No. _____

In The Supreme Court of the United States

LILLIAN PELLEGRINI,

Petitioner,

v.

FRESNO COUNTY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Beverly Pellegrini
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QUESTIONS PRESENTED FOR REVIEW

1. Can the *Rooker-Feldman* Doctrine bar federal court jurisdiction under Federal Rules of Civil Procedure 60(b), 42 U.S.C. 1983, or 18 U.S.C. 1961 et seq. when officers of the state probate courts, its agents, municipal officers and banking officers act under the color of law outside their limited authority to take property from the rightful owner through acts of fraud?

2. Is it an abuse of authority to deny *de novo* review when a district court relies on misstated facts in an unpublished state court's opinion issued without notice, without review, when the state court lacked statutory authority to exercise jurisdiction over the parties to issue the opinion and when best evidence rebuts the facts contained in the opinion issued without any opportunity to be heard in any court and when equal justice requires the same rights to be maintained under the same circumstances?

PARTIES TO THE PROCEEDING

Petitioner:
Lillian Pellegrini
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Respondents:

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   Fresno County Public Guardian, Joshua Cochron
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4. UBS Financial Services
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APPENDIX

Note: Citations to ER refer to Excerpts of Record for Appellant Lillian Pellegrini filed in the Ninth Circuit Court of Appeals, Case No. 17-15735.

TABLE OF AUTHORITIES

Cases

STATUTES

Constitutional Provisions

Federal Statutes

Federal Rules

California Code

BASIS FOR JURISDICTION

Under 28 U.S.C. 1254 the United States Supreme Court has jurisdiction to review cases in the courts of appeals by writ of certiorari granted upon petition of any party in any civil matter after judgment was issued July 17, 2018.

STATUTORY PROVISIONS INVOLVED

The 14th Amendment of the U.S. Constitution requires due process before any taking of property.

Civil redress is provided under 42 U.S.C. 1983 when the state courts, its officers, and agents act under the color of law to knowingly and intentionally take property from the rightful owner.

Federal Rules of Civil Procedure, Rule 60(b) permit a new action, brought under federal law, when no action can be brought in the state court, when the state court officers exceeded their authority and jurisdiction under the U.S. Constitution, federal and state laws, and when the state court officers facilitated and participated in the process allowed to be mired in intrinsic and extrinsic fraud.

Civil remedies and penalties are provided in civil actions under RICO statutes 18 U.S.C. 1961 et seq. when theft is undertaken by persons acting together for purposes of engaging in theft through multiple acts of fraud in addition to damages under state law.

INTRODUCTION

Contrary to the federal district court's assertion (A-7), this matter does not stem from a trust administration dispute.

The matter concerns a property claim regarding Settlor/Trustee Lillian Pellegrini's solely owned property that was converted to the decedent when the decedent could not and did not exercise any control over the solely owned property of the Surviving Settlor/Trustee Lillian Pellegrini during life and held no power to exercise any control over any property interests held in the Angelo John Pellegrini and Lillian Dorothy Pellegrini Revocable Living Trust dated June 18, 1999 (referred to as the 1999 Trust) at death (ER, Vol.2, Tab 1).

The state probate court, with limited statutory authority, never had authority to exercise any jurisdiction over the Settlor/Trustee, her property, or any revocable trust that provided her revocability power with respect to the assets that she owned and contributed; the court held no authority to provide standing to a person with no interest in the property as beneficiary or trustee.

The facts and law, as stated by Plaintiff Lillian Pellegrini, are undisputed by the defendants. This matter concerns the taking of property from the rightful owner in violation of the 14th amendment due process and equal protection clauses, violation of state and federal statutes, facilitated by state courts acting outside the limitations set forth under state and federal statutes.

The state appellate and the federal district courts' opinions were issued by prohibiting participation and denying any opportunity to be heard resulting in perpetuating misrepresentations of fact and law and misconduct to validate the conversion, acts of fraud and theft, racketeering and money laundering in violation of state and federal laws and state and federal procedural and evidentiary rules to uphold the malfeasance undertaken in the state action.

STATEMENT OF THE CASE

Actions under the color of state law include the probate court exercising jurisdiction, outside its limited authority, over a competent, living Settlor/Trustee and rightful owner of all property over which, at all times, she retained control and permitted a petitioner, without standing, who holds no future interest or expectancy in any asset or income owned by the Settlor/Trustee to proceed in an action of conversion to bring the matter under the jurisdiction of the probate court.

As a result of the violations under the color of state law, actions were undertaken by officers of the court, counsel, its agents, banking institutions, and municipal officers to undertake acts of fraud to steal Lillian Pellegrini's property, retain it, launder it, and benefit from the stolen proceeds.

Lillian Pellegrini is entitled to full replacement of all assets stolen and all damages permitted under both federal and state statutes.

ACTION UNDER 42 U.S.C.1983

Congress enacted 42 U.S.C. 1983 as a means to enforce the 14th amendment rights that were being abused, as explained in *Mitchum v. Foster,* 407 U.S. 225 (1972) when

> …state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

In *ex parte Virginia*, 100 U.S. 339 (1880), the state judge, although authorized by law to select jurors, exceeded his authority when he excluded jurors based on race and was found liable for his actions without immunity.

Persons Acting Under Color of State Law

Officers of the courts, including judges, counsel and judge's municipal officers and agents, and banking officers are persons under 42 U.S.C. 1983 acting under the color of state law by acting outside the limitations of their authority and by participating in the common law tort of conversion, without immunity, to subject or cause Lillian Pellegrini to be subjected to a deprivation of her rightful ownership of property, are subject to liability in law, equity, or any other proper proceedings for redress, which includes full replacement of property and all remedial damages and penalties permitted under both state and federal laws.

As in *ex parte Virginia,* court officers have limited authority over probate matters; they have no authority to convert property to bring the matter into probate or provide third parties with orders to insist banking institutions comply with the illicit interference in private accounts to steal assets from the rightful owner.

California Statutes Limit a Probate Court's Authority and Jurisdiction

Specifically excluded from a state probate court's authority is its exercise of jurisdiction over a decedent's estate held in a multi-settlor revocable trust under California Probate Code §15400 and §15401 (ER, Vol 2, Tab 2, p.93). The 1999 Trust's revocability was independent of the any subtrusts' revocability or irrevocability. Financial assets and real property subject to Probate Code §5305 and Civil Code §683, respectively, permit transfer of assets titled in joint tenancy with right of survivorship to the survivor owner outside a probate court's administration or jurisdiction whether these joint tenants hold the property outside a revocable trust or hold their 100% present interests in a revocable trust each as Settlor and Trustee without change in property character. *Estate of Drucker,* 152 Cal. App. 3d 509 (1984); *Matter of Estate of West,* 948 P.2d 351 (Utah Sup. Ct. 1997); *Holdener v. Fieser,* 971 S.W.2d 946 (Mo. Ct. App. 1998)

A probate court has no jurisdiction over the internal affairs of a revocable trust subject to the Surviving Settlor/Trustee's power of revocation of

the trust in terms of all property that she owns and contributed (Probate Code §15800) and/or subject to the Surviving Settlor/Trustee's power of withdrawal of all principal and income or over which she has a general power of appointment whether the trust is irrevocable or revocable (Probate Code 15803).

Under Probate Code §17200, a trustee or beneficiary has no standing when the Settlor/Trustee retains power and control over her property and has exercised that power and control. *Babbitt v. Superior Court,* 246 Cal.App.4th 1135 (2016).

When a probate court exercises jurisdiction despite these statutory limitations to permit conversion of property not subject to its jurisdiction, it acts under the color of law to the harm of the rightful owner. Orders, judgments, or opinions issued by a court without authority when the estate has no interest in the assets are void and subject to attack at any time. *Estate of Lee,* 124 Cal. App. 3d 687 (1981).

Actions by Persons in Excess of their Statutory Authority Engaging in Common Law Torts without Immunity from Liability

State courts and its officers have no authority to facilitate the common law tort of conversion. Under California Probate Code §13605, persons engaging in conversion and fraudulent transactions are liable to the person with superior right and title to three times the amount paid. No immunity can be given, and if a statute exists to grant such actions, the statute is unconstitutional.

The following classes of cases, as stated in *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949), are similar to the present action and have been held to provide no immunity and to find liability by the actors:

i. Cases in which an official justified his action under an unconstitutional statute.
ii. Cases in which an officer exceeded his statutory authority.
iii. Cases in which an officer sought shelter behind statutory authority or some other sovereign command for the commission of a common-law tort.
iv. Cases in which an officer was not relieved of liability for tort merely because he was acting for the sovereign.
v. Cases in which an officer was held liable for a common-law tort, but the opinion made reference to a situation involving an unconstitutional taking.

Conversion Scheme under Color of State Law

The defendants do not dispute their knowledge of Lillian Pellegrini's property ownership and the acts of conversion.

Lillian Pellegrini's property was not derived from the decedent or the decedent's estate. The 1999 Trust maintained all ownership rights of the contributing Settlor (ER, Vol. 2, Tab 1, p. 111). Lillian Pellegrini's property derived from her sole ownership of property she inherited from her siblings' probated estates in 1999 and 100%

ownership interest in assets titled in joint tenancy with right of survivorship, that included real property and limited financial assets (ER, Vol.2, Tab 1). Angelo Pellegrini and Lillian Pellegrini held no property titled as community property at any time during their marriage.

To demand funding of the decedent's trust, Marleen Merchant and her counsel brought a false action, without standing, falsely claiming Lillian Pellegrini breached her fiduciary duty by not funding a Family Trust, which was invalid by law under Probate Code §15205 for failing to designate a beneficiary of financial assets, subject to Lillian Pellegrini's discretionary use after Lillian Pellegrini's life, thereby creating a general power of appointment in Lillian Pellegrini under 26 U.S.C. 2041. Marleen Merchant and her counsel knew that Lillian Pellegrini's property was not subject to the funding requirement and that the decedent spouse held no property interest in title or character that could be used to fund the invalid trust. They falsely claimed Lillian Pellegrini converted assets, which they knew were Lillian Pellegrini's sole and separate property, to demand funding of the credit shelter Family Trust for the court to exercise jurisdiction over this subtrust.

Before commencing any action, Marleen Merchant and her counsel Weintraub Tobin knew that Lillian Pellegrini's financial assets held at UBS Financial Services comprised a 4/9 share of assets inherited by Lillian Pellegrini in 1999 with a market value of more than $1.1 million in 2008 because

Marleen Merchant and her counsel Weintraub Tobin attempted to acquire a greater than equal one-third distribution of the complementary 5/9 share held in the trust estate of Lillian Pellegrini's sister, Rose Avedisian, and knew that Lillian Pellegrini's assets, through capital growth, exceeded the value of Rose's trust estate.

UBS Financial Services knew the value of Lillian Pellegrini's sole and separate property held in the 1999 Trust when UBS acquired the account in 2006 and when UBS Financial Services acquired Rose Avedisian's trust account in 2007. By contract (ER, Vol. 2, Tab 1, p. 86), UBS Financial Services knew that Lillian Pellegrini and Angelo Pellegrini held independent control over the account and that by the terms of the 1999 Trust, UBS Financial Services knew that Lillian Pellegrini retained control over all property contributed to the 1999 Trust and that Angelo Pellegrini never exercised any independent control over any asset held in the 1999 Trust in life and could not control the devise of any asset after death.

Under Lillian Pellegrini's power of full withdrawal of all principal, Lillian Pellegrini transferred her sole and separate property inherited in 1999 that mistakenly funded the Marital Trust to the fully revocable Survivor's Trust, a subtrust under the 1999 Trust that was for the sole benefit of Lillian Pellegrini, contrary to the misstatements cited by the state appellate court (A-71-76). [State courts have copies of the 1999 Trust that was ***revoked before any action commenced,*** after the

approved full distribution (ER, Vol.2, Tab 1, p. 84) of all assets owned by Lillian Pellegrini in 2008.]

Under the 1999 Trust's spendthrift clause (ER, Vol. 2, Tab 1, p. 112) and under Probate Code §15300, no principal or income asset could be transferred to anyone before any gift was received by a beneficiary. Marleen Merchant held no present or future interest in any asset, principal, or income, either vested or unvested, contingent or through expectancy in any trust subject to Lillian Pellegrini's ownership, withdrawal rights, and discretionary devise.

In knowing that Lillian Pellegrini retained revocability control over all assets that she contributed to the 1999 Trust, Marleen Merchant and counsel Weintraub Tobin brought action to convert Lillian Pellegrini's property to that of the decedent with intent to deprive Lillian Pellegrini control over her property.

The Court exercised jurisdiction by providing Marleen Merchant standing, when, under Probate Code §48, Marleen Merchant held no interest in any property at issue. Objections to standing were raised and never heard.

Before trial, the court possessed all ownership records (ER, Vol. 2, Tab 1, p.2-70; 90-102). The court acquiesced to Marleen Merchant and her counsel's demands to remove Lillian Pellegrini as trustee when it knew: (i) the Family Trust was invalid by law; (ii) it could not be funded with Lillian Pellegrini's property; and (iii) Lillian Pellegrini was

never trustee of the Family Trust. The court appointed its agent without notice, without hearing to act as trustee of a nonexistent, invalid trust and issued injunctions to steal Lillian Pellegrini's property.

The public guardian, court officers and counsel seek immunity despite exceeding their authority to engage in theft by fraud while banking officers claim immunity by acting under known illicit court orders and hold property known to be rightfully owned by Lillian Pellegrini.

Therefore, all actors are complicit in their actions to steal property and can be allowed no immunity from liability.

THEFT AND ACTS OF FRAUD RESULT IN RICO CLAIM UNDER 18 U.S.C. 1961 ET SEQ.

The Ninth Circuit Court of Appeals inferred that the act of conversion through acts of fraud resulting in theft were stated with specificity (A-3), which were not disputed by any of the defendants; the defendants only claim no liability for their participation in fraud and theft although no immunity is permitted. If any statute grants immunity for such acts, that statute must be deemed unconstitutional on its face or in its effect.

A federal civil action is permitted under 18 U.S.C. 1964 for redress of racketeering under 18 U.S.C. 1962 (b) stating,

> it shall be unlawful for any person through a pattern of racketeering activity…to acquire or

> maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The predicate acts subject to the 18 U.S.C. 1962 action are listed in 18 U.S.C. 1961 that include mail fraud, bank fraud, securities fraud, money laundering and actions to undertake transactions using the stolen proceeds.

Persons Acting Together to Undertake the Predicate Acts

The persons under the statute are anyone that can hold legal or beneficial title. The enterprise is the entity that brings all actors together under 18 U.S.C. 1962 to undertake the illegal predicate acts.

The "enterprise" was the invalid, nonexistent Family Trust that provided a means by which to convert and steal property from the rightful owner Lillian Pellegrini, appoint a trustee (the Fresno County Public Guardian) to take bare legal title, and through mail fraud, bank fraud, securities fraud, money laundering, has set up different accounts all claiming to be the Family Trust, evidence that the Family Trust does not exist. The Family Trust was invalid with respect to principal and income as of 2004 and a nullity for lack of property in 2008 when the real property was sold.

The plan: Marleen Merchant and her counsel knew before bringing any action that Lillian Pellegrini was the rightful owner of all property

contributed to the 1999 Trust and that the decedent spouse, at death, held no property interest subject to his devise by trust or will.

To gain standing and bring an issue to Probate Court, they claimed that the Family Trust was created, that Lillian Pellegrini breached her duty by failing to fund it, and that Lillian Pellegrini wrongfully took property from the decedent as her own. All claims were proven false by evidence of title and the approved 2008 distribution before the 1999 Trust was revoked (ER, Vol 2, Tab 1, p. 4-8;90-102).

To uphold standing, the Court ignored evidence of title by upholding mistakes in a Statement of Assets, which was corrected by the filed 2013 Accounting and proven false by evidence of title.

The Court denies due process by eliminating any opportunity to be heard by Lillian Pellegrini or Beverly Pellegrini to defend Lillian Pellegrini's ownership rights and Beverly Pellegrini's future interest.

Injunctions were issued on the claim that the "enterprise", i.e., the Family Trust, was a viable entity, created, but not funded. Court orders were issued to fund it using Lillian Pellegrini's assets now converted to that of the decedent spouse.

UBS Financial Services complied, taking an additional $70,000 for which there is no accounting. Depositary banks accepted the stolen funds when they were informed and knew the funds were stolen and when no Lillian Pellegrini Family Trust existed,

no account for the Lillian Pellegrini Family Trust existed, and to this day, no Lillian Pellegrini Family Trust exists.

All persons participating in the fraud and theft with support from the courts have benefited by engaging in transactions using the stolen funds.

Lillian Pellegrini is deprived of her rightfully owned property; she is deprived of investing this capital for earnings and wealth creation.

Facts Known before State Action Commenced

Marleen Merchant held no beneficiary future interest and had no expectancy of any income or principal in any asset owned by Lillian Pellegrini and subject to Lillian Pellegrini's discretionary devise; Marleen Merchant was removed as successor trustee by both Settlors when they opened the 1999 Trust account at UBS Financial Services (ER, Vol. 2, Tab 1, p.86) and in subsequent amendments before the 1999 Trust was revoked due to her own malfeasance and intent to cause waste and deprive Lillian Pellegrini of her property and wealth creation. Therefore, Marleen Merchant or her counsel had no standing to request appointment of the Public Guardian as Trustee.

Fresno Superior Court officers knew, since inception, with proof of statements obtained by subpoena by Weintraub Tobin that a Family Trust did not exist and was an invalid trust since 2004 and confirmed in 2008 when the real property was sold. The Fresno County Public Guardian was appointed as trustee of the invalid Family Trust in violation of

Probate Code 15660.5 that requires full distribution to the sole beneficiary Lillian Pellegrini.

The Fresno County Public Guardian has legal title as trustee of Lillian Pellegrini's property, which could never be used to fund the Family Trust as stated in the 1999 Trust. Three banks now hold the stolen property in four accounts, three of which have different names and the identical EIN fraudulently procured in May 2017 (ER, Vol.3, p.4). No funds have been distributed to Lillian Pellegrini who is the sole owner and beneficiary of these assets and is designated as the sole beneficiary on 2016 Form 1041 (ER, Vol.2, Tab 3, p.2-7).

UBS Financial Services' 1999 Trust account contract agreement indicated that Lillian Pellegrini held independent control over all transactions (ER, Vol 2, Tab 1, p. 86). UBS notarized the addendum appointing Beverly Pellegrini as co-trustee of Lillian Pellegrini's revocable trust from which the property was stolen, with full knowledge that any person or entity, public or private, interfering with Lillian Pellegrini's accounts held at UBS Financial Services without her authenticated authorization would be liable for damages.

The depositary banks have willingly accepted deposits of stolen assets that they have agreed are stolen from Lillian Pellegrini and held in trust accounts but not the trust account indicated on the check issued by UBS Financial Services, proving its nonexistence.

Pattern of Predicate Acts

Fresno Superior Court permitted the conversion of assets when it knew and possessed evidence of Lillian Pellegrini's sole title and interest in all assets held in the 1999 Trust and the approved distribution (ER, Vol 2, Tab 1) before the scheduled trial. A demand for dismissal was provided to the court based on the January trial minutes (ER, Vol. 2, Tab 2, p. 82-90); the court solicited nonparty Beverly Pellegrini to prepare a brief to be heard at the scheduled hearing in May; no hearing ensued. Lillian Pellegrini was removed as trustee of a never created trust with no valid document supporting its existent, and of which Lillian Pellegrini was never trustee. No required notice, hearing, or trial occurred. No hearing at any time in any court, state or federal, has ever taken place regarding any issue raised.

The state appellate court permitted the theft in January 21-28, 2016 without review, without notice, and without a hearing.

Mail Fraud after Conversion

Mail fraud, described under 18 U.S.C. 1341 is a predicate act subject to $1 million in penalties for acts that further theft.

Under California Probate Code, conservatorship or guardianship law is separate from trust law. The public guardian, as a Court-appointed trustee, has no authority to undertake fiduciary duties to

manage assets and is required to distribute all assets outright.

Fresno County Public Guardian sent a certificate of authority under conservatorship law by mail to UBS Financial Services regarding information on a family trust account when the court and the Fresno County Public Guardian already possessed evidence of the approved 2008 distribution that did not include a Family Trust (ER, Vol. 2, Tab 1, p. 90-102). Therefore, the trust that provided Marleen Merchant standing did not exist and the court appointed the guardian as trustee of a known nonexistent trust.

UBS Financial Services stated in its letter sent by mail (ER, Vol. 2, Tab 2, p. 46-47) that the 1999 Trust was the Pellegrini Family Trust and that Lillian Pellegrini was removed as trustee of the 1999 Trust. Any trustee of the 1999 Trust, however, owed a fiduciary duty solely to Settlor Lillian Pellegrini, who held all rights and powers to withdraw any asset that she had contributed to the 1999 Trust. *Estate of Giraldin,* 55 Cal. 4th 1058 (2012).

The Fresno County Public Guardian sent the August 19, 2015 letter (posted August 21, 2015) demanding a check for $544,386.91 made payable to the public guardian's office (ER, Vol. 2, Tab 2, p. 52-53) following the August 18, 2015 Citizen's Complaint filed with the Department of Justice and Fresno County Superior Court (ER, Vol. 2, Tab 2, p. 62-76). The letter was considered fraud.

These letters and demands were the basis of the Mail Fraud Report filed with the Postal Inspector General C#1762977 (ER Vol 2, Tab 2, p. 41-61). A

follow-up report was filed in June online C#1790866. Both are still pending.

Bank Fraud and Securities Fraud

Bank fraud, as stated under 18 U.S.C. 1344 is subject to penalties of $1 million; securities fraud in the unauthorized sale of securities, subject to the Securities and Exchange Act of 1934 Section 10(b), was undertaken when UBS Financial Services Branch Manager took instruction by fax (ER Vol. 2, Tab 2, p. 28) from an unauthorized third party to liquidate securities, fixed income investments, and money market funds without the required authenticated authorization to access Lillian Pellegrini's accounts, knowing it would be liable under the trust addendum notarized by UBS (ER, Vol. 2, Tab 2, p. 29-39).

Keesal Young & Logan filed a wrongful death notice at Fresno Superior Court requesting direction allowing Lillian Pellegrini to keep her property if Beverly Pellegrini's life ended under the presumption and only possible inference by Keesal Young & Logan that Marleen Merchant would be Lillian Pellegrini's sole beneficiary on Beverly Pellegrini's demise. Beverly Pellegrini filed a response (ER, Vol. 2, Tab 2, p. 22-27); no response from either Fresno Superior Court or the state appellate court ensued.

On January 21-28, 2016, without notice, a hearing, review, or any required procedure, Fresno County Public Guardian contacted Mike Williams, Branch Manager at UBS Financial Services to

liquidate Lillian Pellegrini's assets without her authorization (ER, Vol. 2, Tab 2, p. 28). After liquidating the assets, UBS Financial Services threatened to liquidate all holdings in all accounts unless they were transferred immediately. An email to the CEO in Switzerland obtained a time extension and permission to bring action.

Laundering of Monetary Instruments

Under 18 U.S.C. 1956, subject to 18 U.S.C. 1961, persons engaging in transactions involving proceeds obtained through an illegal act are subject to the monetary damages of $500,000 or twice the value, whichever is greater.

