Case No. 18A209

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas A. Spitzer, and Craig J. Spitzer,
Plaintiffs-Petitioners

vs.

Trisha A. Aljoe, et al.
Defendants-Respondents

On petition for Writ of Certiorari to the Court of Appeals of the Ninth Circuit, Case No. 16-16680

PETITION FOR WRIT OF CERTIORARI

Thomas A. Spitzer
P.O. Box 1861
Oakland, CA 94604
Plaintiff-Petitioner in pro se
(deceased 9/05/2018)

Craig J. Spitzer
4812 San Pablo Dam Rd., No. 4
El Sobrante, CA 94803
(415) 426-0802
Plaintiff-Petitioner in pro se and
Representative of Thomas A. Spitzer

QUESTIONS PRESENTED FOR REVIEW

Introduction

This Petition involves two classes of defendant-respondents with distinct legal issues and questions presented for review: 1) A public entity and its attorneys; and 2) a state court receiver.

Questions Regarding the Public Entity and its Attorneys:

1. Does a district court have a duty under FRCP 26(g)(3) to sanction public entities and their attorneys for improper withholding of documents requested through discovery before settlement?

2. On the facts before it, did the district court abuse its discretion regarding the public entity's and its attorneys' withholding of documents?

3. Did the Court of Appeals abuse the abuse of discretion standard of review by not examining the whole record?

Questions Regarding the State Court Receiver:

1. Should the Barton Doctrine be applied to a state court receiver sued in his personal capacity for damages under § 1983?

2. Is a constitutional violation within the scope of a state court receiver's authority?

3. Did Petitioner's plead a constitutional violation by the state court receiver?

LIST OF DEFENDANTS-RESPONDENTS

1. Trisha A. Aljoe - Pleasanton Special Counsel
2. Jonathan P. Lowell – Pleasanton City Attorney
3. City of Pleasanton
4. George Thomas – Pleasanton Chief Building Official
5. Walter Wickboldt – Pleasanton Building Official
6. Sgt. Robert Leong – Pleasanton Police Officer
7. Ryan Tujague – Pleasanton Police Officer
8. J. Benjamin McGrew - Receiver

Defendant-Respondents 1-4, Aljoe, Lowell, City of Pleasanton, and J. Benjamin McGrew are the subjects of this Petition for Writ of Certiorari. Defendant-Respondents 4-7, Thomas, Wickboldt, Leong, and Tujague, were dismissed pursuant to stipulation after settlement.

Defendant-Respondents 1-7, Aljoe, Lowell, City of Pleasanton, G. Thomas, Wickboldt, Leong, and Tujague are collectively referred to herein as "City of Pleasanton, et al."

Defendant-Respondents 1-3, Aljoe, Lowell and City of Pleasanton, are collectively referred to herein as "City Defendants."

Defendant-Respondent 8, J. Benjamin McGrew - Receiver, is referred to herein as "McGrew."

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the 9th Circuit, Case No. 16-16680.

OPINIONS BELOW

Opinions and Orders of the Court of Appeals

1. 06/25/2018 Order Denying Petition for Rehearing and Petition for Rehearing En Banc
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4. 03/28/2018 Order Submitting Case Without Oral Argument

Opinions and Orders of the District Court

1. 12/12/16 Order Re: Motion to Alter or Amend the Judgment or for Relief from Judgment.
2. 08/26/16 Order Denying Motion to Stay and Dismissing Case.
3. 06/15/16 Order Re: Motion to Rescind and Motion to Enforce Settlement Agreement.
4. 06/15/16 Order Denying Leave to File a Fourth Amended Complaint.
5. 05/18/16 Order Vacating Hearing Re: Motion to Enforce and Motion to Rescind Settlement.

JURISDICTION

The order to be reviewed was filed and entered on 05/10/2018. The order denying Petitioners' timely filed Petition for Rehearing was filed and entered on 06/25/2018. Petitioners' timely 8/20/2018 Application to extend time to file in this Court was granted on 8/24/2018, extending the time to and including 11/22/2018. Jurisdiction is under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Introduction:

This case arises from a California statutory receivership unreasonably applied to an owner-occupied single family home without tenants. Petitioner Thomas A. Spitzer and Craig J. Spitzer ("Spitzers") owned the home in joint tenancy. Elderly Petitioner Thomas A. Spitzer ("Leroy") was the original owner. He purchased the home new in 1967, and lived in it continuously up to the time of the receivership. The home was paid for in full. The receivership lasted almost five years. Spitzers' home was ultimately sold to pay the exorbitant costs of the receivership.

Leroy was homeless since the receivership was imposed in Sept. 2012. In early May 2015, Leroy was diagnosed with congestive heart failure. Leroy died on 9/05/2018. He was 77 years old when he died. Leroy's son, co-petitioner, Craig J. Spitzer ("Craig"), is Leroy's sole successor and now Leroy's representative.

2. Factual and Legal Bases of the Claims:

Spitzers pleaded violation of their 1st, 4th, and 14th Amendment constitutional rights under 42 U.S.C. § 1983. See Appx.p.47a n.7.

The factual bases of the constitutional violations include, but are not limited to the following: The receiver (McGrew) arranged for and executed an unnecessary clean-up contract without prior approval of the receivership court and without notice to Spitzers in violation of the order appointing him.[1]

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[1] The receivership court found that McGrew violated the order appointing him by "entering contracts with Decon [ ] without first obtaining court approval." SER 662.

The result was the unreasonable permanent deprivation of Spitzers' valuable personal property, including conversion of some of it by McGrew's contractor and its employees.

Well before the clean-up contract was executed, Spitzers and their helper friends, with McGrew's permission, had finished the required clean-up of all but the garage and kitchen of their home and were within an estimated 30 days of finishing it completely, at which time repairs could begin. At this point, however, McGrew, expressly, unexpectedly and unreasonably, permanently barred Spitzers from entering their home and property because Aljoe, Lowell, and the City of Pleasanton ("City Defendants") coerced him to do so.[2]

The purported clean-up contract was not executed until five months after Spitzers were bared from their house and property. The results were that Spitzers were unreasonably permanently deprived of valuable personal property, and unreasonably deprived of the opportunity to finish the clean-up and

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[2] Related facts: Before the petition to appoint a receiver was filed, Spitzers and their helpers did considerable clean-up work on the property and had started on the interior of the house. In response to the City's ex parte application to appoint McGrew, Spitzers pleaded that they had done considerable clean-up work and were capable of finishing it and any required repairs. The City's application was denied and an OSC hearing was scheduled on the appointment. Several days after the ex parte hearing, Aljoe sent Pleasanton police officers to threaten Spitzers and their helpers with arrest if they entered their house to finish its clean up. At the OSC hearing, Aljoe filed and served Spitzers [*in the courtroom*] surprise false declarations about the work Spitzers had done, and presented a surprise witness concerning a surprise issue that was not pleaded in the Petition or ex parte application. The surprise witness made a material false statement. Spitzers were unrepresented at the hearing.

removal of their valuable personal property without due process of law; and were ultimately unreasonably deprived of their home because they were unreasonably deprived of the opportunity to finish the clean-up, and do the repairs themselves in order to keep the costs within their ability to pay them.

