19-505

10/15/19

No.

In the
Supreme Court of the United States

WILLIAM RUPERT,

Petitioner,

v.

SUSAN BOND, et al.,

Respondents.

On Petition For Writ of Certiorari To the United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Petitioner
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QUESTIONS PRESENTED

(1) Should the circuit splits over the use of FRCP 12(b)(6) motions (prior to discovery or an evidentiary hearing), to rule upon a disputed issue of fact (the "sham litigation" or "fraud exception" to claimed *Noerr-Pennington* immunity), be resolved?; and if so, should the resolution favor judicial expediency? or fair, orderly and prudent procedures?

(2) Whether, Post-*Walden,* due process permits a court to exercise personal jurisdiction over an out-of-state defendant, who individually targets a known forum resident plaintiff, if they send knowingly false statements into the forum state, intending that reliance take place therein, if reasonable and detrimental reliance takes place in the forum state?

(3) Whether the numerous circuit splits between the Ninth Circuit and other Circuits, concerning the RICO Statutes should be addressed and resolved?

(A) Whether injunctive relief, under 18 U.S.C. § 1964(a), is available, in a private civil RICO action, brought pursuant to 18 U.S.C. § 1964(c)?

(B) In a private civil RICO action, is nationwide service of process authorized only by 18 U.S.C. § 1965(b)? or can it also be alternatively authorized by 18 U.S.C. § 1965(d)?

(C) Whether the "ends of justice" language in 18 U.S.C. § 1965(b) implies a single rigid test, or whether a more flexible standard should be utilized, on a case by case basis?

PARTIES TO THE PROCEEDINGS

Petitioner William Rupert was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondents Susan Bond, James Rupert, Gile R. Downes, Edward S. Zusman, Matthew Whitman, Michelle Johansson, Schulte Anderson Downes Aronson & Bittner, P.C., Cartwright Whitman Baer PC, and Markun Zusman & Compton, LLP were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

The district court chose to refer to the four (4) sets of defendants as: (1) the Sibling Defendants – Susan Bond and her brother James Rupert; (2) the Downes Defendants – Gile R. Downes and Schulte Anderson Downes Aronson & Bittner, P.C.; (3) the Zusman Defendants – Edward S. Zusman and Markun Zusman & Compton, LLP; and, (4) the Cartwright Defendants – Matthew Whitman, Michelle Johansson and Cartwright Whitman Baer, PC. (App. C, 7a). Petitioner shall continue to refer to the respondents/defendants/appellees using the same terminology as the District Court.

RELATED CASES

* *Rupert v. Bond, et al.* (*Rupert I*), U.S. District Court for the Northern District of California. Case No. 5:09-cv-02758-JF, Order Granting Motion to Dismiss For Lack of Personal Jurisdiction; Entered September 9, 2010. (App. G, 75a-82a)

* *In the Matter of the Irene E. Rupert Trust,* CV10030497, Clackamas County, State of Oregon. Judgment entered on January 4, 2011;

* *In the Matter of the Samuel J. Rupert Trust,* CV10030498, Clackamas County, State of Oregon. Judgment entered on April 28, 2011

* *In the Matter of the Samuel J. Rupert Trust,* CV10050251, Clackamas County, State of Oregon. Judgment entered on October 4, 2011

* *Bond v. Rupert,* Case No. CV 172524, Superior Court of California, Santa Cruz County. Notice of Entry of Judgment on Sister-State Judgment, entered on November 3, 2011

* *Rupert v. Bond, et al.,* 134 S.Ct. 2738 (2014), United States Supreme Court. Petition for Writ of Certiorari (No. 13-1322) to the Court of Appeals of Oregon Denied. Entered on June 9, 2014

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PETITION FOR A WRIT OF CERTIORARI

