. TRIAL JUDGE PARTICIPATED IN THE FRAUD - TURNED THE CASE INTO HIS OWN CASE

A. Introduction.

Perhaps the most disturbing aspect of this case is this: The Trial Judge allowed, accepted, and expanded the defamatory statements. The Trial Judge then made the statements his own. The facts establish after that the trial judge made the case against Pro se Eugster his own case.

The Trial Judge, Ricardo S. Martinez, was complicit in the wrongdoing of the WSBA and its lawyers. Furthermore, the judge made the case against Pro se Eugster into his own case, and as a result, went beyond his jurisdiction. His actions also violated 28 U.S.C. § 455(a). The judge's conduct of complicity began soon after WSBA Defendants' lawyers filed Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs Motions for Summary Judgment and Preliminary Injunction.

B. Trial Judge Does Not Have Immunity for His Actions.

The Trial Judge does not have immunity for his acts of complicity and making the case his own. Such actions were not within his judicial role. *Gregory*

v. Thompson, 500 F.2d 59 (9th Cir. 1974).

In *Gregory v. Thompson,* the Ninth Circuit elucidated what is meant by a judge's judicial role and which is not his judicial role. The Court said:

> [w]hen courts have spoken of immunity for acts within the jurisdiction of a judge, they have declared that the doctrine insulates judges from civil liability 'for acts committed within their judicial jurisdiction,' or 'for acts within (their) judicial role,' *Pierson v. Ray*, 386 U.S. at 554, 87 S. Ct. at 1218, or for 'their judicial acts.' *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351. Thus judicial immunity does not automatically attach to all categories of conduct in which a judge may properly engage, but only to those acts that are of a judicial nature.

C. Trial Judge Complicity and Making the Case His Own.

The Trial Judge undertook certain actions in the unique setting of this case which were not judicial actions. Rather, they were actions personal to the judge. These actions also establish that the Court acted upon the fraud perpetrated by the lawyers for the WSBA Defendants, thus meeting the 5th element for the determination of whether a fraud has been committed. See discussion above beginning at page 25.

D. The Trial Judge Did Not Have Jurisdiction 28 U.S.C. § 455.

> In Roman law, judicial liability was created by a quasi-delict termed the iudex qui litem suam facit, which translates as a judge who "make[s] a case his own." [citations omitted.] [8]

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[8] *See* Marie Adornetto Monahan, *The Problem of the Judge Who Makes the Case His Own: Notions of Judicial Immunity and Judicial Liability in Ancient*

This “quasi-delict” is perhaps subsumed in 28 U.S.C. § 455(a).

Under § 455(a), recusal is mandatory in "any proceeding in which his impartiality might reasonably be questioned."

Under 28 U.S.C. § 455(b), a judge is expected to disqualify himself whenever any of the five statutorily-prescribed criteria can be shown to exist in fact; even if no motion or affidavit seeking such relief has been filed, and regardless of whether a reasonable person would question the judge's impartiality.

In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. *Liteky v. U.S.*, 510 U.S. 540, 564 (1994).

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (what matters is not the reality of bias or prejudice but its appearance).

III. WSBA DEFENDANTS DO NOT STATE A CLAIM AGAINST *PRO SE* EUGSTER

A. Introduction.

Rome, 49 CATH. U. L. REV. 429, 440 (2000).

The lawyers for the WSBA and Defendants make a claim against Pro se Eugster which was made on the basis of the fraudulent facts in the Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. These claims or rights of actions cannot be made. Three reasons why this is so are explained below.

B. *Ex Dolo Malo Non Oritur Actio:* No Right of Action Can Have its Origin in Fraud.

> No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. The maxim lies at the foundation of a general rule of public policy, the rule that the courts will not sustain an action which arises out of the moral turpitude of the plaintiff or out of his violation of a general law enacted to carry into effect the public policy of the state or nation.

Marshall v. Lovell, 19 F.2d 751 (8th Cir. 1927).

