

APPENDIX A

Case: 16-56735 04/19/2018 DktEntry: 37

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

PHILIP GUTIERREZ, et al,
Defendants-Appellees.

D.C. No. 2:16-cv-06168-PSG,
Central Dist. of Cal., LA

FILED
APR 19 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: WALLACE, SILVERMAN, and BYBEE,
Circuit Judges.

The panel has voted to deny the petition for
panel rehearing.

The full court has been advised of the
petition for rehearing en banc and no judge has
requested a vote on whether to rehear the matter
en banc. See Fed. R. App. P. 35.

Kinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 36) are denied.

No further filings will be entertained in this closed case.

APPENDIX B

Case: 16-56735 12/28/2017 DktEntry: 35

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

PHILIP GUTIERREZ, et al,
Defendants-Appellees.

D.C. No. 2:16-cv-06168-PSG,
Central Dist. of Cal., LA

FILED
DEC 28 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MEMORANDUM *

Appeal from the United States District Court for
the Central District of California Philip S.
Gutierrez, District Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE,
Circuit Judges.

Charles G. Kinney appeals pro se from the district court's order dismissing his action seeking a declaratory judgment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003) (dismissal based on the *Rooker-Feldman* doctrine); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007) (dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6)). We affirm.

The district court properly dismissed Kinney's claims against Presiding Justices Rothschild and Boren; Justices Chaney, Johnson, Ashmann-Gerst, and Chavez; and Judges Scheper and Alarcon, for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because Kinney's claims constitute a "de facto appeal" of prior state court judgments, or are "inextricably intertwined" with those judgments. *Noel*, 341 F.3d at 1163-65 (discussing application of the *Rooker-Feldman* doctrine); see also *Henrichs v. Valley View Dev.*, 474 F.3d 609, 616 (9th Cir. 2007) (*Rooker-Feldman* doctrine barred claim for injunction based on allegedly erroneous and "void" state court judgment because "[g]ranted the injunction would require the district court to determine that the state court's decision was wrong and thus void").

The district court properly dismissed Kinney's claims against Clark, Marcus and Chomsky because Kinney failed to allege facts sufficient to state any plausible claim for relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint

must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” (citation and internal quotation marks omitted)); *see also* *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (stating that the Declaratory Judgment Act “only creates a remedy and is not an independent basis for jurisdiction”).

The district court did not abuse its discretion by dismissing the complaint without leave to amend because amendment would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

The magistrate judge did not abuse her discretion by issuing the related case order. *See* N.D. Cal. Civ. R. 3-12 (setting forth standard for relation of cases).

The magistrate judge did not abuse her discretion by transferring this action to the United States District Court for the Central District of California. *See* 28 U.S.C. §§ 636 (describing magistrate judge’s authority), 1404(a) (authorizing transfer of action for the convenience of parties and witnesses, in the interest of justice); *Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015) (magistrate judges may hear and determine non-dispositive matters); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir.

2000) (setting forth factors relevant to transfer decision).

The district court did not abuse its discretion by transferring this case to Judge Gutierrez because this case was related to another case then-pending before Judge Gutierrez. *See* C.D. Cal. General Order No. 14-03, superseded by General Order No. 16-05 (Oct. 31, 2016).

We reject as unsupported by the record Kinney's contention that Judge Gutierrez should have recused himself and that other judges were biased.

We do not consider Kinney's challenges to the district court's orders certifying this appeal as frivolous and severing certain claims because they are not supported by argument. *See Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Appellees' requests for sanctions and for leave to file a motion for a vexatious litigant pre-filing review order against Kinney, set forth in the answering brief, are denied.

Appellees' corrected motion to take judicial notice (Docket Entry No. 24) is granted.

AFFIRMED.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Kinney's request for oral argument, set forth in the opening brief, is denied.

No. ____

IN THE
SUPREME COURT OF THE
UNITED STATES

____ ♦ ____
CHARLES G. KINNEY,
Petitioner,

v.

PHILIP GUTIERREZ, et al,
Respondents,

____ ♦ ____
On Petition For Writ Of
Certiorari To The
Ninth Circuit Court of Appeals
#16-56735 (April 19, 2018 denial
of petition for rehearing) **[6 of 8]**

U.S. District Court, Central
District of Calif. (Los Angeles)
#2:16-cv-06168-PSG

____ ♦ ____
**SUPPLEMENTAL APPENDIX
FOR A WRIT OF CERTIORARI**

____ ♦ ____
CHARLES KINNEY
Petitioner in pro se
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SUPPLEMENTAL APPENDIX SA

Case 3:16-cv-02278-LB Dk 38 Filed 08/04/16

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIF.