William Rupert petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unpublished Memorandum Opinion is reproduced at App. A, 1a-4a. The Ninth Circuit's denial of petitioner's petition for rehearing and rehearing *en banc* is reproduced at App. B, 5a. The Order Granting Motions to Dismiss, etc., of the District Court for the Northern District of California is reported at *Rupert v. Bond,* 68 F. Supp.3d 1142 (September 22, 2014) and reproduced at App. C, 6a-57a. The Order Denying Plaintiff's Motion For Relief From Final Judgment, of the District Court for the Northern District of California (January 6, 2015) is reproduced at App. D, 58a-69a. The Judgment, of the District Court for the Northern District of California (January 6, 2015) is reproduced at App. E, 70a. The Order Denying Plaintiff's Second Motion to Alter or Amend Judgment, of the District Court for the Northern District of California (March 27, 2015) is reproduced at App. F, 71a-74a. The Order Granting Motion to Dismiss for Lack of Personal Jurisdiction, in *Rupert I* (USDC NDCA Case No. 5:09-cv-02758-JF), by Judge Jeremy Fogel, (September 9, 2010) is reproduced at App. G, 75a-82a.

JURISDICTION

The Court of Appeals entered judgment on June 11, 2019. App. A, 1a-4a. The court denied a timely petition for rehearing and rehearing *en banc* on July 18, 2019. App. B, 5a. This Court has jurisdiction under 29 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of 18 U.S.C. § 1964(a) & (c), and 18 U.S.C. § 1965(b) & (d). The entire statutes containing these subsections are set forth in App. H, 83a-85a.

PREFATORY STATEMENTS

Due to the fact that neither the original action from 2009, commonly referred to as "*Rupert I*"[1], or the current action commenced in 2012, commonly referred to as "*Rupert II*"[2] progressed past the pleadings stage, the facts alleged in the pleadings are significant, because they were supposed to be assumed to be true.

Therefore, the factual statements presented herein are, unless otherwise stated, taken from the *Corrected* Second Amended Complaint ("SAC"), by

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[1] USDC NDCA Case No. 5:09-cv-02758-JF
[2] USDC NDCA Case No. 5:12-cv-05292-BLF

reference to CD 106 and the paragraph ("¶") number, or page number, within the operative pleading. This operative pleading can be found at NDCA CD 106[3], pp. 1-134; or at Ninth Circuit ECF 21-3[4], pp. 6-139.

Also, the SAC includes an Appendix A, which lists the factual details for each of the 54 Predicate Rico Acts that are the foundation of *Rupert II.* (CD 106, pp. 114-127)

Additionally, terminology used in the SAC needs to be properly understood, to correctly ascertain Petitioner/Appellant/Plaintiff William Rupert's ("Plaintiff William") theory of the case. For instance, the phrase "the Big Lie" is mentioned throughout the SAC (and repeatedly in the District Court's rulings, albeit inaccurately – App. C, 7a, 11a, 12a, 48a, 51a and 52a; App. D, 66a[5]).

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[3] The references to "CD" means the Clerk's Docket in the District Court, for USDC NDCA Case No. 5-12-cv-05292-BLF, commonly referred to as *Rupert II.* Due to recently discovered inaccuracies, and unreasonable size reductions, in the version of the SAC, within the Excerpts of Record filed by the Appellees, Petitioner shall refer to the SAC filed in the district court (CD 106, pp. 1-134), instead of the distorted version filed with the Ninth Circuit (ECF 21-3, pp. 6-139).

[4] The references to "ECF", shall mean the appellate court docket number for Ninth Circuit Court of Appeal Case No. 15-15831.

[5] As District Court Judge Freeman inaccurately stated, when Plaintiff William unsuccessfully tried to correct her, in a reconsideration motion: "The Court identified the 'Big Lie' as 'the statement that Irene Rupert, and not Plaintiff, was the trustee of the Samuel Rupert Trust.' Dismissal Order at 4." (App. D, 66a).

As alleged in the SAC, "the Big Lie" was created by Defendant Downes (CD 106, ¶¶ 7, 18, 112), and Defendant Susan Bond (CD 106, ¶¶ 6, 18-23, 111), as part of the RICO Stage 2 scheme to cover-up and conceal Defendant Susan Bond's breaches of trust and fiduciary duties, for the first 7 months after Samuel Rupert died, on October 12, 2008 (as an illegitimate intermeddling trustee *de son tort).*

Defendant Susan Bond refused to provide Plaintiff William (as a permissible distributee of the irrevocable Samuel Rupert Trust she was administering), with a proper and sufficient "accounting", for her open and notorious administration of $900,000 in trust assets, as the self-proclaimed "Successor Trustee" (CD 106, ¶¶ 18, 111), from October 12, 2008 to May 12, 2009 (CD 58, pp. 82-83), after Plaintiff William sent her a formal objection to her initial "financial statement" (CD 58, pp. 87-92), that was in the nature of a static position statement as of March 31, 2009 (CD 58, p. 83).

