UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. CARUSO and SANDRA L. FERGUSON, Plaintiffs-Appellants, v. WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; *et al.*, Defendants - Appellees.	No. 17-35410 D.C. No. 2:17-cv-00003-RSM U.S. District Court for Western Washington, Seattle **RESPONSE TO MOTION TO CONSOLIDATE APPEALS**
STEPHEN KERR EUGSTER, Pro se-Appellant, v. WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; *et al.*, Defendants - Appellees.	No. 17-35529 D.C. No. 2:17-cv-00003-RSM U.S. District Court for Western Washington, Seattle **RESPONSE TO MOTION TO CONSOLIDATE APPEALS**

I. INTRODUCTION

I.

The lawyers for the WSBA Defendants in *Robert E. Caruso and Sandra L. Ferguson v. WSBA*, No. 2:17-cv-00003-RSM WAWD, 9th Circuit No. 17-35410, have perpetrated a fraud on the District Court.

The fraud begins, or perhaps became apparent, in WSBA's Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 16, App. 274.

II. BACKGROUND AND PROCEDURAL HISTORY

A. There are Two Separate Cases on Appeal.

There are two appeals in this matter. The first is the appeal of the dismissal of *Robert E. Caruso and Sandra L. Ferguson v. WSBA*, Appeal, No. 17-35410 (Caruso Appeal). The second is the appeal of the order awarding attorney fees against pro se Stephen Kerr Eugster, *Stephen Kerr Eugster v. WSBA*, 9th Circuit No. 17-35529 (Eugster Appeal).

B. Background.

In their Motion for Consolidation, the lawyers for the WSBA tell of "The Parties and Claims in the Underlying Case." Motion for Consolidation at 2. They say the District Court Plaintiffs, *Robert E. Caruso and Sandra L. Ferguson*, filed

their complaint on January 3, 2017, and amended their complaint on February 21, 2017. Dkt. # 4, App. 1. Next, they say on March 21, 2017, the WSBA filed a "Motion to Dismiss."

That's it. The lawyers for the WSBA fail to tell the Court the whole truth of the procedural record. The "Motion to Dismiss" was not a motion to dismiss; its true name is "Motion to Dismiss and Objection Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." Dkt. # 16, App. 274.

C. Procedural Matters.

After the amended complaint had been filed (Dkt. # 4, App. 1), the lawyers had a telephone conference on February 28, 2017. Dkt. # 35-6, App. 448. 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. Dkt. # 14, App. 810.

On March 1, 2017, Plaintiffs filed their Motion for Summary Judgment. Dkt. # 8, App. 41, and related declarations, Dkt. # 9, App. 65; Dkt. # 10, App. 802; and Dkt. # 11, App. 807. On March 3, 2017, Plaintiffs filed their Motion for Preliminary Injunction. Dkt. # 15, App. 251. On March 21, 2017, WSBA filed their Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 16, App. 274. On April 6, 2017,

Plaintiffs filed their Response to Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 18, App. 310. The Response was together with a declaration by Stephen Eugster. Dkt. # 9, App. 321.

The WSBA Defendants filed their Reply to the Plaintiffs Response April 18, 2017 and filed their Reply to Response to Motion. Dkt. # 21, App. 341. On April 27, 2017, WSBA Defendants filed a Motion for Attorney Fees. Dkt. # 22, App. 356. On May 11, 2017, the Court entered its Order on Motion for Summary Judgment. Dkt. # 28, App. 381. The case closed on May 11, 2017. 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. Dkt. # 33, App. 403. Judgment of the court was entered May 11, 2017. Dkt. # 29, App. 390. 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 (Dkt. # 8, App. 41) and Plaintiffs' Motion for Preliminary Injunction. Dkt, # 15, App. 251.

III. ARGUMENT

A. Standards.

Fraud on the court may be raised the first time on appeal. In *Hendricks &*

Lewis PLLC v. Clinton, 766 F.3d 991,1000 (9th Cir., 2014), the court held that perpetration of a fraud on the district court may be raised for the first time on appeal. The district court said:

> "Courts have inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir.2011) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)); *see also Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir.2003) ("Courts possess the inherent power to vacate or amend a judgment obtained by fraud on the court."). We have held that "[w]hen we conclude that the integrity of the judicial process has been harmed . . . and the fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,' we not only can act, we should." Dixon, 316 F.3d at 1046 (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir.1960)).