CHARLES KINNEY,
Plaintiff,

v.

TYSON TAKEUCHI, et al.,
Defendants.

Case No. 16-cv-02018-LB

ORDER REGARDING RELATED CASES

Re: ECF No. 23

CHARLES KINNEY,
Plaintiff,

v.

JUDGE PHILLIP GUTIERREZ, et al.,
Defendants.

Case No. 16-cv-02278-LB

ORDER REGARDING RELATED CASES

Mr. Kinney objects to the court's prior order relating case number 16-cv-02018-LB to cases that the court previously decided. (See ECF No. 20.) The court deemed this case related to case number 16-cv-01260-LB, and it also is related to case number 14-cv-02187-LB. The court transferred both cases to the Central District of California. Mr. Kinney points out that there is an earlier-numbered case: case number 13-cv-01396-MMC. That case primarily involved Mr. Kinney's efforts to enjoin the State Bar from conducting

proceedings against him. By contrast, his latest lawsuits focus on state-court lawsuits he lost. Considering the local rules, and how recently the undersigned addressed similar issues, the court does not reconsider its related case order. The court appreciates Mr. Kinney's point but the interests of judicial economy that underlie the related-case rule militate in favor of the court's decision. The same analysis applies to the court's order relating case number 16-cv-02778-HSG.

IT IS SO ORDERED.

Dated: August 4, 2016

____s/____

LAUREL BEELER

United States Magistrate Judge

SUPPLEMENTAL APPENDIX SB

Case 3:16-cv-02278-LB Dk 44 Filed 08/15/16

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

CHARLES KINNEY,
Plaintiff,

v.

JUDGE PHILIP S. GUTIERREZ, et al.,
Defendants.

Case No. 3:16-cv-02278-LB

ORDER TRANSFERRING CASE
[ECF No. 39]

INTRODUCTION

The plaintiff Charles Kinney sued a number of judges — District Judge Philip S. Gutierrez of the Central District of California; Presiding Justice Frances Rothschild, Justice Victoria Chaney, Justice Jeffrey Johnson, Presiding Justice Roger Boren, Justice Judith Ashmann-Gerst, and Justice Victoria Chavez of the California Court of Appeal; and Judge Barbara Scheper and Judge Gregory Alarcon of the Los Angeles Superior Court — for declaratory relief from various judgments entered against him.¹ Mr. Kinney also sued Michele Clark, David Marcus, and Eric Chomsky, who are residents of Los Angeles County, for declaratory relief stemming from allegedly improper counterclaims in previous litigation in Los Angeles County

Superior Court that Mr. Kinney alleges violated the terms of Ms. Clark's bankruptcy judgment.²

An ongoing dispute between Mr. Kinney and Ms. Clark began in 2005 when she sold him a home in Los Angeles known as the Fernwood property.³ Mr. Marcus and Mr. Chomsky acted as Ms. Clark's attorneys in cases Mr. Kinney brought against her.⁴ In this case, Mr. Kinney alleges that the defendants' actions caused or will cause —adverse consequences in this judicial district such as —recording of abstracts of judgment in Alameda County by [the defendants].⁵ Mr. Kinney primarily alleges here that, in a number of Ms. Clark's state-court cases collecting outstanding debts from Mr. Kinney, which Mr. Kinney removed from state court to federal court, he filed counterclaims and third-party complaints that were not remanded to state court along with the complaint.⁶ Mr. Kinney now seeks to resolve those counterclaims and third-party complaints.⁷

The defendants recount Mr. Kinney's many lawsuits surrounding the Fernwood property, including his civil RICO suit in 2014 and his FDCPA suit in 2016 that the undersigned transferred to the Central District of California. See *Kinney v. Chomsky*, No. 3:14-cv-02187-LB, Order – ECF No. 27 (N.D. Cal. July 25, 2014); *Kinney v. Marcus*, No. 3:16-cv-01260-LB, Order – ECF No. 29 (N.D. Cal. May 11, 2016); *Kinney v. Takeuchi*, No. 3:16-cv-02018-LB, Order – ECF No. 30 (N.D. Cal. August 8, 2016).⁸ Mr. Kinney complains about many of the same transactions and alleges many of the same facts in all lawsuits, albeit sometimes under different legal theories.⁹ The defendants move to transfer the case to the

Central District of California under 28 U.S.C. § 1404(a).¹⁰ The defendants consented to magistrate-judge jurisdiction.¹¹ Although Mr. Kinney has not consented to magistrate-judge jurisdiction, the court may decide this non-dispositive motion to transfer venue. See *Pavao v. Unifund CCR Partners*, 934 F. Supp. 2d 1238, 1241 n.1 (S.D. Cal. 2013) (collecting cases). The court can decide the matter without oral argument under Civil Local Rule 7-1(b). The court grants the motion to transfer.

