

**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 (**Lead**)

No. 17-35529

D.C. No. 2:17-cv-00003-RSM

U.S. District Court for Western  
Washington, Seattle

REPLY IN SUPPORT OF MOTION  
TO CONSOLIDATE APPEALS

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## I. INTRODUCTION

Appellants' counsel Steven Eugster ("Eugster") fails to rebut Appellee the Washington State Bar Association's ("WSBA's") argument that consolidation would allow for the most efficient review of the two appeals before this Court. Eugster separately appeals the District Court's dismissal of claims he brought on behalf of Robert E. Caruso (Case No. 17-35410, "Merits Appeal") and the District Court's imposition of sanctions because those claims were frivolous (Case No. 17-35529, "Fee Appeal"). Both appeals necessarily will require consideration of the merits of Eugster's claims, as well as Eugster's past lawsuits on similar grounds. Accordingly, consolidation of these appeals would help avoid duplicative briefing and would assist the Court in deciding these interrelated issues.

Rather than arguing that the two appeals cannot be efficiently and effectively briefed together, Eugster instead makes unsupported assertions that he and his client, Robert E. Caruso, will be prejudiced by consolidation. But his assertions of prejudice are premised upon meritless accusations of fraud upon the court and other arguments that are irrelevant to consolidation. Consolidation is appropriate and favored for cases such as this one where an appeal of a fee award and an appeal on the merits arise from the same lawsuit. This Court should order consolidation of the Fee Appeal into the previously filed Merits Appeal.

## II. ARGUMENT

### A. Eugster Fails to Refute That Consolidation Will Promote Efficiency or That These Appeals Can Be Effectively Briefed Together.

Eugster does not and cannot refute that the Merits Appeal and the Fee Appeal hinge on many of the same issues such that it would promote efficiency to address them together. *See* Resp. to Mot. to Consolidate Appeals, Dkt. Entry 13 (“Response”). Without any supporting argument, Eugster simply asserts that the appeals “are not based on the same ‘operative facts.’” Response at 16. This assertion is incorrect. Indisputably, the District Court granted the WSBA’s Motion to Dismiss because none of the claims Eugster advanced on behalf of Caruso were facially plausible, and awarded attorney fees because these same claims were legally and factually baseless. Order Granting Mot. To Dismiss, ECF No. 28 at 4-6;<sup>1</sup> Order Granting Mot. for Att’y Fees in Part, ECF No. 33 at 7. Thus, the merit of the claims brought by Eugster on behalf of Caruso is the core issue in both appeals.

This Court previously has recognized that consolidation of merits and attorney fees appeals is appropriate to ensure efficient appellate review. *Metcalf v. Borba*, 681 F.2d 1183, 1188 (9th Cir. 1982) (“expeditious consideration of all issues arising from a single lawsuit, disputes on appeal over the merits, as well as disputes regarding the allowance of attorney’s fees to a prevailing party, should

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<sup>1</sup> Docket entries in *Caruso v. Wash. State Bar Ass’n*, No. 2:17-cv-0003-RSM (W.D. Wash. May 23, 2017) are cited as “ECF No.”  
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ordinarily be considered and decided by this court in either a single or consolidated appellate proceeding” (quoting *Obin v. International Association of Machinists and Aerospace Workers*, 651 F.2d 574, 583 (8th Cir. 1981))). Eugster fails in his attempt to distinguish this authority. *See* Response at 16 (asserting, without any further explanation that “[t]he Eugster Appeal is a separate case”).

Eugster also does not specifically object to the WSBA’s position that the current case schedule for the Merits Appeal would allow sufficient time to address the Fee Appeal as well. Mot. to Consolidate Appeals, Dkt. Entry 12 (“Motion”) at 12. Accordingly, the WSBA respectfully requests that the Court consolidate the Fee Appeal into the Merits Appeal and order that the consolidated matter will follow the current schedule in the Merits Appeal.

**B. Eugster Fails to Establish That Consolidation Would Cause Any Prejudice to Caruso or to Eugster.**

Rather than challenging the basis for consolidating these appeals, Eugster instead relies on unsupported claims that he and his client will be prejudiced by consolidation. With respect to his client Caruso, Eugster merely asserts, without argument or explanation, that Caruso will be prejudiced by the WSBA’s arguments regarding Eugster’s history of bringing similar claims against the WSBA. *See* Response at 16-17. But Eugster’s history of bringing similar claims against the WSBA will be part of the Merits Appeal regardless of whether or not it is consolidated with the Fee Appeal. The District Court based its decision to dismiss

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several of the claims underlying the Merits Appeal in part on the fact that Eugster previously had raised the same claims and been rebuked in doing so. ECF No. 28 at 6 (“Plaintiffs’ counsel, Stephen K. Eugster, has previously raised these same constitutional claims in this District and been sharply rebuked by the Honorable James L. Robart for ‘mischaracterization of case law’ and making ‘nonsensical’ arguments.”). Eugster’s role in prosecuting the same claims against the WSBA, whether on behalf of himself, or on behalf of a client, is directly relevant to the Merits Appeals. Accordingly, Eugster has failed to establish any actual prejudice against Caruso from consolidation.