3. Pre-Settlement Circumstances

Aljoe, Lowell, City of Pleasanton, Thomas, Wickboldt, Leong, and Tujague, ("City of Pleasanton, et al.") answered the 3rd Amended Complaint. McGrew was dismissed on Barton Doctrine jurisdictional grounds.

The Spitzers made multiple requests for documents and performed six depositions. *But unknown to Spitzers, at the time of the depositions, and before settlement*, City Defendants withheld responsive documents material to Spitzers' claims. Among them were multiple emails from Aljoe to McGrew sent during the state court receivership. These withheld emails show City Defendants' knowledge of McGrew's persistent on-going misconduct which City Defendants tolerated to their benefit, and about which, City Defendants deliberately failed to inform the receivership court to the substantial prejudice of Spitzers.

During Aljoe's deposition, Spitzers questioned her about the only two emails from Aljoe to McGrew that had been produced in City Defendants' discovery responses.[3] City of Pleasanton Assistant Attorney

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[3] Spitzers' 11/17/2014 discovery request to Aljoe requested, inter alia, all documents and electronically stored information related to "all your meetings and communications with receiver J. Benjamin McGrew." Only two Aljoe to McGrew emails were produced. PLST 240 and 787. Aljoe signed a false "Verification" of this production. See Appx.p.106a.

Rene Von Gemmingen Perko ("Perko") attended Aljoe's deposition. When the many withheld emails from Aljoe to McGrew were later produced by City Defendants pursuant to court order about a year after settlement, see sub-§ 4 below, it was determined that many of them had been copied to Perko. Both Aljoe and Perko, therefore, knew at the time of Aljoe's deposition that Spitzers had received only two of the many emails that Aljoe had sent to McGrew and knew these emails had been withheld from production.

Respondents' circumstances immediately before Settlement included the following: 1) Leroy who was homeless had newly diagnosed congestive heart failure. 2) Spitzers' original very low-cost attorney was coincidentally arrested and subsequently disbarred for substance abuse. 3) Finding a new attorney was difficult and caused delay and the expense of substantial additional attorney fees. 4) Discovery had not been productive because of the then unknown withholding of material documents by City Defendants. 5) Discovery cut-off and dispositive motions were looming and the Spitzers and their new attorney were consequently unprepared. 6) Spitzers were facing a motion to sell their home in the state receivership case, had two demanding cases to prosecute, and lacked the man-power and resources to handle them both effectively. On the bases of these exigent circumstances, Spitzers decided to attempt to settle with City of Pleasanton, et al., and concentrate their limited resources on Receiver McGrew.

4. Post-Settlement Circumstances, Motions, and Orders

For the purpose of finding new evidence that

McGrew had acted beyond the scope of his authority to support amendment as to McGrew, Spitzers proposed, and City Defendants agreed to Settlement Term 4, which provided that "*Defendants will look again for any non-privileged communications regarding McGrew.*" Appx.p.114a. City Defendants also agreed to stipulate to removal of McGrew in the Receivership court (Settlement Term 2).

City Defendants promptly produced "approximately 65 pages of additional material" that "fulfills Term 4 of the Settlement." See n.5. These documents included several new emails from Aljoe to McGrew that were not previously produced in response to Spitzers' discovery request. See n.3. One of these emails stated "you have once again ceased responding to my phone calls and emails," SER 774, indicating there were still more emails that had not been produced. On the basis of this evidence and City Defendants' failure to perform Settlement Term 2 in good faith, and their frustration of its purpose to remove McGrew,[4] Spitzers refused to stipulate to

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[4] Pursuant to Settlement Term 2, Spitzers filed a motion to remove McGrew. In Opposition, City Defendants excoriated Spitzers for purportedly making "an untimely motion for reconsideration" of previous motions to remove McGrew, see Appdx.p.67a, without admitting to their knowledge of McGrew's *on-going* misconduct; and filed an unacceptable unbargained for proposed order appointing an unacceptable receiver. FER 71-72. Contrary to the Court of Appeal's clearly erroneous statement otherwise, Appx.p.4a, City Defendants also did not stipulate to remove McGrew. [The Court's error depends on City Defendants' misrepresentations in their Answer, see n.5]. City Defendants admitted and the District Court found that City Defendants refused to sign the stipulation. Appx.pp.31a-32a, 60a-61a. Aljoe admitted "we have no stipulation," and argued that Settlement Term 2 "[H]as no legal authority with this court because the receiver belongs to this court." Appx.pp.51a-52a. All this occurred while the Aljoe

dismissal of City of Pleasanton and its attorneys Aljoe and Lowell ("City Defendants"), but did stipulate to dismissal of the other defendants.

Pursuant to stipulation, Spitzers filed a *Motion to Rescind*, and City Defendants filed a *Motion to Enforce* the settlement agreement. In their briefs City Defendants repeatedly asserted they had produced all the documents responsive to Settlement Term 4. See Appx.p.70a. These assertions were later clearly and convincingly proved false when Spitzers' serendipitously received many more new emails from Aljoe to McGrew,[5] as well as many other new responsive documents in a 4/13/2016 discovery production from McGrew in the state receivership case.[6] The new Aljoe to McGrew emails were responsive to both Settlement Term 4 and Spitzers' discovery request to Aljoe before settlement, see n.3, but had not been produced in either case.

At the time this new evidence was received, the motions to rescind and enforce were being briefed.

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to McGrew emails documenting City Defendants' knowledge that McGrew had, in fact, "breached his obligations to Defendants and to the Court," Appx.p.68a (quoting receivership court's order on Settlement Term 2 motion to remove McGrew), *were being withheld*. Both Settlement Terms 2 and 4, therefore, were not performed by City Defendants in good faith, and the circumstances amount to fraud on both the receivership and District Court.

[5] Spitzers have repeatedly pointed out that City Defendants' statements of purported fact are not supported by declaration, and they have made many unsupported false statements and misrepresentations that have prejudiced Spitzers by misleading the Courts. See Appellants' Brief at 19-22 and Reply at 17 (citing record).