GOVERNING LAW

28 U.S.C. § 1404(a) states: —For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Although Congress drafted § 1404(a) in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law. *Piper Aircraft v. Reyno*, 454 U.S. 235, 253 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Thus, a § 1404(a) transfer is available —upon a lesser showing of inconvenience¹² than that required for a *forum non conveniens* dismissal. *Norwood*, 349 U.S. at 32.

The burden is upon the moving party to show that transfer is appropriate. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); see also *Los Angeles Mem'l Coliseum Comm'n. v. Nat'l Football League*, 89 F.R.D. 497, 499 (C.D. Cal. 1981), *aff'd*, 726 F.2d 1381, 1399 (9th Cir. 1984). Nonetheless, the district court has broad discretion —to adjudicate

motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.¹ *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)); see *Westinghouse Elec. Corp. v. Weigel*, 426 F.2d 1356, 1358 (9th Cir. 1970).

An action may be transferred to another court if: (1) that court is one where the action might have been brought; (2) the transfer serves the convenience of the parties; and (3) the transfer will promote the interests of justice. *E & J Gallo Winery v. F. & P. S.p.A.*, 899 F. Supp. 465, 466 (E.D. Cal. 1994) (citing 28 U.S.C. § 1404(a)). The Ninth Circuit has identified numerous additional factors a court may consider in determining whether a change of venue should be granted under § 1404(a):

- (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones, 211 F.3d at 498–99. Courts may also consider —the administrative difficulties flowing from court congestion . . . [and] the local interest in having localized controversies decided at

home.¶ Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986) (quoting Piper Aircraft, 454 U.S. at 241 n. 6).

Generally, the court affords the plaintiff's choice of forum great weight. Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987). But when judging the weight to be given to plaintiff's choice of forum, consideration must be given to the respective parties' contact with the chosen forum. Id. —If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter,¶ the plaintiff's choice —is entitled only minimal consideration.¶ Id.

ANALYSIS

The defendants have met their burden to show that transfer is appropriate.

First, Mr. Kinney could have brought his action in the Central District. The general venue requirements of 28 U.S.C. § 1391(b) are met because all defendants reside in the Central District, a substantial part of the events occurred there, and all three defendants may be found there. Mr. Kinney does not dispute this in his opposition.

Second, the defendants have shown that transfer serves the convenience of the parties and will promote the interests of justice. The defendants live and work in Los Angeles, the property is there, Mr. Kinney litigated cases about the Fernwood property there, and the witnesses are there, 400 miles away, outside the reach of compulsory process. The docket sheet reflects that Mr. Kinney is a lawyer with law offices in Oakland, but he has a home in Los Angeles and

thus resides here and in the Central District. As for promoting the interests of justice, only one factor supports keeping the case here: Mr. Kinney's choice of forum. The remaining factors favor transfer. As the court held previously, to the extent that there are some contacts here (such as the allegations that Ms. Clark improperly sought to collect debts here), everything else took place in the Central District.¹²

In sum, the court concludes that the defendants met their burden to show that transfer of the lawsuit to the Central District of California is appropriate under 28 U.S.C. § 1404(a).

CONCLUSION

The court grants the defendants' motion to transfer and transfers the case to the Central District of California. The court grants the request to take judicial notice of public-record documents showing the existence of other litigation (but does not take judicial notice of the facts contained in the documents). This disposes of ECF No. 20.

IT IS SO ORDERED.

Dated: August 15, 2016

____s/____
LAUREL BEELER

United States Magistrate Judge

Fn 1 First Amended Compl. (–FACl) — ECF No. 21. Citations are to the Electronic Case File (–ECFl); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

Fn 2 Id.

Fn 3 Amended Motion for Change of Venue – ECF No. 39 at 3.

Fn 4 Id. at 2.

Fn 5 FAC – ECF No. 21 at 6.

Fn 6 Id. at 7-8.

Fn 7 Id.

Fn 8 Notice of Related Cases — ECF No. 38.