However, Defendant Susan Bond never responded to the demand letter from Plaintiff William. (CD 106; SAC ¶¶ 22, 23) Instead, there was the cover-up scheme, that was premised upon "the Big Lie" (See RICO – Stage Two; SAC, ¶ 112).

The "Big Lie" cover-up scheme is alleged, throughout the SAC, to involve:

> "the objectively baseless assertion that Susan's mother, Irene Rupert, had been the trustee (not Susan), after Samuel Rupert died."
> (CD 106; SAC, ¶ 23, p. 27:20-22).

To date, the cover-up scheme has worked, and it has enabled Defendant Susan Bond to avoid her fiduciary duty to account for her open and notorious administration of all trust assets, for two separate trusts, for the first 7 months after Samuel Rupert died. (CD 106; SAC ¶ 1, p. 4:12-17, ¶ 6)

Additionally, the term "Extrinsic Fiduciary Fraud" is used throughout the SAC, and in the District Court's rulings under review (App. C, 6a-57a; App. D, 58a-69a). Plaintiff William used the term to refer to the actions by Defendant Susan Bond, when she concealed information (from Judge Fogel in *Rupert I,* and from Judges Maurer and Welch in Oregon), that she had a fiduciary duty to disclose.

The meaning given to the term by the Plaintiff is explained in ¶ 27, of the SAC, by reference to the case of *Lazzarone v. Bank of America,* 181 Cal.App.3d 581, 596-97 (1986), where the following point of California law is set forth, with regards to a form of fraud that California regards as "extrinsic fraud" (but Oregon regards as only intrinsic fraud[6]):

> "A second species of extrinsic fraud has also been found where fiduciaries have concealed information they have a duty to disclose. (Citations.). This variety of extrinsic fraud recognizes that, even if a potential objector is not kept away from the courthouse, the objector cannot be expected to object to matters not

[6] This distinction was raised in a related case, which was *Rupert v. Bond, et al.,* 134 S.Ct. 2738 (2014), where Certiorari to the Court of Appeals of Oregon was denied, on June 9, 2014.

known because of concealment of information by a fiduciary."
Lazzarone v. Bank of America,
181 Cal.App.3d 581, 596-97 (1986)

Another recurring term used throughout the SAC, and by the District Court (App. D, 67a), also is explained in ¶ 27 of the SAC, and it is "the crucial *Hanson v. Denckla,* 357 U.S. 235, 251-53 (1958), jurisdictional factors (identity of trustee, location of trustee, and location of trust assets)".

This term refers to the jurisdictional factors that were identified as significant by the Supreme Court, with regards to multi-state trust jurisdiction disputes (and withholding application of the Full Faith and Credit Clause to state court judgments with jurisdictional defects). The *Hanson v. Denckla* Court ultimately determined that Maryland did not have to give full faith and credit to judgments from Florida, under 28 U.S.C. § 1738, because the necessary parties included the trustee, who the beneficiaries had neglected to join as a party, in the Florida actions. (*Id.* at 254-255).

The case of *Hanson v. Denckla* is relevant to the jurisdictional analysis, and the case is also relevant to the alleged invalidity, and unenforceability, of the related State of Oregon judgments obtained by Defendant Susan Bond[7], through alleged corrupt

[7] In the two related Oregon cases concerning the Samuel Rupert Trust (CV10030498 & CV10050251), only beneficiaries participated in the actions, and the trustee from California (William Rupert) (who could only appear through counsel), was

Officer of the Court misconduct by the Cartwright Defendants and Defendant Matthew Whitman.

District Court Judge Freeman's own rulings contain a reference to the "crucial *Hanson v. Denckla* jurisdictional factors" (See App. D, 67a), but she concluded the concealment of these factors from Judge Fogel was not significant.

LITIGATION HISTORY OF *RUPERT I*

Rupert I was stopped at the pleadings stage, when former District Court Judge Jeremy Fogel granted a Joint FRCP 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction, on September 9, 2010. (App. G, 75a-82a).