C. What is Being Asked for is Against Public Policy: Violation of Rules of Professional Conduct.

The lawyers for the WSBA have intentionally violated several Washington Rules of Professional Conduct.

1. RPC 3.3(a)(1). Candor Toward the Tribunal.

RPC 3.3(a)(1) says: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

2. RPC 3.4. Fairness to Opposing Party.

RPC 3.4 addresses "Fairness to Opposing Party." The rule provides, in relevant part, as follows:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

3. RPC 3.5 Impartiality of the Tribunal.

RPC 3.5 provides:

> A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(d) engage in conduct intended to disrupt a tribunal.

4. RPC 8.4 Misconduct.

RPC 8.4 "Misconduct" in applicable part, provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(f) knowingly (1) assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law,

(n) engage in conduct demonstrating unfitness to practice law.

D. The Claim Against Pro se Eugster is an Intentionally False Res Judicata Claim.

The results were enormously successful. Indeed, the Trial Judge gave the WSBA Defendants and their lawyers a result which could only have been secured under res judicata ("claim preclusion") or collateral estoppel ("issue preclusion") standards.

The standards of res judicata are these: "Three elements constitute a successful res judicata defense. 'Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between

parties.' *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc*., 298 F.3d 1137, 1143 n. 3 (9th Cir. 2002) (citing *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001))." *Tahoe-Sierra Pres. Council v. Tahoe Reg. Planning*, 322 F.3d 1064, 1077 (9th Cir. 2003) (footnotes omitted). Obviously, WSBA Defendants, cannot meet these requirements as will be explained below.

"Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Clark v. Bear Stearns & Co., Inc*., 966 F.2d 1318, 1320 (9th Cir.1992).

> To foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id*. at 1320. The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. *Id.* at 1321.

Offshore Sportswear, Inc. v. Vuarnet Intern., B.V., 114 F.3d 848, 850 (9th Cir. 1997).

IV. IMPROPER PROCEDURE

A. Isolation of Defendants' Motion to Dismiss.

The court did not have authority to limit itself to Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction.

The first paragraph of the Order Granting Motion to Dismiss is this:

> This matter comes before the Court on the [Defendants']Motion to Dismiss [Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction] 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 at 1. (Corrections to the title of the motion the Trial Judge says came before the Court have been added.)

The Trial Judge goes further to explain this isolation. He says At page 3 of the Order he says: "<u>On March 21, 2017, Defendants filed a Motion to Dismiss, which the Court will address first</u>." The full text of this paragraph is:

> On March 1, 2017, Plaintiffs filed a Motion for Summary Judgment. 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 Dkt. # 15. <u>On March 21, 2017, Defendants filed a Motion to Dismiss, which the Court will address first</u>. ER Dkt. #16. [Emphasis added.]

ER 639, Dkt. # 28 at 2.

The Trial Judge did not have authority to cause the Court to consider and decide the Defendants' "Motion to Dismiss" first and in isolation of the Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction. All of the motions were to be heard together. They were part of the Joint Stipulated Motion

for Briefing Schedule and Order (ER 492, Dkt. # 14). All dispositive motions were to be determined at the same time.

B. Trial Judge "Denies as Moot Plaintiffs' Other Pending Motions."

The Trial Judge could not simply deny as moot Plaintiffs' other pending motions. First, the motions could not be acted upon. They were not before the Court at the time of Defendants' Motion. *Id.*

Second, assuming the motions were before the court, neither they nor the Plaintiffs' Argument and Declarations in Support were Considered. Had they been considered, the results the Court was provided by the Trial Judge might have been different. This is error. The other motions were material to the making of the "decisions;" the motions were Moot and were to be Denied.

Third, the Trial Judge just declared in the Order that Plaintiffs' Motions were moot and denied them. The statement is arbitrary, it is not a judicial decision. Judicial decisions require the exercise of discretion. Plaintiffs' Motions were not before the court according to its introduction to the Order. If they were not before the court, they were not considered. If they were not considered, the Trial Judge was merely giving them a label. A trial judge does not have the power *sua sponte* to place a label on the motions as moot, and then deny the motions.