Fn 9 See generally FAC – ECF No. 21.

Fn 10 Motion – ECF No. 39 at 1-2.

Fn 11 Consent – ECF No. 40.

Fn 12 Order, Case No. 3:14-cv-02187-LB – ECF No. 27 at 6-7; FAC – ECF No. 21 at 6-7.

SUPPLEMENTAL APPENDIX SC

Case 2:16-cv-06168-PSG Dk 55 Filed 08/30/16

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

CHARLES G. KINNEY
Plaintiff,

v.

JUDGE PHILIP GUTIERREZ, et al.,
Defendants.
Case No. 2:16-cv-06168 PA

**ORDER RE TRANSFER PURSUANT
TO GENERAL ORDER 14-03
(RELATED CASES)**

CONSENT

I hereby consent to the transfer of the above-entitled case to my calendar, pursuant to General Order 14-03.

Date 8/29/16

____s/____
Philip S. Gutierrez
United State District Judge

DECLINATION

I hereby decline to transfer the above-entitled case to my calendar for the reasons set forth:

Date

United States District Judge

REASON FOR TRANSFER AS INDICATED BY
COUNSEL

Case __2:12-cv-10046 PSG (JCx)__ and the
present case:

- ☒ A. Arise from the same or closely related transactions, happenings or events; or
☒ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☒ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
___ D. Involve one or more defendants from the criminal case in common, and would entail substantial duplication of labor if heard by different judges (applicable only on civil forfeiture action).

NOTICE TO COUNSEL FROM CLERK

Pursuant to the above transfer, any discovery matters that are or maybe referred to a Magistrate Judge are hereby transferred from Magistrate Judge __NA__ to Magistrate Judge __NA__.

On all documents subsequently filed in this case, please substitute the initials __PSG (JCx)__ after the case number in place of the initials of the prior judge, so that the case number will read __2:16-cv-06168 PSG (JCx)__. This is very important because the documents are routed to the assigned judges by means of these initials.

SUPPLEMENTAL APPENDIX SD

Case 2:16-cv-06168-PSG Dk 67 Filed 10/04/16

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL**

Case No. CV 16-6168 PSG
CV 16-6172 PSG (JCx)
Date October 4, 2016

Title

Kinney v. Judge Gutierrez, *et al.*
Kinney v. Tyson Takeuchi, *et al.*

Present: The Honorable Philip S. Gutierrez,
United States District Judge
Wendy Hernandez Not Reported
Deputy Clerk Court Reporter
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

**Proceedings (In Chambers): Order
CERTIFYING Plaintiff's Appeals as
Frivolous**

Before the Court are Plaintiff Charles Kinney's ("Plaintiff") notices of appeal to the Ninth Circuit in *Kinney v. Judge Gutierrez et al.*, CV 16-6168 PSG (Dkt. # 63), and *Kinney v. Takeuchi, et al.*, CV 16-6172 PSG (Dkt. # 44). Although the filing of a notice of appeal typically divests the district court of jurisdiction, this is not so where the lower court certifies the appeal as

frivolous. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). Plaintiff's appeals, taken before the Court has entered any order in Plaintiff's cases, are patently frivolous. Accordingly, the Court certifies Plaintiff's appeals as frivolous and retains jurisdiction over the cases.¹

I. Background

Plaintiff Charles Kinney ("Plaintiff"), appearing pro se, filed two related lawsuits in the Northern District of California. The lawsuits, *Kinney v. Judge Gutierrez et al.*, CV 16-6168 PSG, and *Kinney v. Takeuchi, et al.*, CV 16-6172 PSG, relate to a series of lawsuits that have a long history in the Central District. See, e.g., CV 12-10046 PSG (JCx); CV 13-8147 PSG (JCx); CV 15-1143 PSG (JCx), CV 15-8910 PSG (JCx), CV 15-9022 PSG (JCx). Because of Plaintiff's conduct in the earlier litigation, the Court declared Plaintiff a vexatious litigant in the Central District of California in May 2016. See *Order Granting Motion to Declare Charles Kinney a Vexatious Litigant*, CV 15-8910 PSG (JCx), Dkt. # 70. The Court suspects that Plaintiff filed the most recent lawsuits in the Northern District in an attempt to circumvent the Court's vexatious litigant order or to otherwise avoid the Court's jurisdiction in the underlying matters.