Mike Williams, UBS Financial Services Branch Manager liquidated invested assets without authorization that exceeded the proceeds of $1,528,271.44 transferred by UBS Financial Services to its account at Bank of New York Mellon (ER, Vol. 1, Tab 5, p. 80-87; ER, Vol. 2, Tab 3, p. 47), including transaction costs. An additional estimated $70,000 was also taken from the account for which there is no accounting.

Bank of New York Mellon refused to issue a stop payment before the funds were deposited at Comerica Bank when it was informed of the illegal transaction and that the funds were stolen.

The check was endorsed by the Fresno County Public Administrator, deposited at Comerica Bank in a pooled trust account, which was not the account indicated on the face of the check (ER, Vol. 2, Tab 3,

p. 47). Comerica Bank, discovered to be the depositary bank through Fresno County Treasurer, refused to return the check or issue a stop payment when it knew from the face of the check that the Lillian Pellegrini Family Trust did not exist and that the funds were being deposited, instead, in a pooled trust account. *Smith v. Olympic Bank***,** 693 P.2d 92 (Wash. Sup. Ct. 1985) (en banc).

The Lillian Pellegrini Family Trust remains nonexistent. Comerica's branch manager confirmed Lillian Pellegrini's rightful ownership by records of title, the same records provided to the court (ER Vol. 2 Tab 1). Comerica refused to return the stolen assets to Lillian Pellegrini.

In October 2017, Comerica informed Beverly Pellegrini that the Pellegrini Family Trust account was opened in December 2016 using Lillian Pellegrini's individual social security number without notice or authorization from Lillian Pellegrini. The EIN was procured in May 2017 for filing the 1041 tax return, indicated by correspondence from the IRS (ER, Vol 3, p.4).

In 2018, two additional trust accounts at Bank of America and California Bank and Trust were also opened with the identical EIN obtained in May 2017; all are fraudulent accounts of different names with the identical EIN that exist for the benefit of Fresno County officers, the courts, and its agent. Officers at the Department of Treasury and Internal Revenue Service were informed of the stolen property; the banks' branch managers agree that the funds are stolen but continue to conceal all account

information and will not return the property to the rightful owner. Upon receipt of the IRS correspondence dated August 31, 2018, the Federal Trade Commission's Legal Counsel was contacted as directed.

All banks continue to be knowing participants in concealing and retaining stolen property from the rightful owner Lillian Pellegrini.

Undertaking Transactions Using Stolen Property

Under 18 U.S.C. 1957, penalties are assessed for each transaction using the stolen property.

All defendants have participated in transactions using the funds known to be owned by Lillian Pellegrini that were converted and stolen through acts of fraud. UBS Financial Services liquidated assets that generated more than $1,528,271.44 and withdrew an estimated $70,000 for which there is no accounting.

On February 4, 2016, Fresno County Public Guardian transferred $439,497.62 of the stolen property to Weintraub Tobin from Lillian Pellegrini's revocable trust for unpaid fees supposedly owed by Marleen Merchant when Marleen Merchant held no beneficiary interest in these assets or any asset previously held in the 1999 Trust, before or after the 2008 distribution, in violation of Probate Code §15300 and the 1999 Trust's spendthrift clause (ER, Vol. 2, Tab 1, p. 112).

From 2016-2018, Fresno County Public Guardian and Fresno County Counsel have filed two

accountings and filed two 1041 tax returns. Participation in the hearings was not permitted despite objections (ER, Vol. 2, Tab 3, p. 15-46). The tax returns claimed income of less than $600.00 for the combined two years and deductions of less than $9,400. The returns did not include the payment of $439,497.62 as a deduction. A reconciliation of the accountings filed was submitted to the Department of Treasury and the IRS shows total deductions in excess of the $439,497.62 of $22,661.74 through March 2018, thereby overstating the balance in the pooled account.

In February 2018 Fresno County Public Guardian withdrew $249,000 that was deposited at Bank of America in the Pellegrini Revocable Living Trust Family Trust dated February 1, 2016 with the same EIN as the Pellegrini Family Trust held at Comerica that was fraudulently obtained in May 2017.

In March 2018, an additional $249,000 was withdrawn and deposited at California Bank and Trust under yet a different undisclosed name with the identical EIN.

The bank statements would not be released to Lillian Pellegrini by the banks or the court, thereby concealing all activities regarding these accounts. Nevertheless, the reported earnings over a 2-year period total less than $600. This is waste of assets stolen from the rightful owner and used for the sole benefit of the perpetrators of fraud and theft.

Control of Bogus Trusts

The bogus trust accounts and the pooled trust account hold stolen assets belonging to and rightfully owned by Lillian Pellegrini. All bank accounts' income flows into the pooled trust account controlled by Fresno County Public Guardian as trustee with Lillian Pellegrini reported as beneficiary. Lillian Pellegrini, despite requests, receives no income and no principal for her support. All assets are used for the benefit of the County, Fresno County Counsel, Fresno Superior Court, and Fresno County Public Guardian and anyone else that receives any transfer of these assets.

The theft continues to proliferate in accounts for the perpetrators' benefit.

Theft of Lillian Pellegrini's Property Affects Domestic and Foreign Commerce

Lillian Pellegrini actively invested cash assets as a shareholder and holder of commercial paper of domestic and foreign corporations with operations worldwide, actively traded on the New York Stock Exchange. Other holdings included municipal bonds, and U.S. Treasuries. The dividends and income generated were re-invested in similar holdings that produced dividends and income of more than $100,000 annually since 2008, according to Social Security Administration records.

Earnings generated under management by the Fresno County Public Guardian have totaled less than $600.00 over a 2-year period. This waste has

resulted in diminished capital for investment, affecting commerce.

Total federal damages and penalties more than double the state claim of damages, increasing the state claim of $14 million as of 2016 to a total of $30 million under state and federal law in addition to the replacement of all assets.

WHY THE U.S. SUPREME COURT MUST GRANT CERTIORARI REVIEW

Inconsistent Application of *Rooker-Feldman* Denies Fundamental Property Rights, Guaranteed under the U.S. Constitution, 14th Amendment

The problem with *Rooker-Feldman* is not its complexity or the difficulty with its basic and narrow concept. The problem with the doctrine is that it is applied inconsistently among the circuits and within the Ninth Circuit despite rulings from the U.S. Supreme Court in *Exxon Mobil Corporation v. Saudi Basic Industries Corp.,* 544 U.S. 280 (2005) and *Lance v. Dennis*, 546 U.S. 459 (2006).

Procedurally, this matter is similar to the *Exxon Mobil* case. Exxon Mobil filed an action in federal court while Saudi Basic's action was ongoing in state court.

The complaint for the claim of stolen property held by Fresno County since January 2016 was filed in federal court in August 2016 while the state

appellate case was still pending. The cases in state and federal court concerned two different matters.

The state appellate court matter concerned the lack of statutory authority to exercise jurisdiction over Lillian Pellegrini, her trusts, or her property that was not derived from the 1999 Trust or the decedent and that by exercising jurisdiction that the court did not have, it exceeded its authority in entertaining the false claims stated by the petitioner, who was without standing to bring any claim.

The claim in Federal Court was the theft of Lillian Pellegrini's property through acts of fraud permitted by the state appellate court without any opportunity to be heard in any court. Under similar actions of equal protection, denial of any participation in the proceedings to defend one's rights has been automatically reversed to undo the harm. In this matter the harm is perpetuated.

This Court, in *Lance v. Dennis,* 546 U.S. 459 (2006) stated in a footnote that a de facto appeal might be a case in which an estate is litigating in federal court an earlier state court decision involving a decedent. The present matter, however similar in sound, differs. The decedent's property interest or estate held in a multi-settlor joint revocable trust was not subject to a probate court's jurisdiction or administration. The probate court had no authority to exercise jurisdiction over a living, competent Settlor/Trustee who was also the sole owner and contributor retaining full dominion and control over

her property interests. *Estate of Lee,* 124 Cal. App. 3d 687 (1981)

Lance v. Dennis concerned the issue of privity; a nonparty to the state action was not in privity with the federal action. Beverly Pellegrini was not a party to the state court action but was an indispensable, unjoined party who was prohibited from defending her future interest when it would be affected by the action as Lillian Pellegrini's beneficiary and trustee to preserve and protect Lillian Pellegrini's interests. Marleen Merchant, petitioner in the state court action, had no interest in any asset held in the 1999 Trust subject to Lillian Pellegrini's sole ownership and control and no interest in any asset held by the decedent during his lifetime or at death. (Opening Brief, p. 1-2)

The Ninth Circuit relied on *Rooker-Feldman*, citing *Noel v. Hall,* 341 F. 3d 1148 (9th Cir. 2003) (A-2) to deny subject matter jurisdiction over Lillian Pellegrini's claim for the conversion, acts of fraud, theft, and money laundering employed to take her property. The Ninth Circuit held that *Rooker-Feldman* is a bar against a legal injury caused by a state court judgment based on allegedly erroneous legal ruling, i.e., a de facto appeal.

The court failed to add that *Noel v. Hall* stated *Rooker-Feldman* is not a bar when the injury is caused by the illegal act or omission by the defendants or when the state action had already gone to judgment, which in such cases, state preclusion laws may apply.

Other cases apply *Rooker Feldman* differently:

Sibley v. Lando, 437 F.3d 1067 (11th Cir. 2005) has been cited to uphold that claims for monetary damages are outside the *Rooker-Feldman* doctrine; *Sibley* judges were found to have acted within their authority and therefore immune from liability.

Long v. Shorebank Development Corporation, 182 F. 3d 548 (7th Cir. 1998) found the state and federal claim were not inextricably intertwined when a person is precluded from participating in the proceedings.

Kougasian v. TMSL, Inc. 359 F 3d. 1136 (9th Cir. 2004) found extrinsic fraud in failing to provide witness contact information. The matter might be subject to preclusion.

Maldonada v. Harris, 370 F. 3d 945 (9th Cir. 2004) found that a nuisance law against advertising on a billboard on one side and free speech on the other might be unconstitutional as the purpose of the nuisance law gave a right to the public for unobstructed views. *Rooker-Feldman* and claim preclusion were not bars.

Extrinsic Fraud is a Bar to Preclusion and Res Judicata

Extrinsic fraud prevents a party from participating in the proceedings to defend her rights. Courts have consistently held that extrinsic fraud renders a judgment void.

In *Windsor v. McVeigh,* 93 U.S. 274 (1876) this Court addressed the issue of whether the plaintiff's property could be forfeited by the court in judicial

proceedings to which he was not permitted to appear and defend his right of title. The Court stated, "[w]herever one is assailed in his person or his property, there he may defend for the liability and that right are inseparable."

In California state preclusion law requires that a full and fair hearing must have occurred. The California Supreme Court stated in *Spector v. Superior Court,* 55 Cal. 2d 839 (1961),

> It is a cardinal principle of our jurisprudence that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions. His right to a hearing does not depend upon the will, caprice or discretion of the trial judge who is to make a decision upon the issues.

[See also *Estate of Buchman,* 123 Cal. App. 2d 546 (1954)].

Extrinsic Fraud Denies Due Process and Equal Protection

Extrinsic fraud preventing a party from a fair opportunity to present his defenses, as stated above, renders the judgment void.

To facilitate the conversion, the state court denied Lillian Pellegrini and Beverly Pellegrini any opportunity to defend Lillian Pellegrini's superior

title and interest at any scheduled hearing, thus exercising extrinsic fraud. Letters and complaints (ER, Vol. 2, Tab 2) stated no opportunity to be heard was permitted. In effect, no hearing ever occurred in any court, state or federal.

Critical hearings at Fresno Superior Court where due process was eliminated:

i. No hearing was ever held when the lower court demanded unjoined party Beverly Pellegrini file an accounting indicating discrepancies in the previously filed statement of assets under threat of sanctions against Lillian Pellegrini.

ii. The lower state court demanded that Beverly Pellegrini prepare and file comments to the tentative ruling and briefs for Lillian Pellegrini; Lillian Pellegrini and Beverly Pellegrini were denied opportunity to defend the legal arguments presented.

iii. Statements obtained by Weintraub Tobin's subpoenas from UBS Financial Services through its counsel, Keesal Young & Logan (ER, Vol. 2, Tab 1, p. 92-102) confirmed that the Family Trust was not created; Weintraub Tobin knew the assets in the UBS account were Lillian Pellegrini's sole and separate property and knew from deeds and public records that the real property sale was final in March 2009 before any action commenced. The Court took judicial notice of the $684,558.25 in proceeds transferred by the title company to the Survivor's Trust, noted by Weintraub Tobin at the pre-trial settlement conference in September 2013.

iv. The trial court issued its ruling on the docket at 7:44 a.m. before the trial (ER, Vol. 2, Tab 2, p.91). At trial, Beverly Pellegrini was prohibited from the proceedings and prohibited from testifying as Lillian Pellegrini's witness.

v. Injunctions to take property require notice and a hearing by law as upheld in *Connecticut v. Doehr,* 501 U.S. 1 (1991). The ruling issued in June 2014 stated that the court was without authority to issue injunctions requiring funding of a trust that did not exist. Notice and hearings were eliminated indicated on the face of the injunction orders.

vi. The January 6, 2016 writ of prohibition was granted on January 19, 2016 seeking review; no review and no hearing ensued. The opinion was issued 9 months after the theft; a claim filed with the County in February 2016 was filed in federal court in August 2016; no hearing took place in federal court either.

vii. The January and August trials were one-sided; Lillian Pellegrini's evidence was prohibited. Whatever transpired was not a hearing or a trial.

The state court continues to exercise jurisdiction on an open case, continues to deny Lillian Pellegrini and Beverly Pellegrini any opportunity to be heard, and continues to approve transactions to launder money.

The basis for dismissal by the district court and the Ninth Circuit is circular. The District Court claimed a hearing occurred in its forum (A-5). It dismissed the complaint with prejudice which could

only be accomplished after a hearing (A-68). The Ninth Circuit claimed in Item 3 of its memorandum (A-3) that extrinsic fraud was not stated and directs the District Court to change the dismissal to one without prejudice to find a forum, (A-4) but by its change, it indicates that no hearing occurred in federal court when subject matter jurisdiction was the basis of granting jurisdiction. The Ninth Circuit omits discussion of preclusion under state law. Preclusion, however, cannot apply where there is extrinsic fraud, and the matter cannot be inextricably intertwined when the matter was not heard in any state or federal court.

Federal claims can be brought in federal court. State court judgments obtained outside the statutory limitations of the state court with a cause of action by state actors acting under the color of state law is a federal claim purposefully enacted to handle U.S. CONST. amend. 14 violations.

Intrinsic Fraud

Federal Rules of Civil Procedure (FRCP) 60(b) does not distinguish between extrinsic and intrinsic fraud. Either is sufficient to provide relief. In addition, FRCP 60(b) permits relief when the judgment is void. Congress enacted 42 U.S.C. 1983 specifically to address wrongdoing in state courts, either through the court's inability to stop the wrongdoing or by the court's participation in the wrongdoing. Congress enacted a private civil cause of action under RICO when actors take part in theft through multiple acts of fraud.

Intrinsic fraud was used by the parties to make a claim for the property at issue. The courts have applied *Rooker-Feldman* in intrinsic fraud cases to determine if the issue is inextricably intertwined, for which the next test is issue preclusion under state law, which reverts back to extrinsic fraud to determine if the hearing was fair. The concept is that if there were a fair hearing, the intrinsic fraud of the actors would be made evident. If no hearing or no fair hearing occurred, the fraud would be perpetuated as in the present matter.

This matter presents a case in which Lillian Pellegrini's property was stolen through conversion and multiple acts of fraud, in which the court participates in the fraud and theft by maintaining an open case outside its authority and jurisdiction to launder funds for county officers and its agent while continuing to deny Lillian Pellegrini or noticed party Beverly Pellegrini any opportunity to be heard regarding Lillian Pellegrini's property rights. The court officers have crossed the line of their authority and are fully liable for their illegal acts without immunity. *Rooker Feldman* cannot be used as a shield to uphold a state court's illegal acts and the illegal acts of the defendant officers of the court and banking institutions.

It is asserted that if courts continue to apply *Rooker-Feldman* inconsistently to bar jurisdiction based on some acts of fraud and exclude others when all acts of fraud are illegal, fundamental, guaranteed protected rights will be harmed, negating the intent of Congress in passing 42 U.S.C.

1983 as a means to correct the abuses that are known to continue to occur in state courts. When a doctrine is used to avoid protecting fundamentally guaranteed rights, the doctrine is unconstitutional in its practice.

Review Begins with Title

In *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) title had passed to Lord Fairfax's heir before the treaty was ratified. Analysis began with title as opposed to the treaty. Had the state appellate court began its analysis with title, the court would have found that all assets were owned and contributed by Lillian Pellegrini and that the 1999 Trust provided that the contributing Settlor retained ownership rights over the property and interest held in the 1999 Trust (ER, Vol 2, Tab 1, p. 111). On distribution, only the Survivor's Trust would be funded with property interests reflected by Lillian Pellegrini's ownership, i.e., all assets in her sole name and all assets that were titled in joint tenancy with right of survivorship of which Lillian Pellegrini was the sole owner on the death of her husband, Angelo Pellegrini, as intended by the creators of the 1999 Trust.

The state appellate court stated the Family Trust was irrevocable on the decedent's death (A-97). The Family Trust's irrevocability is irrelevant to the requirements specified for funding. The decedent held no community property and no separate property and no balance of either to fund the Family Trust. The 1999 Trust specified that,

> Any portion of the Marital Trust not qualified for the marital deduction shall be held in a separate share of that Trust, subject to all of the rights, interests, powers, and other terms prescribed for the Marital Trust.

The funding decision was provided to the Executor Lillian Pellegrini or the Trustee Lillian Pellegrini. Lillian Pellegrini's property could not be substituted for funding the Family Trust. Conversion cannot be upheld to provide legal or beneficial title.

All principal and income funding the Family Trust or the Marital Trust were subject to discretionary withdrawal by the Trustee/Beneficiary Lillian Pellegrini, creating a general power of appointment under 26 U.S.C. 2041 despite any support limitations. Unlike the Marital Trust, however, the Family Trust was a nullity after the real property sale and rendered invalid by the First Amendment under Probate Code §15205 for lack of any beneficiary of financial assets at the end of Lillian Pellegrini's life. Assets cannot be transferred to a nullity. *Diocese of San Joaquin v. Gunner,* 246 Cal. App. 4th 254 (2016).

The Fresno County Public Guardian, appointed trustee of an invalid, nonexistent trust that is a nullity, holds stolen assets that are to be fully distributed to Lillian Pellegrini as indicated on the K-1's filed with IRS Form 1041 (ER, Vol 2, Tab 3, p.4). Instead the stolen assets are used for the benefit of the courts, county officers and the public

guardian, i.e., the essence of racketeering; Lillian Pellegrini receives nothing.

FRAUDULENTLY OBTAINED JUDGMENTS ISSUED WITHOUT AUTHORITY TO EXERCISE JURISDICTION ARE MERITLESS

In *Hovey v. Elliott,* 167 U.S. 409 (1897) the court stated,

> a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

Despite many hearings being scheduled, no hearing that provided any opportunity to be heard ever occurred. Whatever Fresno Superior Court conducted, it did not hold or conduct, by any definition, anything that could be considered hearings.

All statements of facts and law issued by the state court petitioner and her counsel were proven false through Lillian Pellegrini's ownership records (ER, Vol 2, Tab 1). Therefore, all parties, including officers of the courts, counsel, the court's agents, financial and banking institutions, knew that Lillian Pellegrini was the rightful owner of the assets when the court facilitated the conversion to steal the property and launder it for their benefit. For these acts, there is no immunity, and the orders and judgments to support these acts are without merit, void, and null.

The nullity of the state court action equates to no action occurring; all that remains is theft by using an institution and its officers to acquire legal title through illegal acts.

Judicial Notice of Void Documents Violates Rules of Evidence 201

Rules of Evidence 201 provides that judicial notice refers to facts not subject to dispute and facts capable of accurate and ready determination. Despite the court's discretionary power to take judicial notice when supplied with documents, a party is also entitled to an opportunity to be heard regarding taking judicial notice or after it has been taken. No opportunity occurred in the district court.

The documents contained false facts proven false by best evidence of the actual documents and by undisputed records of title.

The clearly erroneous standard was set forth in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948) under Rule 52(a) that in civil actions without a jury, findings of fact will not be set aside unless clearly erroneous and due regard is given to the trial court in judging the credibility of witnesses. The rule does not apply; no hearings took place and issues raised were never heard. All that remains are Lillian Pellegrini's unrefuted right of title.

In *Anderson v. Bessemer City,* 470 U.S. 564 (1985), overreaching was recognized when courts rely on the prevailing party to write orders stating the court's findings. The probate court was informed

of embellishing court findings in August 2012 and forbade the practice. After retirement, and another's recusal, court officers permitted issuing of embellished pre-prepared orders claiming hearings took place when neither the hearing nor the substance in the documents ever occurred.

The defendants requesting judicial notice from which the District Court cited Fresno Superior Court's findings were neither present nor parties to the Fresno Superior Court action and cannot assert any claims as to the factual correctness of the content of the documents for which they were seeking judicial notice. The state court's unpublished opinion, generated after the complaint was filed in August 2016, is not subject to citation, and contains provable errors of the terms of the 1999 Trust on which it relied.

In effect, because the state court acted outside its limited authority and exceeded its jurisdiction by denying due process, the documents issued by the court are without merit, null, and void for any purpose in any tribunal.

Circuits Diverge on Court Orders, Judgments, and Opinions as Public Records, Subject to Judicial Notice

Nearly all district courts and all circuits contend that court orders, judgments, and opinions are hearsay under Federal Rules of Evidence 803(8)(iii) that are not subject to the public records exception as they are not public records. The Court in *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994) relied on the

matter of *Nipper v. Snipes,* 7 F.3d 415 (4th Cir. 1993) regarding Federal Rules of Evidence 201 (judicial notice) and Federal Rules of Evidence 803(8)(iii) (public records). The Ninth Circuit, however, generally contends that court filings not attached to the complaint can be subject to judicial notice.

The district court and the Ninth Circuit's argument cannot be supported. In *Lee v. City of Los Angeles,* 250 F. 3d 668 (9th Cir. 2001), the court stated that when defendants seek dismissal based on a 12(b)(6) motion, materials extraneous to the complaint, which are not excluded, subject the motion as one for summary judgment unless the material is submitted as part of the complaint or if the materials are matters of public record.

The defendants in the present matter requested judicial notice of many court filings, orders, and the state appellate court's opinion. Objection was raised but not heard. The district court stated that it did not use the documents for their factual content, but judicial notice can be taken for their existence and what the document states (A-22).

The state court's unpublished opinion and other documents were not attached to the complaint; the majority of district and circuit courts state these documents are hearsay, not subject to the public records exception. Their existence is not debated. Because they were issued without a hearing, they are without merit, null and void. *Hovey v. Elliott, supra.* Because the content correctness is disputed, the materials cannot be subject to judicial notice under Rules of Evidence 201. Therefore, the district

court's citation of what the documents state can serve no purpose. No defendant disputed the facts stated in the compliant or the records of title. The court abuses its discretionary authority to take judicial notice of the documents issued by a state court without authority to exercise jurisdiction over Lillian Pellegrini, her property, or her trusts and cite the conclusory content.(A-7-15)

Without the judicially noticed documents' content, only the facts stated in the complaint by plaintiff/appellant Lillian Pellegrini could be sustained. The defendants offered no evidence to contradict the Plaintiff's facts because no evidence exists.