[6] The discovery in the receivership court was intended "to obtain McGrew's financial records related to the receivership for purposes of inspection and audit." Appx.p.130a ¶1.

Before the scheduled hearing, Spitzers filed a *Request for Supplemental Briefing and Submission of New Evidence on Pending Motions.* Appx.p.129a. The request was summarily denied by order on 05/18/16, Appx.p.94a, and the District Court issued its 6/15/2015 Order granting City Defendants' motion to enforce, and denying Respondents' motion to rescind without an oral hearing. The Order, at Appx.pp.86a-87a, however, ordered that:

> Defendants shall produce to Plaintiffs any non-privileged documents related to McGrew, [and] [E]ach Defendant (and a representative for the City) shall file a declaration [ ] attesting to their complete review and production of non-privileged documents related to McGrew. When the Court is satisfied that Defendants have complied with Term 4, the Court shall dismiss them.

In compliance with this order, on 8/12-15/2016 City Defendants produced almost 1200 pages of documents, and filed the ordered declarations. This production contained many new documents responsive to both Settlement Term 4 and Spitzers' discovery requests before settlement, *including many more new emails sent by Aljoe to McGrew.* See n.3, Appx. 106a. One of these new emails, ER 212, dated 12/19/2013, 15 months after the receivership was imposed on 9/18/2012, is quoted in full below (emphasis in original):

> I'm quite curious and concerned as to why you still have not complied with your receiver order and brought the required motions before the court to even be able to enter into contracts to start the repair/

rehab work that was the SOLE reason for your appointment?

Until you finally do that, you continue to provide Kartoon [Spitzers' first attorney] with endless fodder for their countless filings AND the house remains in sub-standard condition and a blight on the neighborhood. And yes, the neighbors are complaining about nothing being done.

Regardless if the proposed modified order sets a deadline for you to do that, I only insisted it to be in there because you have consistently failed, even after more than a year, to take that basic and fundamentally necessary step. The inclusion of that deadline was NOT intended to function as an excuse for you to not move forward, or do you really need to be ordered to do your job?

Had you acted in a timely manner from the day you were appointed, the estate would not now be facing attorney fees that are in excess of a hundred thousand dollars, and continue to mount. Once you manage to actually get the repair/rehab work done, there is little left for the Spitzers to complain about. [7]

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[7] (a) Aljoe's statement re attorney fees shows Aljoe falsely stated in her 04/03/2015 deposition, inter alia, "I don't know if [McGrew's] actions increased the costs [of the receivership]." SER 365 at 50:21-22. The withholding seriously compromised Spitzers' depositions.

(b) High attorneys' fees [and delays] benefited hired attorney Aljoe. High receivership costs also benefited the City of

My whole point to the court was that the city could not wait any longer to allow the Spitzers to clean up and make the necessary repairs and to get it done in a timely fashion required a receiver to come in and take action. So much for that argument.[8]

The City needs a real commitment from you that you will be FILING the contract approval motions within the next 15 days. Since you've presumably done that many times, that should be a reasonable request.

If you are unable to take any action on your own regarding MOVING the receivership forward, I would be doing my client a disservice if I did not file a motion to have you removed and replaced with a receiver who has the time and interest to see that this case is handled properly and correctly. The other attorneys in the office agree with that assessment.

Pleasanton because Spitzers were ultimately going to pay them, and Pleasanton had an interest in removing a low income elderly home-owner (Leroy), and replacing him with a high income taxpayer paying high property taxes. If the costs of receivership were high enough, Spitzers would be sure to lose their home. That was City Defendants' motive for imposing the receivership, and keeping McGrew as receiver in spite of his misconduct and delay, as long as he did their bidding. Pursuant to that interest, Spitzers' home was not just repaired, but extensively remodeled [in violation of the H&S Code] at a much higher cost than if it had only been repaired. It was receivership redevelopment, paid for by Spitzers, not Health and Safety Code rehabilitation. See notes 2, 4, 9, and 10.

[8] See n.2.

> I've had that same discussion with you in the past but this time we simply cannot accept any more excuses.[9]
>
> I think this last example of your inexplicable inability to follow the simplest court order was the proverbial "last straw for us."[10]
>
> Please advise me if you intend to and are able [to] file the necessary motions within 15-days so that we may take the appropriate action to bring this saga to an end.

After reviewing the documents produced by City Defendants on 8/12/2016, Spitzers filed a *Motion for Stay* stating, inter alia, "*City Defendants' documents came too late to be useful without a stay and opportunity for reconsideration based on this and other new evidence*" [produced by McGrew]. The stay was denied and the case dismissed, Appx.p.42a, and judgment was entered in favor of City Defendants and McGrew. Appx.p.41a.

5. Rule 59(e)/60(b) Motion and Order

Spitzers filed a combined Rule 59(e) and 60(b)

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[9] This withheld email was sent while Spitzers' motion for reconsideration of the receivership court's denial of Spitzers' first motion to remove McGrew was pending. Aljoe vigorously opposed the motion without a word of criticism of McGrew. Aljoe's opposition was disingenuous, to say the least. See notes 2 and.4.

[10] Aljoe's series of emails to McGrew contain multiple threats and ultimatums, but the circumstances show they were all intended to get McGrew moving in the direction City Defendants wanted him to go. If McGrew had allowed Spitzers to continue to do the clean-up and repair work, they certainly would have and could have removed him. See n.7(b).

motion "*substantially based on new evidence acquired on 8/12/2016 pursuant to Settlement Term 4 and the Court's 6/15/16 Order and the circumstances surrounding its belated production well after it would have been useful in this case and the receivership case,*" and argued, inter alia, fraud in the discovery and Settlement Term 4 withholding. The district court denied the motion stating, inter alia, that Spitzers:

> [N]egotiated and reached the Settlement while six discovery disputes were pending, in so doing, they settled with full knowledge that resolution of those disputes could lead to useful evidence against City Defendants.[11] [ ] Because Plaintiffs were aware of and assumed this risk, the Court concluded there was no evidence of mistake or fraud when the parties settled ... 'Plaintiffs bargained for what is essentially discovery. But there is no mistake here as they knew they were trading the traditional discovery process for the terms of their agreement.' [12]

Appx.p.32a. The District Court further held that there is "*no new evidence,*" Appx.p.34a, because

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[11] The discovery disputes *were not filed.* They were only in the meet and confer stage. Therefore, the District Court did not have personal knowledge of their substance.

[12] The District Court adopted City Defendants' argument in their Motion to Enforce. See FER 66-67 ("[B]y electing to settle, the plaintiffs bargained away the possibility of potentially later, case-changing information. [ ]. And by requesting Defendants undertake a search for additional McGrew related documents, they explicitly undertook the risk such might be discovered."). See n.17.