In recognition of Plaintiff's litigation history with the Central District, Magistrate Judge Beeler transferred both cases to the Central District of California on August 15, 2016. See 16-6168, Dkt. # 44; 16-6172, Dkt. # 32. *Kinney v. Judge Gutierrez, et al.* was originally assigned to Judge Percy Anderson, but was reassigned to me

as a related case on August 30, 2016. *Kinney v. Takeuchi et al.* was originally assigned to Judge Otis D. Wright, but was reassigned to me as a related case on August 30, 2016. Plaintiff now appeals Magistrate Judge Beeler's orders transferring the cases to the Central District of California, and the subsequent reassignments of the cases to me.

II. Discussion

As a general rule, only one tribunal handles a case at a time. "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The purpose of this jurisdictional rule is to prevent simultaneous proceedings in multiple forums that create confusion and duplication of effort. *See Apostol v. Gallion*, 870 F.2d 1335, 1337 (7th Cir. 1989).

However, as Judge Easterbrook colorfully recognized in *Apostol*, "Courts are not helpless in the face of manipulation." *Id.* at 1339. While it is well established that the appellate court may dismiss the appeal and award sanctions, "district courts have their own means too." *See id.* "[A] notice of appeal may be so baseless that it does not invoke appellate jurisdiction." *Id.* (citing *Richardson v. United States*, 468 U.S. 317, 322 (1984)). Adopting the Seventh Circuit's "*Apostol*

rule,” the Ninth Circuit has recognized a district court’s power to certify an interlocutory appeal as frivolous and continue with proceedings. See *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Marks v. Clarke*, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996). If the district court certifies an appeal as frivolous, the party seeking appeal may then apply to the appellate court for a discretionary stay. *Chuman*, 870 F.2d at 105 n.1.

An appeal is frivolous if “the result is obvious, or the arguments of error are wholly without merit.” *Wilcox v. Commissioner*, 848 F.2d 1007, 1009 (9th Cir. 1998); see also *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (stating that an issue is frivolous if it has “no arguable basis in fact or law”). This means that the appeal is “so baseless” that “the disposition is so plainly correct that nothing can be said on the other side.” See *Isayeva v. Cty. of Sacramento*, No. CV 13-2015 KJM (KJNx), 2015 WL 6744529, at *2.

Plaintiff Kinney’s appeals are wholly lacking in merit. It is well established that a transfer order is not appealable. *Gulf Research & Dev. Co. v. Harrison*, 185 F.2d 457, 458 (9th Cir. 1950) (holding that an order to transfer a case to a Delaware district court is not an appealable order); *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir. 2007) (citing *Varsic v. U.S. District Court*, 607 F.2d 245, 251 (9th Cir. 1979)); accord *Preston Corp. v. Raese*, 335 F.3d 827, 828 (4th Cir. 1964); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.3d 360, 361 (4th Cir. 1949). Plaintiff’s appeals address only the decision of Magistrate Judge Beeler to transfer the cases to the Central

District and the subsequent reassignments of the cases to me.

Accordingly, the Court finds Plaintiff's appeals baseless and insufficient to deprive this Court of jurisdiction. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006).

III. Conclusion

For the foregoing reasons, the Court certifies Plaintiff's appeals as frivolous. The Court retains jurisdiction over *Kinney v. Judge Gutierrez et al.*, CV 16-6168 PSG, and *Kinney v. Takeuchi, et al.*, CV 16-6172 PSG.

Fn. 1 This Order is filed simultaneously with another order in *Kinney v. Judge Gutierrez, et al.*, CV 16-6168 PSG, that severs all of Plaintiff's claims against me. This Order in no way passes judgment on the merits of Kinney's claims in the underlying proceedings.

SUPPLEMENTAL APPENDIX SE

Case 2:16-cv-06168-PSG Dk 68 Filed 10/04/16

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. CV 16-6168 PSG
Date October 4, 2016

Title Kinney v. Judge Gutierrez, *et al.*
Present: The Honorable Philip S. Gutierrez,
United States District Judge
Wendy Hernandez Not Reported
Deputy Clerk Court Reporter
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

**Proceedings (In Chambers): Order
SEVERING Claims Where Judge Gutierrez Is
Named As Defendant**

Plaintiff Charles Kinney ("Plaintiff"), appearing pro se, filed this lawsuit on April 27, 2016, in the U.S. District Court for the Northern District of California. CV 16-2278 (HSG), Dkt. # 1. Plaintiff named four Defendants in the Complaint: Michele Clark, David Marcus, Eric Chomsky, and myself. *Id.* ¶¶ 2-4. Shortly after Plaintiff filed the Complaint, Defendants Clark, Marcus, and Chomsky moved to transfer the case to the Central District of California. Dkt. # 24. Although originally assigned to Judge Percy

Anderson, the case was reassigned to me on August 30, 2016, as a related case. Dkts. # 51, 55.