The standards and elements of fraud on the court are as follows:

> [A] party seeking to show fraud on the court to present clear and convincing evidence of 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." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010); (quoting *Carter v. Anderson*, 585 F.3d 1007, 1011-12 (6th Cir. 2009)).

B. <u>The Fraud Began with WSBA's Motion to Dismiss</u>

1. <u>Fraud – WSBA's Motion to Dismiss [and Opposition to Plaintiffs'Motions for Summary Judgment and Preliminary Injunction].</u>

On March 21, 2017, WSBA filed what their lawyers call a "**Motion to Dismiss.**" It is a highly unusual document. It makes the person of Stephen Kerr Eugster the basis upon which the case is to be dismissed. The beginning of the fraud on the District Court is found in WSBA Motion to Dismiss in the "Introduction" and "Conclusion."

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. [Footnotes omitted.] Dkt. # 16, App. 274.

CONCLUSION

> 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.*

C. The Fraud Dissected.

1. WSBA's Premise is A Fraud.

The greatest fraud in the fraud perpetrated in the Introduction is this: The lawyers do not disclose that all they have to say about pro se Eugster's efforts in his pro se cases is based on the false premise that pro se Eugster's previous cases addressed WSBA, which at the time was a common integrated bar association, an association limited to lawyers. The lawyers were and are well aware that the Caruso Case addressed a WSBA which, as of January 1, 2017, became a WSBA whose members are lawyers, Limited Practice Officers, and Limited License Legal Technicians. The lawyers had a duty to disclose this before they said pro se Eugster's cases were the same as the Caruso Case.

2. WSBA Ad Hominem Attack and False Statements.

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."

The lawyers do not tell the court what Washington's bar system was when pro se Eugster engaged the WSBA. They failed to disclose a material fact, as has been said they failed to disclose that the WSBA then was not the WSBA after January 1, 2017. They knew the cases were not the same. One would also think they knew

that if they had disclosed this, the entire fraud would fail. Dkt. # 4, Amended Complaint, App. 1.

They falsely denigrate pro se Eugster by saying the cases were a crusade against the system. The "crusade" was this: In Case III, pro se Eugster tried to get the case of *Lathrop v. Donohue*, 367 U.S. 820 (1961) overruled. Pro se Eugster even petitioned the United States Supreme Court for a writ of certiorari, which was not granted. Petition for Writ of Certiorari, App. 524. The lawyers fail to disclose that a continued *Lathrop v. Donohue* would have no bearing in the Caruso Case because it was a single lawyer member association case, not a multiple member association as in the Caruso Case.

Case IV and Case V were brought against the WSBA which was then a single member association. The lawyers for the WSBA are aware res judicata requires the same facts and the same parties.

3. False Statements about Pro Se Eugster's Efforts.

The lawyers say: "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.

The falsehood of this statement is the failure to disclose that the WSBA then

was not the WSBA of the Caruso Case.

There is yet another falsehood in the statement – that "each such lawsuit was meritless." The lawsuits were not meritless. To say the suits were meritless requires that they did not have merit and were dismissed. The fact that Case IV and Case V were dismissed on the basis that the court said it did not have jurisdiction to hear the case does not mean they were meritless. Dkt. # 29, Order of Dismissal, App. 519 and Dkt. # 19, Order Granting Motion to Dismiss, App. 842. The merits were not gotten to. Of course, the lawyers know that so they do not disclose the cases were dismissed on jurisdictional grounds.

And again, they fail to disclose that the facts in the pro se Eugster cases involved the WSBA then, not the WSBA after January 1, 2017.

4. "Eugster Enlisted Other Lawyers."

The lawyers say: "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 lawsuit," the lawyers say, is "no different." This is an intentionally false statement. "This lawsuit" is entirely different again because the WSBA as of January 1, 2017 was a multi-member "bar [sic] association."

5. Arguments Were Not Rejected As Meritless.

The lawyers say: "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.

The arguments here are not the same as were made in the pro se Eugster cases.

The cases were not rejected as meritless. They were rejected because the court said it did not have jurisdiction to decide the cases. Case IV was rejected because the Superior Court said the Washington State Supreme Court had exclusive jurisdiction. Case V was rejected because the District Court judge held that the decision in Case IV was res judicata. This case is on appeal. The lawyers for the WSBA fail to disclose these essential facts. They certainly were aware of them. *Id.*

6. <u>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.</u>

The lawyers say: "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." The facts of a new lawsuit against the bar would not be the same as the pro se cases.