Spitzers "could have resolved the discovery disputes before settling," it was, therefore, not "previously unavailable," Appx.p.35a; and refused to consider it.

6. Opinion of the Court of Appeals

The Court of Appeals had jurisdiction under 28 U.S.C. 1291. Oral argument was scheduled but cancelled at the last minute. Spitzers' then filed a motion stating why oral argument should be permitted, requested that it be rescheduled, stated in writing the oral argument that the Spitzers planned to present, and asked in the alternative that the written argument be considered. See Appx.p. 102a. Spitzers' written argument cited the new declarations of Aljoe and Perko that showed Aljoe's City of Richmond email account containing the withheld Aljoe to McGrew emails, and the City's servers were not searched under the obvious search term "McGrew," until *after* the District Court issued its 6/15/16 production Order. Appx.pp.108a ¶6; 111a ¶¶5-6. Spitzers argued that this new evidence, showed that the emails were deliberately withheld by City Defendants, both before and after Settlement. The requests were denied. Appx.p.6a.

The Court of Appeals then issued a 5 page unpublished Memorandum decision that stated:

> The Spitzers were *well aware of discovery issues regarding McGrew* when they entered into the Settlement, but the parties dealt with them in the Settlement itself. To the extent there was a risk arising out of the then undisclosed material, the Spitzers assumed the risk when they entered into Settlement (emphasis added).

Appx.p.4a n.3. The Court of Appeals also stated that "the settlement was not entered into on account of fraud by the City." Appx.pp.3a-4a. In regard to the almost 1200 pages of new evidence produced by City Defendants on the eve of judgment, the Court of Appeals merely stated that Spitzers Rule 59(e)/60(b) Motion "*merely bespoke of a desire to relitigate the issues already decided.*" Appx.p.4a-5a. No mention is made of the new evidence. [13]

1. REASONS FOR GRANTING THE WRIT AS TO THE PUBLIC ENTITY AND ITS ATTORNEYS

RELEVANT LAW and RULES

Federal Rules of Civil Procedure Rule 26(g)(3), in relevant part provides for and mandates the following:

> (1) Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name .... By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief

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[13] The District Court conflated the Settlement Term 4 and discovery dispute issues, see Appx.34a-35a; and the Appeals Court failed to address the Settlement Term 4 issues. The delayed 08/12/2016 production did not provide the documents under Settlement Term 4 at the time they were intended to be used in drafting the 4th Amended Complaint filed on 11/30/2015. There was, therefore, a failure of consideration. Cal.Civ. Code §1689, Appx.p.100a. There was also fraud and misrepresentation under Settlement Term 4 because the withholding was repeatedly denied by City Defendants in their briefs after settlement. See Appx.p.70a, n.5 herein, and FRCP Rules 11, 60(b)(3).

formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made (emphasis added). ...

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both (emphasis added). The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Notes of Advisory Committee on Rules further explain that "Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision," and that Rule 26(g)(3) specifies "the authority judges now have to impose appropriate sanctions and requires them to use it" (emphasis added).

Federal Rules of Civil Procedure, Rules 11 and 60(b)(3). Appx.pp.96a-99a California Civil Code §§ 1572, 1667, 1668, and 1689. Appx.pp.99a-101a.

ARGUMENT RE QUESTION ONE

Does a district court have a duty under FRCP 26(g)(3) to sanction public entities and their attorneys for improper withholding of documents requested through discovery before settlement?

Under Rule 26(g)(3) a district court has a mandatory duty to sanction a party for improperly certifying that a discovery response "is complete and correct," when it is not. If the Rule is to be effective,

this mandatory duty cannot be permitted to be allegedly "bargained away," and a withholding party should not be allowed to present, or a court to use "bargained away" as a viable defense. A settling party has a right to rely on the 26(g)(3) certification at settlement, and a party should be required to come to settlement with clean hands in regard to their obligations under the discovery Rules, without exception. Failure to do so should, *at the least,* be deemed to presumptively invalidate a settlement agreement. This should especially be true in the case of government entities and their attorneys.

Spitzers contend that, under the foregoing circumstances, Rule 26(g)(3) mandated the District Court to impose sanctions against City Defendants for improper withholding of responsive documents, before settlement, and false certification the responses were "complete and correct" - regardless of settlement.[14] Compare *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990)(Re rule 11 sanctions after dismissal). It is undisputed that, before settlement, City Defendants' discovery responses were not complete and correct as to the emails sent by Aljoe to receiver McGrew, as well as many other withheld documents. Spitzers' Rule 59(e)/60(b) Motion was effectively asking for the sanction of rescission against City Defendants for withholding the documents both before and after settlement. The new evidence that City defendants falsely certified their discovery responses, and further falsely stated their Settlement Term 4 responses were complete in their

[14] Under California law settlement cannot be used to protect prior or future willful misconduct. See Cal.Civ.Code §§ 1572, 1667 and 1668. Appx.pp.99a-100a. The same should apply to the discovery rules.

briefs, also triggered the District Court's duty to impose sanctions under both Rules 11 and 26(g)(3).

Rescission is an appropriate sanction because *Spitzers' decision to seek settlement was based in significant part on unproductive and futile discovery due to City Defendants' improper withholding of documents.* See *Haeger v. Goodyear Tire and Rubber Co.*, 906 F. Supp. 938, 976 (D.Ariz. 2012) ("*Haeger I*")[15] (Haegers' potential remedies included rescinding the settlement agreement). *The withholding also depleted Spitzers' financial and man-power resources and adversely affected their ability to effectively continue the litigation in both the district and receivership courts.* See *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081, 1086-88 (1979)(Powell, J. dissenting from denial of certiorari)(The cost of litigation in this country—furthered by discovery procedures susceptible to gross abuse—has reached the point where many persons and entities simply cannot afford to litigate even the most meritorious claim or defense). *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J. concurring) ("[D]iscovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."). *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976) (Discovery sanctions are used "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.").

The effect of City Defendants' withholding of documents during discovery was to wear down

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[15] Overruled on other grounds by *Goodyear v. Haeger*, 581 U.S. [ ] (2017).

Spitzers and deplete their resources, and deprive them of material evidence, which allowed City Defendants to force settlement in their favor. This oppressive strategy cannot be allowed, especially not by government entities and their attorneys. Compare *Haeger v. Goodyear Tire and Rubber Co.*, 813 F.3d 1233, 1245 (9th Cir. 2016) ("*Hager II*"). *Olmstead v. United States*, 277 U.S. 438 (1927) (Butler, J. dissenting) ("If the government becomes a law-breaker, it breeds contempt for the law").