Because Plaintiff has named me, the presiding judge, as a Defendant, I must consider whether to disqualify myself from hearing this case before taking further action. In making this determination, I first look to the nature of the allegations against me.

In 2006, Kinney filed a series of lawsuits in Los Angeles Superior Court related to property on Fernwood Avenue in Los Angeles, California.¹ Kinney attempted to remove the cases to federal court on four separate occasions, and each time the Court remanded the cases after finding the rationales for removal meritless. *See* CV 12-10046 PSG (JCx), Dkt. #7 at 1 (C.D. Cal. Dec. 19, 2012); CV 13-8147 PSG (JCx), Dkt. #12 (C.D. Cal. Nov. 4, 2013); CV 15-1143 PSG (JCx), Dkt. #24 (C.D. Cal. Feb. 17, 2015); CV 15-8910 PSG (JCx), Dkt. #44; CV 15-9022 PSG (JCx), Dkt. #37. Kinney appealed the Court's remand orders to the Ninth Circuit, *see Clark v. Kempton*, 593 F. App'x 667, 668 (9th Cir. 2015); *Charles Kinney, et al. v. Michele Clark*, No. 15-55546, Dkt. #18 (9th Cir. Aug. 11, 2015); *Kinney v. Cooper, et al.*, No. 16-55343 (9th Cir. filed Mar. 4, 2016) (appeal of CV 15-8910); *Kinney v. Cooper, et al.*, No. 16-55347 (9th Cir. filed Mar. 4, 2016) (appeal of CV 15-9022), and in at least one of the cases, Kinney appealed the Ninth Circuit's order to the U.S. Supreme Court, which denied certiorari. *Kinney v. Chomsky*, 136 S. Ct. 1165 (2016).

This most recent Complaint appears to urge the Court to reconsider its remand orders and it faults the Court for failing to address the counter-

claims and third-party complaints that Kinney filed in those cases. *Compl.* ¶¶ 6-8. The Complaint mentions my role in the case in the following paragraphs:

7. Each of the removals was ultimately assigned to Judge Gutierrez. Those removals were assigned the following case numbers in U.S. District Court: 2:15-cv-01143-PSG-JCx; 2:15-cv-08910-PSG-JCx; and 2:15-cv-09022- PSG-JCx.

8. Each of the removals was remanded back to the state court in Los Angeles County by Judge Gutierrez, but nothing was stated or ruled upon in the remand orders as to each of the counter-claims and third-party complaints filed by Kinney; see *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315-16 (9th Cir. 1986) [a counter-claim cannot be remanded].

In addition to the allegations in the Complaint, there are several other facts that should be noted here. Kinney has a long history of litigation in California state and federal courts. See *Order Granting Motion to Declare Charles Kinney a Vexatious Litigant* 4-7, CV 15-8910 PSG (JCx), Dkt. #70. In 2008, the Los Angeles Superior Court declared Kinney a vexatious litigant, and in 2011, the California Court of Appeal barred Kinney from filing any new litigation in his name or in the name of his co-associate, Kimberly Jean Kempton. *In re Kinney*, 201 Cal. App.4th 951, 955 (2011). In 2014, the State Bar Court of California Review Department disbarred Kinney for multiple acts of misconduct, engagement in vexatious litigation, and harm of the public. See *Matter of Kinney*, No. 09-O-18100, 2014 WL 7046611, at *1, 9 (Cal. Bar Ct. Dec. 12, 2014). Finally, in May

2016, this Court declared Kinney a vexatious litigant in the Central District of California. See *Order Granting Motion to Declare Charles Kinney a Vexatious Litigant*, CV 15-8910 PSG (JCx), Dkt. #70.

In assessing recusal, I turn to two sources. First, I must consider the statutes governing recusal and, second, I must consider my ethical duties under the Code of Conduct for United States Judges (“Code of Conduct”). As to the statutory authority, 28 U.S.C. § 455 generally provides that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). More specifically, the statute bars a judge from presiding over a proceeding if he is a party to the proceeding. See 28 U.S.C. § 455(b)(5)(i). Although this latter provision would seem dispositive, courts have not read it to be so. “[A] judge is not disqualified merely because a litigant sues or threatens to sue him.” *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 701 (9th Cir. 1982) (quotation marks omitted). “Such an easy method for obtaining disqualification should not be encouraged or allowed.” *Id.* It should not be encouraged or allowed because “a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.” *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J., mem.). In accord with this duty, the Ninth Circuit has upheld a district court judge’s decision not to recuse himself after pro se litigants named him as a defendant in an amended complaint. *Gabor v. Seligmann*, 222 Fed. Appx. 577, 578 (9th Cir. 2007) (unpublished).