D. <u>"Conclusion" of the Motion</u>.

The Conclusion consists of a restatement, with some additional nuances about pro se Eugster, is:

> (A) "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."
>
> (B) "Enlisting other lawyers to serve as named plaintiffs does not change the outcome."
>
> (C) "As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice."

But, the Conclusion is more than a restatement of what has already been said; it is proof that the WSBA lawyers see what pro se Eugster is said to have done, said to be, which is part and parcel, of the Motion to Dismiss. What they say is the reason to dismiss the case is what pro se Eugster had done in the past. That is to say, the *raison d'être* of the case is pro se Eugster.

E. Plaintiffs' Response to Motion to Dismiss and Declarations.

Caruso filed his Response to the Motion to Dismiss on April 6, 2017. Dkt. # 18, App. 310. Within a few hours, the WSBA lawyers served an unfiled Motion for Attorney Fees. The Motion was filed 21 days after it was served to comply with Rule 11(c)(2).

F. **WSBA Files Motion for Attorney Fees.**

The lawyers for the WSBA filed a Motion for Attorney Fees on April 27, 2017, 21 days after the unfiled Motion for Attorney Fees was served on pro se Eugster. Dkt. # 22, App. 356.

The Motion for Attorney Fees said:

I. INTRODUCTION

> 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 scheduled 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.

V. CONCLUSION

> In this case, Eugster brought a frivolous, harassing lawsuit; filed a series of lengthy complaints and duplicative motions; and furthered his broader ongoing strategy—an unending series of baseless suits against the WSBA in courts across Washington State. The imposition of fees and expenses pursuant to Rule 11, Section 1927, and the court's inherent authority would appropriately sanction and deter this conduct. The WSBA thus respectfully requests that this Court order Eugster to pay the WSBA's reasonable attorney fees and expenses incurred in defending this lawsuit and that the Court grant the WSBA leave to file a statement of its attorney reasonable fees and costs incurred in this matter.
>
> As readily perceived, the conduct of the fraud on the court is restated

in the Motion for Attorney Fees. The conduct with respect of pro se Eugster raises a host of problems for the lawyers of the WSBA and the WSBA leadership lawyers. *See* below at 17.

G. District Court Grants the WSBA's Motion to Dismiss.

The Court signed and entered the Order Granting Motion to Dismiss, Dkt. # 28, App. 381. The Order shows that District Court was deceived by the lawyers' fraudulent statements and conduct, thus establishing the 5th element of fraud on the court, that the conduct "deceives the court." As a result of the conduct, the Court treated the Motion to Dismiss in isolation of Plaintiffs' Motions For Summary Judgment and Preliminary Injunction. The court dealt with the "Motion to Dismiss" first. Order #28 at 3, line 9, App. 381. Having done that, the court granted the Motion to Dismiss (with prejudice). As for Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, each was "Denied" as "Moot." Dkt. # 28 at 9, App. 381. The two motions should have been considered as they were part of motions which preceded the Motion to Dismiss. The whole process should have been treated as a summary judgment motion.

The Motion To Dismiss was considered as an isolated Rule 12(b)(6) motion using the standards for such a motion. See the "Legal Standard" section in the

Order, Dkt. # 28 at 3, App. 382.

IV. CONSOLIDATION IS INAPPROPRIATE

A. Fraud on the Court.

By clear and convincing evidence, it is established that the lawyers for the WSBA have successfully perpetrated fraud on the District Court. All of the elements have been met: "1) the lawyers are officers of the court who engaged in conduct, 2) directed to the judicial machinery itself; 3) the conduct 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."

The WSBA lawyers seek to consolidate the Eugster Appeal with the Caruso Appeal. They seek to do so for the same reason they made pro se Eugster the centerpiece of their Motion to Dismiss. They want the Court of Appeals to react the same way the District Court acted. They want the Court in the Caruso Appeal to have the same negative and false regard for Eugster they convinced the District Court to have. They want the ad hominem argument to shore up results of their false statements, their failure to disclose material facts, their intentional misrepresentation of the character of the bar as a single class lawyer member organization. They do not want the Court to see the WSBA for what it is today and

has been since January 1, 2017 − a "bar association of lawyers, Limited Practice Officers and Limited License Legal Technicians" which violate Plaintiff Caruso's First, Fifth and Fourteenth Amendment Rights. Dkt. # 4, Amended Complaint, App. 1.

B. Consolidation Is Not Appropriate.

WSBA lawyers cite many cases in support of consolidation. When one looks closely at the cases, however, they will find they do not support consolidation.