The hearing on the MTD was on January 8, 2010, and the Reporter's Transcript (CD 58; pp. 12-37), shows that Judge Fogel thought the motion was a close call, as he stated:

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never served, or otherwise made a party to the action (as trustee), and never appeared in the action (through counsel). So these Oregon actions lack legitimacy for the same reason as the Florida cases in *Hanson v. Denckla,* 357 U.S. 235, 251-253, 254-255 (1958) (failure to join the trustee as a party). In the other related Oregon case, concerning the Irene Rupert Trust (CV10030497), for a declaratory judgment concerning a trust, Michigan beneficiary Defendant James Rupert was not made a party to the action, as required under Oregon trust law (CD 106; SAC ¶ 88) (*See Wright v. Hazen Investments, Inc.,* 293 Or. 259, 264 (1982); ORS 28.110), so fundamental jurisdiction over that action was also never acquired, resulting in another lack of legitimacy and another Oregon judgment that should be unenforceable in California, and outside the Full Faith and Credit Clause (28 U.S.C. § 1738).

> "I think this is an interesting problem and I think it's a close question as to whether there is personal jurisdiction. But I think Mr. Rupert has articulated a cognizable or at least a colorable argument, one that the court has to take seriously, that there is a deliberate and conspiratorial, that's what's he's alleging here, that his rights and obligations are in California." (CD 58; p. 16:17-24)

Judge Fogel was further informed, by the defendants' counsel that: (1) all trust assets were in Oregon; (2) all trust administration activities had been in Oregon and Defendant Susan Bond had no business dealings in California (CD 58; p. 20:15-19); (4) Irene Rupert, in Oregon, was the trustee of both trusts (CD 58; p. 21:16-22); and (5) Irene Rupert's health did not allow her to travel to California (CD 58; p. 32:4-8), for the proposed mediation that was discussed and agreed to (while the motion was taken under submission[8]).

Moreover, in *Rupert I,* Judge Fogel's dispositive Order (App. G, 75a-82a), shows he relied upon the following matters: (1) Plaintiff William's concession (in reliance upon Defendant Downes false statements), that "none of the defendants has property interests in California, does business in California" (App. G, 80a); (2) "Susan's . . . alleged mismanagement of trust funds occurred in Oregon." (App. G, 82a); and, (3) the Downes Defendants "communications with William related solely to their

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[8] Although Irene Rupert passed away on March 12, 2010, while Judge Fogel had the FRCP 12(b)(2) under submission, Judge Fogel was never informed of her death.

representation of Irene under Oregon law." (App. G, 82a).

Judge Fogel declined to exercise specific personal jurisdiction on the basis that it would be "unreasonable for it to exercise personal jurisdiction over Defendants" (App. G, 82a)

"Reasonableness", as Judge Fogel explained earlier in his Order, was the 3rd prong of the test he used for analyzing specific jurisdiction. (App. G, 80a)

INTRODUCTION: REASONS WHY *RUPERT II* HAS BEEN BROUGHT AS A RICO ACTION

After Judge Fogel entered his dispositive order in *Rupert I,* Plaintiff William discovered: (1) the relevant and pertinent case of *Hanson v. Denckla,* 357 U.S. 235, 251-253, 254-255 (1958), that concerns inter-state trust disputes over jurisdiction and the non-enforceability of state court judgments that have jurisdictional defects; (2) that an intentional fraud on the court had been successfully perpetrated in *Rupert I,* by Defendant Susan Bond, and her first set of attorneys (the Zusman Defendants, from California) (in conjunction with the Downes Defendants and the California law firm retained by them); and, (3) under FRCP 60(d)(1)&(3), he could bring an independent action to set aside the fraudulently obtained Order from Judge Fogel. (See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 245-246 (1944); *United States v. Throckmorton,* 98 U.S. 61, 65-66 (1878))

This discovery was due to the documentary evidence produced voluntarily by Defendant Susan Bond's second set of attorneys (the Cartwright Defendants, and Defendant Matthew Whitman, from Oregon), in the baseless and abusive litigations she commenced in the State of Oregon, in Clackamas County, after Irene Rupert passed away