Finally, the judge's actions were are error because there was not evaluation of the Plaintiffs' Motions for Summary Judgment and Preliminary Injunction as to whether the motions were moot as a result of the trial judge's efforts and conclusions in the only motion the Court considered.

V. SEPARATE CLAIM DISMISSALS IN ORDER GRANTING MOTION TO DISMISS ORDERS ARE ERRONEOUS

A. Standards: The Court Did Not Use the Correct Decisional Standards.

Appellate review of the decisions of the District Court is governed by the same standard used by the trial court under Rule 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). The Court used the standards applicable to a Rule 12(b)(6) motion. This standard was improper because the Motion to Dismiss was a motion in opposition to Plaintiffs' Motion for Summary Judgment. In addition, the court's consideration of the Motion to Dismiss included matters outside of a strict Rule 12(b)(6) motion.

Applying the proper standard, the Summary Judgment standard, 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).

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).

B. Proper Standard of Review for Dismissals.

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Conclusory allegations and unwarranted inferences, however, are insufficient to defeat a motion to dismiss. *See Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

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. The phrase 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 Sanjuan*, 40 F.3d at 251

(once a claim for relief has been stated, a plaintiff 'receives the benefit of imagination, so long as the hypotheses are consistent with the complaint')." *Id.,* (citations omitted).

C. Claim Dismissals in Order Granting Motion to Dismiss.

The Court, in its Order Granting Motion to Dismiss, addressed each of the claims for relief or causes of action of Plaintiffs Caruso and Ferguson raised in their complaint as amended. ER 234, Dkt. # 4. As will be shown below, each and every one of the dismissals was wrongly decided, in error.

1. Fourth Claim - "WSBA."

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 never became a new entity. What it became, when the bylaws of the WSBA were amended, was an integrated association of multiple members; lawyers, Limited Practice Officers and Limited License 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 Plaintiffs were making in the complaint was that the WSBA of the ELC is not the WSBA of this action. This was argued in detail in Caruso's Motion for 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 639, Dkt. # 28.

In the Terminology part, the Amended Complaint (ER 234, Dkt. # 4 at 3), 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 Appellant 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. ER 495, Dkt. # 15 at 4 and 6. 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.

2. Second and Third Claims - "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

became 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 the case at hand. The facts of this case are decidedly different, the memberships of the WSBA are not the same as they were.

3. Fifth and Sixth Claims - "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 Appellant 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, ER 234, Dkt. # 4, paragraphs 66 through 151. Claim 190 and 191.

4. First Claim - "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.

VI. RULE 11(B) AND THE ORDERS AGAINST PRO SE EUGSTER

A. Standard of Review.

The orders against Pro se Eugster do not comply with the requirements of Rule 11. A district court's interpretation of the Federal Rules of Civil Procedure is reviewed de novo. *See United States v. 2,164 Watches*, 366 F.3d 767, 770 (9th Cir. 2004).

B. Safe Harbor Rule of Rule 11.

The District Court did not have jurisdiction or authority to impose fees against Pro se Eugster under Rule 11. The Trial Judge improperly applied and did not comply with the Safe Harbor Rule of Rule 11(c)(2).

> Rule 11 authorizes a court to impose a sanction on any attorney, law firm, or party that brings a claim for an improper purpose or without support in law or evidence. Rule 11(c), however, provides a 21-day safe harbor period. Under this provision, Rule 11 sanctions may not be imposed if the challenged claim is withdrawn within 21 days after service of the sanctions motion. Fed. R. Civ. P. 11(c)(2); *see also Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998).

Sneller v. City of Bainbridge Island, 606 F.3d 636, 638-39 (9th Cir. 2010).