The standard of review employed by the court was insufficient in this case because the judgment is void from lack of authority by the issuing court to exercise jurisdiction and when extrinsic and intrinsic fraud were used to obtain the orders, judgments, and findings for which judicial notice was taken. In this situation, it is not discretionary error, but the court is actually exceeding its jurisdiction by giving merit to documents without merit and that are void.

CONCLUSION

When public officers and private actors in regulated industries undertake the fraudulent actions to convert and steal property, acting in conjunction with state officers of the courts, the private actors and the officers of the court are in violation of 42 U.S.C. 1983. When state court

officers act outside the limitations of their statutory authority, no immunity can be granted. When these actors act together to take part in the theft by facilitating it and/or benefiting from it, they engage in racketeering.

No forum, state or federal is available. The state courts have facilitated the theft, continue to exercise control over the assets, will not address any objections or motions, and hold no hearings that permits any opportunity to be heard. The federal court will hear no claim on the matter; the appellate court has now given the matter to this U.S. Supreme Court. As this Court has determined property cases since *United States v. Lee,* 106 U.S. 196 (1882), so should it hear this matter to permit Lillian Pellegrini full replacement of her property and payment of all damages permitted by law and to uphold fundamentally guaranteed rights over property afforded to all citizens under the U.S. Constitution.

We respectfully request that the Court uphold Lillian Pellegrini's rightful ownership in her property and grant this writ of certiorari for review.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
JUL 17 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LILLIAN PELLEGRINI,
Plaintiff-Appellant,

v.

FRESNO COUNTY; et al.,
Defendants-Appellees.

No. 17-15735
D.C. No. 1 :16-cv-01292-LJO-BAM

MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief Judge, Presiding

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[*]This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted July 11, 2018[**]
San Francisco, California

Before: TASHIMA, GRABER, and HURWITZ, Circuit Judges.

After the Fresno County Superior Court ordered Plaintiff Lillian Pellegrini to transfer assets to a family trust and pay damages, she filed this federal action against the court, Fresno County, three banks, and the law firm that had prosecuted the state court proceedings. The district court dismissed the complaint with prejudice for lack of subject-matter jurisdiction. We have jurisdiction over Pellegrini's timely appeal under 28 U.S.C. § 1291 and we vacate and remand.

1. The Eleventh Amendment barred district court jurisdiction over Pellegrini' s claims against the Superior Court. *See Franceschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir. 1995) (per curiam) ("The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies." (citation and internal quotation marks omitted)). The claims are also barred under the *Rooker-Feldman* doctrine. *See Noel v. Hall,* 341 F.3d 1148, 1163 (9th Cir. 2003) (noting that the doctrine bars review of a "legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling").

[**]The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

2. Pellegrini failed to "specifically and distinctly" argue on appeal why the district court had subject-matter jurisdiction over the fraud and conversion claims against the other defendants, so the issue is forfeited. *See Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 738 (9th Cir. 1986) (describing forfeiture of issues). In any case, Pellegrini's claims directly contravene the Superior Court's holding that these assets belonged to the trust. The district court lacked jurisdiction over these "inextricably intertwined" claims, as the "the relief requested in the federal action would effectively reverse the state court decision or void its ruling." *Cooper v. Ramos,* 704 F.3d 772, 779 (9th Cir. 2012) (citation omitted).

3. Pellegrini's arguments of extrinsic fraud fail. She asserts that "[t]he defendants acted in concert to misrepresent property title and interest for purposes of stealing" her property, but does not contend that she was deprived of the ability to present her case in state court. *See Green v. Ancora-Citronelle Corp.,* 577 F.2d 1380, 1384 (9th Cir. 1978) (defining extrinsic fraud as conduct that "prevents a party from having an opportunity to present his claim or defense in court or deprives a party of his right to a day in court," not "misrepresentations" that go "to the very heart of the issues contested in the state court action" (citations and internal quotation marks omitted)).

4. The district court did not abuse its discretion by taking judicial notice of documents and orders filed in the state proceedings. "[A] court may take judicial notice of 'matters of public record.'" *Lee v. City of Los*

Angeles, 250 F .3d 668, 689 (9th Cir. 2001) (citation omitted). The district judge made clear that he took judicial notice of"the existence of the document or order," not "[t]he truth or the correctness of the factual content." *See id.* at 690 (holding that "when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion" (citation and internal quotation marks omitted)). Pellegrini also asserts that she had no opportunity below to oppose judicial notice. To the contrary, the district court expressly considered, and rejected, Pellegrini's objections to judicial notice.

5. The district court dismissed Pellegrini's complaint with prejudice. But "a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert [her] claims in a competent court." *Frigard v. United States,* 862 F.2d 201, 204 (9th Cir. 1988). We therefore vacate the dismissal with prejudice and remand with directions that the dismissal be without prejudice.

VACATED and **REMANDED;** costs shall be taxed against Pellegrini.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA

LILLIAN PELLEGRINI,

v. CASE NO: 1:126-CV-01292-LJO-BAM

FRESNO COUNTY, CALIFORNIA, ET AL.,

JUDGMENT IN A CIVIL CASE

XX – Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 4/6/2017

Marianne Matherly
Clerk of Court

ENTERED: April 6, 2017

by: /s/ T. Lundstrom
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA

LILLIAN PELLEGRINI,
Plaintiff,

v.

FRESNO COUNTY, *et al.*,
Defendants.

1:16-cv-01292 LJO BAM

MEMORANDUM DECISION AND ORDER GRANTING DEFEDANTS' MOTIONS TO DISMISS
(Docs. 40, 42,43, 44, 45, 46)

MEMORANDUM DECISION AND ORDER DENYING BEVERLY PELLEGRINI'S REQUEST FOR INTERVENTION (Doc. 15)

I. INTRODUCTION

Pending before the Court are six motions to dismiss the complaint filed by Defendants Fresno County Superior Court ("FCSC") (Docs. 40, 42); Fresno County (erroneously sued as Fresno County Counsel representing Joshua Cochron and Fresno County Public Guardian (Doc. 43); UBS Financial Services

("UBS") and The Bank of New York Mellon ("BNY") (Doc. 44); Weintraub Genshlea Chediak Tobin & Tobin (erroneously sued as and herein referred to as "Weintraub Tobin") (Doc. 45); and Comerica, Inc. ("Comerica") (Doc. 46). Also pending is Beverly Pellegrini's ("Beverly") request to intervene. (Doc. 15.)

Having reviewed the parties' briefs and all supporting documents, the Court found these motions suitable for decision without oral argument, and the hearing set for April 10, 2017, was vacated. For the reasons set forth below, Defendants' motions to dismiss are GRANTED, and Beverly Pellegrini's motion for intervention is DENIED.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from a trust administration dispute between Lillian Pellegrini ("Lillian") and her daughter, Marleen Merchant ("Marleen"), which was decided in a probate proceeding conducted by the FCSC, Case No. 10CEPR00683. Lillian appealed the FCSC judgment, and the Fifth District Court of Appeal (the "Fifth DCA") affirmed the FCSC judgment on October 31, 2016. Lillian filed a petition for review in the California Supreme Court, which was summarily denied on January 11, 2017. The FCSC judgment is now final.

A. The 1999 Trust

Angelo John Pellegrini (Angelo) and Lillian, as

husband and wife, executed what the Fifth DCA termed a "fairly standard revocable living trust" on June 18, 1999. As described by the Fifth DCA,

> [t]he Trust states that Angelo and Lillian (also referred to as the trustors) have two children – namely, their daughters Beverly Jean Pellegrini (Beverly) and Marleen – who would receive the remainder of the Trust estate in equal shares after Angelo and Lillian died. Angelo and Lillian, during their joint lifetimes, were the co-trustees of the Trust.
>
> The Trust provides that on the death of the first spouse, the surviving spouse would continue to act as trustee. However, at that time, the Trust assets were supposed to be divided into separate trusts. As the Trust clearly states: "On the death of the Deceased Spouse, the Trustee shall divide the Trust Estate . . . into three separate trusts, designated as the 'Survivor's Trust,' the 'Marital Trust,' and the 'Family Trust.'" Here, Angelo died on March 27, 2008, at which time Lillian became the sole trustee and, according to the above language, was obligated to divide the Trust estate into separate trusts as provided in the Trust.
>
> . . .

> On the Subject of amendment or revocation, the Trust provides that during their joint lifetimes, Angelo and Lillian were free to revoke or amend the trust. However, "[o]n the death of the Deceased Spouse, the Surviving Spouse shall have the power to amend, revoke or terminate the Survivor's Trust, but the Marital Trust or the Family Trust may not be amended, revoked, or terminated on the death of the Deceased Spouse."

Merchant v. Pellegrini, No. F072656, 2016 WL 6426389, at * 1-2 (Oct. 31, 2016) (unpublished).[1]

In her complaint before this Court, Lillian alleges a different operation of the 1999 Trust. After inheriting money from Lillian's siblings Mike and Gladyce, Lillian and her husband Angelo created the Angelo Pellegrini and Lillian Dorothy Pellegrini Revocable Living Trust on June 18, 1999 (the "1999 Trust"). (Cmplt., p. 62.)[2] In creating this Trust and "tax subtrusts," if either spouse continued to live while the federal estate tax exemption was being increased, the tax subtrusts would not be necessary and would not be funded. (Cmplt., p. 12:17-20.) By the Trust's

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[1]This summary does not represent any factual findings with respect to disputed aspects of the 1999 Trust, it is merely the Fifth DCA's summary of the trust provisions to provide factual context.

[2]All page numbers are made in reference to the CM/ECF pagination at the top of filed documents.

terms, all assets contributed to the trust would retain their same character and ownership interests and the settlor contributing the property would retain control of that property during his/her lifetime. Moreover, the Trust would remain subject to revocation during the survivorship period by the settlor contributing the property. (Cmplt., p. 12:21- 23, p. 62, Exh. 3.) Lillian contributed her inherited separate property which comprised nearly all assets held in the Trust account. Other financial assets contributed to the Trust had been titled in joint tenancy and were transferred. The only other asset that was transferred to the Trust was residential property held by Angelo and Lillian as joint tenants.

In 2004, Angelo and Lillian amended the distribution clause of the Family Trust on the surviving spouse's death permitting a life estate to Beverly in the Trust's residential property, if then unsold. (Cmplt., p. 63, Exh. 3.) Two amendments "left the Family Trust void of any beneficiary designation, rendering the Family Trust a nullity and an invalid trust." (*Id.*)

In March 2008, Angelo died. Pursuant to the Trust terms, Lillian maintained unrestrained power of sale, and she sold the San Francisco real property within six months of Angelo's death, distributing the proceedings to her Survivor's Trust. Shortly after this sale in 2008, Lillian revoked the Trust. (Cmplt., p. 63, Exh. 3.) Lillian also claims that in 2008, a Marital and Survivor's trust were funded, which she claims implied that the Family Trust was not intended to be funded

on the first spouse's death. (Cmplt., p. 14:5-11.) Lillian asserts subsequent amendments to the 1999 Trust were made in 2010, which rendered the Family Trust "void and a nullity for lack of any beneficiary designation on the Surviving Settlor's eventual death." (Cmplt., p. 16:17-20.)

B. FCSC Proceedings

In July 2010, Marleen successfully petitioned the FCSC for an order compelling Lillian to provide an accounting of assets as of the time of Angelo's death and to provide information on how the assets were allocated between the Survivor's Trust, the Marital Trust, and the Family Trust. Lillian filed a statement of trust assets as of March 27, 2008. Among the assets purportedly allocated to the Family Trust was one-half of the $800,000 value of a San Francisco residence. The total value of assets that Lillian, through her attorney, represented to have been allocated to the Family Trust was $544,386.91. In 2011, these representations regarding the Family Trust were repudiated by Lillian in a letter written by her in response to a request by Marleen's attorney for further information and accounting concerning the Family Trust. Lillian stated that there were no assets in the Family Trust and no assets were ever allocated or distributed to a Family Trust.

Purportedly based on this letter, in July 2012, Marleen filed a petition to remove Lillian as trustee, appoint a successor trustee, and obtain other relief. On January 13, 2014, Marleen filed an additional petition

seeking the recovery of property belonging to the Family Trust, for an award of double damages under Probate Code § 859, and for an award of attorney's fees.

On June 17, 2014, the FCSC granted a motion to bifurcate the trial and determined two issues would be tried first: (1) whether the Family Trust was required to be funded after Angelo's death, and (2) whether the title to real property in San Francisco maintained its joint tenancy characterization after being transferred into the 1999 Trust. (*See* Doc. 44-2, pp. 170-72, Exh. 16.) On January 14, 2015, a trial was conducted on these two issues, and the FCSC determined by clear and convincing evidence that the Family Trust was required to be funded following the death of Angelo with a minimum of $544,386.91. (*Id.*) The FCSC also found the San Francisco real property did not maintain its joint tenancy characterization after being transferred to the 1999 Trust. (*Id.*)

In May 2015, after holding a hearing, the trial court ordered the removal of Lillian as trustee of the Family Trust for failing to fund it after Angelo's death, and it appointed the Fresno County Public Guardian as the successor trustee. (Doc. 44-2, pp. 42-43, Exh. 2.) The May 2015 order also directed Lillian to fund the Family Trust in the amount of $544,386.91, and to pay this amount to the Public Guardian. (*Id.*) As to all remaining issues, a one-day court trial was set for

August 25, 2015. (*Id.*)[3]

On trial of the remaining issues in August 2015, the trial court found that Lillian wrongfully and in bad faith took assets belonging to the Family Trust, and double damages were awarded pursuant to California Probate Code § 859 which Lillian was ordered to pay to the Public Guardian. (Doc. 44-2, pp. 45-47, Exh. 3.) Lillian was also ordered to pay Marleen's attorney's fees through the Public Guardian. In total, Lillian was ordered to pay $1,528,271.44 to the Public Guardian. (*Id.*)

On October 14, 2015, Lillian filed a document in the U.S. District Court for the Eastern District of California entitled "Request for Transfer to Federal Court 28 U.S.C. § 1441," which was construed as a notice of removal of the trial court proceedings over which this Court determined it had no jurisdiction; the case was remanded to the FCSC *sua sponte* less than one week later. (Doc. 44-2, pp. 49-84, Exh. 4; 1:15-cv-01564-LJO-EPG, Doc. 1.)

On October 19, 2015, the Public Guardian filed

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[3]Both the January 14, 2015, order and the May 15, 2015, orders were final and appealable when issued. Cal. Prob. Code § 1304(a). No appeal of these orders was taken within the 60-day time period to do so. Cal. Rules of Ct., rule 8.104(a)(1). Lillian did not file an appeal with the Fifth DCA until November 2015, after the second trial was held by FCSC. The Fifth DCA held that, to the extent Lillian was attempting to appeal the January 2015 and May 2015 orders, this portion of her appeal was untimely. (Doc. 44-2, pp. 19-21.)

an ex parte application seeking to enforce FCSC's order requiring Lillian to fund the Family Trust and pay Marleen's attorney's fees through the Public Guardian and to freeze Lillian's UBS accounts. (Doc. 44-2, pp. 159-60, Exh. 13.)

On October 20, 2015, FCSC granted the Public Guardian's motion, froze Lillian's accounts at UBS until further order, and required UBS to transfer the sum of $1,528,271.44 to the Public Guardian. (Doc. 44-2, pp. 156-57, Exh. 12.) Lillian then appealed the trial court's orders to the Fifth DCA on November 15, 2015. (Doc. 44-2, p. 93, Exhibit 6). On November 16, 2015, FCSC issued an ex parte order granting full authority to the Public Guardian to liquidate assets from Lillian's UBS accounts. (Doc. 44-2, p. 162 (Exh. 14).)

C. Proceedings Before the California Fifth District Court of Appeal

On November 16, 2015, Lilian filed a "Request for Writ of Supersedeas []," and the Fifth DCA issued a temporary stay of FCSC's October 20, 2015, and November 16, 2015, ex parte orders in the underlying case. (Doc. 44-2, p. 93 (Exhibit 6).) On December 4, 2015, the Fifth DCA issued an order clarifying FCSC's October 20, 2015, ex parte order "freezing accounts held in the name of Lillian Dorothy Pellegrini at UBS Financial Services, Inc." remained enforceable "insofar as it directs that 'no transfers or withdrawals shall be made from the [specified] account[s] until further order of the Court.'" (*Id.*)

On December 19, 2015, Lillian filed a "Request to Respond to Answer," and on January 6, 2016, Lillian filed a "Motion to Decide Writ of Prohibition." (*Id*. at pp. 96-97.) On January 19, 2016, the Fifth DCA issued the following order regarding Lillian's motions:

> The "Request to Respond to Answer" filed on December 10, 2015, and the "Motion to Decide Writ filed on January 6, 2016, are granted. The "Request for Writ of Supersedeas or the Alternative Writ of Prohibition ... , " filed on November 16, 2015, is denied. This court's November 18, 2015, stay order, and December 4, 2015, clarifying order are vacated and the temporary stay is lifted.

(Doc. 45-2, p. 8.)

On October 31, 2016, the Fifth DCA issued an order affirming FCSC's judgment. (Doc. 45-2, p. 10-45.)

D. Proceedings Before This Court

Prior to the Fifth DCA's October 2016 decision, Lillian filed suit in August 2016 in the U.S. District Court for the Northern District of California naming as defendants Fresno County, Fresno County Counsel, Fresno County Public Guardian, FCSC, UBS, BNY, Comerica, and "Weintraub Tobin." Lillian alleges the probate proceedings before FCSC were void for lack of jurisdiction, various Defendants committed fraud on the court because they knew no Family Trust ever

existed, FCSC denied Lillian due process by failing to provide her notice of hearings and an opportunity to be heard; and the Public Guardian, Weintraub Tobin, UBS, Comerica, and BNY were all complicit with and participated in the fraudulent conveyance and conversion of Lillian's trust assets held in UBS accounts. Lillian also alleges UBS breached her privacy in providing information to the Public Guardian without her consent.

On August 30, 2016, the Northern District *sua sponte* determined venue was improper there and transferred the case to the Eastern District where it determined venue was proper, finding that Lillian's claims arose out of events that occurred in Fresno, California. (Doc. 9.)

On October 31, 2016, Lillian filed a document entitled "Motion to Notify Court of a Conflict of Interest by Lillian Pellegrini" – construed as seeking disqualification of the undersigned – and a second document was filed by Lillian's daughter, Beverly Pellegrini, entitled "Notice – Federal Jurisdiction Under Federal Rule of Civil Procedure 60; Intervenor by Right Under Federal Rule of Civil Procedure 24; Joinder Under Federal Rules of Civil Procedure 19." (Docs. 14, 15.)

On November 3, 2016, Lillian was ordered to serve the complaint, and Beverly's motion entitled "Notice – Federal Jurisdiction Under Federal Rule of Civil Procedure 60; Intervenor by Right Under Federal Rule of Civil Procedure 24; Joinder Under Federal

Rules of Civil Procedure 19" ("request to intervene") was held in abeyance until such time as the Defendants were served and the motion was properly re-noticed. (Doc.16.) Between December 27, 2016, and January 9, 2017, each Defendant filed a motion to dismiss. (Docs. 40, 42, 43, 44, 45, 46.)

On January 12, 2017, Lillian filed a motion for venue change and a motion to stay the proceedings. (Docs. 53, 54.) On February 14, 2017, the Court denied Lillian's motions to transfer venue, stay the proceedings, and to disqualify the undersigned. (Doc. 76.) The Court did not reach Beverly's October 2016 request to intervene as it had never been re-noticed for a hearing and was not properly before the Court.

On February 24, 2017, Beverly filed a "notice of appeal" seeking immediate appeal of the Court's refusal to reach her request to intervene. (Doc. 80.) As Beverly's motion was never properly re-noticed or set for a hearing and no order had therefore been issued regarding the matter of intervention that could be appealed, the Court construed Beverly's "notice of appeal" as a motion for an order on her request to intervene. (Doc. 81.) The Court set a hearing on this request, supplied the parties with a briefing schedule, and continued Defendants' motions to dismiss to be heard concurrently with Beverly's request to intervene. (Doc. 81.)

III. JUDICIAL NOTICE

Defendants UBS, Weintraub, and Fresno

County each seek judicial notice of various court documents. (Docs. 43-2, 44-2, 43-2, 57, 97.)

UBS and Bank of NY Mellon's Request (Doc. 44-2):

California Supreme Court Records: California Supreme Court Docket in Case No. S238760 (Doc. 44-2, Exh. 7).

Fifth DCA Records: (1) an October 31, 2016, order in *Merchant v. Pellegrini*, Case No. F072656 (Doc. 44-2, Exh. 1); and (2) the Docket (Register of Actions) in Case No. F072656 (Doc. 44- 2, Exh. 6).

FCSC Records and Filings, Case No. 10CEPR00683:

• March 3, 2014, Memorandum of Points and Authorities in Support of Motion of Petitioner Marleen Merchant to Enforce Subpoenas (Doc. 44-2, Exh. 8)

• April 4, 2014, Further Reply of Petitioner Marleen Merchant to Opposition to Motion to Enforce Subpoenas (Doc. 44-2, Exh. 9)

• June 17, 2014 Order granting the Motion of Petitioner Marleen Merchant to Enforce Subpoenas (Doc. 44-2, Exh. 10)

• August 8, 2014, FCSC Order Directing Compliance with Subpoenas (Doc. 44-2, Exh. 11)

• January 21, 2015, Finding and Order After Trial

(Doc. 44-2, Exh. 16)

• May 15, 2015, Order Removing Lillian D. Pellegrini as Trustee and Appointing Successor Trustee; Order Directing Lillian D. Pellegrini to Fund a Family Trust in the Amount of $544,386.91 (Doc. 44-2, Exh. 2)[4]

• September 4, 2015, Findings and Order After Trial (Doc. 44-2, Exh. 3)

• October 20, 2015, Ex Parte Order Freezing Accounts Held in the Name of Lillian Dorothy Pellegrini at UBS Financial Services Inc. (Doc. 44-2, Exh. 12)

• October 20, 2015, Ex Parte Order Directing UBS Financial Services Inc. to Pay $1,528,721.44 to the Fresno County Public Guardian as Successor Trustee of the Family Trust in Satisfaction of Court Orders (Doc. 44-2, Exh. 13)

• November 16, 2015, Ex Parte Order Granting Full Authority to the Fresno County Public Guardian, as Successor Trustee, as to Liquidation of Family Trust Assets (Doc. 44-2, Exh. 14)[5]

• A January 22, 2016, Notice to Court and All Parties filed by UBS (Doc. 44-2, Exh. 15)

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[4]A copy of this order is attached to Plaintiff's complaint. (Doc. 1, p. 77-78.)

[5]A copy of this order is attached to Lillian's complaint. (Doc. 1, p. 95-96.)

Eastern District of California Orders and Filings in Case No. 1:15-cv-01564-LJO-EPG: (1) an October 14, 2015, document filed by Lillian Pellegrini entitled "Request for Transfer" (Doc. 44-2, Exh. 4); and (2) an October 20, 2015, Order of Remand (Doc. 44-2, Exh. 5).