ARGUMENT RE QUESTION TWO:

On the facts before it, did the district court abuse its discretion regarding the public entity's and its attorneys' withholding of documents?

1. As a matter of law, Spitzers did not "bargain away" their discovery right to requested McGrew related documents.

In its Order denying Spitzers' Rule 59(e)/60(b) Motion, the District Court concluded that Spitzers "knew they were trading the traditional discovery process for the terms of their agreement." Appx. p.32a. This conclusion is clearly erroneous as a matter of law, because McGrew was a non-settling party. City Defendants' discovery duty as to previously requested McGrew related documents, therefore, continued after Settlement until final judgment as to all parties. FRCP 26, 34. Settlement Term 4, therefore, concerned City Defendants' pre-existing and continuing duty under the discovery rules. It did not end that duty.

2. The District Court's bargained-away conclusion is not supported by evidence in the record.

The discovery disputes before settlement are neither mentioned nor implied as settled in the Settlement Terms. Appx.pp.113a-115a. The District Court's bargained-away conclusion is based solely on its *presumption* that Spitzers were "well aware of discovery issues regarding McGrew" before settlement. The Court *presumed* that the discovery "issues" (disputes) concerned McGrew related documents. This conclusion was presumptuous because the District Court did not have personal knowledge of the substance of the un-filed disputes, and in spite of the numerous meet and confer documents in the record related to the discovery disputes, the District Court did not cite any documentary evidence in support of its conclusion, and there is none.[16] Furthermore, even though the facts of what Spitzers knew before settlement is clearly disputed, no evidentiary hearing was held on the question. *Russell v.*

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[16] The *only* purported evidence the District Court cites for its bargained-away conclusion is Spitzers' statement in their Motion to Rescind that the *initial Settlement Term 4 documents* "show that Plaintiffs' discovery disputes had merit ...." Appx. p.73a. Indeed it did. It served to show that City Defendants' discovery responses were generally flawed, not just in regard to the withheld Aljoe to McGrew emails. It did not, however, show that Spitzers "were well aware of Discovery issues regarding McGrew," *before* settlement, nor that Spitzers' discovery disputes *before* settlement concerned McGrew related documents. That was an unwarranted and reckless presumption. The circumstance here is a deceptive and misleading *partial* response to the request for Aljoe to McGrew emails. See n.3. Spitzers had no evidence that the response was only partial *before* settlement, therefore, there was no discovery dispute related to the withholding.

Puget Sound Tug & Barge Co., 737 F.2d 1510, 1511 (9th Cir. 1984) (Evidentiary hearing required on "complex factual issues" before rescission motion decided). *Amin v. Superior Court*, 237 Cal. App.4th 1392, 1398 (2006)(Evidentiary hearing held on prosecutor's knowledge of facts before agreeing to plea bargain - cited but not followed by both the District and Appeals Courts on this dispositive point). See also *Jones v. Aeorchem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (Hearing should be held "to determine whether there had been misconduct" in the withholding of documents). Instead, the District Court's conclusion is improperly based on City Defendants' misrepresentations. See n.17.

The *un-filed* discovery disputes are otherwise documented in the record, and the record does not show that the disputes concerned McGrew related documents. See e.g Appx.p.119a (ER 296 which generally describes the 6 discovery disputes pending at settlement). Only Disputes 1, 2, and 4 concerned any suspected withholding of non-privileged documents. The subject of Dispute No.1 was City Defendants' responses to Spitzers' 03/02/2015 Discovery Request. Appx.pp.118a-120a.[17] The subject of Dispute No. 2 was "Failure of Pleasanton Police Officer Sergio Martinez to bring requested documents to his

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[17] The full text of Dispute No.1 is not part of the record. City Defendants, however, included all of Spitzers' discovery requests and their responses in their SER. The general subject matter of Dispute No.1 was, therefore, readily available to the District and Appeals Courts. Spitzers' subject 03/02/2015 Discovery Request, at Appx.pp.122a-128a, shows it would not have produced the withheld McGrew related documents. This and other evidence shows that City Defendants advanced their bargained-away defense knowing that resolution of the pending discovery disputes would not have produced the withheld documents. See notes 5 and 12. FRCP Rules 11, 60(b)(3).

deposition by subpoena," in regard to the unreasonable seizure and final deprivation of Leroy's vehicle. Dispute 3 concerned "deficiencies in City Defendants' privilege log;" Dispute 4 concerned only attachments to *privileged* emails, and *privileged* emails that should have been redacted and produced. Dispute No.5 concerned grounds for "waiver of the work product privilege;" Dispute No.6, "Deficiencies in City Defendants' document and electronic information production," concerned only the general sloppy nature of City Defendants' responses to Spitzers' discovery requests. Its grounds are summarized, at FER 91, as follows:

> City Defendants' produced documents are not properly numbered or ordered. Their first document production contained a 200 + page gap. There were no documents numbered 22-234. This gap was later filled, in substantial part by undated and otherwise unidentified, non-responsive photographs in multiple copies. Some of the produced documents are not numbered. The produced documents contain many duplicates with different numbers in violation of N.D. Local Rule 30-2(b)(3). They also contain many unrequested documents, including virtually every document alleged in the complaint. Many emails produced are not produced in order by date, and many are produced in multiple duplicates, making them inscrutable until put in order and the duplicates removed.

None of the discovery disputes, therefore, concerned McGrew related documents of any significance, and their resolution would not have produced

the withheld documents. The District Court's "bargained away" conclusion based on the purported fact that Spitzers were "well aware of discovery issues regarding McGrew" before settlement is, therefore, not supported by any documentary evidence or testimony. Instead the record shows that *Spitzers did not have "actual or constructive knowledge" before settlement that McGrew related documents were being withheld*; and that City Defendants "*contributed to or induced*" Spitzers' to settle by withholding the documents. *A.J. Industries v. Ver Halen*, 75 Cal. App.3d. 751, 757-760 (1977). See sub-§3 below.

Furthermore, the circumstances clearly show that filing the discovery dispute letters would have been futile. It is irrational to conclude that the withheld McGrew related documents would have been ordered to be produced without evidence of their withholding which was completely lacking before Settlement. The withheld documents were, in fact, eventually produced *only* because clear and convincing evidence of the withholding, that could not be ignored, was discovered serendipitously through discovery in the state receivership case. Because of City Defendants' persistent false claims their Settlement Term 4 production was complete, without this serendipitous discovery, the District Court would not have issued its order resulting in the 8/12/2016 belated production. See *Haeger II* p.1245, *Haeger I* pp.960-61 supra (Multiple hearings on discovery disputes were unproductive and judge admitted she was deceived by Goodyear's counsels' misrepresentations.).