Likewise, Eugster provides no argument or explanation as to why he will be prejudiced if the Fee Appeal is consolidated with the Merits Appeal. Eugster merely cites to the “Safe Harbor Rule” and “Rule 12(c)(2),” as well as issues of whether there was sufficient support under Rule 11(b)(2) and (3), but he fails to articulate how these arguments relate in any way to consolidation. *See* Response at 17. Eugster also asserts, without any support, that the intent of the WSBA’s motion for attorney fees was not to seek sanctions, but rather to bring his prior actions before the District Court. Response at 18. As was the case with the Merits Appeal, however, the District Court’s consideration of Eugster’s prior claims against the WSBA is directly relevant to the Fee Appeal regardless of whether it is

consolidated with the Merits Appeal. *See* ECF 33 at 7 (discussing Eugster's prior lawsuits against the WSBA as relevant to basis for awarding sanctions).

Finally, Eugster asserts, without any explanation or argument, that the District Court lacked jurisdiction to consider the WSBA's Motion for Attorney Fees under Rule 11. In support of this contention, Eugster cites to the first page of the Motion for Attorney Fees. Response at 18. This Court should not address assertions unsupported by argument or legal authority. *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012).<sup>2</sup>

Eugster has failed to establish any prejudice to Caruso or to Eugster as a result of the consolidation of these two interrelated appeals.

**C. Eugster's Claims of Fraud Are Without Merit and Are Irrelevant to the Issue of Consolidation.**

Eugster's unsupported assertions of fraud on the court are entirely irrelevant to the issue of whether consolidation of these two appeals is appropriate. Rather, Eugster attempts to argue the merits of the WSBA's arguments to the District

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<sup>2</sup> Eugster also argues that because Plaintiffs' motions for Summary Judgment and for Preliminary Injunction preceded the WSBA's Motion to Dismiss, the District Court should have reviewed whether the Plaintiffs met the standards for summary judgment, rather than evaluating whether the standards for dismissal were met. Response at 13. It is unclear how this procedural argument relates to consolidation of these appeals or what relief Eugster seeks by asserting it. Regardless, it is procedurally appropriate to dismiss pending motions as moot in a matter where the standards for dismissal are met. *See, e.g., Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209, 1217 (W.D. Wash. 2006) (relying on motion to dismiss standard where both a motion to dismiss and motion for summary judgment were filed).

Court, which are issues the Court will consider when it reviews the merits of these appeals. Regardless, Eugster's allegations of fraud are entirely meritless for the reasons set forth below.

Relief from judgment for fraud on the court is "available only to prevent a grave miscarriage of justice." *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, \*5 (9th Cir. 2017) ("*Sierra Pac.*") (internal quotation omitted). Fraud on the court is evaluated based on whether the conduct at issue harmed the integrity of the judicial process, involved an unconscionable plan to improperly influence the court's decision, and included an intentional, material misrepresentation. *Sierra Pac.*, 862 F.3d at \*6. None of Eugster's assertions of fraud satisfy these standards.

First, Eugster asserts that the WSBA's counsel "fail[ed] to tell the Court the whole truth of the procedural record," because counsel referred to the WSBA's Motion to Dismiss and Objection to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction as the "Motion to Dismiss," in the WSBA's Motion to Consolidate Appeals. Motion at 3. The abbreviation of the title of the WSBA's filing, used for the sake of brevity rather than obfuscation, does not constitute fraud. The full nature of the motion was not hidden from the Court—rather, the WSBA's counsel directed the Court to the motion in the record with proper citation. *See, e.g.*, Motion at 2.

Eugster also repeatedly alleges that counsel withheld a “material fact” that the WSBA Eugster sued in past pro se cases is a distinguishable entity from the WSBA Eugster sued on behalf of Caruso. Response at 7, 8, 9, 14. This is not a fact, let alone a material one. The concept that the WSBA changed into a new entity as a result of bylaw amendments related to WSBA membership is a legal theory Eugster unsuccessfully advanced on Caruso’s behalf to the District Court. See ECF No. 28 at 4 (the District Court concluded that this theory was a “legal conclusion couched as a factual allegation” (internal quotations omitted)). The WSBA argued against this theory before the District Court, and will continue to so argue on appeal. See ECF No. 16 at 12-15. Refusing to adopt Eugster’s legal theory as a factual premise does not manifest an unconscionable plan to improperly influence this Court. See *Sierra Pac.*, 862 F.3d at \*6.

Additionally, Eugster asserts that the WSBA “fail[ed] to disclose” that two of his past cases, *Eugster IV* and *Eugster V*, were dismissed on jurisdictional and res judicata grounds respectively, rather than on the merits in the WSBA’s Motion to Dismiss. Response at 9-10. To the contrary, the WSBA expressly laid out the basis for the disposition of both cases. ECF No. 16 at 5-6.

In sum, Eugster has failed to establish any fraud on the District Court, nor is that issue relevant to the WSBA’s motion to consolidate these two appeals before this Court.

### III. CONCLUSION

Consolidation of these two appeals will promote the efficient and effective review of the interrelated issues in both matters. Eugster fails to establish that he or his client will be prejudiced by consolidation. Accordingly, the WSBA respectfully requests that this Court order consolidation of the Fee Appeal into the Merits Appeal and issue a new consolidated briefing schedule that tracks the schedule for the Merits Appeal.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2017.

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**CERTIFICATE OF SERVICE**

I certify that on August 10, 2017, I electronically filed the foregoing Reply in Support of Motion to Consolidate Appeals with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system by sending notification of such filing to the following:

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DATED this 10<sup>th</sup> day of August, 2017.



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