The Cartwright Defendants produced over 2,000 pages of documents and business records (scanned onto a CD, that they mailed to Plaintiff William in California). (CD 106; SAC ¶ 80). It took Plaintiff William about 3 months to review these documents. Ultimately, the documents showed that Defendant Susan Bond had related business dealings, and contacts, within California, with Charles Schwab Institutional, and had caused disputed trust assets worth more than $400,000.00 to be transferred from Michigan to California, in February and March of 2009 (CD 106; SAC ¶ 83). The documents further showed that the trust assets stayed in California during the litigation of *Rupert I.*

Rupert I was not a RICO action. *Rupert II* became a RICO action because of the allegedly corrupt and dishonest actions by the various errant Officers of the Court that Defendant Susan Bond collaborated with, or retained, to corruptly cover-up and conceal her misappropriations of trust assets, her breaches of trust and fiduciary duty, and her unjust enrichment.

The instant private civil RICO action, by way of the SAC, seeks various modes of relief, including:

(1) appropriate money damages, trebled, for damages suffered to Plaintiff William Rupert's economic interests, employment income, and vested property interest as a remainder beneficiary of the Samuel Rupert Trust, after it became irrevocable on October 12, 2008, when Samuel Rupert died (CD 106; SAC, p. 110:4-12);

(2) appropriate equitable relief; including recognition of Plaintiff William Rupert's Successor Trusteeship of the Samuel Rupert Trust, effective July 8, 2009 (CD 106; SAC, p. 110:17-20); and recognition of Defendant Susan Bond's "unclean hands" as an intermeddling trustee *de son tort* (CD 106; SAC, p. 110:21-111:2); plus recognition of Defendant Susan Bond's continuing duty to account for the initial months when she was improperly in charge as a trustee *de son tort* (CD 106; SAC, p. 111:3-7)), and also providing equitable relief from corrupt rulings obtained by frauds upon the courts (in *Rupert I,* and in Clackamas County, Oregon) (CD 106; SAC, p. 111:8-23), by corrupt Officers of the Court in aid of a corrupt trustee *de son tort*, in proceedings that lack legitimacy, and have the same jurisdictional defects that were dispositive in *Hanson v. Denckla,* 357 U.S. 235, 251-253, 254-255 (1958) (CD 106; SAC ¶ 88) and are unworthy of enforcement under either 28

U.S.C. § 1738, or under the California Sister-State Money Judgment Act[9];

(3) to recover double the amount of misappropriated trust assets, from his late father's trust (CD 106; SAC, p. 111:25-112:5), that disappeared or were diverted/ converted by Defendant Susan Bond, during the first 9 months after their father died, when she used fraud and deceit against Plaintiff William Rupert, to stop him from immediately accepting his nomination to be in charge (as trustee and executor), by her false claim, sent from Oregon to Plaintiff in California, in a phone call, that she had more recently amended estate plans, signed by their parents, that nominated her ahead of Plaintiff William Rupert, to be in charge. (CD 106; SAC ¶¶ 18, 111) In fact, these purported amended estate plans never existed, but it took Plaintiff nine months to realize he had been deceived. Moreover, after Plaintiff William objected in writing to the single financial statement Defendant Susan Bond mailed to him in California,

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[9] This Act is relevant because of the California Money Judgment Defendant Susan Bond obtained on November 3, 2011, from the Santa Cruz County Superior Court, based on one of her corrupt and fraudulently obtained Oregon judgments. District Court Judge Freeman rejected Plaintiff's argument in his reconsideration motion (CD 161), that she overlooked this contact with California, that was alleged in the SAC (CD 106; SAC ¶ 99), and which represented Defendant Susan Bond's consent to jurisdiction, because Plaintiff raised the argument in a motion for reconsideration, and not sooner. (See App. D, 61a).

dated May 12, 2009, which she signed as "Successor Trustee" (CD 58, pp. 82-83), she has failed and refused to ever provide a legitimate accounting for her management of roughly $900,000.00 in assets, that illegitimately began on October 12, 2008, as soon as Samuel Rupert passed away (CD 106; SAC ¶¶ 22, 23); and,

(4) all other appropriate relief. (CD 106; SAC, p. 113:3)

STATEMENT OF THE CASE

A timely Notice of Appeal was filed on April 24, 2015. After the briefing phase was concluded on November 17, 2015 (ECF 38), the Ninth Circuit took roughly 42 months, before the case was finally submitted for determination on June 7, 2019.