A motion for sanctions may not be filed, unless there is strict compliance with Rule 11's safe harbor provision. *See Holgate v. Baldwin*, 425 F.3d 671, 678 (9th Cir. 2005) (holding that we 'enforce [Rule 11's] safe harbor provision strictly'); *see also, Ridder v. City of Springfield*, 109 F.3d 288, 296 (6th Cir. 1997) (noting that 'Rule 11 cases emerging in the wake of the 1993 amendments [to Rule 11] have found [compliance with] the 'safe harbor' provision to be an absolute requirement.'). *Islamic Shura Council of S. Cal. v. Fed. Bureau of Investigation*, 757 F.3d 870, 872 (9th Cir. 2014).

The Court applied Rule 11(b) to (a) the Complaint, ER 184, Dkt. # 1, and (b) the Amended Complaint, ER 234, Dkt. # 4. It did not have authority to do so. The Order is beyond the jurisdiction of the Court. I explain.

The motion for attorney fees served on April 6, 2017 and filed after 21 days on April 27, 2017, ER 600, Dkt. # 22, addressed and was directed to Rule 11 violations as to Plaintiffs' Response to Motion to Dismiss filed on April 6, 2017.

ER 554, Dkt. # 18. Despite this, the court concluded, "Defendants are essentially attacking the Complaint and Amended Complaint filed by Mr. Eugster in this case, so the Court will conduct the *Christian* two-prong inquiry." ER 661, Dkt. # 33 at 7.

Thus, the court applied Rule 11 to the Complaint and Amended Complaint. It did not apply the rule to the pleading which was the subject of the 21- day letter, and the Motion for Attorneys' Fees. The pleading subject to the 21-day letter and Motion for Attorneys' fees was Plaintiffs' Response to Motion to Dismiss filed on April 6, 2017. ER 554, Dkt. # 18.

Here the court challenged the Complaint (ER 184, Dkt. #1) and Amended Complaint (ER 234, Dkt. #4). Neither of these pleadings were challenged by the Defendants 21-day safe harbor letter. Therefore, the court did not have jurisdiction or the authority under Rule 11 to impose sanctions for the Complaint and Amended Complaint.

The 21-day letter was served on Pro se Eugster on April 6, 2017. It was served a few hours after Plaintiffs' Response to Defendants Motion to Dismiss was served and filed on April 6, 2017. ER 554, Dkt. # 18.

The action was commenced on January 3, 2017 with the filing of the Complaint. ER 184, Dkt. # 1. On February 21, 2017, Plaintiffs filed their

Amended Complaint. ER 234, Dkt. # 4.

On March 21, 2017, Defendants filed their Motion to Dismiss. ER 518, Dkt. # 16. On April 6, 2017, Mr. Eugster filed Plaintiffs' "Response to Defendants' Motion to Dismiss Plaintiffs' Claims and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." (Herein "Response to Motion to Dismiss.") ER 554, Dkt. # 18. Within a few hours of the filing, Defendants served Mr. Eugster with a Motion for Fees. This motion was made pursuant to Rule 11(c)(2) calling for a 21-day letter to Mr. Eugster to allow him to withdraw the pleading - the Response to Motion to Dismiss. *Id*.

After 21 days, Defendants filed Defendants' Motion for Attorneys' Fees and Expenses on April 27, 2017. ER 600, Dkt. # 22. (This is the only 21-day notice received by Plaintiffs in these proceedings.)

The pleading to which the 21-day notice applied was Plaintiffs' Response to Defendants' Motion to Dismiss, Dkt. # 18. Defendants say, "[o]n April 5[sic, should be April 6], 2017, the WSBA served this Motion on Eugster, 21 days in advance of filing the Motion in compliance with Rule 11(c)(2). See attached Certificate of Service." Dkt. # 22 at 4.

C. What If the Court Were to Apply Rule 11 to Plaintiffs' Response to Motion to Dismiss?

The challenged pleading is Plaintiffs' Response to Defendants' Motion to Dismiss. Dkt. # 18. The challenges in the Motion for Attorneys' fees have nothing to with Rule 11 violations which might be applicable to the pleading - Plaintiffs' Response to Defendants' Motion to Dismiss.