***Weintraub Tobin's Request (Doc. 45-2, Doc. 57)*:**

California Supreme Court Records: California Supreme Court Order issued January 11, 2017, denying Lillian's petition for review of the Fifth DCA's October 31, 2016, order (Doc. 57, Exh. A)

Fifth DCA Records: (1) a November 18, 2015, Order (Doc. 45-2, Exh. A); (2) a December 4, 2015, Clarifying Order (Doc. 45-2, Exh. B)*;* (3) a January 19, 2016, order denying writ of supersedaes and dissolving temporary stay (Doc. 45-2, Exh. C); and (4) an October 31, 2016, order in *Merchant v. Pellegrini*, Case No. F072656 (Doc. 45-2, Exh. D).

***Fresno County's Request (Doc. 43-2, 43-4)*:**

Fifth DCA Records: (1) a January 19, 2016, order denying writ of supersedaes and dissolving temporary stay (Doc. 43-4, Exh. A); (2) a October 31, 2016, order in *Merchant v. Pellegrini*, Case No. F072656 (Doc. 43-4, Exh. B).

Eastern District of California Orders and Filings in Case No. 1:15-cv-01564-LJO-EPG: (1) an October 14, 2015, document filed by Lillian Pellegrini

entitled "Request for Transfer" (Doc. 43-4, Exh. C); (2) an October 14, 2015, document filed by Lillian Pellegrini entitled "Motion to Dismiss" (Doc. 43-4, Exh. D); (3) an October 14, 2015, document filed by Lillian Pellegrini entitled "Motion for Confidentiality" (Doc. 43-4, Exh. E); and (4) an October 20, 2015, *sua sponte* order of the Eastern District of California, remanding Lillian Pellegrini's case to the FCSC (Doc. 43-4, Exh. F).

Under the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

Rule 12(d) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, there are two exceptions to this rule: a court may consider material (1) which is properly submitted as part of the complaint, or (2) matters of public record that have been judicially noticed. *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001).

As orders of the court or documents filed with a court, all the documents identified by Fresno County,

UBS, and Weintraub Tobin are subject to judicial notice as matters of public record. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). The truth or the correctness of the factual content of these documents may *not* be judicially noticed, but the *existence* of the document or order and what the particular document states are subject to judicial notice. *Lee v. City of L.A.*, 250 F.3d 668, (9th Cir. 2001) (court may take judicial notice of another court's opinion, but not for the truth of the facts recited therein, but for the existence of the opinion).

Lillian argues the Court may not take judicial notice of these documents without converting Defendants' motions to dismiss into motions for summary judgment, but this is incorrect. Judicial notice of public documents is one of the long-standing exceptions to Rule 12(d)'s prohibition on considering documents outside the pleadings in relation to a motion to dismiss. *Lee*, 250 F.3d at 688- 89. Defendants' requests for judicial notice are GRANTED.[6]

IV. SUBJECT MATTER JURISDICTION

All Defendants except Comerica assert the Court lacks subject matter jurisdiction over Lillian's claims under the *Rooker-Feldman* doctrine, and they argue dismissal is required pursuant to Federal Rule of Civil Procedure 12(b)(1). Defendants contend

[6]The Court notes several of Defendants' requests for judicial notice overlap.

Lillian's claims amount to an impermissible collateral attack on FCSC's judgments.

A. Legal Standard – Motion to Dismiss Pursuant to Rule 12(b)(1)

"As courts of original jurisdiction, federal district courts have no authority to review the final determinations of a state court in judicial proceedings." *Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995) (citing *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986). "This is true even when the challenge to a state court decision involves federal constitutional issues." *Id.* (citing *Feldman*, 460 U.S. at 484-86; *Worldwide Church of God*, 805 F.2d at 891). This is so because, pursuant to 28 U.S.C. § 1257, the power to review a state court's judgment lies solely with the United States Supreme Court, not with federal district courts. *Feldman*, 460 U.S. at 476. In other words, "[t]he *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 n. 3 (2002).

B. The Court Lacks Subject Matter Jurisdiction Under *Rooker-Feldman*

The *Rooker-Feldman* doctrine has been subject

to criticism as overused and little understood.[7] In 2005, the United States Supreme Court revisited the doctrine in *Exxon Mobile Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283 (2005) and reiterated it "is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. The Court clarified that where there is parallel state and federal litigation, *Rooker-Feldman* "is not triggered simply by the entry of judgment in the state court." *Id.* at 292. Moreover, section 1257 "does not stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously in state court." *Id.* at 293. Where a federal plaintiff "'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Id.* (quoting *GASH Assocs. v. Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)).

In its most recent application by the Ninth Circuit Court of Appeals, a case cited with approval by

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[7] *See* Thomas D. Rowe, Jr., "Rooker-Feldman: Worth only the Powder to Blow it Up?," 74 Notre Dame L. Rev. 1081, 1083 (1999) (observing the "notable frequency" with which federal courts invoke Rooker-Feldman to find they lack jurisdiction).

the Supreme Court in *Exxon*, the *Rooker-Feldman* doctrine was held not to apply. *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003). In *Noel*, the court observed that in its routine application, *Rooker-Feldman* is "exceedingly easy." *Id.* at 1155. However, the doctrine "becomes difficult – and, in practical reality, only comes into play as a contested issue – when a disappointed party seeks to take not a formal direct appeal, but rather its de facto equivalent, to a federal district court." *Id.*

The court explained that it "is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* at 1163. A forbidden de facto appeal is brought in two kinds of cases: (1) where a "federal plaintiff complains of harm caused by a state court judgment that directly withholds a benefit (or imposes a detriment on) the federal plaintiff, based on an allegedly erroneous ruling by the court"; and (2) where a federal plaintiff complains "of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff was one of the litigants." *Id.*

This litigation fits into the second type of case identified in *Noel*, and despite some of the noted difficulties and narrow scope of the *Rooker-Feldman* doctrine, it is applicable here. To determine whether *Rooker-Feldman* deprives the court of subject matter jurisdiction, "the immediate inquiry is whether the

federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim." *Taylor v. Fed. Nat'l Mortg. Ass'n*, 374 F.3d 529, 531 (7th Cir. 2004). "Claims that directly seek to set aside a state court judgment are de facto appeals and are barred without additional inquiry." *Id.* Federal claims that were not raised in state court or that do not, on their face, require review of a state court's decision may still be subject to *Rooker-Feldman* if those claims are inextricably intertwined with a state court judgment. *Id.*

Lillian's injury for all Defendants' alleged conduct is the loss of UBS account assets resulting from FCSC's order that she pay $1,528,271.44 to the Family Trust through the Public Guardian. Lillian states she has sought a "dismissal" through the FCSC and the Fifth DCA before the order for payment was issued by the FCSC, but due to failures of due process and "through the courts' negligence, the property has been stolen and dismissal is too late." (Cmplt., p. 42:18-23.) Lillian maintains her "only remedy" now is to demand payment "of the full claim." Lillian asks this Court to enter a "default judgment" in her favor, and then order UBS to replace all her assets and reimburse Lillian for the associated costs, liabilities, and interest.

Although Lillian generally alleges violations of due process, and makes reference to fraud and conversion, none of her claims are pled distinctly as causes of action against particular Defendants. Rather, her complaint is an amalgamation of the various

reasons why the FCSC lacked jurisdiction over her trust, made incorrect legal determinations, and issued a judgment and orders that are void due to fraud on the court. Lillian's alleged injury from all Defendants' conduct is one in the same: Lillian's UBS accounts were levied to pay $1,528,271.44 to the Family Trust pursuant to the FCSC order; the remedy she seeks is return of the $1,528,271.44 plus additional costs and interest.[8] Although Lillian does not explicitly ask to void the FCSC's judgment and orders, seeking recovery of the sum FCSC ordered she pay to the Family Trust is tantamount to such a request. In that sense, Lillian's entire complaint is a de facto appeal of the FCSC judgment, which is barred under *Rooker-Feldman*. *See Long v. Shorebank Dev. Corp*., 182 F.3d 548, 557 (7th Cir.1999) ("[A] litigant may not attempt to circumvent the effect of *Rooker-Feldman* and seek a reversal of a state court judgment simply by casting the complaint in the form of a civil rights action.").

Parsing Lillian's allegations into distinct claims, including claims for due process violations against the FCSC as well as fraud and conversion claims against the remaining Defendants, these claims are inextricably intertwined with the state court judgment and therefore are also barred under *Rooker-Feldman*. In *Feldman*, the Court expanded the doctrine to include claims that were inextricably intertwined with the state court's ultimate decision. *Feldman*, 460 U.S.

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[8]Lillian also claims she is entitled to double and triple damages under the California Probate Code §§ 859, 13605. (Cmplt., p. 42.)

at 486-87. Inextricably intertwined claims are those that would necessarily require the district court to review a judicial decision of a state court, something the district court has no jurisdiction to do.[9] *Id.*

Since *Feldman*, lower federal courts have formulated different criteria and rules for determining which claims are "inextricably intertwined" with the state court's judgment such that *Rooker-Feldman* applies. The Ninth Circuit has embraced the GASH approach, named for the Seventh Circuit decision formulating the approach, to determine whether claims are "inextricably intertwined." *Noel*, 341 F.3d at 1164 (citing *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726 (7th Cir. 1993) ("Of the formulations in the other circuits, we find most notable (and most useful) the similar formulation of the Seventh Circuit, first articulated at some length by Judge Easterbrook in [*GASH*]")). Under this approach, whether a claim is "inextricably intertwined" "hinges on whether the federal claim alleges that the injury was caused by the state court judgment, or, alternatively, whether the federal claim alleges an independent prior injury that the state court failed to remedy." *Taylor*, 374 F.3d at 533; *GASH*, 995 F.2d at 728-29. Thus, if a plaintiff is not seeking to set aside the state court judgment but rather presents "some independent claim," even if it is one that denies a legal conclusion that a state court has reached in a case to which he was a party, then

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[9]There are very limited exceptions to this jurisdictional prohibition, including writs of habeas corpus under 28 U.S.C. § 2254.

Rooker Feldman does not apply and the federal court has jurisdiction. *Taylor*, 374 F.3d at 533.

Although Lillian asserts due process violations by the courts and the judges involved in the underlying Probate proceedings,[10] the essence of her complaint is that FCSC improperly and impermissibly determined she was required to fund the Family Trust when Angelo died in 2008, and then erroneously ordered that she fund the Family Trust. Adjudicating and deciding any due process violation by the state court necessarily implicates FCSC's judgment, rendering those due process claims against FCSC inexplicably intertwined with its judgment.

Lillian's claims against Fresno County, UBS, BNY, Comerica, and Weintraub Tobin for fraud and conversion are somewhat more difficult, in part because the allegations are scattered, vague, and conclusory. Some allegations relate to these Defendants' compliance with the FCSC order that the Family Trust be funded from Lillian's UBS account assets. Lillian alleges that UBS, BNY, and Comerica refused to stop the payment from her UBS account when she requested it, and that this constituted conversion. (Cmplt., pp. 27-30, 38-39.) Lillian also alleges generally that in providing her account information to the Public Guardian and in freezing her account *prior* to a court order to do so, UBS breached

[10]Although there were allegations of various due process violations by different FCSC judges, none were identified as Defendants.

its duties of privacy and breached a contract. In essence, however, these allegations stem from the FCSC's orders removing Lillian as trustee of the Family Trust, freezing Lillian's UBS accounts, and ordering distribution of Lillian's assets to the Family Trust via the Public Guardian. An element of these claims necessarily requires that the FCSC orders executing its judgment were somehow void or invalid, thus implicating the underlying state court judgment. Even to the extent Lillian alleges UBS froze her accounts before an order was in place to do so or otherwise impermissibly divulged information to the Public Guardian, the only damage she alleges as a result of this conduct is the loss of assets from her UBS account – which is directly tied to the FCSC order that she fund the Family Trust by making payment to the Public Guardian. Moreover, the allegation that information was provided to the Public Guardian regarding her UBS accounts is fundamentally connected to the FCSC order appointing the Public Guardian successor trustee of the Family Trust and implicates the Public Guardian's rights and obligations as successor trustee to seek financial information. Lillian vigorously contends the FSCS order appointing the Public Guardian as trustee was invalid, impermissible, and otherwise in violation of her rights. Analyzing these allegations will necessitate an evaluation of FCSC's order that Lillian pay UBS trust assets to the Public Guardian. These claims are inextricably intertwined with the FCSC judgment.

Another portion of the allegations against Fresno County, Weintraub Tobin, and UBS relate to

fraud on the court and alleged misrepresentations these Defendants made to the FCSC or the Fifth DCA regarding the nature of the Family Trust. (*See, e.g.*, Cmplt., p. 28:23-26 (UBS colluded with Weintraub Tobin and Fresno County); p. 18:26-19:24) ("Weintraub Tobin knowingly and falsely claimed" in a 2012 petition that the Family Trust was created, and then claimed in a brief filed before the Fifth DCA that the trust was "supposed" to have been created, evidencing the misrepresentation in 2012).)

This is very similar to fraud-on-the-court claims considered by the Seventh Circuit in *Taylor,* 374 F.3d at 533. There, the plaintiff-appellant, Taylor, lost her home in a judicial foreclosure action. Rather than directly appealing the state court judgment, Taylor filed a separate suit alleging the defendant mortgage company and its law firm committed extrinsic fraud and fraud upon the court by instituting wrongful foreclosure actions against her in violation of federal statutes. The defendants removed the case to federal court where it was dismissed for lack of jurisdiction under *Rooker-Feldman*. On appeal, the court held Taylor's alleged injuries did not stem from an independent violation of her rights, but from the alleged extrinsic fraud upon the state court and intentional deprivation of her property that she claimed occurred due to that violation. As such, the claims were inextricably intertwined with the state court's judgment and barred by *Rooker-Feldman*.

Like *Taylor*, Lillian's allegations of fraud on the court do not arise from an independent violation of her

rights, but from the court processes she claims were in violation of her rights and from purported misrepresentations various Defendants made in characterizing to FCSC the nature of the 1999 trust and the trust assets. Notably, Lillian also alleges that FCSC knew about the fraud and was complicit with it – which intertwines all the fraud allegations with the FCSC's orders and judgment. (Cmplt., 20:26-21:2.) There is no way to examine the alleged fraud on the court without evaluating FCSC's underlying legal determinations. *See Worldwide Church of God*, 805 F.2d at 892-93 (impossible to evaluate constitutional claims without conducting review of state court's legal determinations and jury verdict, thus *Rooker-Feldman* applied to constitutional claims). Lillian's allegations of fraud on the court against Fresno County, UBS, Weintraub Tobin are inextricably intertwined with FCSC's legal determinations and its judgment.[11]

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[11]Lillian alleges UBS filed a document before FCSC containing a "wrongful death ransom" against Beverly, but this is difficult to frame as a "claim" for relief. The allegation of "wrongful death ransom" seemingly relates to a January 2016 notice filed by UBS in the FCSC case, but that filing contains no words that could be construed as a "wrongful death ransom." (*See* Doc. 97.) The Court considers that allegation in more depth below, but standing alone, it is difficult, if not impossible, to construe this as a claim for relief, particularly as Lillian has no standing to seek any relief on Beverly's behalf, and there is no allegation relating to Lillian herself.

Lillian's bare allegation against Comerica is that it may have been the depository bank for the Public Guardian and it would not respond to Lillian's request to stop payment and return her UBS funds. (Cmplt., pp. 38-39.) Construing this assertion as some type

Because Lillian's complaint amounts to a de facto appeal of FCSC's legal determinations in the underlying probate matter, and because all other allegations that can be construed as claims against various defendants are inextricably intertwined with FCSC's legal determinations and judgments, the Court finds it lacks subject matter jurisdiction over Lillian's complaint under the *Rooker-Feldman* doctrine, and it is DISMISSED.

V. BEVERLY'S REQUEST TO INTERVENE

As the Court finds it is without subject matter jurisdiction over Lillian's complaint, there can be no jurisdiction over any complaint in intervention filed by Beverly. *See Canatella v. California*, 404 F.3d 1106, 1113 (9th Cir. 2005) (intervention as of right cannot extend federal jurisdiction); *Mattice v. Meyer*, 353 F.2d 316 (8th Cir. 1965) (where no action was pending since plaintiff was without standing to initiate an action, person who sought to intervene as co-plaintiff could not complain on appealed that he was not allowed to do so); *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176 (D. La. 1970) (intervenor takes case as he finds it and may not intervene if there is no proper suit before the court); *see also* 7C Fed. Prac. & Proc. § 1917 (3d ed.) (2017) (intervention presupposes the pendency of an action in a court of competent jurisdiction and

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of claim, it is still inextricably intertwined with FCSC's order requiring payment be made to the Public Guardian and cannot be considered without examining FCSC's underlying legal determinations.

cannot create jurisdiction if one existed before).

Even if there were jurisdiction over some claim in Lillian's complaint, for all the reasons set forth below, the request for intervention is DENIED.

A. Beverly and Lillian's Request "for Intervenor by Right or Joinder"

Aside from the jurisdictional issue, the Court notes the procedural awkwardness of Beverly's request to intervene. Beverly is not eligible to represent Lillian before this Court because she is not admitted to the California Bar, and she is not eligible to practice before this Court pro hac vice. Nevertheless, Beverly continues to draft and file all Lillian's papers in this case:

> Lillian Pellegrini is Settlor/Trustee and competent but she lacks legal skill and acumen to be able to prepare and file her own papers by herself. Lillian Pellegrini and Beverly Pellegrini discuss all legal issues completely and thoroughly and all filings are read aloud to Lillian Pellegrini to facilitate her comprehension and compensate for her diminished vision acuity . . . [w]ithout representation, Lillian Pellegrini has relied on services provided by Beverly Pellegrini.

(Doc. 15, 9:19-27.)

At the February 13, 2017, hearing on Lillian's motions to stay, to transfer venue, and to disqualify the undersigned, the Court explained to Lillian that if she were unable to represent herself, she would need to retain counsel, which could not be her daughter Beverly. The request to intervene is signed by both Beverly and Lillian, and they both request that "the District Court grant the motion for intervention by right or in the alternative, grant joinder under Federal Rule 19 to permit Beverly Pellegrini" to participate in the litigation. (Doc. 15, 10:27-11:2.) It appears some of the motivation to intervene stems from Lillian's purported inability to represent herself in pro se.[12]

The request to intervene first asserts the Court has jurisdiction over claims of an intervenor under 28 U.S.C. §1367, and then asserts the Court has jurisdiction under Federal Rule of Civil Procedure 60 due to "fraud on the Court that was perpetrated with an intent and knowledge to steal property from Lillian Pellegrini." (Doc. 15, 2:2-3.)

Beverly and Lillian request that Beverly be permitted to intervene as a matter of right or that she be joined under Rule 19. The basis for this request is articulated, in relevant part, as follows:

> The property involved in this action before the District Court is property that

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[12]Given the coordination of this lawsuit between Lillian and Beverly noted above, it is unclear why Beverly was not added as a co-plaintiff from the outset.

is owned by and belongs to Lillian Pellegrini, over which Lillian Pellegrini retained control since acquisition through inheritance in 1999 from her siblings[']estates. This property was stolen from her revocable trust through the unauthorized sale of invested assets and the proceeds were withdrawn without notice or authorization.

Beverly Pellegrini was appointed co-trustee to protect Lillian Pellegrini's rights to her property and income and to protect trust assets to generate wealth. Beverly Pellegrini is also a named beneficiary of this trust and is a named beneficiary of a general power of appointment. Because Beverly Pellegrini, as beneficiary, has an interest in the property that was stolen and an obligation by contract to protect Lillian Pellegrini's rights to her property, Beverly Pellegrini has a right of intervention to protect her interest. By protecting her interest, she is also protecting the preceding interest of the real party of interest, Lillian Pellegrini, as owner and as Settlor/Trustee.

The matter before this District Court is the recovery of the unauthorized sale of invested assets and withdrawal of proceeds that has caused substantial

> financial harm to Lillian Pellegrini and future beneficiaries. The property was stolen through extrinsic fraud and fraud on the Court by prohibiting any semblance of due process when the Court lacked statutory authority to exercise any jurisdiction over Lillian Pellegrini or her property held in any of her trusts at any time and the Court thereby exceeded its jurisdiction to permit stealing and conversion of assets owned by Lillian Pellegrini. The liquidation has caused an overall loss resulting from the unauthorized sale of investments and denied income and growth and wealth for which Beverly Pellegrini was requested by Angelo Pellegrini and Lillian Pellegrini to help preserve through her investment experience as a securities analyst of a broad spectrum of industries and understanding of financial markets and economics.

(Doc. 15, 8:3-23.) Lillian and Beverly maintain that Beverly's intervention is necessary to protect Beverly's interests as a beneficiary of the trust, and, on her own, Lillian lacks the legal and physical skills necessary to adequately defend Beverly's interests.

B. Legal Standards

1. Intervention As of Right

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right where the potential intervenor "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Ninth Circuit has articulated four requirements for intervention as of right under Rule 24(a)(2):

> (1)[T]he [applicant's] motion must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impeded its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Freedom from Religion Found v. Geithner, 644 F.3d 836, 841 (9th Cir. 2011) (quoting *Cal. Ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006)). Proposed intervenors must meet all four criteria, and "[f]ailure to satisfy any one of the requirements is fatal to the application." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). In evaluating motions to intervene, "courts are guided primarily by practical and equitable considerations,

and the requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.,* 370 F.3d 915, 919 (9th Cir. 2004). "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in invention, and the declarations supporting the motion as true absent sham, frivolity or other objections." *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

2. Permissive Intervention

Under Federal Rule of Civil Procedure 24(b)(1), "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Permissive intervention "requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found.*, 644 F.3d at 843 (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.3d 470, 473 (9th Cir. 1992)). "Even if an applicant satisfies those threshold requirements," however, "the district court has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "[T]he court may also consider other factors in the exercise of its discretion, including 'the nature and extent of the intervenors' interests' and 'whether the intervenors'

interests are adequately represented by other parties.'" *Perry*, 587 F.3d at 955 (quoting *Spangler v. Pasadena City Bd. Of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)).

Both permissive and intervention as of right motions must be served on all parties, "[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

3. Amendment of the Complaint to Join A Party under Rule 15

Federal Rule of Civil Procedure 15(a)(2) requires the court to "freely give" leave to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is "applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). It is within the court's discretion whether to grant or deny leave to amend. *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). "In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate a decision on the merits, rather than on the pleadings or technicalities." *Id.* In considering requests to amend, courts analyze the following factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended her complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

C. Request for Intervention under Rule 24 is DENIED

1. Lillian and Beverly's Motion for Intervention or Joinder is Procedurally Defective

Initially, no matter how the October 2016 request is construed – whether as a motion to intervene or a motion to amend the complaint to add Beverly as a plaintiff – the motion is defective. Any motion for intervention under Rule 24 requires the motion to "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). No proposed pleading has been submitted to the Court. Lillian and Beverly's request indicates that, if Beverly is permitted to intervene, an addendum to the complaint "will include" causes of action under 18 U.S.C. §§ 1961, 1962, 1956, and 1957,[13] code sections promulgated under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). This citation to various code sections is insufficient for the Court to infer the substance of the claims Beverly wishes to assert under RICO.