3. The withholding contributed to the cause of Petitioners' exigent circumstances and was a significant factor inducing Petitioners to Settle.

A significant part of the reason Spitzers settled was that, through no fault of their own, their discovery had been unproductive, and consequently insufficient evidence had been produced for dispositive motions. Spitzers were further oppressed by the exigent circumstances described in Statement of the Case ("SOC") sub-§ 3. City Defendants withholding contributed to these exigent circumstances by causing the depletion and waste of their manpower and resources which were futilely expended on unproductive discovery. See e.g. n.7(a).

4. The District Court and Court of Appeals Courts improperly refused to consider the new evidence of City Defendants' deliberate withholding of documents.

In its Order denying Spitzers' Rule 59(e)/60(b) Motion, the District Court explicitly stated in reference to the new documents produced by City Defendants on 8/12/2016, that "there is no new evidence," and the District Court did not consider it in reaching its conclusions. Appx.pp.34a-36a. The Court of Appeals stated only that Spitzers Rule 59(e)/60(b) Motion "*merely bespoke of a desire to relitigate the issues already decided,*" and did not even mention the new evidence. The Court of Appeals also explicitly refused to consider Spitzers' proposed oral argument regarding the declarations of Aljoe and Perko. See SOC sub-§ 6, and Appx. pp. 102a, 107a, 110a, and 6a.

In refusing to consider this new evidence, the District and Appeals Courts improperly refused to

consider evidence that the withholding of documents by City Defendants was deliberate and constituted Rule 60(b)(3) fraud. Clearly, at the very least, an evidentiary hearing was required. *Jones* supra.

5. The bargained-away conclusion is inconsistent with analogous 9th Circuit precedent.

The *Haeger* cases, supra, which Spitzers cited extensively in their Opening Brief are inconsistent with the Court of Appeal's decision. Under similar circumstances, the Haegers weren't held to have "bargained away" their discovery rights by settling. Like City Defendants, Goodyear and its attorneys "failed to search for, and/or withheld relevant responsive documents *before settlement*" (emphasis added). *Haeger II* p.1238. Discovery disputes before settlement were involved, but *Haeger II* rejected Goodyear's and its attorneys' asserted defense that they couldn't be sanctioned because the Haegers didn't move to compel production before settlement. *Haeger II*, p.1244,

ARGUMENT RE QUESTION THREE:

Did the Court of Appeals abuse the abuse of discretion standard of review by not examining the whole record

The District Court stated that there was "no new evidence" and ignored the new evidence presented in Spitzers Rule 59(e)/60(b) Motion. The Court of Appeals by implication did the same. The Court of Appeals also expressly refused to consider Spitzers' written argument citing the new evidence submitted with their request that the oral argument be rescheduled. The Court of Appeals also did not examine the record in regard to the issues of

whether Spitzers had actual or constructive knowledge of the withholding before settlement, and whether City Defendants' withholding contributed to or induced Spitzers to settle. *A.J. Industries* supra. See *Bose corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1981) ("[T]he Rule [52(a)] expressly contemplated a review of the entire record."). And see *Oregon Natural Res. Council v. Marsh*, 52 F.3d 1485, 1492 (9th Cir. 1995)("The district court abuses its discretion [ ] *when the record contains no evidence on which [it] rationally could have based that decision.*").

The Court of Appeals further had an independent duty to examine the record under its inherent powers. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). *Burton v. United States*, 483 F.2d 1182, 1187-1188 (9th Cir. 1983). *Haeger I* and *II* supra (The *Haeger I* court performed its own investigation of Goodyear's and its attorneys' conduct in other cases). The issue of a public entity's and its attorneys' discovery abuse in this case, is not merely personal to Spitzers. Improper withholding of material documents by a public entity and its attorneys is a matter of utmost public concern that reflects badly on the legitimacy of our system of law and justice. *Olmstead* supra. The Court of Appeals, therefore, had an independent inherent duty and power to examine the whole record in regard to the facts of improper withholding of documents by a government entity and its attorneys, and should have done so.

CONCLUSION AS TO CITY DEFENDANTS

For the foregoing reasons, this Petition as to City Defendants should be granted.

2. REASONS FOR GRANTING THE WRIT AS TO THE STATE COURT RECEIVER

RELEVANT LAW and RULES

Barton Doctrine: *Barton v. Barbour*, 104 U.S. 126 (1881), holding that suits against a receiver of a railroad in his *official capacity* must be brought in the receivership court, or if suit is brought in another jurisdiction, leave of the appointing court must be obtained.

42 U.S.C. §1983. Appx.p.96a California Code of Civil Procedure § 568.5. Appx.p.101a.

ADDENDUM TO STATEMENT OF THE CASE

The following are additions as to McGrew to the foregoing Statement of the Case.

1. District Court Proceedings

McGrew was dismissed on *Barton* Doctrine jurisdictional grounds on the 2nd Amended Complaint which pleaded violation of Spitzers constitutional rights by McGrew under 42 U.S.C. §1983. Spitzers pleaded acts by McGrew beyond the scope of his authority with more particularity in the 3rd Amended Complaint ("TAC"), which included a new claim based on new facts that McGrew acted outside the scope of his authority by unlawfully signing and recording a deed of trust without prior approval of the receivership. See Appx.27a n.7. The District Court denied leave to amend as to McGrew on *Barton* and "scope of authority" grounds, holding that "[w]hile McGrew's actions may not have been authorized by the appointing court, [ ], his actions were taken in pursuit of his receivership duties." 04/06/2015 Order at 28:25-27.

Spitzers' Motion for leave to file a 4th Amended

Complaint ("4thAC") was filed shortly after settlement on 11/30/2015. The 4thAC dealt more particularly with, inter alia, McGrew's violation of a court order, see n.1, and the deed of trust issues, but Spitzers were prejudiced in drafting and arguing the 4thAC by the discovery and Settlement Term 4 withholding of the Aljoe to McGrew emails. See e.g. email quoted above and related footnotes.