During the 42 month delay, Plaintiff William filed 13 separate FRAP 28(j) Letters, citing relevant supplemental legal authorities. Plaintiff William also filed a Request for Oral Argument, after his 10th FRAP 28(j) Letter. (ECF 63, 7/11/18)

On June 11, 2019, the Ninth Circuit entered its unpublished Memorandum Opinion, that affirms all actions by the lower court. None of the FRAP 28(j) Letters were considered. Oral argument was denied. (App. A, 1a-4a).

On July 18, 2019, the Ninth Circuit entered its Order Denying Petition for Rehearing and Petition for Rehearing En Banc. (App. B, 5a).

The instant Petition for Writ of Certiorari to the Ninth Circuit follows.

REASONS FOR GRANTING THE PETITION

I. There Are Significant Inter-Circuit Splits With Regards To Adjudication Of "Sham Litigation" Exceptions (An Issue Of Fact), To A Claimed *Noerr-Pennington* Immunity Affirmative Defense

A. The Circuits Are Split Upon *When* The Adjudications Can Be Made

In the instant case, the Ninth Circuit's affirmance of the District Court's ruling granting a FRCP 12(b)(6) Motion to Dismiss based upon claimed *Noerr Pennington* immunity (App. C, 25a-32a), and plaintiff's purported inability to prove the "sham litigation or fraud exception" applied, at the pleadings stage (prior to any discovery and without an evidentiary hearing), reveals inter-circuit splits, between the Ninth Circuit and at least the Fourth and Seventh Circuits, as to *when* issues of fact concerning the sham litigation or fraud exception, become "ripe" for adjudication.

For instance, concerning the *when* issue, the same FRCP 12(b)(6) MTD that was granted in the instant case (See App. C; 6a-57a), would have been denied as premature, had it been brought in either the Fourth Circuit or the Seventh Circuit.

The Fourth Circuit's view, regarding the limited reach of FRCP 12(b)(6) motions, is illustrated by the

case of *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-244 (4th Cir. 1999), where the following is stated:

> "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; 'importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.' *Republican Party v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992)."
> Edwards v. City of Goldsboro
> 178 F.3d 231, 243-244 (4th Cir. 1999)

Similarly the understanding of the law within the Seventh Circuit, regarding consideration of affirmative defenses, is discussed in the case of *Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 901 (2004), where the following is stated:

> "Orders under Rule 12(b)(6) are not appropriate responses to the invocation of defenses, for plaintiffs need not anticipate and attempt to plead around all potential defenses. Complaints need not contain any information about defenses and may not be dismissed for that omission. (Citations)"
> Xechem, Inc. v. Bristol-Myers Squibb Co.
> 372 F.3d 899, 901 (7th Cir. 2004)

Circuit splits upon this subject clearly exist, as shown by the Ninth Circuit's affirmance of the District Court's actions in the instant case.

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B. The Circuits Are Split Upon *How* The Adjudications Should Be Made

Inter-circuit splits also exist, between the Ninth Circuit and at least the Third Circuit, concerning how the materiality of alleged misrepresentations should be evaluated (when appropriate).

In the Third Circuit case of *Cheminor Drugs, Ltd. V. Ethyl Corp.*, 168 F.3d 119, 123 (3rd Cir. 1999), the sham litigation's fraud exception was addressed and resolved upon a motion for summary judgment, and that court explained how to review claims of misrepresentations to the court, by stating:

> "The Supreme Court has not addressed how alleged misrepresentations affect *Noerr-Penington* immunity or the sham exception to *Noerr-Penington* immunity. In *PRE,* the Court explicitly declined to decide whether the sham exception to immunity would include situations where the litigant had perpetrated 'fraud' or had made 'other misrepresentations.' *Id.* at 61 n.6, 113 S.Ct. 1920. (fn. 11) Cheminor argues either that *Noerr- Penington* immunity does not apply at all to petitions containing misrepresentations or that Ethyl's alleged misrepresentations led to the conclusion that the Ethyl's AD/CVD petition to the ITC and DOC was objectively baseless.
>
> We decline to carve out a new exception to the broad immunity that *Noerr-Penington* provides. Rather, we will determine whether Ethyl's petition was objectively baseless under the Supreme Court's test in *PRE, without regard to*