The same is true of a motion to amend the complaint to name Beverly as a plaintiff. Rule 137(c) of the Local Rules for the U.S. District Court, Eastern District of California, states in pertinent part that, "[i]f filing a document requires leave of court, such as an

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[13] 18 U.S.C. §§ 1957, 1958 are criminal statutes that do not contain a private right of action.

amended complaint after the time to amend as a matter of course has expired, counsel shall attach the document proposed to be filed as an exhibit to the moving papers seeking such leave." The Court has discretion to deny a motion to amend for failure to attach a proposed pleading as required by local rule. *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d 503, 507 (9th Cir. 1978). As noted above, Beverly has failed to attach a proposed amended complaint or describe the new claims in sufficient detail. A court's ability to evaluate the propriety of a motion to amend a pleading is hampered when the moving papers do not describe the proposed amendments in sufficient detail or attach the proposed amended pleading. *United States v. Molen*, No. 2:10-cv-02591-MCE-KJN, 2011 WL 3678431, at *2 (E.D. Cal. Aug. 22, 2011). As either a request for intervention or a motion to amend, the request is procedurally deficient without a proposed pleading.

2. Lillian and Beverly's Motion for Intervention is Substantively Defective

In considering the intervention of right factors set forth by the Ninth Circuit in *Geithner*, 644 F.3d at 841 the motion is timely as the pleadings have not closed and no schedule has yet been set. Given this posture, Beverly's intervention does not pose a risk of undue prejudice to Defendants. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

The second factor, whether the applicant has a significant protectable interest, is fatal to the request.

An applicant seeking intervention has a significant protectable interest in an action if (1) she asserts an interest that is protected under some law, and (2) there is a "relationship between its legally protected interest and the plaintiff's claims." *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). In addition, an applicant to intervene must be "so situated that disposing of the action may as a practical matter impair or impede" her ability to protect her interest. Fed. R. Civ. P. 24(a)(2). Beverly claims that she is a co-trustee with Lillian, and she is also a beneficiary of the trust. However, these allegations are conclusory – there is no allegation when Beverly was made co-trustee, of what particular trust she is co-trustee, or of what trust she is beneficiary.[14] It is simply too vague and conclusory to assert co-trustee and beneficiary status of the trust to allege a significant protectable interest. Moreover, this allegation is facially contradicted by Lillian's complaint which states that Lillian "is the only party of interest as Settlor, Trustee and sole Beneficiary of the [1999 Trust]." (Cmplt., 3:26-28.) Lillian also asserts she revoked the trust sometime in 2008. (Cmplt., p. 63, Exh. 3.)

Moreover, even assuming Beverly has a significant protectable interest, Beverly and Lillian

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[14]In her reply brief, Beverly states a UBS account statement attached to the complaint bears her name as co-trustee, which is sufficient to establish this fact. This bare reference on an account does not provide any details regarding which trust Beverly is co-trustee or when this occurred.

have not shown that Lillian will not adequately represent Beverly's interests. Courts consider three factors in assessing whether the present party will adequately represent the interests of the proposed intervenor: (1) whether the interest of present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). The "most important factor in determining adequacy of representation is how the interest compares with the interests of the existing parties. When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.*

Beverly and Lillian's argument as to adequacy of representation focuses on Lillian's physical limitations that preclude her from representing herself and the inability to locate and retain counsel. This is essentially an argument that, although Beverly is ineligible to represent her mother before this Court, Beverly wishes to become a party so she can litigate the case on her own and Lillian's behalf. Under these circumstances, Beverly has not established Lillian is *unwilling* or *legally incapable* of making all Beverly's arguments with regard to the claims regarding Lillian's trust. Rather, Lillian "lacks legal skill and acumen to be able to prepare and file her own papers by herself." If that is true, Lillian cannot proceed pro se with the case – adding Beverly to the suit as a

plaintiff does not cure Lillian's inability to represent herself. Intervenor is not a mechanism whereby an unrepresented plaintiff hands off her case to another party to litigate it on her behalf. There is no showing that Beverly's interests diverge from Lillian in some way that requires Beverly's presence in the litigation. For these reasons, Lillian and Beverly's request to intervene as of right is both substantively and procedurally flawed and cannot be granted.

These same deficiencies preclude Beverly's request for permissive intervention. It is not clear how Beverly's interests diverge from that of her mother, such that Beverly needs to intervene to protect her own interests. Without a proposed amended complaint, the jurisdictional basis of the complaint in intervention is not ascertainable, and the Court cannot evaluate the viability of any claims under RICO Beverly states she wishes to file. Both procedurally and substantively, the request for permissive intervention is defective and cannot be granted.

D. Amendment to Add Beverly as A Party under Rule 15 is DENIED

Finally, even construing this filing as a motion to amend the complaint simply to add Beverly as a plaintiff, the request cannot be granted. While amendment to the complaint should be freely granted, where the amendment is futile a request to amend will not be granted. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996). For the reasons discussed below, Lillian's claims are not viable, even assuming the Court has

subject matter jurisdiction. Beverly will be precluded from litigating these claims to the same degree as Lillian, and thus amending the complaint to add her as a party is futile. With respect to additional claims Beverly wishes to file against Defendants under RICO, those claims were not properly presented to the Court in the form of a proposed amended complaint. For all the reasons set forth above, Beverly and Lillian's request to intervene is DENIED.

VI. DEFENDANTS' MOTIONS TO DISMISS ARE GRANTED

The Court finds it lacks subject matter jurisdiction over Lillian's claims as a de fact appeal of the FCSC judgment in the underlying probate matter prohibited by *Rooker-Feldman*. Even if the Court had jurisdiction over any of Lillian's claims, however, none are viable, and Defendants' motions to dismiss must be granted.

A. Standard of Decision – Motion to Dismiss Pursuant to Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. Dismissal under Rule 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the

allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations omitted). Thus, "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements'. . . are not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. "[T]o be entitled to the presumption of truth, allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). In practice, "a complaint . . . must contain either direct or inferential

allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. To the extent that the pleadings can be cured by the allegation of additional facts, a plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

B. FCSC's Motion to Dismiss is GRANTED[15]

Beyond the jurisdictional argument under *Rooker-Feldman*, FCSC contends Lillian's claims against it are barred by the Eleventh Amendment of the U.S. Constitution and precluded by judicial immunity; moreover, even if Lillian's claims were somehow cognizable, they must be dismissed for failure to comply with the California Government Claims Act. (Doc. 42-1.)

Lillian's claims against FCSC, as can be cobbled together from the amorphous allegations of the complaint, relate entirely to FCSC's adjudication of the trust administration issues that arose in *In re The Angelo John Pellegrini and Lillian Dorothy Pellegrini Revocable Living Trust, dated June 18, 1999*, Case. No. 10CEPR00683, Fresno County Superior Court. Lillian alleges FCSC acted without any jurisdiction over the 1999 Trust and its orders where therefore void; FCSC was without jurisdiction to appoint a trustee over the

[15]FCSC filed two identical motions to dismiss. (Docs. 40, 42.)

Family Trust, since that trust never existed (Cmplt., 24:1-4); it violated rules of due process by granting and imposing injunctions without notice or a hearing (Cmplt., 21:24- 28, pp. 23-24); and it was without any jurisdiction to order UBS to furnish Lillian's account information or to freeze and levy Lillian's UBS account (Cmplt., pp. 24-25). Lillian also alleges FCSC "facilitated the fraud" by denying due process in issuing rulings before trials or hearings took place, denying Beverly Pellegrini a chance to be heard or permitted to be present at hearings; ignored evidence related to the existence of the Family Trust; and lacked any authority to issue orders regarding Lillian's trust property. (Cmplt., pp. 31-35.)

1. The Eleventh Amendment Bars Lillian's Claims Against FCSC

FCSC contends the Eleventh Amendment bars suits seeking either damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies. State courts are state entities for the purposes of the Eleventh Amendment, and thus FCSC maintains it is immune from Lillian's claims which arise out of its official actions in adjudicating the underlying trust administration proceedings. The Court agrees.

Put simply, Lillian can state no claim against FCSC (or its employees) pertaining to its adjudication of her trust in probate proceedings because such suits are barred by the Eleventh Amendment. *Simmons v. Sacramento*, 318 F.3d 1156, 1161 (2003) (citing *Will v.*

Mich. Dep't of State Police, 491 U.S. 58, 70 (1989) (holding that "'arms of the State' for Eleventh Amendment purposes" are not liable under § 1983)); *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) ("We conclude that a suit against the Superior Court is a suit against the State, barred by the eleventh amendment.")).

2. FCSC's Additional Arguments

As the Court finds Lillian's claims against FCSC are barred by the Eleventh Amendment, it does not reach FCSC's alternative arguments pertaining to immunity and the Government Tort Act. Even if the *Rooker-Feldman* doctrine does not deprive the Court of jurisdiction, Lillian's claims against FCSC must be dismissed with prejudice as barred by the Eleventh Amendment.

C. UBS and BNY's Motion to Dismiss is GRANTED

Beyond arguing *Rooker-Feldman* deprives the Court of jurisdiction over Lillian's complaint, UBS and BNY contend Lillian's claims against them are subject to dismissal under the doctrines of res judicata, collateral estoppel, law of the case, and the Anti-Injunction Act, 28 U.S.C. § 2283. UBS and BNY also contend Lillian's claims must be dismissed as vague, unsupported, and unintelligible.

Lillian alleges UBS colluded with Marleen Merchant's counsel, Weintraub Tobin, to release

Lillian's UBS account statements pursuant to Marleen's subpoena *before* FCSC had a chance to rule on Merchant's petition to enforce the subpoenas. (Cmplt., 27:15-18.) She also claims UBS released statements to the Public Guardian in August 2015 that were not the statements requested and those statements were furnished without prior notice or authorization from Lillian. Lillian asserts UBS knew that she was the settlor of the 1999 Trust, that no Family Trust was ever created, and that she intended to sell the San Francisco real property in 2008. She claims that UBS agreed "to conform to the demands of Weintraub Tobin and Fresno County," knowingly and intentionally aiding and abetting the conversion and theft of her UBS assets. (Doc. 1, Cmplt., p. 27-30.) She contends UBS breached her right to privacy in her accounts and froze her account in September 2015 before any court order or ruling was issued; breached its contract by harassing her for unnecessary private information; made a "wrongful death ransom" against Beverly's life; and demanded she remove all her accounts from UBS within a week or face further liquidation.

1. Issue Preclusion Bars Certain Claims Against UBS[16]

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[16]Even if Beverly were added as co-plaintiff, her claims would be barred by issue preclusion to the same extent as Lillian because she and Lillian are in privity. To determine privity, courts examine the practicalities of the situation and determine whether the parties are sufficiently close to afford application of the principles of preclusion. *Armstrong v. Armstrong*, 15 Cal. 3d 942, 951 (1976). Privity may be established by "a mutual or successive

UBS contends Lillian's claims are barred by the doctrine of issue preclusion. As the Court understands Lillian's allegations, her claims of fraud, unspecified privacy violations, breach of contract, and "wrongful death ransom" spring directly from UBS' compliance with FCSC's orders directing UBS to comply with Marlene Merchant's 2014 subpoena requests; to freeze Lillian's UBS accounts pursuant to the October 20, 2015, order; to allow the Fresno County Public Guardian access and discretion to direct UBS on what assets in Lillian's account to liquidate; and to pay $1,528,271.44 to the Public Guardian. Lillian's claims are premised on the notion that FCSC had no jurisdiction to issue any orders regarding the trust assets, and that UBS acted in a spurious and unlawful manner in carrying out FCSC's orders.

Issue preclusion can be invoked by one not a party to the first proceeding, such as UBS, against a

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relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights." *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1069 (1998) (internal citations omitted). Privity "has also been expanded to refer to . . . a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application" or preclusion. *Id.* at 1069-70. Privity will also be found where the two parties have a "sufficient commonality of interests." *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003). In her motion to intervene, Beverly alleges she and Lillian are co-trustees. As such, they share a sufficient commonality of interests in the trust and its assets to establish privity in the underlying lawsuit regarding administration of the trust.

party who had a "full and fair opportunity to litigate the issue in the first case but lost," such as Lillian. *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 820 (2015). The underlying objective is to preclude a party from re-litigating an issue that has been finally decided against that party in a prior suit. *Id.*

Issue preclusion prohibits the re-litigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Issue preclusion will apply "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party to the first suit or one in privity with that party." *Id*. at 819.

Here, Lillian had a full and fair opportunity to litigate in the underlying proceeding whether the Family Trust existed and should have been funded at the time of Angelo's death in 2008, the amount the Family Trust should have been funded, and whether Lillian was fit to act as trustee of the Family Trust. Those identical issues were finally decided against Lillian by FCSC in the underlying case, which was affirmed by the Fifth DCA, and Lillian's petition for review before the California Supreme Court was denied.[17] The requisite elements for issue preclusion

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[17]FCSC's January 2015 and May 2015 orders were final and appealable when issued, and no appeal was taken within the 60-day period. Cal. Prob. Code § 1304(a); Cal. Rules of Ct., rule 8.104(a)(1). Lillian appealed in November 2015, and FCSC's orders were affirmed. Lillian sought review by the California

are satisfied, and Lillian cannot state a cause of action that seeks to re-litigate the issue of whether the Family Trust existed or whether and how much it should have been funded. Lillian maintains UBS had information showing the Family Trust never existed. (Cmplt., 27:5-29:11.) The existence of the Family Trust, the amount it should have been funded, and whether Lillian could serve as trustee were finally decided and are not subject to re-litigation. Lillian cannot state a fraud claim against UBS based on a theory the Family Trust never existed.[18]

Lillian's allegations of privacy violations and contract breach appear to stem from UBS providing account statements to the Public Guardian. Lillian, however, was removed as Trustee of the Family Trust as of May 2015, and the Public Guardian was appointed by FCSC as successor trustee. There is no allegation by Lillian how, in its role as trustee, the Public Guardian was not entitled to account information pertaining to funding of the Family Trust. This allegation suggests that the Public Guardian was not entitled to account information, which in essence seeks to re-litigate the appointment of a successor trustee.

Supreme Court, which was summarily denied on January 11, 2017. The FCSC's orders and legal determinations are all now final.

[18]The allegations against UBS asserting it worked a fraud on the court in conjunction with Weintraub Tobin and Fresno County are considered in Weintraub Tobin's motion to dismiss below.

Lillian's allegations that UBS wrongfully paid the Public Guardian out of her UBS accounts do not and cannot form the basis of a cognizable claim. The issue of whether assets from the UBS account were to be paid to the Family Trust was decided by FCSC in the underlying litigation. UBS' actions in complying with FCSC's judgment and its orders enforcing its judgment cannot form the basis of a legitimate cause of action because it necessarily seeks to re-litigate whether Lillian was required to fund the Family Trust.

2. Lillian's Remaining Allegations Do Not Constitute Viable Claims

Lillian also alleges UBS froze her accounts before FCSC issued any order requiring it to do so, which resulted in an IRS payment being rejected by UBS. However, Lillian concedes the IRS check was resubmitted for payment and penalties were paid by UBS. (Cmplt., p. 29:24-28.) As a result, Lillian has alleged there were no damages stemming from this "freeze" of her UBS account. To the extent there is any alleged wrongdoing by UBS in rejecting the IRS check or freezing the account at some point prior to the FCSC's October 20, 2015, order, there were no damages suffered, and the claim is not viable.

Lillian's allegations pertaining to UBS' "wrongful death ransom" are difficult to understand. Lillian alleges that

> UBS liquidated securities through Mike Williams Branch Manager on January

> 21-22, 2016. Keesal Young & Logan filed a WRONGFUL DEATH RANSOM with Fresno Superior Court (also filed with the Fifth District Court of Appeal) stating that Lillian Pellegrini could keep her funds if Beverly Pellegrini's life were abruptly ended.

(Doc. 1, Cmplt., 30:5-8.) The document filed by UBS in January 2016 on the FCSC docket, which is judicially noticed,[19] contradicts Lillian's allegation in this regard. On January 22, 2016, UBS filed a "Notice to the Court and All Parties" with FCSC which states that

> 7. On or about January 21, 2016, UBS became concerned about the welfare of Ms. Lillian Pellegrini's daughter, Beverly Pellegrini, who has repeatedly and recently threatened to harm or kill herself should UBS comply with the Court's Pay Order and pay $1,528,271.44 to the Public Guardian.
>
> 8. Also on January 21, 2016, UBS' counsel, Audette Paul Morales, alerted the City of Fresno Police Department (the "Fresno PD") about Ms. Beverly Pellegrini's threats to harm or kill herself. The Fresno PD advised it would

[19]To be clear, the Court has taken judicial notice of *what* was filed on the FCSC docket by UBS in January 2016 – not the *truth* of the *contents* of that filing. (Doc. 97.)

> send officers to the Pellegrini home to conduct a welfare check on the Pellegrinis. As of the date of this *ex parte* petition, UBS is unaware of the results of said welfare check.

(Doc. 97, ¶¶ 7-8.) This document does not state that Lillian could keep her funds if "Beverly Pellegrini's life were abruptly ended." Although there is no specific document referenced by Lillian in her complaint with regard to this "Wrongful Death Ransom" allegation, this is the only document filed by UBS with FCSC at that time. Lillian's allegation that UBS filed a "wrongful death ransom" is contradicted by the FCSC docket, and the Court need not assume the truth of this fact. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (court need not accept as true allegations that contradict facts which may be judicially noticed).[20] Moreover, Lillian has no standing to assert a claim on Beverly's behalf, and there are no allegations in this regard that pertain to Lillian.

Typically, leave to amend a complaint should be granted, unless it is clear that Lillian's claims against UBS cannot be saved by amendment and any attempt to do so would be futile. *Chang*, 80 F.3d at 1296. The fraud and privacy allegations against UBS, aside from being overly vague and conclusory, are predicated on issues that were fully litigated by FCSC in the underlying case and decided against Lillian. Lillian

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[20]Whether or not the content of the "Notice" filed by UBS is true, it simply does not say what Lillian alleges it does.

cannot re-litigate those issues in this Court, even though framed inside a different claim. The wrongful death ransom allegation is contradicted by the text of UBS' state court filing in January 2016, and there are no damages alleged. None of Lillian's purported claims against UBS can be cured by amendment.

3. Claim Against BNY is Dismissed

Lillian's only allegation against BNY pertains to the withdrawal of funds from Lillian's trust account in the amount of $1,528,271.44:

> UBS withdrew funds from Lillian Pellegrini's trust account, issued check number 0001023561 for $1,528,271.44 on Bank of NY Mellon account number 043301601 made payable to the Unapproved Payee, Fresno County Public Guardian for the Lillian Pellegrini Family Trust (a trust that was known by UBS Financial Services, Weintraub Tobin, Fresno County Counsel, the Fresno County Public Guardian, and Fresno Superior Court not to exist at the time of transfer and was not created at any time, before or after the transfer). Bank of NY Mellon . . . were contacted immediately and informed of the fraudulent transfer and to stop payment and return the check to UBS Financial Services. Bank of NY Mellon did not comply.

(Cmplt., 38:10-23.) This claim stems from an allegation that Lillian's UBS account funds were improperly withdrawn. This issue, however, was already decided by FCSC; UBS was complying with an order executing FCSC's judgment as to the trust assets. As discussed above, Lillian cannot relitigate any issue pertaining to the existence of the Family Trust, the amount FCSC ordered it be funded, or FCSC's order that UBS make payment to Public Guardian. The claim against BNY is barred by issue preclusion. The predicate facts and issues of law on which this claim rests – the existence and funding of the Family Trust – were already decided against Lillian. This claim cannot be saved by amendment, and it is dismissed without leave to amend.

D. Fresno County's Motion to Dismiss is GRANTED

Fresno County[21] seeks dismissal of Lillian's complaint under Rule 12(b)(6). Fresno County asserts Lillian's conversion allegations against it cite criminal statutes for which there is no private right of action. Moreover, Fresno County contends the claims against it are barred by immunity and the prosecutorial privilege.

Lillian asserts Fresno County perpetrated a fraud that a Family Trust had been created under the

[21]Fresno County was erroneously sued as "Fresno County Counsel representing Joshua Cochron" and the "Fresno County Public Guardian."

1999 Trust document and cites 18 U.S.C. §§ 1621-1623. Lillian claims the statements made by Fresno County, through the County Counsel, in its ex parte petition filed with the FCSC on October 19, 2016, were false. (Cmplt., 39:21-40:18.) Lillian also maintains Fresno County acquired funds from her UBS account by way of fraud and deliberate misrepresentation of the facts and the law. (Cmplt., 41:21-27.) These allegations stem from Lillian's primary contention that the Family Trust never existed:

> The property actually stolen by Fresno County from Lillian Pellegrini's revocable trust came from two trusts of which Lillian Pellegrini owns all property. Income generated from investments in the irrevocable trust, of which Lillian Pellegrini is sole Trustee and sole Beneficiary and has full power of appointment that she has exercised, flows into the revocable trust of which also was the inherited separate property of Lillian Pellegrini that she holds as Sole Settlor, Trustee, and Sole Beneficiary.

(Cmplt., 41:15-20.) The issue of whether the Family Trust existed and whether it should have been funded with Lillian's trust assets was decided by FCSC. Any conversion claim against Fresno County predicated on Lillian's allegation that funds were wrongfully withdrawn from her account pursuant to court order is barred by issue preclusion. Additionally, the statutes

Lillian cites in reference to a "conversion" claim, including 18 U.S.C. §§ 1621 (perjury), 1622 (subornation of perjury), 1623 (false declarations before grand jury or court), are criminal statutes for which there is no private right of action.

Lillian also alleges Fresno County Counsel, as representative for the Public Guardian, took Lillian's UBS assets by falsifying documents and court rulings in preparing ex part petitions and orders. These allegations, too, hinge on the premise that "Fresno County Counsel knew that no Family Trust had been created." (Doc. 1, Cmplt., 40:4.) As discussed above, Lillian cannot re-litigate the issue of whether a Family Trust was created – that issue was expressly decided by the FCSC. Her claim of fraud, conversion, and due process violations cannot rest on allegations regarding issue that were already decided against Lillian in the underlying matter.[22]

Moreover, in their role as advocates for the Public Guardian and as the Public Guardian in the probate proceedings, Fresno County Counsel and Joshua Cochron are entitled to prosecutorial immunity. The California Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope

[22]As it relates to allegations that Fresno County colluded with UBS and Weintraub Tobin to perpetrate a fraud on the FCSC (Cmplt., pp. 39-41), that issue is addressed below in considering Weintraub Tobin's motion to dismiss.

of his employment, even if he acts maliciously and without probable cause." "California courts construe this provision broadly 'in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." *Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077, 1108-09 (N.D. Cal. 2011) (quoting *Gillan v. City of San Marino*, 147 Cal. App. 4th 1033, 1048 (2007)). "Immunity under Government Code section 821.6 is not limited to claims for malicious prosecution, but also extends to other causes of action arising from conduct protected under the statute, including defamation and intentional infliction of emotional distress." *Gillan*, 147 Cal. App. 4th at 1048. It also applies to all employees of a public entity, not just its legally trained personnel. *Asgari v. City of L.A.*, 15 Cal. 4th 744, 756-57 (1997).

For example, in *Pagtakhan v. Alexander*, 999 F. Supp. 2d 1151, 1160 (N.D. Cal. 2013), the district court applied section 821.6 to claims against employees of the Public Guardian's office based on the prosecution of a conservatorship proceeding. Here, like *Pagtakhan*, the Public Guardian, as successor trustee, was obligated to pursue FCSC's order that Lillian fund the Family Trust. Lillian's allegations regarding the County Counsel's preparation of ex parte petitions and orders and obtaining injunctions related to this funding of the Family Trust all stem from the County Counsel's representation of the County and the Public Guardian in the underlying case, and the County Counsel and the Public Guardian are immune from suit under section 821.6

Finally, to the extent Lillian claims County Counsel or the Public Guardian made misrepresentations to the FCSC during the course of the underlying proceedings, they are part of Fresno County, a public entity, and are immune for any injury caused by misrepresentation. Cal. Gov't Code § 818.8.