What did the Defendants warn Plaintiffs about concerning Rule 11 and the 21- day Safe Harbor letter? One must look to the motion (the 21- day notice and the motion which was the same as that in the 21-day notice), Dkt. # 22. Rule 11 provides that a party notified of potentially sanctionable conduct may cure the error by withdrawing or correcting the challenged paper, claim, defense, contention, or denial within 21 days. Rule 11(c)(2).

This is what was said about the challenged pleading: Defendants' letter said " Eugster violated Rule 11 by presenting claims that are contrary to governing precedent and unsupported by authority, by advancing arguments that multiple courts already have rejected in his prior lawsuits, and by filing yet another lawsuit against the WSBA challenging bar membership, license fees, and the lawyer discipline system." ER 600, Dkt. # 22 at 4, lines 15-18. This is clearly false.

The Response to Motion to Dismiss did not present claims nor were any claims or arguments made which had been rejected in prior lawsuits. Furthermore, the 21- day letter of the Motion for Attorneys' Fees must "describe the specific

conduct that allegedly violates Rule 11(b)." Rule 11(c)(2). The letter and the motion failed to comply with this requirement.

Application of Rule 11 to the Response to Motion to Dismiss does not and cannot produce any Rule 11 violations by Mr. Eugster.

D. Even If the Court Were to Claim Rule 11(b) Violation, the Sanctions Would Have to Be Minimal.

Sanctions are for deterrence purposes. Rule 11(c)(4) provides:

> (4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

"Rule 11's express goal is deterrence." *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994). "[W]hen there is . . . conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Chambers v. NASCO, Inc*., 501 U.S. 32, 50 (1991); *Ringgold-Lockhart v. Cnty. of L. A.*, 761 F.3d 1057, 1065 (9th Cir. 2014).

The financial circumstances of the attorney must be considered in determination of the proper sanctions. Determination of the amount of sanctions

would involve consideration of Mr. Eugster's financial circumstances. *See Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 685 (8th Cir. 1997) (inability to pay sanction should be treated as an affirmative defense, and therefore burden is upon sanctioned party to offer evidence of financial status). Mr. Eugster has no ability to pay fees as sanctions. ER 724, Dkt. # 45, Declaration of Stephen Eugster.

The court paid no attention to this requirement, instead saying Pro se Eugster had not proved anything concerning his ability to because he did not tell the court of his assets and income from his law practice. He did tell of his total income. The income from his law practice was minimal. The financial inquiry has to do with the ability to pay from what person has to pay it will. The rule does not contemplate the sale of assets.

E. Prevailing Party, Rule 11(c)(2) .

Under Rule 11(c)(2) Pro se Eugster and Plaintiffs should be awarded "reasonable expenses, including attorney's fees."

VII. LEAVE TO AMEND

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 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 for 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.

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).

CONCLUSION

Wherefore, Pro se Eugster respectfully requests this Honorable Court reverse the Orders of the District Court, remand the case to the District Court,

order Hon. Ricardo S. Martinez to recuse himself, disqualify the lawyers for the WSBA Defendants, and direct the District Court to determine whether Pro se Eugster should be awarded "reasonable expenses, including attorney's fees, incurred for the motion" (Defendants' Motion for Attorneys' Fees and Expenses), pursuant to Rule 11(c)(2).

November 1, 2017.

Respectfully submitted,

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 less than 14,000 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.

November 1, 2017.

s/ Stephen Kerr Eugster
STEPHEN KERR EUGSTR
Appellant, Pro se

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.

Ferguson v. WSBA et al., Case: 17-35529.

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.

November 1, 2017.

s/ Stephen Kerr Eugster
STEPHEN KERR EUGSTER
Appellant, Pro se

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 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 November 1, 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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