In the interim while the decision on the motion for leave to amend was pending, Spitzers filed three requests for judicial notice of filed court documents from multiple contemporaneous state receivership cases in which McGrew was removed as receiver for misconduct. McGrew's 4/13/2016 document production, see SOC sub-§4, revealed additional cases. All told, Spitzers discovered, investigated, and obtained court documents from 10 cases in which McGrew was removed for misconduct. In four of them, McGrew was sanctioned for a total of more than $74,000, including an award to plaintiffs of attorney fees expended for his removal; sanctions for failure to appear, follow court orders and file required documents, and in two cases absconding with receivership funds. Two of the 10 cases involved resident elderly homeowners, one of whom died in the midst of the receivership proceeding after being removed from her home. The District Court held that this evidence was inadmissible "character evidence." Appx.p.25a.[18]

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[18] These cases are evidence, inter alia, of McGrew's state of mind, and City Defendants' bad faith in not admitting to McGrew's misconduct and not seeking his removal. See notes 4, and 9. *Duran v. City of Maywood*, 221 F.3d 1127, 1132-33 (9th Cir. 2000). *Haeger II* supra, p.1241, n.2. The unpublished case the District Court cites in support of its holding was reconsidered and overruled based on *Duran*.

McGrew's 4/13/2016 production also included new evidence, in multiple emails between McGrew and his lenders who McGrew had used in other receivership cases, which showed, *for the first time*, evidence that a real estate broker had not arranged the loan, and therefore, the interest rate was usurious under California law. The emails also showed that the lenders required that McGrew provide a deed of trust as security for the loan. McGrew arranged the usurious loan and recorded the deed of trust as grantor of title to Spitzers' home without prior approval of the receivership court and without notice to Spitzers.

As stated above at SOC sub-§4, on 5/17/2016 Spitzers filed a *Request for Supplemental Briefing and Submission of New Evidence on Pending Motions*. At the time it was filed, Spitzers had not had time to thoroughly analyze the voluminous McGrew production. Appx.p.130a-131a ¶¶ 2-3. While the order denying Spitzers' Request did not specifically apply to the pending motion for leave to amend as to McGrew, it did by implication.

2. Order on Motion for Leave to File 4th Amended Complaint.

In its 6/15/2016 Order denying leave to amend, the District Court, citing *New Alaska* infra, stated that "as the Court has previously noted," a receiver is entitled to "absolute derivative judicial immunity" for acts "intimately connected with his receivership duties." Appx.p.91a.

3. Rule 59(e) and 60(b) Motion and Order.

Spitzers briefed and submitted excerpts from the new evidence from McGrew's production in their Rule 59(e)/60(b) Motion and argued clear error of

law. In support of its denial of leave to amend as to McGrew, the District Court reiterated that it "relied on" *New Alaska*, infra, "for the proposition that a receiver appointed by a state court is entitled to immunity in §1983 cases, unless the receiver 'acted in the clear absence of jurisdiction," Appx.p.21a, and concluded there is "no clear error of law."

4. Opinion of the Court of Appeals.

The Court of Appeals only stated that the "Spitzers brought claims against [McGrew] for actions within the scope of his duties as receiver. However, they failed to obtain leave of the Receivership court to commence this action against him. Thus, the district court properly determined that it lacked jurisdiction over the Spitzers' claims." And "the acts charged against him were not outside the scope of his duties as receiver." Appx.p.5a. The new evidence was not mentioned.

INTRODUCTION TO ARGUMENT

In support of its foregoing holdings, the Court of Appeals cited only federal bankruptcy cases involving a trustee, receiver, and appointee: *Beck v. Fort James Corp.* (*In re Crown Vantage, Inc.*), 421 F.3d 963, 970-71 (9th Cir. 2005) (liquidating trustee); *Med. Dev. Int'l v. Cal. Dept. of Corr. & Rehab.*, 585 F.3d 1211, 1216-17 (9th Cir. 2009)(receiver); and *Blixseth v. Brown* (*In re Yellow-stone Mountain Club, LLC*), 841 F.3d 1090, 1094-96 & n.2 (9th Cir. 2016)(Creditor Committee chairman). These cases are all factually inapposite as to application of *Barton* to this case, and to the "scope of authority" of McGrew, because they do not involve state court receivers and §1983 claims. Federally appointed receivers and trustees cannot be sued under §1983, and federal receivers

and trustees have considerably more vested discretion than state court receivers whose discretionary powers are strictly limited. See California Real Estate 3d, Receivers § 41.9 (2018).

> A receiver's powers are limited. The functions and powers of a receiver are controlled by statute, by the order appointing the receiver, and by orders subsequently made by the court. The scope of the receiver's power is, by statutory definition, 'under the power of the court.' The receiver has no other powers. 'No sale can take place, no debt can be paid, no contract can be made which does not have the sanction of the court.' [ ]. A receiver does not have the authority to file any suit or take any other action unless he or she has received specific instructions from the court or unless the action is specifically permitted by statute.

The Spitzers are also not equivalent to a bankruptcy debtor whose legal and equitable interest in property is subject to administration and liquiddation under the Bankruptcy Code by the trustee. In contrast, "[u]nder California law, a receiver has possession only; title remains in those who had it at the time of appointment," *In re Domum Locis LLC*, 521 B.R. 662, 676 (C.D. Cal. 2014); and sale of a receivership defendant's property may be made only pursuant to a money judgment. See Code of Civil Procedure § 568.5 (citing enforcement of money judgment law). Appx. p.101a. Federal bankruptcy receivers and trustees and state court receivers and receiverships are, therefore, not analogous and should not be treated as such.

ARGUMENT RE QUESTION ONE

Should the Barton Doctrine be applied to a state court receiver sued in his personal capacity for damages under § 1983?

The Court of Appeal's holding in regard to *Barton* fails to consider or distinguish 9th Circuit controlling authority cited by Spitzers, involving state court receivers and §1983 claims, *that do not apply* the Barton Doctrine.[19] See *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 818 (9th Cir. 1989) (reversing dismissal of §1983 claims against a state court receiver and his attorneys); and *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1305 (9th Cir. 1989) (Affirming dismissal of a "deprivation of property without due process of law" claim against a state court receiver).[20]

The Barton Doctrine should not be applied to §1983 claims because the Barton Doctrine applies only when a receiver is sued in his *official* capacity. *Blixseth* at 1097 (*Barton* concerns "actions taken in a trustee's or officer's official capacity."). Section 1983 claims for damages are suits against a *state* government official in his *personal* capacity. Section 1983 is, therefore, a statutory exception that trumps the judge-made Barton Doctrine. Section 1983 is also meant to provide federal *jurisdiction* for claims

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[19] Spitzers cited multiple other §1983 cases against receivers that did not apply *Barton*, including cases cited by the District Court that it ignored on this issue.

[20] The District Court misconstrued *New Alaska*. See Appx. pp.24a and 92a. *New Alaska* did not "allow some other claims to proceed." It dismissed all claims. The acts of "theft and slander" and retaining "assets long after [the state court] entered the final [judgment]" were not deemed by *New Alaska* to be constitutional violations.

under the statute. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989).[21] *Lebbos* and *New Alaska* were decided without any mention of *Barton*. They should have been, but were not followed in this regard by the District and Appeals Courts.