In sum, the Court finds Lillian's allegations against Fresno County based on assertions the Family Trust never existed or that Fresno County had no legitimate power to withdraw funds from Lillian's UBS account, are barred by the doctrine of issue preclusion. Moreover, as it pertains to actions Fresno County and the Public Guardian took in carrying out FCSC's orders, Fresno County – and its employees – is entitled to immunity. Fresno County's motion to dismiss is GRANTED.

E. Weintraub Tobin's Motion to Dismiss is GRANTED

In its motion to dismiss, Weintraub Tobin argues Lillian's allegations of fraud against it are insufficient to state a cognizable claim as a matter of law. (Doc. 45.) Beyond this, Weintraub Tobin asserts the allegedly fraudulent conduct is outside the applicable statute of limitations.

Lillian asserts Weintraub Tobin, as counsel for Marleen Merchant, knowingly and falsely claimed to FCSC that a Family Trust was created and that Lillian had breached her fiduciary duties by failing to fund the Family Trust. (Cmplt., 18:26-29:2.) Lillian

also contends Weintraub committed fraud by claiming that all property held in the 1999 Trust was community property, which Weintraub Tobin knew to be false. (Cmplt., 18:2-5.) Lillian asserts this became clear when Weintraub Tobin filed a document in June 2016 with the Fifth DCA stating that the Family Trust was "supposed" to have been created, implying that it never actually had been created. (Cmplt., 18:6-8.) Lillian terms this "fraud on the court."

Weintraub Tobin argues there is no private cause of action for "fraud on the court," and any such claim is barred by res judicata because the only remedy for such a claim is to set aside the FCSC's findings in the underlying case.

A claim for "fraud on the court" arose from the common law as a court-created equitable device to remedy injustices under the court's inherent power. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944). Federal Rule of Civil Procedure 60 expressly provides a remedy for such fraud, stating that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . [for] fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing part . . . . " Fed. R. Civ. P. 60(b)(3). Rule 60 does "not limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). Due to its equitable origins, however, no court has ever recognized fraud on the court as an independent legal cause of action for which a plaintiff may recover damages. It is, instead, a theory pursuant

to which a party may seek relief from a judgment or court order induced on the basis of the opposing party's fraud. *Hazel- Atlas Glass Co.*, 322 U.S. at 248.)

To the extent Lillian's "fraud on the court" claim seeks damages, it is not viable because the only available remedy is equitable. To the extent Lillian's claim of fraud on the court seeks to set aside the FCSC judgment, the claim is barred by res judicata. Federal courts "will not entertain a collateral attack on a state judgment on the basis of 'fraud on the court' in an action for damages." *LaMie v. Wright*, No. 1:12-cv-1299, 2014 WL 1686145, at *14 (W.D. Mich. Apr. 29, 2014); *see also Fox Hollow of Turlock Owner's Ass'n v. Mauctrst, LLC.*, No. 1:03-cv-5439-AWI-SAB, 2015 WL 5022762, at * 4 (E.D. Cal. Aug. 24, 2015). "The universal rule in the federal courts . . . is that an equitable action to set aside a judgment may only be heard by the court whose judgment is challenged." (citing *Weisman v. Charles E. Smith Mgmt., Inc.*, 829 F.2d 511, 514 (4th Cir.1987); *Sessley v. Wells Fargo Bank, N.A.*, No. 2:11–cv–348, 2012 WL 726749, at * 9 (S.D. Ohio Mar. 6, 2012) (if plaintiff believed that a state court foreclosure judgment was obtained by fraud on the state court, plaintiff's remedy was by way of motion for relief filed in the state court, not by way of a collateral attack in federal court)). If she believes the FCSC judgment was procured by fraud on the court, Lillian's remedy is (or was) to bring a post-judgment motion or an independent action in equity to vacate the judgment in that court. A collateral attack on that

state court judgment cannot be made in federal court.[23]

For this reason, Lillian's allegation of fraud against Weintraub Tobin is not viable as a claim for relief and cannot be cured by amendment. As such, leave to amend is inappropriate.[24]

F. Comerica's Motion to Dismiss is GRANTED

Comerica contends Lillian makes no allegation that gives rise to a cognizable claim against it, and Comerica owes no duty of care to Lillian as an unrelated third party. Comerica requests the claim against it be dismissed without leave to amend. (Doc. 46-1.)

Lillian alleges that UBS withdrew funds from her trust account in the amount of $1,528,271.44 on BNY account number 043301601. BNY CEO Gerald Hassell and General Counsel Anthony Mancuso were "contacted immediately and informed of the fraudulent transfer and to stop payment and return the check to UBS Financial Services. Bank of NY Mellon did not comply." (Cmplt., 38:10-23.) Lillian's daughter, Beverly, was informed by the CPA and Controller for Fresno County that the Public Guardian uses Comerica Inc. to deposit funds that the Public

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[23]This applies equally to Lillian's claims that UBS and Fresno County colluded with Weintraub Tobin to commit a fraud on the court. (Cmplt., pp. 49-41.)

[24]Because the claim is otherwise not viable, the Court does not reach Weintraub Tobin's statute of limitations argument.

Guardian receives. (Cmplt., 38:24-26.) Lillian claims Comerica was contacted immediately to return the check unpaid to UBS "on receipt and before it cleared." (Cmplt., 39:2-12.) Lillian does not state whether she was able to confirm that Comerica was the depository bank.

No formal cause of action is stated, and the allegation that Comerica was asked to stop payment, but did not return the funds to UBS does not form the basis of a claim upon which relief can be granted. Even to the extent Comerica received a deposit from UBS made payable to the Public Guardian, Comerica would have been acting in accord with FCSC's order that funds from Lillian's UBS account be withdrawn and paid to the Public Guardian. Lillian has not alleged any facts showing how Comerica has any duty to her. The allegations against Comerica merely show that Comerica may have been the depository bank for the trust funds ordered to be paid to the Public Guardian. There is no cognizable claim stated against Comerica and any amendment will be futile. As such, Lillian's claim against Comerica is dismissed with prejudice.

VII. CONCLUSION AND ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:

1. Defendants' motions to dismiss are GRANTED;

2. Beverly Pellegrini's Request for

Intervention is DENIED;

3. Lillian Pellegrini's complaint is DISMISSED with prejudice and without leave to amend; and

4. The Clerk of Court is DIRECTED to enter judgment in favor of Defendants and close this case.

IT IS SO ORDERED.

Dated: April 6, 2017

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

APPENDIX C

Court of Appeal, Fifth Appellate District
No. F072656

S238760

IN THE SUPREME COURT OF CALIFORNIA
En Banc

MARLEEN MERCHANT,
Plaintiff and Respondent,

v.

LILLIAN D. PELLEGRINI, as Trustee, etc.,
Defendant and Appellant.

[DATE STAMP]
SUPREME COURT
FILED
JAN 11 2017
Jorge Navarrete Clerk

_____
Deputy

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

Filed 10/31/16 Merchant v. Pellegrini CA5

**NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

MARLEEN MERCHANT,
Plaintiff and Respondent,

v.

LILLIAN D. PELLEGRINI, as Trustee, etc.
Defendant and Appellant.

F072656
(Super. Ct. No. 10CEPR00683)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Lillian D. Pellegrini, in pro. per., for Defendant and Appellant.

Weintrab Tobin, Kelly E. Dankbar and Brendan Begley for Plaintiff and Respondent.

In the probate proceedings below, the trial court found after a trial on reserved issues that Lillian Dorothy Pellegrini (Lillian), as former trustee of the Angelo John Pellegrini and Lillian Dorothy Pellegrini Revocable Living Trust of June 18, 1999 (the Trust), had repeatedly refused to comply with the Trust provisions requiring the funding of a subtrust designated as the Family Trust, even when ordered to do so by the trial court. The trial court found that Lillian acted in bad faith and wrongfully took assets belonging to the Family Trust. Consequently, the trial court granted the relief sought by plaintiff Marleen Merchant (Marleen), one of the residuary beneficiaries of the Family Trust, by awarding double damages under Probate Code section 859, which sums had to be paid by Lillian to the successor trustee of the Family Trust.[1] In the same order, the trial court also directed Lillian to pay the attorney fees incurred by Marleen. Lillian appeals from the above order, as well as from

[1]Unless otherwise indicated, all further statutory references are to the Probate Code.

subsequent postjudgment enforcement orders. Because Lillian's appeal has failed to establish any reversible error or abuse of discretion in regard to the above orders of the trial court, we will affirm.

FACTS AND PROCEDURAL HISTORY

The Trust Provisions

Angelo John Pellegrini (Angelo) and Lillian, as husband and wife, executed the Trust on June 18, 1999, which appears to be a fairly standard revocable living trust. The Trust states that Angelo and Lillian (also referred to as the trustors) have two children—namely, their daughters Beverly Jean Pellegrini (Beverly) and Marleen—who would receive the remainder of the Trust estate in equal shares after Angelo and Lillian died. Angelo and Lillian, during their joint lifetimes, were the co-trustees of the Trust.

The Trust provides that on the death of the first spouse, the surviving spouse would continue to act as trustee. However, at that time, the Trust assets were supposed to be divided into separate trusts. As the Trust clearly states: "On the death of the Deceased Spouse, the Trustee shall divide the Trust Estate … into three separate trusts, designated as the 'Survivor's Trust', the 'Marital Trust', and the 'Family Trust'." Here, Angelo died on March 27, 2008, at which time Lillian became the sole trustee and, according to the above language, was obliged to divide the Trust estate into separate trusts as provided in the Trust.

As defined by the Trust, the share of the trust estate to be allocated to the Survivor's Trust consisted of "the Surviving Spouse's interest in the Trustors' community property and the Surviving Spouse's separate property, if any, …." The income of the Survivor's Trust was to be paid by the trustee in frequent installments to the surviving spouse during his or her lifetime. Further, the trustee was entitled to "pay to or apply for the benefit of the Surviving Spouse so much of the principal, up to the whole thereof, as the Trustee deems appropriate for the surviving spouse's health, general welfare and support in accordance with his/her accustomed standard of living." Upon the death of the surviving spouse, the principal of the Survivor's Trust "shall be added to the Family Trust and distributed in the same fashion as provided for hereinafter [regarding the Family Trust]."

The share of the trust estate to be allocated to the Marital Trust (also referred to in the Trust as a Q-Tip Trust) consisted of "the minimum dollar amount necessary for a marital deduction to eliminate (or reduce to the extent possible) any federal estate tax at the death of the Deceased Spouse." However, the Trust further provided that "assets qualifying for the federal estate tax marital deduction shall be transferred to the Marital Trust only to the extent that such transfer would effect a reduction in the federal estate tax otherwise payable by the Deceased Spouse's estate."[2]

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[2]In light of this provision, it appears the Marital Trust need not be funded if doing so would not effect a reduction in federal estate tax otherwise payable by the deceased spouse's

Upon the death of the surviving spouse, the principal of the Marital Trust "shall be distributed … [o]ne share for each of the Trustors' then living children" (i.e., Marleen and Beverly) or, if deceased, to their issue by right of representation.

Finally, the Trust specifies that the Family Trust "shall consist of the balance of the Trust Estate representing the balance of the Deceased Spouse's interest in the Trustors' community property and the balance of the Deceased Spouse's separate property included in the Trust Estate but after the allocation of such property to the Marital Trust." Here, as already noted, Angelo was the deceased spouse; Lillian was the surviving spouse and sole trustee. Following the terms of the above Trust provision, it appears that the allocation of assets that should have been made by Lillian to the Family Trust consisted of Angelo's share of the community property and his separate property, less any portion of such property actually allocated to the Marital Trust.[3] As will be seen, that is precisely what the trial court concluded.

With regard to administering the Family Trust, the Trust states that "[t]he Trustee shall distribute the

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estate. Notably, the Family Trust did not have a such a provision, but was to be funded from the balance of the Trust estate after any allocations were made to the Survivor's Trust and Marital Trust.

[3]The position taken by Lillian in the trial court was that she did not have to fund either the Marital Trust *or* the Family Trust.

income and so much of the principal [of the Family Trust] as the Trustee deems appropriate in the event of accident, illness or like emergency to the Surviving Spouse or to maintain the Surviving Spouse in his or her accustomed standard of living or for extended care." Upon the death of the surviving spouse, the entire principal and any accrued interest in the Family Trust "shall be distributed … [o]ne share for each of Trustors' then living children" (i.e., Marleen and Beverly) or, if deceased, to their issue by right of representation.

On the subject of amendment or revocation, the Trust provides that during their joint lifetimes, Angelo and Lillian were free to revoke or amend the trust. However, "[o]n the death of the Deceased Spouse, the Surviving Spouse shall have the power to amend, revoke or terminate the Survivor's Trust, but the Marital Trust or the Family Trust may not be amended, revoked or terminated on the death of the Deceased Spouse."

In their first amendment to the Trust, executed in 2004 (the 2004 amendment), Angelo and Lillian amended the provision of the Trust relating to the distribution of the Family Trust upon the death of the surviving spouse. The 2004 amendment primarily focused on one item of trust property—the trustors' residence in San Francisco—and provided Beverly with a right to a life estate therein that could be used or relinquished by her, after which an equal division between the trustors' two daughters would be carried

out.[4] Other provisions of the Trust remained unchanged. The 2004 amendment stated in part as follows:

> "c. Distribution of Family Trust on Surviving Spouse's Death. Upon the death of the Surviving Spouse, our daughter, BEVERLY J. PELLEGRINI ('BEVERLY') shall be granted an estate for her lifetime to occupy the real property commonly known and designated as 2554 – 33rd Avenue, San Francisco, California ('the real property') including the contents therein, rent free, or until such time as she voluntarily terminates her possession of said premises for a continuous period of one year. [¶] Upon BEVERLY's death or her voluntary termination of her right to possession by vacating the property for a continuous period of one year, her life estate shall cease and the property shall be sold and the trustees shall divide the proceeds equally among our daughters BEVERLY and MARLEEN J. MERCHANT ('MARLEEN')."

Proceedings After Death of Angelo

Following Angelo's death on March 27, 2008,

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[4]The San Francisco real property was sold by Lillian in 2009.

Lillian became the sole trustee of the Trust or, more specifically, of the separate subtrusts into which the Trust estate was then supposed to be divided. She was removed as trustee of the Family Trust in 2015. As should be apparent, the parties' dispute centers on Lillian's actions while trustee and, in particular, her failure and refusal to fund the Family Trust.

Although the record before us is somewhat sketchy, it appears that the relevant proceedings in the trial court arose out of two petitions filed in the trial court by Marleen. First, on July 3, 2012, Marleen filed a petition to remove Lillian as trustee, appoint a successor trustee and obtain other relief (the petition to remove trustee). Second, on January 13, 2014, Marleen filed a petition for the recovery of property belonging to the Family Trust, for an award of double damages under section 859 and for an award of attorney fees (the petition to recover property). Both petitions were verified by Marleen, and numerous exhibits were referenced in the allegations or attached as exhibits. Because the two petitions set the stage for the subsequent trials of particular issues and the resulting orders that have been appealed by Lillian, we briefly describe the nature of the allegations set forth in those pleadings.

The Petition to Remove Trustee

Marleen's petition to remove trustee contained,

in substance, the following allegations:[5] Following Angelo's death, Lillian refused to provide information concerning the trust assets. Consequently, in 2010, Marleen successfully applied to the trial court for an order compelling Lillian to provide an accounting of the assets as of the time of Angelo's death and also to provide information on how the assets were allocated between the Survivor's Trust, the Marital Trust and the Family Trust. On December 3, 2010, while represented by counsel (attorney Robert Sullivan), Lillian filed a "STATEMENT OF TRUST ASSETS AS OF MARCH 27, 2008," (the 2010 Statement of Trust Assets) signed by her under penalty of perjury. Included with the 2010 Statement of Trust Assets was a summary of a purported allocation of trust assets to the Family Trust.[6] Among the assets set forth in the purported allocation to the Family Trust was one-half of the $800,000 value of the San Francisco residence as of March 27, 2008, or $400,000.[7] The total value of assets

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[5]Although at this point we are summarizing allegations in the petition, for ease of expression we do not insert the word "allegedly" into each sentence.

[6]The allocation summary stated that assets were allocated to the Survivor's Trust and the Family Trust, but not the Marital Trust. Attorney Sullivan's cover letter, dated December 7, 2010, to Marleen's attorney explained that no assets were allocated to the Marital Trust due to the Trust's formula relating to estate taxes.

[7]The San Francisco real property was listed in the 2010 Statement of Trust Assets as "Community Property," valued as of the time of Angelo's death at $800,000. It also noted that the San Francisco real property was sold by Lillian in 2009.

that Lillian (through her attorney) represented to have been allocated to the Family Trust was $544,386.91.

However, in 2011, the above representations regarding the Family Trust were directly contradicted or repudiated by Lillian, who by that time was no longer represented by counsel. Specifically, in response to a subsequent request by Marleen's attorney for further information and accounting concerning the Family Trust, Lillian replied by letter of September 27, 2011, that no Family Trust exists, there are no assets in the Family Trust, and no assets were ever allocated or distributed to a Family Trust.

Based on the above allegations, the petition to remove trustee alleged that Lillian had breached the trust by either (1) failing to fund the Family Trust or (2) even if it had been funded (despite Lillian's most recent statements), by making contradictory and bad faith representations to the beneficiaries, which displayed her unfitness to serve. The petition sought Lillian's removal as trustee, the appointment of a successor trustee, further accounting of the Trust assets, redress of any breaches of trust, and other relief.

The Petition to Recover Property

Marleen's petition to recover property was based on essentially the same factual allegations as the petition for removal of trustee, but included several new allegations. The new allegations were largely based on a revised accounting filed by Lillian in 2013.

In that 2013 accounting, Lillian (1) confirmed that no Family Trust was ever created or funded following Angelo's death, (2) claimed that the San Francisco real property was entirely Lillian's separate property upon Angelo's death,[8] and (3) admitted that she held assets that were formerly in the Trust estate in her own name individually, and outside of the trust.[9] Marleen's petition to recover property further alleged: "[B]y purposefully and continuously refusing over the last five years to follow the provisions of the Trust agreement that require her to create a Family Trust, Lillian has in bad faith wrongfully taken, concealed and disposed of property belonging to the Family Trust." Accordingly, said petition asserted that Lillian was liable for twice the value of the property that belonged to the Family Trust, and for attorney fees and costs pursuant to section 859.[10]

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[8]Lillian's argument that the real property became her separate property upon Angelo's death was based on the original form of title (i.e., joint tenancy) that had existed before the real property was transferred by the trustors to the trust.

[9]In addition to reporting that the Family Trust and Marital Trust were not funded, the 2013 accounting stated that the Survivor's Trust was no longer in existence, Lillian having exercised her power to revoke or terminate that subtrust.

[10]Section 859 states, in relevant part, as follows: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to … a trust, … the person shall be liable for twice the value of the property recovered by an action under this part. In addition, … the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an

Bifurcation of Issues Ordered

On June 17, 2014, the trial court granted Marleen's motion to bifurcate issues. Under the bifurcation order, a trial on "the issues of (a) whether the Family Trust was required to be funded after [Angelo's] death and … (b) whether the title to the San Francisco real property maintained its joint tenancy characterization after being transferred to [the Trust]," was to proceed first. After the trial of the above two issues was completed, the remaining issues would be set for separate trial. Among other things, the remaining issues included: whether Lillian should be removed as trustee as a result of the breaches of trust alleged by Marleen; whether Lillian as trustee breached the Trust and, if so, whether she should be surcharged (in an amount to be determined); whether Lillian as trustee should be surcharged for the attorney fees and costs incurred by Marleen in this matter; whether Lillian as an individual is required to return assets or property to the Family Trust; and whether Lillian, in bad faith, wrongfully took, concealed or disposed of property belonging to the Trust and is, therefore, liable for twice the value of the property recovered as well as Marleen's attorney fees and costs.

The First Issues Tried and Decided

On January 14, 2015, a trial was conducted to determine the issues of whether the Family Trust was

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action pursuant to this part."

required to be funded after Angelo's death and whether the title to the San Francisco real property maintained its joint tenancy characterization after being transferred to the Trust. After considering the evidence presented and the parties' arguments, the trial court issued its findings and order after trial on January 20, 2015 (the January 2015 Order). The trial court found, by clear and convincing evidence, that "the Family Trust was required to be funded following the death of Angelo … on March 27, 2008," and that the amount it should have been funded with at that time was "a minimum of $544,386.91." The trial court also found, by clear and convincing evidence, that "the title to the San Francisco real property did not maintain its joint tenancy characterization after being transferred to the Trust." All other matters were reserved and would be determined by a subsequent trial or hearing. The reserved matters were expressly listed as including "surcharge of Lillian …, as Trustee, removal of Lillian … as Trustee, Lillian['s] … liability for double damages under … section 859, and Lillian['s] … liability for [Marleen's] attorneys' fees and costs under … section 859 …."

On January 28, 2015, Marleen served notice of entry of the January 2015 Order, but Lillian never filed an appeal from that order. Thus, the trial court's determination of these foundational issues became final. Despite the trial court's determination that the Family Trust had to be funded in the minimum amount of $544,386.91, Lillian continued to fail or refuse to do so.

Lillian Removed as Trustee of the Family Trust

On May 11, 2015, the trial court held a hearing on the issue of whether Lillian should be removed as trustee of the Family Trust. In its order filed on May 15, 2015, the trial court (1) ordered the removal Lillian as trustee of the Family Trust "for failing to fund the Family Trust after the death of Angelo" and (2) appointed the Fresno County Public Guardian as the successor trustee of the Family Trust (the May 2015 Order). Furthermore, the May 2015 Order unequivocally stated that "Lillian … is directed to fund the Family Trust in the amount of $544,386.91, and shall pay said amount to the Fresno County Public Guardian as the Successor Trustee of the Family Trust …." As to the remaining issues, the May 2015 Order advised the parties that "[t]he Petition to Recover Property Belonging to Trust, For Award of Double Damages, and For Recovery of Attorneys' Fees and Costs, filed by [Marleen] on January 13, 2014, is set for a one-day court trial on August 25, 2015, …."

On May 21, 2015, Marleen served a notice of entry of the May 2015 Order. Lillian did not file an appeal from that order, nor did Lillian comply with the clear directive therein to fund the Family Trust in the amount of $544,386.91.