Therefore, I find that 28 U.S.C. § 455 does not mandate recusal in this situation.

Next, I turn to the ethical duties contained in the Code of Conduct. The Code of Conduct provisions concerning recusal are nearly identical to the recusal provisions in 28 U.S.C. § 455. *See Code of Conduct*, Canon 3C. To inform the application of the Code of Conduct to particular circumstances, the Committee on Codes of Conduct of the Judicial Conference of the United States has issued advisory opinions on various issues. Advisory Opinion 103 (the “Opinion”) is pertinent to the present situation. *See Advisory Opinion 103*, www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf.

The Opinion summarizes the Committee’s views on recusal when claims are asserted against judges. The Committee identified the following competing interests in these situations:

Important reasons exist for a judge not to disqualify routinely, as this would permit and might even encourage litigants to manipulate and abuse the judicial process, which could undermine public confidence in the integrity of the judiciary. Automatic disqualification of a judge cannot be obtained by the simple act of suing the judge, particularly where the suit is primarily based on the judge’s prior judicial rulings. On the other hand, a universal refusal to recuse could also lead to disrespect for and a loss of public confidence in the integrity of the judicial process.

To resolve these types of situations, the Committee identified certain factors to be considered: the nature of the complaint, the

applicable law, the possibility of factual issues involving the credibility of the named judge or judges, and any other circumstances that might provide a reasonable ground for questioning the impartiality of the assigned judge.

In light of these factors, the Committee advised: "A complaint filed against a judge that is subject to prompt dismissal on judicial immunity grounds will not ordinarily give rise to a reasonable basis to question the judge's impartiality in unrelated cases filed against others by the same litigant. Such a nonmeritorious complaint, standing alone, will not lead reasonable minds to conclude that the judge is biased against the litigant or that the judge's impartiality can reasonably be questioned, and thus will not require the judge to recuse."

I find the above analysis from the Committee to be instructive. In light of the fact that Plaintiff's allegations concern my rulings in prior cases involving Plaintiff, the apparent lack of factual issues involving my credibility, Plaintiff's status as a vexatious litigant in state court and this Court, and the likelihood that my prior orders remanding the cases would be subject to judicial immunity, I find that recusal is not required. However, it may still be improper for me to preside over the allegations against me.

I acknowledge that the Ninth Circuit disapproved of a judge's partial recusal in the criminal context where a judge recused himself from the restitution portion of defendant's resentencing after a bank merger, but continued to retain jurisdiction over the rest of the mail fraud case. *United States v. Feldman*, 983 F.2d

144 (9th Cir. 1992). While such a decision made sense in the context of the criminal proceeding where the judge is not named as a defendant, to apply the same standard in the civil context where the judge is named as a defendant would be at odds with the Ninth Circuit's goals in *Ronwin* and *Gabor* as it would enable litigants to obtain recusal of a judge merely by naming him or her as a defendant. It would also be at odds with the Code of Conduct.

Accordingly, I order that the Clerk of the Court SEVER the claims alleged in the Complaint against me, Judge Philip S. Gutierrez. The claims against me will go forward in a new case, separate and apart from the remaining claims against the remaining Defendants in the Complaint. The remaining case will retain the same case number with my initials (i.e., CV 16-6168 PSG). The severed case against me will be randomly assigned to a different judge. The severed case will then be identified with a case number containing the initials of the new judge (e.g., CV 16-6168 XXX). I find that this solution carefully balances the need for judges to avoid the appearance of impropriety while simultaneously protecting the integrity of the judicial system from manipulation and abuse.

IT IS SO ORDERED.

Fn 1 These cases are: *Kempton, et al. v. Carolyn Cooper*—LASC Case No. BC354136; *Kempton, et al. v. (Jeffrey) Harris*—LASC Case No. BC354138; *Kempton, et al. v. (Ben) Harris*—LASC Case No.

BC363261; *Kempton, et al. v. City of Los Angeles*—
LASC Case No. BC363837; *Kempton, et al. v.*
Clark—LASC Case No. BC374938; *Kempton, et al.*
v. City of Los Angeles—Case No. BC413357.