> *those facts that Cheminor alleges Ethyl misrepresented.* If the alleged misrepresented facts do not infect the core of Ethyl's claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Penington* immunity under the first step of *PRE.*"
> Cheminor Drugs, Ltd. V. Ethyl Corp.,
> 168 F.3d 119, 123 (3rd Cir. 1999)

The *Cheminor* Court determined that the starting point is the alleged sham petition or pleading, from which all alleged misrepresentations must be removed, before determining whether the truncated, or cleansed, petition would still be sufficient, and result in the same ruling.

In the Ninth Circuit, however, as illustrated by the instant case, the alleged sham petition itself (the Joint FRCP 12(b)(2) Motion to Dismiss, from *Rupert I*), was never presented to, or considered by, the District Court, in *Rupert II.*

Instead, the District Court restricted its review to only the face of the very order from Judge Fogel (App. G, 75a-82a), in *Rupert I,* that *Rupert II* argues was procured through a successful fraud on the court by a group of corrupt Officers of the Court (who jointly concealed the crucial *Hanson v. Denckla,* 357 U.S. 235, 251-253 (1958), jurisdictional factors for trust disputes).

Also, the District Court compared the successful FRCP 12(b) motion to a "winning lawsuit" (App. C, 28a), and cited to *Professional Real Estate Investors,*

Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60 n.5 (1993).[10]

A winning lawsuit comes after the pleadings are joined, necessary discovery takes place, and either a trial is conducted or a dispositive motion is granted, determining factual disputes, the legal issues, and resulting in a judgment on the merits.

A successful FRCP 12(b)(2) motion, however, resolves nothing on the merits, and effectively deprives a plaintiff of his First Amendment rights.

C. Resolution Of These Circuit Splits Will Provide Broad Benefits

Further guidance upon *when* and *how,* the "sham litigation" or "fraud exception" to a claimed *Noerr-Penington* immunity affirmative defense should be decided, in regular civil proceedings, could provide valuable and beneficial judicial results. Especially if this Supreme Court's guidance was structured to discourage Officers of the Court from filing objectively baseless FRCP 12(b)(2) motions to dismiss that are based upon intentional misrepresentations.

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[10] Within disputes regarding FRCP 13, it is widely agreed that FRCP 12(b) motions to dismiss are not pleadings (*Mellon Bank. N.A. v. Temisky,* 999 F.2d 791, 795 (4th Cir. 1993). A holding might be in order, that a successful MTD, at the inception of a case, is also not the same as a "winning lawsuit" for purposes of *Noerr-Pennington* immunity protections, and the analysis of whether the MTD is objectively baseless because it is based upon fraudulent misrepresentations.

II. Deep Inter-Circuit Splits Have Developed, Concerning How And When To Apply *Walden v. Fiore,* 134 S.Ct. 1115 (2014), To Targeted Torts Involving Intentional Misrepresentations Of Facts

The case of *Walden v. Fiore,* 134 S.Ct. 1115 (2014) has resulted in deep inter-circuit splits, as to its meaning, scope, and application to dissimilar situations, such as fraudulent misrepresentation schemes that are alleged to have been concluded (through reasonable reliance), in the forum state, causing injury therein, to a forum resident plaintiff.

For instance, the Ninth Circuit has concluded that *Walden* made drastic changes to how, and when, the second prong of the *Calder*-effects test (express aiming at the forum), is to be applied.

However, the First Circuit, the Second Circuit, the Fifth Circuit and the Sixth Circuit have concluded that *Walden* is readily distinguishable, and its limitations are inapplicable, when intentional torts are alleged, and the injurious conduct alleged to have caused the tortious injury (the false statements and reasonable reliance), is alleged to have occurred in the forum state.