Subsequent Trial of Remaining Issues

On August 25, 2015, the trial court proceeded with the trial on the remaining issues. The trial court reviewed the court file, heard the testimony of

witnesses, considered the other evidence presented at trial, and heard the arguments of counsel and of Lillian. In its findings and order after trial, issued on September 4, 2015 (the Damages Order), the trial court made the following findings:

> "1. … Lillian … is in default with respect to the Petition to Recover Property Belonging to Trust, For Award of Double Damages, And For Recovery of Attorneys' Fees and Costs, as she does not have a written response on file to that petition.
>
> "2. Further, based on the evidence of
>
> "(a) [Lillian's] repeated misrepresentations regarding the funding of the Family Trust;
>
> "(b) [Lillian's] deliberate refusal to fund the Family Trust, even in the face of court orders to do so;
>
> "(c) [Lillian's] repeated delay of the proceedings through the filing of frivolous motions and proceedings; and,
>
> "(d) [Lillian's] outright refusal to comply with the terms of [the Trust],
>
> "the Court finds that … Lillian … in bad

> faith wrongfully took assets belonging to the Family Trust, and double damages are awarded pursuant to … section 859.
>
> "3. The evidence is uncontradicted that … Lillian … repeatedly breached the standard of care with respect to her duties as trustee, including, among other things, by failing to fund the Family Trust, even after being ordered to do so. The Court finds that this conduct justifies an award of attorneys' fees and costs in favor of … Marleen … as a surcharge against … Lillian …."

Based on the above findings, the trial court ordered that Lillian "shall pay double damages in the amount of $544,386.91 to the Fresno County Public Guardian as the Successor Trustee of the Family Trust … pursuant to … section 859." The Damages Order explained that "[t]his amount is *in addition to the $544,386.91 that [Lillian] was already ordered to pay* to the Fresno County Public Guardian as the Successor Trustee of the Family Trust" pursuant to the May 2015 Order. (Italics added.) Additionally, the trial court ordered that Lillian "is surcharged for the attorneys' fees and costs that … Marleen … has incurred in this matter in the amount of $439,497.62."

Marleen served a notice of entry of the Damages Order on September 25, 2015. On October 28, 2015, Lillian filed a notice of appeal from the Damages Order, identified in the notice of appeal as a judgment

"dated September 4, 2015." Her notice of appeal also referenced two subsequent postjudgment orders entered by the trial court in October 2015, which we describe below.

Postjudgment Enforcement Orders

In mid-October 2015, when still no action had been taken by Lillian to comply with the trial court's orders, the successor trustee (i.e., the Fresno County Public Guardian) filed an ex parte application seeking to enforce the judgment embodied in the Damages Order against a financial account held by Lillian.[11] The application stated that relief was being sought on an ex parte basis because of Lillian's continuing statements that she would not fund the Family Trust, which created a reasonable likelihood that Lillian would attempt to move or conceal assets if a noticed motion were brought. The application further alleged that enforcement of the judgment would not create a financial hardship on Lillian because, other than the attorney fees recovery to Marleen, the recovered funds would be placed into the Family Trust, and Lillian continued to be the beneficiary of the Family Trust during her lifetime.

On October 20, 2015, the trial court granted the ex parte relief sought by the successor trustee,

[11]Since the Damages Order had incorporated the prior determination that Lillian must fund the Family Trust in the amount of $544,386.91, for simplicity we treat the enforcement request as simply pertaining to the Damages Order.

including to freeze accounts of Lillian's at a particular financial institution (UBS Financial Services) until the further order of the trial court, and to require UBS Financial Services to transfer the sum of $1,528,271.44 to the successor trustee in full satisfaction of the September 4, 2015, Damages Order entered against Lillian.[12]

As noted, Lillian's notice of appeal is from the Damages Order dated September 4, 2015, and from the postjudgment enforcement orders entered on October 20, 2015.

DISCUSSION

I. Burden on Appeal

Preliminarily, we point out Lillian's burden as appellant. A judgment or order of a trial court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Because a trial court's judgment or

[12]Apparently, not all of the assets in the UBS Financial Services account were in the form of cash. Because there was insufficient cash in the UBS Financial Services account to satisfy the entire judgment, it was necessary to liquidate some noncash assets in the UBS Financial accounts. A follow-up order dated November 16, 2015, further authorized the successor trustee to direct UBS Financial Services as to which noncash assets to liquidate. The November 16, 2015, order came after Lillian's notice of appeal, and she did not file a subsequent notice of appeal from the November 16, 2015, order.

order is presumed to be correct, reversible error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, an appellant must affirmatively show prejudicial error based on adequate legal argument and citation to the record. (*Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 556–557; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523.) These requirements apply equally to an appellant who is acting without an attorney. (*McComber v. Wells*, *supra*, at p. 523.)

In light of the burden on appeal, when points are perfunctorily raised, without adequate analysis and authority or without citation to an adequate record, we may pass over them and treat them as abandoned. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700; *Duarte v. Chino Community Hospital*, *supra*, 72 Cal.App.4th at p. 856.) In fact, a failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) As stated in *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318 at page 324: "[A]n appellant must not only present an analysis of the facts and legal authority on each point made, but must also support arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited." (Accord, *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3.)

In the present case, glaring deficiencies in the record indicate that, for the most part, Lillian has failed to meet her burden on appeal. For example, Lillian's opening brief is replete with factual assertions, but she only sporadically cites to anything in the minimal record she provided.[13] More than that, although Lillian provided an appendix containing selected documents, she intentionally declined to furnish any reporter's transcripts of the relevant proceedings in the trial court. Thus, to the extent her appeal involves challenges to the factual findings and/or to the sufficiency of the evidence in the trial and hearings below, the lack of a reporter's transcript renders the record materially incomplete to address those issues.[14] ""[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed."" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 [citing examples where failure to provide reporter's transcript was fatal to assertion of

[13]Lillian provided an appendix containing some exhibits, but she did not provide a clerk's transcript or a reporter's transcript.

[14]Cases coming before an appellate court in such a posture are generally treated as an appeal ""on the judgment roll"" (*Kucker v. Kucker* (2011) 192 Cal.App.4th 90, 93), in which "'review is limited to determining whether any error "appears on the face of the record." [Citations.]'" (*Ibid.*; see *Nielsen v. Gibson*, *supra*, 178 Cal.App.4th at pp. 324-325; Cal. Rules of Court, rule 8.163.)

error premised on insufficiency of evidence].)[15] As helpfully explained by one Court of Appeal: "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

Compounding the problem of an incomplete record is the fact that most of Lillian's opening brief concerns appealable orders from which she failed to file a timely appeal. Remarkably, even though she ostensibly appeals from the Damages Order, almost nothing in her brief addresses that order. We discuss below the implications of Lillian's misdirected attempt

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[15]Additionally, where an appellant challenges the sufficiency of the evidence to support a judgment or order, he or she should *discuss* all of the material evidence, including that which is unfavorable to the appellant's claim: "When a party challenges on appeal the sufficiency of evidence, the party must discuss all the evidence supporting the court's ruling or the party waives the point." (*Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1374.) When we compare the evidence referred to in the trial court's orders (e.g., the Damages Order and the January 2015 Order) to the minimal citations to the evidentiary record in Lillian's brief herein, it is apparent that Lillian has chosen to ignore significant portions of the evidence in her discussion.

to obtain review of nonreviewable matters (due to her failure to timely appeal from those appealable orders).

Despite the above shortfalls on Lillian's part, in an abundance of caution we shall nonetheless briefly consider Lillian's main arguments, but we do so acknowledging at the outset that affirmance would appear to be supportable based on the deficiencies in the record alone.

II. Impact of Failure to Timely Appeal from Appealable Orders

In her statement of appealability, set forth in her opening brief, Lillian asserts without any discussion that the January 2015 Order was "interlocutory and not subject to appeal." Lillian is mistaken on that point. As noted previously herein, the January 2015 Order set forth the trial court's determination that "the Family Trust was required to be funded following the death of Angelo … on March 27, 2008" in the amount of $544,386.91. The January 2015 Order also set forth the trial court's determination that "the title to the San Francisco real property did not maintain its joint tenancy characterization after being transferred to the Trust."

An appeal lies from any order made appealable by the Probate Code. (Code Civ. Proc., § 904.1, subd. (a)(10).) Section 1304, subdivision (a), makes appealable any final order under a section 17200 petition by a trustee or beneficiary concerning the internal affairs of a trust. (§ 1304, subd. (a) [final

orders under § 17200 appealable, with two exceptions not applicable here]; *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 523 ["An order determining the existence of a power, duty, or right under a trust is appealable."]; see § 17200, subds. (a) & (b) [a trustee or beneficiary may petition the trial court to determine any of a broad range of issues relating to the internal affairs of a trust].) Here, the January 2015 Order was clearly an appealable order under section 1304, subdivision (a), since the trial court made final determinations about the internal affairs of the Trust under section 17200.[16] Likewise, the May 2015 Order was appealable under section 1304, subdivision (a), since it also constituted a final order entered under section 17200. (See § 17200, subd. (b)(10).)

When an appealable order or judgment is entered by the trial court, an aggrieved party has 60 days from notice of entry of said order or judgment in which to file an appeal. (Cal. Rules of Court, rule 8.104(a)(1).) The time period is *jurisdictional*; once the deadline expires, the appellate court has no power to entertain an appeal as to that judgment or order. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) Lillian did not file a timely appeal (or any appeal) from the January 2015 Order or the May 2015 Order. As a consequence, Lillian's right to challenge those orders or the matters resolved therein was forfeited and she

[16]It was also appealable under section 1300, subdivision (a), which provides that orders confirming rights in a real property conveyance or transfer are appealable.

cannot seek to review them in connection with her present appeal from a subsequent judgment or order. California law is unequivocal on this point: If an appealable order is not timely appealed, the right to appellate review of that order or to challenge its particulars is "forfeited" and "forever lost." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8; see *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1215–1216 [party who failed to timely appeal an appealable order "cannot be heard to complain" about that order].) Moreover, an appellate court may not review a decision or order from which an appeal could previously have been taken, but was not. (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1347; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119; Code Civ. Proc., § 906.) """The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken."" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 89, p. 152 [same].)

Here, despite her failure to appeal from the January 2015 Order, most of Lillian's appeal challenges the correctness of the trial court's resolution of the issues in that order. Among other things, Lillian's appeal argues that (1) the Trust was wholly revocable by Lillian after Angelo's death and that she did not have to fund the Family Trust and (2) the San Francisco real property, after being transferred into the Trust, retained its joint tenancy status and became her separate property upon

Angelo's death. However, those issues were resolved against Lillian in the January 2015 Order and, therefore, cannot be raised by Lillian in the present appeal. Additionally, Lillian argues on various grounds that the January 2015 Order was erroneous or invalid. She makes a similar argument regarding the May 2015 Order. Again, those orders were not timely appealed by her and are not subject to Lillian's belated collateral attack in an appeal from a subsequent order.

Because the January 2015 Order and the May 2015 Order are not subject to ordinary appellate review for the reasons noted above, Lillian's arguments against the orders' validity would normally be disregarded or dismissed by this court. No timely appeal of an order means no appellate review. However, in our discussion below, we briefly address Lillian's arguments to the extent that she has portrayed the alleged errors as *jurisdictional*.

III. Lillian's Jurisdictional Arguments Fail

In an apparent effort to get around the problem of failing to timely appeal from the prior orders, Lillian characterizes her arguments challenging the validity of those orders as jurisdictional in nature. That is, she claims the trial court exceeded its power or jurisdiction to act. On that basis, Lillian is apparently asking that we treat the portion of her appeal challenging the January 2015 Order and the May 2015 Order as

essentially a petition for a writ of prohibition,[17] concerning which she adds "there is no time limit." We decline to do so for reasons that will be explained in our discussion below.

Preliminarily, we briefly describe what is meant by jurisdictional error in this context. "[J]urisidictional errors can be of two types. A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable." (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) Lillian's contentions are solely of the latter type—i.e., an alleged excess of jurisdiction. Prohibition is used to challenge jurisdictional errors of *both* types; i.e., the writ may arrest or restrain proceedings that are either without *or* in excess of the jurisdiction of the tribunal. (8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 52, p. 929; Code Civ. Proc., § 1102; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288–291.) Most procedural or statutory errors are not

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[17]Lillian's opening brief is entitled "Appellant's Opening Brief" *and* "Writ of Prohibition." (Capitalization omitted.) The caption page of Lillian's appellant's appendix states that a motion for a writ of prohibition "remains pending." (Capitalization omitted.) We previously denied Lillian's motion for a writ of supersedeas and/or for a writ of prohibition relating to the postjudgment enforcement orders. (See order filed Jan. 19, 2016.) To the extent there remained a further or broader request for writ of prohibition, we now make clear that we are denying same. Lillian's request for a default in regard to her prohibition request is likewise denied.

jurisdictional. Nevertheless, an error under a statutory provision may be considered to be in excess of jurisdiction, but ""*only* where the clear purpose of the statute is to restrict or limit the power of the court to act and where the effective enforcement of such restrictions requires the use of extraordinary writs of certiorari or prohibition."" (*In re Marriage of Goddard*, *supra*, at p. 57, italics added.)

For a number of reasons, we reject Lillian's apparent request to treat her appeal as a request for writ of prohibition. The first is Lillian's delay. "'As a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals. [Citations.] "An appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent 'extraordinary circumstances' justifying the delay.'" [Citation.]" (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 310.) Here, no justification for the delay is apparent and none is presented by Lillian. The second reason we decline to treat Lillian's attack on the prior orders as a petition for writ of prohibition is that Lillian had available to her the usual remedy of appealing from those orders, but she simply failed to pursue that remedy. (See, e.g., 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 58, p. 936.) No explanation is offered for failure to avail herself of the presumptively adequate remedy of filing a timely appeal from the prior appealable

orders.[18] The third reason we reject Lillian's request to treat her appeal as a petition for writ of prohibition is that she has failed to identify or demonstrate any jurisdictional error. We discuss this latter point more fully below.

A. Revocability Argument

Lillian makes two main arguments in her attempt to show that the trial court was without power or jurisdiction to issue the January 2015 Order. The first argument relies on Lillian's assumption that the Trust was entirely revocable by her at all times, even after Angelo's death. Based on that premise, Lillian argues that Marleen lacked standing to seek any relief under section 17200 and the trial court was without power to grant Marleen's petition. In support of that contention, Lillian notes that section 17200, subdivision (a), states: "*Except as provided in Section 15800*, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust …." (Italics added.) Further, section 15800 provides: "Except to the extent that the trust instrument otherwise provides …, during the time that a trust is revocable and the person holding the power to revoke the trust is competent: [¶] (a) The person holding the power to revoke, and not the beneficiary,

[18]Additionally, prohibition is generally not available to remedy completed judicial acts or proceedings that are not continuing, since nothing remains to be restrained (8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, §§ 50–51, pp. 927–928), which would appear to be the case here.

has the rights afforded beneficiaries under this division. [¶] (b) The duties of the trustee are owed to the person holding the power to revoke." (See *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1065–1066 [if a trust was fully revocable by the settlor during his lifetime, the contingent beneficiaries' interest was merely potential and could be divested during the settlor's lifetime, during which time the contingent beneficiaries would be powerless to act regarding the trust].)

Whatever we may think of Lillian's argument in the abstract, it fails in this case because it is based on a false foundational premise—namely, that the entire Trust was revocable by Lillian after Angelo's death. Contrary to that assumption, the Trust clearly provided that after the death of the first spouse, the Trust assets were to be divided into the separate subtrusts and only the Survivor's Trust would remain revocable. Specifically, the Trust stated that "[o]n the death of the Deceased Spouse, the Surviving Spouse shall have the power to amend, revoke or terminate the Survivor's Trust, but the Marital Trust or the Family Trust may not be amended, revoked or terminated on the death of the Deceased Spouse." For this reason, Lillian's argument is without merit, since it erroneously assumes that a right of total and complete revocability existed following Angelo's death.[19]

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[19]The presumption of revocability set forth in section 15400 is not applicable to the extent the trust is expressly made irrevocable, which was the case here after Angelo died.

Lillian advances substantially the same revocability argument concerning the May 2015 Order removing Lillian as trustee of the Family Trust and appointing the Fresno County Public Guardian as successor trustee. For the same reasons as discussed above, her argument fails with respect to that order as well. No jurisdictional error is shown. We note that Lillian also argues the trial court abused its discretion because there were inadequate grounds to remove a trustee, but that is plainly not a jurisdictional argument. Moreover, grounds for removal plainly existed based on Lillian's refusal to comply with provisions of the Trust even after being ordered to do so by the trial court. (See § 15642, subds. (a), (b)(1), (b)(4) & (b)(9).)

B. Statute of Limitations Argument

Lillian's second argument offered in support of her claim of jurisdictional error regarding the January 2015 Order is simply that one or more statute of limitations had lapsed.[20] Lillian's argument cannot succeed because an ordinary statute of limitations (as here) does not create a jurisdictional bar; it merely provides a special defense that may be waived. (See, e.g., *Bliss v. Sneath* (1898) 119 Cal. 526, 528 [statute of limitations defense may be waived]; *Redlands etc. Sch. Dist. v. Superior Court* (1942) 20 Cal.2d 348, 360 [award of damages to the plaintiff despite his failure to

[20]It is possible she is making this argument as to the May 2015 Order as well. If so, our analysis and the outcome would be the same.

file timely tort claim against district was not jurisdictional error].) Moreover, there is nothing in the terms of the particular statutes in question (i.e., §§ 16061.7, 16460)[21] to indicate that a clear purpose of either section was to restrict the power of the court to act, or to require it to exercise its jurisdiction in a particular manner. (See *In re Marriage of Goddard*, *supra*, 33 Cal.4th at p. 57 [describing the type of statutory provision necessary to support claim of excess of jurisdiction]; *Abelleira v. District Court of Appeal*, *supra*, 17 Cal.2d at p. 288 [same].) Lillian has failed to explain how violation of the statutes in question could possibly constitute jurisdictional error, and none is apparent.

We conclude that the purported errors based on the above statutes of limitation, if any such errors occurred, were of a nonjurisdictional nature and cannot support a writ of prohibition. (See, e.g., 2

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[21]Section 16061.7, together with section 16061.8, simply provides for a 120-day limitations period for filing a contest to the validity of a trust, commencing when the notice required by section 16061.7 has been sent. Similarly, section 16460 provides a three-year limitations period for a beneficiary to sue the trustee for breach of trust, after the expiration of which all such claims are time-barred. The three-year period runs from the date the beneficiary has received an interim or final accounting in writing or a similar report that adequately discloses the existence of a claim against the trustee for breach of trust, or in the absence of such an accounting, within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim. (§ 16460, subd. (a)(1) & (2).) These appear to be ordinary statute of limitations, not provisions that restrict the power of the court to act.

Witkin, Cal. Procedure (5th ed., 2008) Jurisdiction, § 287, p. 894 [errors in matters of pleading, evidence, procedure, or substantive law are normally nonjurisdictional errors and not grounds for attack by writ of prohibition]; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950 [noting that a failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake of law, have been held to be nonjurisdictional errors for which collateral attack will not lie]; *Abelleira v. District Court of Appeal*, *supra*, 17 Cal.2d at p. 287 [mere errors of law or fact insufficient to support prohibition because "[i]f the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition."].)[22]

In any event, even assuming for the sake of argument that a failure to comply with the statute of limitations could conceivably be considered a jurisdictional bar, Lillian has failed to show that any error occurred. Below, we briefly discuss Lillian's assertion that the time limits of sections 16061.7 and 16460 were violated.

1. Section 16061.7

Service of the notification required under

[22]Lillian has also failed to show that she raised the issue in the trial court, which is a further reason for denial of prohibition. (See 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, §§ 140–141, pp. 1037–1038.)

section 16061.7 creates a 120-day limitations period for a beneficiary or an heir to bring "an action to contest the trust." (§ 16061.7, subd. (h); cf. § 16061.8.) We fail to see how either of Marleen's petitions filed in the trial court could reasonably be considered a *contest* of the Trust. In no sense was the validity or applicability of the Trust or its provisions challenged or attacked. To the contrary, Marleen sought to carry out the terms of the Trust where the trustee was refusing to do so, and also sought remedies related thereto. For this reason, Lillian's attempt to assert the deadline under section 16061.7 (also § 16061.8) is misplaced, and she offers no argument or explanation to the contrary.

Despite this, Lillian appears to argue that section 16061.7's deadline was nonetheless violated because of something she claims was revealed in connection with the statutory notification given to Marleen under section 16061.7. That notification was sent to Marleen pursuant to section 16061.7 by Lillian's then attorney, Mark Drobny, along with the attorney's cover letter dated May 13, 2008, and the waiver form (together the notification papers).[23]

Before proceeding to examine Lillian's contention more closely, for the sake of context we briefly explain what a section 16061.7 notification is. Section 16061.7, subdivision (a)(1), provides in part that a trustee shall serve a notification pursuant to

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[23]Lillian focuses on the waiver form, but we note that all three of these documents have similar content.

that section "When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors …." The notification must include the following information: (1) the identity of the settlor or settlors of the trust and the date of execution of the trust instrument; (2) the name, mailing address and telephone number of each trustee of the trust; (3) the address of the physical location where the principal place of administration of the trust is located; (4) any additional information that may be required by the terms of the trust instrument; and (5) a notification that the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and correct copy of the terms of the trust. (§ 16061.7, subd. (g).) In addition, the notification in this case had to include a conspicuous warning that the recipient may not bring an action to contest the trust more than 120 days from the date of the notification. (§ 16061.7, subd. (h).)

On May 13, 2008, Attorney Drobney sent the required notification to Marleen. His accompanying cover letter summarized the statutory notification and also explained the reason for the attached waiver form: "In order to assist the Trustee in expediting the trust administration process, we request that you sign the enclosed Waiver, which waives your right to object to the trust within the statutory 120-day period. [¶] By signing the enclosed Waiver, it will allow the Trustee to more quickly administer the trust." The core provision of the waiver form stated that Marleen, by signing, was waiving "[her] statutory, common law, and/or other right to bring an action contesting [the

Trust]."[24]

In the notification papers sent by Attorney Drobney, it was briefly recited that the notification was being sent pursuant to section 16061.7 since "a portion of [the Trust] became irrevocable upon the death of ANGELO … on March 27, 2008." The part of the Trust identified as irrevocable at that time was "The Angelo J. Pellegrini Marital Trust."[25] Lillian seizes on the fact that no other irrevocable portion of the Trust was mentioned, arguing that the notification papers, as a matter of law, gave Marleen actual or constructive knowledge in May 2008 that the Family Trust would never be funded by Lillian and would not be treated as irrevocable by her. We disagree. No such definite information about the Family Trust may reasonably be gleaned from the notification papers. Nothing in the notification papers denies that the Family Trust will be funded, and no apparent representation about the revocability of the Family Trust is made. On the other hand, the notification *does* plainly affirm: "Upon the death of the first Trustor, the Trust estate is to be divided into three separate trusts, designated as the 'Survivor's Trust', the 'Marital Trust', and the 'Family Trust'," and goes on to state that the Family Trust "shall consist of the balance of the Trust Estate representing the balance of the

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[24]Marleen signed the waiver form under penalty of perjury.

[25]This was in the notification and repeated in the cover letter and waiver form.

Deceased Spouse's interest in the Trustors' community property and the balance of the Deceased Spouse's separate property included in the Trust Estate but after the allocation of such property to the Marital Trust." Thus, if anything, the overall effect of the notification papers would have been to confirm that the Family Trust was going to be created and funded. Consistent with that assessment, Lillian subsequently submitted the 2010 Statement of Trust Assets (through her then attorney, Robert Sullivan), specifically representing that the amount of assets allocated to the Family Trust was $544,386.91.