First, they cite *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978) and of it say "(consolidation may be ordered where the court in its discretion deems it appropriate and in the interest of justice)." However, the court also mentioned the issue of jurisdiction regarding consolidation matters. "Consolidation under Federal Rule of Appellate Procedure 3(b) may be ordered where the court in its discretion deems it appropriate and in the interests of justice, but each of the matters to be consolidated must be within the jurisdiction of the court." *Id.*, 573 F.2d at 1123, (emphasis added). As will be later discussed, there is a jurisdictional issue which is foremost in the Eugster Appeal. *See* below at 17.

The next case is *Medlin v. Palmer*, 874 F.2d 1085, 1088 (5th Cir. 1989) (court consolidated appeals on its own motion where three separate

appeals arose from the same set of operative facts). But, this statement does not apply here; the appeals are not based on the same "operative facts."

Speaking of consolidation to "promote efficiency rather than piecemeal appeals," *Metcalf v. Borba*, 681 F.2d 1183, 1188 (9th Cir. 1982) is cited. But what the court is concerned about has to do with rules which make attorney fee motions and decisions part of the case, and not part of a separate case. The Eugster Appeal is a separate case. *Id.*

Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014) is cited for the proposition where attorney fees under the Lanham Act necessarily involved consideration of "the substantive strength of a party's litigating position." *Octane Fitness* does not apply here because the issue under the Lanham Act had to do with facts as to an "exceptional circumstances" factual determination. The strength of a party's position had to do with the "exceptional circumstances" issue.

C. Caruso and Eugster Will Each be Prejudiced by Consolidation of the Appeals.

1. Caruso.

Appellant Caruso has already been subjected to the WSBA lawyers' efforts to prejudice the District Court. The prejudice will be extended to the Court of Appeals if the appeals in these separate cases are consolidated. As we have already

observed, prejudiced by the fact the WSBA brought Eugster into the proceedings conducted a false and personal attack on Eugster. Likewise, he will be prejudiced in this appeal if the wrongdoing is continued into Caruso's appeal.

2. Eugster.

Pro se Eugster will be prejudiced if his appeal is not considered independently of the Caruso Appeal. His objections to the fees motion will be subverted by the WSBA lawyers' fraud on the court in *Caruso and Ferguson v. WSBA* which was set out in the WSBA's Motion to Dismiss. Dkt. # 16, App. 274.

Furthermore, pro se Eugster's issues in the case against him go well beyond the fraud on the court. First, there is the issue of the Safe Harbor Rule. Rule 12(c)(2).

Second, there is the issue of whether factual issues claimed by the WSBA lawyers in the Motion for Fees have evidentiary support as required by Rule 11(b)(3).

Third, there is the issue of whether the claims and contentions have support as required by Rule 11(b)(2).

Fourth, there is the issue of the true purpose of the motion for attorney fees. It was not for sanctions under Rule 11; it was instead, a means by which the lawyers for the WSBA could obtain an order against pro se Eugster for actions he had

previously brought against the WSBA. It was to bring Eugster in as a party and claim Eugster should pay attorneys fee because of his previous pro se litigation involving the WSBA. See page 6 of the motion.

Fifth, pro se Eugster raises jurisdictional concerns; the District Court did not have jurisdiction under Rule 11 to entertain the Motion for Attorney Fees. Dkt. # 22, App. 356.

V. CONCLUSION

What the lawyers for the WSBA have done is shocking. They have defamed Stephen Kerr Eugster as a lawyer for his clients and have trashed him for the purpose of getting the District Court to order Eugster to pay because of what he did representing himself in previous litigation.

They have not told the truth; they have failed to disclose material facts.

The lawyers for the WSBA and WSBA lawyer leaders have shown they have no qualms about doing what they have done. Their view is that the WSBA must prevail at all costs. The morality they advance is this: The end justifies the means. Their view of the legal process is that the work of the court is to make "judgments of power."

The consolidation of the appeals would be improper and would not serve the interests of justice.

August 4, 2017.

Respectfully submitted,

EUGSTER LAW OFFICE, PSC

_s/Stephen Kerr Eugster
Stephen Kerr Eugster
Attorneys for Robert E. Caruso

PRO SE STEPHEN KERR EUGSTER

_s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro se

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing along with its appendix with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on August 4, 2017, I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on August 4, 2017, I emailed, the foregoing document, including its appendix to counsel listed below at their respective email addresses:

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August 4, 2017.

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Stephen Kerr Eugster

APPENDIX

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