ARGUMENT RE QUESTION TWO

Is a constitutional violation within the scope of a state court receiver's authority?

When a government official commits an unconstitutional act, he is necessarily acting outside his official capacity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949). *Taylor v., Westly*, 402 F.3d 924, 930 (9th Cir. 2005)("[N]o state could or would authorize a state officer to act contrary to the federal Constitution, so any such action would be ultra vires.").

Under the scope of authority test as applied to McGrew by the District and Appeals Courts, however, a constitutional violation is within the scope of McGrew's authority because virtually anything done by McGrew under color of his receivership duties has been deemed to be within the scope of his authority. As such it is essentially absolute quasi-judicial immunity under a different name. Under this Court's precedent this should not be the case. See e.g. *Forrester v. White*, 484 U.S. 219 (1988); and *Antoine v. Byers & Anderson*, 508 U.S. 429 (1993). The relation of an action to a judicial proceeding is no longer the standard. The test of

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[21] See also Handbook for Chapter 7 Trustees pp.1-2--1-3 (2002)(A major reason for bankruptcy reform legislation was concern about the partiality of bankruptcy judges in matters concerning trustees they appointed and supervised).

whether McGrew's pleaded actions were functionally equivalent to those of a judge should have been, but was not applied. *Id.* See also *Coleman v. Dunlap*, 695 F.3d 650, 654-55 (7th Cir. 2012) ("unqualified language to the effect that receivers are immune from liability [for acts within the scope of their authority] was not accurate even before *Forrester.*"). And see *Mosser v. Darrow*, 341 U.S. 267, 274 (1951) (A receiver is personally liable for "forbidden acts.").

The Court of Appeals cited cases, if read more than superficially to support a mere legal conclusion, also support Spitzers' argument that McGrew' is not entitled to immunity. They also show that because of its preoccupation with *Barton* the District Court "didn't undertake a meaningful claim-by-claim analysis,"[22] *Blixseth* at 1096.

Med. Devel. Intern., p.1222, held that "Judicial immunity does not apply to everything a receiver does in the course of performing his responsibilities." *Blixseth* reversed the bankruptcy court's finding of "derivative judicial immunity," and stated the proper test for determining whether judicial immunity applied. According to that test, McGrew "must have acted within the scope of his authority and *candidly disclosed* [his] *proposed acts to the* [receivership] *court*, [ ]. Additionally, the [Spitzers] *must have had notice of his proposed acts and the* [receivership] *court must have approved these acts*" (emphasis added). *Id.* at 1097. Under *Blixseth*, therefore, a receiver is not entitled to the immunity given McGrew by the District and Appeals Courts.

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[22] See *Denny v. Drug Enforcement Admin.*, 508 F.Supp.2d 815, 824-25 (E.D.Cal. 2007). And see n.23.

ARGUMENT RE QUESTION THREE

Did Petitioners plead a constitutional violation by the state court receiver?

Spitzers have plainly pleaded that McGrew arranged and executed the clean-up contract "without prior approval of the court in violation of the order appointing him. ... without prior notice to plaintiffs, [and] without their having an opportunity to be heard ...." 3rd Amended Complaint ("TAC") ¶123. See Clark on Receivers, Liability of Receivers, §392(g)("When [a receiver] acts beyond the court order, he acts without official sanction and he acts as an individual."). Under *Forrester* and *Antoine* [and Clark] these acts are not judicial. The results were, inter alia, unreasonable seizure and final deprivation of Spitzers' valuable personal property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1975) ("[S]ome form of hearing is required before an individual is finally deprived of a property interest."). The receivership court further expressly found that McGrew violated the order appointing him by his execution of the clean-up contract without prior approval of the receivership court.[23] See n.1. McGrew also did not have jurisdiction over Spitzers' valuable personal property, nor

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[23] The District Court's analysis in this regard, at Appx.p.21a, n.5, improperly depends on disputed facts and facts outside the pleadings, and fails to treat the allegations of the complaint as true, *Blixseth*, *Denny* supra; improperly treats facts in a court order as true and gives undue credit to a clearly erroneous receivership court finding caused by City Defendants misrepresentations; improperly finds after-the-fact purported approval by the receivership court adequate due process; and fails to properly consider the new evidence of, inter alia, Aljoe's bad faith. See e.g. new Aljoe to McGrew email quoted above and related footnotes.

the authority to dispose of it. TAC ¶116. Under *Mathews, Blixseth, Lebbos,* and Clark, therefore, Spitzers have pleaded constitutional violations by McGrew under §1983, and McGrew is not immune from suit.

Spitzers also pleaded, inter alia, that McGrew, unlawfully recorded a deed of trust as grantor of title to Spitzers' real property to secure an [unlawful usurious] loan, and did so without prior approval of the receivership court, or notice to Spitzers. See Appx.p.27a n.7 (In their TAC "Plaintiffs allege that McGrew acted outside the scope of his authority by [signing and] recording a Deed of Trust on May 28, 2014")(text in brackets added). In California, a receiver has possession only, not title. *In re Domum Locis* supra. McGrew, therefore, acted unlawfully by signing and recording the deed of trust to secure the unlawful usurious loan, and is liable for depriving Spitzers of a property interests without due process of law. *Mathews, Blixseth, Lebbos,* Clark supra. [24]

CONCLUSION AS TO THE RECEIVER

For the foregoing reasons this Petition as to McGrew should be granted. Additionally, it should be granted because of the "confused state" of trustee liability, and the "inconsistent" guidance of the common-law. See Elizabeth H. McCullough, Bankruptcy Trustee Liability: Is there a Method to the Madness. 15 Lewis and Clark Law Review 153 at 153 (2011):

> *Mosser v. Darrow*, decided over 50 years ago, was the Supreme court's first and only

[24] Spitzers deserved leave to amend as to the usurious loan, evidence of which was not in Spitzers' possession at the time the 4thAC was drafted.

opinion concerning personal liability of a bankruptcy trustee. Unfortunately, its mandates in the area of bankruptcy trustee liability are anything but clear, and it has since created uncertainty in the common law about when a bankruptcy trustee should be personally liable or immune from suit. Many courts rely on faulty analysis and a misunderstanding of the doctrine and terminology involved with bankruptcy trustee liability."

Respectfully submitted by:

Craig J. Spitzer
4812 San Pablo Dam Rd., No. 4
El Sobrante, CA 94803
(415) 426-0802
Plaintiff-Petitioner in pro se and representative of
Thomas A. Spitzer