In summary, section 16061.7 (also § 16061.8) was not violated in this case. Although the 120-day period was triggered by the service of the section 16061.7 notification, it applied only to actions to contest the trust, which was not the case here. Lillian's attempt to somehow make the section applicable by means of her argument that the notification papers revealed her true intentions is unpersuasive. In any event, nothing in the notification papers served on Marleen would have put Marleen on notice of Lillian's wrongdoing. In short, Lillian has failed to show a violation of section 16061.7.

2. Section 16460

Section 16460 provides a three-year statute of limitations for actions by a beneficiary against the trustee for breach of trust. The three-year period runs from the receipt of an interim or final account or other written report that adequately discloses the existence

of a claim against the trustee for breach of trust. (§ 16460, subd. (a)(1).) If an interim or final account or other written report does not adequately disclose the existence of a claim against the trustee for breach of trust, or if a beneficiary does not receive any written account or report, then the three-year period runs from the time the beneficiary discovered, or reasonably should have discovered, the subject of the claim. (§ 16460, subd. (a)(2).)

Here, Marleen's petition to remove trustee, filed by her on July 3, 2012, was the pleading that commenced her claims for breach of trust.

As noted above, Lillian's 2010 Statement of Trust Assets specifically represented that the amount of assets allocated to the Family Trust was $544,386.91. Obviously, nothing in the 2010 Statement of Trust Assets disclosed that anything was remiss, since it represented Lillian's division of Trust assets and the funding of the Family Trust. The only other financial accounting or report provided by Lillian was on February 19, 2013, where Lillian's revised accounting disclosed that she did not allocate funds to the Family Trust after all. In Lillian's letter of September 27, 2011, she wrote to Marleen's attorney and made representations that there is no Family Trust and no assets were allocated to the Family Trust. Since the September 27, 2011, letter does not appear to be an accounting or report, the three-year period arguably was triggered when Marleen received the February 19, 2013, revised accounting. In any event, even if the three-year period was

triggered by the September 27, 2011, letter, Marleen's pleading was well within the statutory period.

In conclusion, there is no merit to Lillian's contention that a statute of limitations deprived the trial court of jurisdiction or power to make the rulings that it did in the proceedings before it. The purported statute of limitations violations, if any such violations occurred, did not constitute jurisdictional error. In any event, Lillian failed to demonstrate that any statute of limitations violation actually did occur. Moreover, the judgments or orders of the trial court are presumed correct, and Lillian has failed to provide an adequate record of all of the potentially relevant evidence bearing on this issue. As a result, the failure to provide an adequate record provides a further ground for our rejection of Lillian's contention.

For all of the reasons discussed above, Lillian has failed to show that any jurisdictional error was committed by the trial court in the subject proceedings.

III. Lillian Cannot Attack the Funding Order

As we have explained above, Lillian's attempt to characterize the nature of the purported errors as jurisdictional as a means to possibly gain review of the subject orders by a writ of prohibition was unavailing. Consequently, because Lillian failed to file a timely appeal from the January 2015 Order (requiring that the Family Trust be funded) or the May 2015 Order (reiterating that requirement and directing Lillian to

comply with it), she is not entitled to challenge them in the present appeal. She nevertheless attempts to do so, making a variety of further arguments that assert ordinary error in regard to the trial court's determinations, which arguments amount to claims of insufficient evidence to support the trial court's findings or of mistaken application of law to the facts. We summarily reject such claims of error. As a matter of law, Lillian's right to make such claims was lost by her failure to timely appeal from the subject orders (*In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 761, fn. 8; *In re Marriage of Padilla*, *supra*, 38 Cal.App.4th at pp. 1215–1216), and we will not review or disturb the trial court's orders or rulings from which an appeal could previously have been taken, but was not (*In re Marriage of Rifkin & Carty*, *supra*, 234 Cal.App.4th at p. 1347; *In re Marriage of Weiss*, *supra*, 42 Cal.App.4th at p. 119; Code Civ. Proc., § 906).

Even if were to give brief consideration to Lillian's claims, we would have no difficulty rejecting them. The clear terms of the Trust, or a reasonable interpretation thereof, were sufficient to support the trial court's conclusion that the Family Trust must be funded. Additionally, case law adequately supported the trial court's determination that the San Francisco real property was no longer in joint tenancy once it was transferred by the trustors into the Trust (see *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1441–1442). Moreover, Lillian has failed to provide a reporter's transcript to demonstrate any purported lack of substantial evidence regarding the contested rulings of the trial court. Thus, the above attacks also

fail because of a lack of an adequate factual record. A failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Hernandez v. California Hospital Medical Center*, *supra*, 78 Cal.App.4th at p. 502.) As we recited previously: "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)

Although we completely reject Lillian's attacks on the trial court's orders requiring the funding of the Family Trust, we briefly comment on one of her arguments. Lillian asserts that the Family Trust became invalid as a result of the 2004 amendment because that amendment, by focusing primarily on the San Francisco *real* property, allegedly left out an explicit beneficiary designation for the *personal* property in the Family Trust upon the death of the surviving spouse. The trial court implicitly rejected Lillian's claim of invalidity because it's order requiring that the Family Trust be funded necessarily included the court's conclusion that the Family Trust was valid. Moreover, Lillian fails to explain why the issue she raises would not simply be one of trust construction, not of invalidity. As to the issue of trust construction,

Lillian has failed to furnish an adequate record on appeal (i.e., no reporter's transcript). Such a record may well have included extrinsic evidence helping to resolve any potential ambiguity in regard to the effect of the 2004 amendment.[26] In any event, Lillian has not established the invalidity of the Family Trust. In addition to the issue being unsupported by an adequate record and unreviewable for failure to timely appeal from the subject appealable order, it is forfeited for the additional reason that Lillian has presented it in a perfunctory manner without adequate citation to California authority or legal discussion. (*Yield Dynamics, Inc. v. TEA Systems Corp.*, *supra*, 154 Cal.App.4th at pp. 556–557; *People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699–700.)

In summary, we reject all of Lillian's efforts to challenge the orders requiring the funding of the Family Trust, since she failed to appeal from such orders.

IV. No Reversible Error Shown in Regard to Postjudgment Enforcement Orders

The remainder of Lillian's appeal appears to be directed at the October 2015 postjudgment enforcement orders (the enforcement orders). Since Lillian *did* file an appeal from these orders, her right to seek appellate review is not forfeited at the outset

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[26]On the use of extrinsic evidence in construing a trust instrument, see *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73–74.

as was the case with the prior appealable orders.

A. Notice and/or Due Process Arguments

The trial court granted the enforcement orders on an ex parte basis, and not at a noticed hearing. Consequently, Lillian claims that she did not receive due process. We begin our discussion of this claim by highlighting some of the procedural background that preceded the orders in question.

As the record in this case reveals, the trial court on three separate occasions had issued final orders or judgments requiring Lillian to fund the Family Trust, including the January 2015 Order, the May 2015 Order, and lastly the Damages Order issued on September 4, 2015. Nothing in the record suggests that Lillian ever made any attempt to voluntarily comply with the trial court's orders to fund the Family Trust.

In mid-October 2015, when still no action had been taken by Lillian to obey the trial court's orders, the successor trustee of the Family Trust (i.e., the Fresno County Public Guardian) filed an ex parte application seeking to enforce the judgment embodied in the Damages Order against an account held by Lillian at a financial institution known as UBS Financial Services. The application sought two alternative forms of relief: (1) an order freezing the account held by Lillian at UBS Financial Services and/or (2) an order directing UBS Financial Services to pay the successor trustee the sum of $1,528,271.44 in

full satisfaction of the Damages Order against Lillian. It was further indicated in the application that the freezing of the account would be to preserve the status quo pending the issuance of the writ of execution and levy on the accounts.

The application explained that the relief was being sought on an ex parte basis because of Lillian's continuing statements that she would never fund the Family Trust, which created a reasonable likelihood that Lillian would attempt to move or conceal assets if a noticed motion were brought. As summarized by the successor trustee in its moving papers filed in the trial court: "To date, Lillian has failed and refused, and continues to fail and refuse, to fund the Family Trust. Lillian has a long established pattern of refusal to obey court orders, and based on her history of bad faith wrongful taking of trust property (as found by Judge Black at the August 25, 2015 trial), Lillian will continue to secrete and hide her assets rendering the judgment uncollectible or otherwise resulting in a multiplicity of suits." The application further asserted that enforcement of the judgment would not create financial hardship to Lillian because, other than the attorney fees recovery to Marleen, the entirety of the recovered funds would be placed into the Family Trust, and Lillian remained the beneficiary of the Family Trust during her lifetime. The application also informed the trial court that if, as requested, UBS Financial Services was ordered to transfer sufficient funds from the accounts held or possessed by Lillian to the successor trustee to satisfy the Damages Order, approximately $1 million in other funds or assets

would still remain in Lillian's account at UBS Financial Services.

The legal basis argued by the successor trustee for the enforcement orders was the broad authority granted to the trial court under sections 850 to 859, under which authority Marleen's petition to recover property had been tried and the Damages Order entered. We briefly summarize these sections. Section 850 allows (among other things) a petition to be filed by an interested person for the recovery of property belonging to a trust or trustee, where such property is in the possession of another. (§ 850, subd. (a)(3)(A), (B) & (C).) Section 856 provides, in relevant part, that "if the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the … person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief." In accordance with section 856, the trial court ordered in the Damages Order, as well as in the May 2015 Order,[27] that Lillian "shall pay" to the successor trustee the amounts set forth therein, including in the Damages Order an award of double damages under section 859. Section 857 declares the legal effect of such orders made in connection with proceedings under sections 850 to 859: "(a) The order is prima facie evidence of the correctness of the proceedings and of the authority of the personal representative or other fiduciary or other

[27]The May 2015 Order was also, in part, granted pursuant to the petition to recover property (i.e., under §§ 850–859).

person to make the conveyance or transfer. [¶] (b) After entry of an order that the personal representative, other fiduciary, or other person execute a conveyance or transfer, the person entitled thereunder has the right to the possession of the property, and the right to hold the property, according to the terms of the order as if the property had been conveyed or transferred in accordance with the terms of the order." (See *Estate of Kraus* (2010) 184 Cal.App.4th 103, 110–118 [describing broad statutory and equitable powers of the trial court under sections 850–859 to recover and collect assets belonging to a trust or decedent's estate and to fashion appropriate relief to accomplish same, including to recover improperly obtained funds from a wrongdoer's account].)

On October 20, 2015, the trial court granted the ex parte relief sought by the successor trustee, including the issuance of orders (1) freezing certain accounts of Lillian's at UBS Financial Services until the further order of the trial court and (2) requiring UBS Financial Services to transfer the sum of $1,528,271.44 (from certain accounts held by Lillian) to the successor trustee in satisfaction of the September 4, 2015, Damages Order that was entered against Lillian.[28] On November 18, 2015, at Lillian's

[28]Apparently, not all of the assets in the UBS Financial Services account were in the form of cash. Because there was insufficient cash in the UBS Financial Services account to satisfy the entire judgment, it was necessary to liquidate some noncash assets in the UBS Financial accounts. A follow-up order dated

request, we issued a temporary stay of the trial court's enforcement orders to allow briefing from the parties regarding Lillian's "REQUEST FOR A WRIT OF SUPERSEDEAS OR IN THE ALTERNATIVE WRIT OF PROHIBITION …." After considering the parties' arguments, we denied Lillian's request for writ of supersedeas and/or prohibition, and we lifted the temporary stay. Lillian then petitioned for review to the California Supreme Court and applied for a further stay. On February 17, 2016, the Supreme Court denied both requests.

In the instant appeal, Lillian argues that because the enforcement orders entailed the taking or transfer of property, she was entitled to a noticed hearing, rather than such relief being granted by the trial court on an ex parte basis.[29] Since Lillian has

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November 16, 2015, further authorized the successor trustee to direct UBS Financial as to which noncash assets to liquidate. The November 16, 2015, order came after Lillian's notice of appeal, and she did not file a subsequent notice of appeal from the November 16, 2015, order.

[29]Contrary to Lillian's suggestion, the ex parte grant of the enforcement orders in this case did not represent a failure by a probate court to adhere to a jurisdictional notice provision in a statute relating to a special proceeding, as was the case in *Olcese v. Superior Court* (1930) 210 Cal. 566 and *Texas Co. v. Bank of America etc. Assn.* (1935) 5 Cal.2d 35. Here, the relevant notice provision for purposes of section 850 et seq. proceedings was section 851, which provides that, at least 30 days in advance of the trial of the issues set forth in the petition, a notice of hearing along with a copy of the petition must be served on all interested parties. Lillian has not argued, and nothing in the record reflects,

failed to provide a sufficient record, we are not adequately apprised of the exact nature or extent of any alleged deficiency of notice or opportunity to be heard. (*Foust v. San Jose Construction Co., Inc.*, *supra*, 198 Cal.App.4th at p. 187 [""[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.""].) Further, Lillian's appeal fails to address the issue of whether her ongoing defiance of the trial court's direct orders to fund the Family Trust, and the risk implied therefrom that she would seek to hide or conceal assets to prevent enforcement of the Damages Order may have provided justification for the trial court to proceed on an ex parte basis in this particular instance. Where exceptional circumstances are present, ex parte relief may be granted on extremely short notice (see, e.g., Cal. Rules of Court, rules 3.1200–3.1204; 6 Witkin, Cal. Procedure (5th ed., 2008) Proceedings Without Trial, §§ 58–59, pp. 483–485), and the Rules of Court relating to ex parte motions even include a provision to inform the trial court "[t]hat, for reasons specified, the applicant should not be required to inform the opposing party." (Cal. Rules of Court, rule 3.1204(b)(3).) Based on the foregoing, we conclude that Lillian has failed to

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that this notice provision was not complied with here. Even on the meager record before us, there is no question that Lillian was present at, and participated in, the trial on the merits to determine the property recovery issues under section 850, et seq. It is evident that Lillian received notice of the section 850 et seq. petition and of the trial proceedings, she had her day in court, and she lost—resulting in the Damages Order that was thereafter enforced by the subject enforcement orders.

adequately show error. But even if there was error, Lillian has failed to demonstrate that it was of a reversible or prejudicial nature. (Code Civ. Proc., § 475.) Lillian was personally liable for the amounts due under the Damages Order, and she has failed to show that if events had proceeded on a regularly noticed motion, the outcome could have turned out differently.

B. Failure to Join Indispensable Party

Lillian argues that all of the proceedings in the trial court below (including the orders from which she appealed) must be set aside based on an alleged failure to join Beverly as an indispensable party under Code of Civil Procedure section 389. The argument is that when Marleen filed her petitions as a remainder beneficiary, the other remainder beneficiary (Beverly) should have been joined. Lillian fails to cite anything in the record to indicate that she ever pursued a motion to bring Beverly in as a party or that she otherwise raised the argument in the trial court. Accordingly, Lillian has forfeited the issue.[30] (See *Jermstad v. McNelis*, *supra*, 210 Cal.App.3d at p. 538 [a claim of error based on failure to join a compulsory party is waived if not properly raised in the trial court].) Lillian argues the issue is jurisdictional, but that is not so. "'Since the 1971 revision of Code of Civil

[30]Even though the issue was not properly raised in the trial court, it might still be considered on appeal if there was "some compelling reason of equity or policy which warrant[ed] belated consideration." (*Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 538.) Lillian presents no such compelling reason.

Procedure section 389, failure to join "indispensable" parties does not deprive a court of the power to make a legally binding adjudication between the parties properly before it.'" (*Golden Rain Foundation v. Franz* (2008) 163 Cal.App.4th 1141, 1155.) "'[T]he failure to join an "indispensible party" is not a "jurisdictional defect" in the fundamental sense; even in the absence of an "indispensable" party, the court still has the power to render a decision as to the parties before it which will stand.' [Citation.]" (*Ibid*.)

C. Fraud or Embezzlement

Finally, Lillian appears to argue that the trial court's rulings should be reversed because the trial court allegedly engaged in or abetted the commission of fraud and embezzlement when it permitted the judgment to be enforced against Lillian's financial account at UBS Financial Services. In support, she further claims in conclusory fashion that the ex parte petitions contained perjured declarations. We find Lillian's accusations on these points to be largely unintelligible and without any support in the record. "'A judgment or order of the lower court is *presumed correct*'" and, thus, "'error must be affirmatively shown.'" (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.) "[A]n appellant must not only present an analysis of the facts and legal authority on each point made, but must also support arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited." (*Nielsen v. Gibson*, *supra*, 178 Cal.App.4th at p. 324.) Lillian has not met her fundamental burden as

appellant concerning the accusations of fraud or embezzlement; accordingly, such claims are forfeited.

V. Reply Brief, New Exhibits and Motion to Strike

We have read and considered Lillian's appellant's reply brief. Nothing in that brief alters our analysis or conclusions stated in this opinion. Lillian's reply brief contains a new argument that was not presented in her opening brief or in the trial court. Specifically, she argues that Judge Black, who, prior to his appointment to the bench in 1998, had been with the Fresno law firm of McCormick Barstow et al., had a conflict of interest in the present action because Attorney Robert Sullivan (Lillian's attorney for a brief time in 2010-2011) was with the law firm of McCormick Barstow et al. Aside from the fact that no showing of any ground of disqualification or conflict of interest has been shown under Code of Civil Procedure section 170.1, or under any other law, Lillian's argument is "'doubly waived'" for failure to raise it in her opening brief or in the trial court. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776– 777.) The argument, therefore, is forfeited and will be disregarded.

Lillian has also submitted with her reply brief a number of documents that were not part of the record before the trial court at the time it entered the orders from which Lillian has appealed. The new documents were included in appellant's reply appendix (the reply appendix). Marleen has filed a motion to

strike the improper exhibits from Lillian's reply appendix and also to strike any references to those exhibits in Lillian's reply brief. "An appellant's appendix may only include copies of documents that are contained in the superior court file." (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404 [striking noncompliant exhibits]; *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 ["an appellate court will consider only matters which were part of the record at the time the judgment was entered"]; *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, 673 [granting motion to strike portions of brief that referred to evidence that was not part of the record].) We grant Marleen's motion to strike exhibits Nos. 2–6 and 16 from the reply appendix, along with any references thereto in the reply brief.

DISPOSITION

The judgment and orders of the trial court are affirmed. Costs on appeal are awarded to Marleen.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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DETJEN, J.

APPENDIX E

STATUTES

U.S. Constitution
14th Amendment
No state shall…enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

28 U.S.C. §1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

42 U.S.C. §1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory…, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. §1961. Definitions

(1) "racketeering activity" means (A) any act or threat involving…robbery…; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud),…section 1344 (relating to financial institution fraud),…section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity);…(D)…fraud in the sale of securities;

(2) "State" means any State of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962. Prohibited activities

(b) It shall be unlawful for any person through a pattern of racketeering activity…to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service… If the violation occurs in relation to…or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or…

(B) knowing that the transaction is designed in whole or in part—
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
(ii) to avoid a transaction reporting requirement under State or Federal law,
shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

18 U.S.C. §1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
(b) (2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.
(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States…

26 U.S.C. §2041. Powers of appointment

(2) Powers created after October 21, 1942

To the extent of any property…with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive.

(b) Definitions

For purposes of subsection (a)—

(1) General power of appointment

(ii) …For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

Securities and Exchange Act of 1934

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-

(b) To use or employ, in connection with purchase or sale of any security registers on a nations securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or of the protection of investors.

Rules

Federal Rules of Civil Procedure Rule 60. Relief from a Judgment or Order

…(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

… (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;…

(6) any other reason that justifies relief….

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;…or

(3) set aside a judgment for fraud on the court.

Rules of Evidence.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) Taking Notice. The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Rules of Evidence
Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness
(8) *Public Records.* A record or statement of a public office if:
(A) it sets out:
(i) the office's activities;
(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

California Statutes

Civil Code §683. Joint tenancy; definition; method of creation

(a) A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from spouses, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

Probate Code §48. Interested Person

(a) Subject to subdivision (b), "interested person" includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

Probate Code §5305. Married parties; community property; presumption; rebuttal; change of survivorship right, beneficiary, or payee by will.

(b)…the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married person made a written agreement that expressed their clear intent that the sums be their community property.

(2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

Probate Code §13605. Effect of chapter on rights of heirs or devisees; liability for payment; fraudulent transactions

(a) Nothing in this chapter limits the rights of the heirs or devisees of the deceased spouse. Payment of a decedent's compensation pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

(b) Any person to whom payment is made under this chapter is answerable and accountable therefor to the personal representative of the decedent's estate and is liable for the amount of the payment to any other person having a superior right to the payment received. In addition to any other liability the person has under this section, a person who fraudulently secures a payment under this chapter is liable to a

person having a superior right to the payment for three times the amount of the payment.

Probate Code §15205. Designation of beneficiary.
(a) A trust, other than a charitable trust, is created only if there is a beneficiary.

Probate Code §15300. Restraint on transfer of income
…[I]f the trust instrument provides that a beneficiary's interest in income is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

Probate Code 15400. Presumption of revocability
Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor.

Probate Code §15401. Revocable trusts; method; multiple settlors; granting of power to revoke; modification or revocation by attorneys in fact
(a) A trust that is revocable by the settlor or any other person may be revoked in whole or in part by any of the following methods:
(1) By compliance with any method of revocation provided in the instrument
(2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the

lifetime of the settlor or the person holding the power of revocations.
(b)(1) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor…
(2) Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.

Probate Code §15660.5 Public guardian or public administrator appointed as trustee by court; requirements

(a) The court may appoint as trustee of a trust the public guardian or public administrator of the county in which the matter is pending subject to the following requirements:
(1) Neither the public guardian nor the public administrator shall be appointed as trustee unless the court finds, after reasonable inquiry, that no other qualified person is willing to act as trustee or the public guardian, public administrator, or his or her representative consents.
(2) The public administrator shall not be appointed as trustee unless either of the following is true:
(A) At the time of the appointment and pursuant to the terms of the trust, the entire trust is then to be distributed outright. For purposes of this paragraph, a trust that is "then to be distributed outright" does

not include a trust pursuant to which payments to, or on behalf of, a beneficiary or beneficiaries are to be made from the trust on an ongoing basis for more than six months after the date of distribution.
(B) The public administrator consents.
(4) Neither the public guardian nor the public administrator shall be appointed as general trustee without a hearing and notice to the public guardian or public administrator or his or her representative, and other interested persons as provided in Section 17203, i.e., all trustees and all beneficiaries.
(5) Neither the public guardian nor the public administrator shall be appointed as temporary trustee without receiving notice of hearing as provided in Section 1220. The court shall not waive this notice of hearing, but may shorten the time for notice upon finding of good cause.

Probate Code §15800. Limitations on rights

Except to the extent that the trust instrument otherwise provides…during the time that a trust is revocable and the person holding the power to revoke the trust is competent:
(a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.
(b) The duties of the trustee are owed to the person holding the power to revoke.

Probate Code §15803. Rights of holder of power of appointment or withdrawal

The holder of a presently exercisable general power of appointment or power to withdraw property from the trust has the rights of a person holding the power to revoke the trust that are provided by

Sections 15800 to 15802, inclusive, to the extent of the holder's power over the trust property.

Law Revision Commission Comments

1990 Enactment

This section makes clear that a holder of a power of appointment or a power of withdrawal is treated as a person holding the power to revoke the trust for purposes of Sections 15800-15802 in recognition of the fact that the holder of such power is in an equivalent position to control the trust as it relates to the property covered by the power.

Probate Code §17200. Internal affairs; existence of trust; petition by trustee or beneficiary; purposes

(1) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.