SUPPLEMENTAL APPENDIX SF

Case 2:16-cv-06168-PSG Dk 75 Filed 10/21/16

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL JS-6

#61 (11/7 HRG OFF)
Case No. CV 16-6168 PSG
Date October 21, 2016

Title Kinney v. Gutierrez, *et al.*
Present: The Honorable Philip S. Gutierrez,
United States District Judge
Wendy Hernandez Not Reported
Deputy Clerk Court Reporter
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

**Proceedings (In Chambers): Order
GRANTING the Judicial Defendants' Motion
to Dismiss and SUA SPONTE DISMISSING
All Remaining Claims Against the Non-
Judicial Defendants**

Before the Court are defendants, the Hon. Roger W. Boren and the Hon. Francis Rothschild, presiding justices of the California Court of Appeal, Second Appellate District; the Hon. Judith Ashmann-Gerst, the Hon. Victoria G. Chaney, the Hon. Victoria M. Chavez, and the Hon. Jeffrey W. Johnson, associate justices of the California Court of Appeal, Second Appellate District; and the Hon. Gregory W. Alaracon and

the Hon. Barbara M. Scheper, judges of the Superior Court of California, County of Los Angeles ("Judicial Defendants"). Judicial Defendants move to dismiss Plaintiff Charles Kinney's ("Plaintiff") Complaint for lack of subject matter jurisdiction, and in the alternative, failure to state a claim. See Dkt. # 61. The Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7-15. After considering the moving and opposing papers, the Court GRANTS the Judicial Defendants' motion to dismiss and SUA SPONTE DISMISSES any remaining allegations against the non-judicial Defendants WITHOUT LEAVE TO AMEND.

This action, along with a number of previous state and federal civil actions, arises from Plaintiff's 2006 purchase of a residential property. In this action, Plaintiff alleges that the Judicial Defendants, who participated in various ways in the state civil actions, violated Plaintiff's constitutional rights and acted in concert to defraud Plaintiff. See generally *Complaint* ("Compl."). As the Judicial Defendants properly point out, the *Rooker-Feldman* doctrine bars Plaintiff's claims. Under that doctrine, "the United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings." *Worldwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986); see *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). The basis of Plaintiff's Complaint as it relates to the Judicial Defendants is that Plaintiff disagrees with the

orders and rulings in the state court civil proceedings. This action is thus a de facto appeal of a state court proceeding over which this Court lacks subject matter jurisdiction. *See, e.g., Bianchi v. Rylaarsdam*, 334 F.3d 895, 899 (9th Cir. 2003). Accordingly, the Court finds that the *Rooker-Feldman* doctrine bars Plaintiffs' claims against the Judicial Defendants and GRANTS Defendants' motion to dismiss.

Plaintiffs' remaining claims against the non-judicial Defendants, Michele Clark, David Marcus, and Eric Chomsky, are similarly lacking in any cognizable legal theory. A complaint is subject to dismissal if "one cannot determine from the complaint who is being sued, for what relief, and on what theory" *McHenry v. Renne*, 84 F.3d 1171, 1178 (9th Cir. 1996). Plaintiff has a long history of filing meritless, frivolous, and harassing litigation against Clark, Marcus, and Chomsky. *See Charles Kinney v. Carolyn Cooper, et al.*, CV 15-8910 PSG (JCx), Dkt. #70 (C.D. Cal. May 13, 2016). After reviewing the complaint filed in this case, the Court believes that it is consistent with Plaintiff's previous filings—it is conclusory, redundant, confusing, and implausible. *See Membreno v. Fu Wei*, No. 215CV06322ODWRAOX, 2015 WL 5567763, at *1 (C.D. Cal. Sept. 22, 2015) ("A court may sua sponte dismiss a complaint for failure to comply with Rule 8 when 'the complaint is so verbose, confused and redundant that its true substance, if any, is well disguised.'" (quoting *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969))); accord *Haddock v. Countrywide Bank, NA*, CV 14-

6452 PSG (FFMx), 2015 WL 9257316, at *25 (C.D. Cal. Oct. 27, 2015).

The Court refuses to entertain any more of Plaintiff's frivolous filings. Thus, in addition to GRANTING the Judicial Defendants' motion to dismiss, the Court SUA SPONTE DISMISSES any remaining allegations against the non-judicial Defendants WITHOUT LEAVE TO AMEND.

IT IS SO ORDERED.