A. The Dissenting Opinion in *Morrill v. Scott Financial Corp.,* 873 F.3d 1136, 1155 (9th Cir. 2017) Acknowledges An Implicit Circuit Split With The Sixth Circuit Case Of *MAG IAS Holdings Inc. v. Schmuckle,* 854 F.3d 894 (6th Cir. 2017)

The current split between the Ninth Circuit and the Sixth Circuit was even acknowledged in a Dissenting Opinion entered by Senior Circuit Judge Andrew J. Kleinfeld, in *Morrill v. Scott Financial Corp.*, 873 F.3d 1136, 1150-1155 (9th Cir. 2017), where he stated the following, in pertinent part:

> "I respectfully dissent. The majority gets the law wrong and misapplies it to the extent it is stated correctly. . . . . .
> . . . . . .
> The majority's new rule creates at least an implicit circuit split with the Sixth Circuit. In *MAG IAS Holdings Inc. v. Schmuckle,* (fn. 40) a Michigan company sued a German resident who was CEO of its parent company. The German resident invoked *Walden* and argued that 'because he targeted his contacts only at plaintiffs and not at Michigan itself' there was no jurisdiction. (fn. 41) The Sixth Circuit rejected this view and held that '*Walden* simply holds that an out-of-state injury to a forum resident, standing alone, cannot constitute purposeful availment.' (fn. 42) 'It would severely limit the availability of personal jurisdiction if every defendant could simply frame his conduct as targeting only the plaintiffs and not the forum state.' (fn. 43) In *Schmuckle* and in our case, the out-of-state injury to the forum resident did not 'stand alone.' So we should, as the Sixth Circuit did, conclude that *Walden* is distinguishable."
> Morrill v. Scott Financial Corp.,
> 873 F.3d 1136, 1150-1155 (9th Cir. 2017)

In the instant case, the District Court Order Granting Motions to Dismiss (App. C, 40a-54a) repeatedly ignored the out-of-state defendants targeting of the plaintiff, by framing it as conduct targeting *only* the plaintiff, but not the forum state itself. (similar to the majority opinion in *Morrill v. Scott Financial Corp.,* 873 F.3d 1136, 1155 (9th Cir. 2017).

Thereafter, on appeal, in the instant case, the Ninth Circuit's unpublished Memorandum Opinion affirmed the dismissals at the pleading stage, under *Walden*, on the basis that, "the plaintiff cannot be the only link between the defendant and the forum" (See App. A, 2a)

B. Then *Axiom Foods, Inc. v. Acerchem International, Inc.,* 874 F.3d 1064, 1070 (9th Cir. 2017), Relied Upon *Walden* To Effectively Eliminate Individualized Targeting Of Known Forum Residents

The implicit circuit split that was acknowledged in *Morrill's* dissenting opinion became an actual split with the publication of *Axiom Foods, Inc. v. Acerchem International, Inc.,* 874 F.3d 1064, 1070 (9th Cir. 2017).

The relevant holding from *Axiom* is set forth below, in pertinent part:

> "Following *Walden,* we now hold that while a theory of individualized targeting may remain relevant to the minimum contacts inquiry, it will not, on its own, support the exercise of specific

> jurisdiction, absent compliance with what *Walden* requires."
> Axiom Foods, Inc. v. Acerchem International, Inc.
> 874 F.3d 1064, 1070 (9th Cir. 2017)

Of course, it should not be forgotten that *Walden* involved a truly "random" encounter with a TSA Agent at an out-of-state airport in Georgia, and there were no suggestions or allegations of any "individualized targeting". Moreover, the *Walden* defendant had zero contacts with the forum state of Nevada.

As such, it appears the *Axiom* Court forgot the importance of the longstanding California rule of jurisprudence that is set forth in *Ginns v. Savage,* 61 Cal.2d 520, 524, fn. 2 (1964), where the Court stated:

> "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered. (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38 [4-5] [4 Cal. Rptr. 176, 351 P.2d 344] and cases there cited.)"
> Ginns v. Savage
> 61 Cal.2d 520, 524, fn. 2 (1964)

Additionally, the following recent California case further confirms that *Axiom* changed the law in the Ninth Circuit:

"It is no longer enough in the Ninth Circuit to base specific jurisdiction on a defendant's individualized targeting of a plaintiff known to reside in the forum state. (*Axiom Foods, Inc. v. Acerchem International, Inc.*, (9th Cir. 2017) 874 F.3d 1064, 1070 (*Axiom* Foods).) '*Walden* requires more.' (*Axiom Foods,* at p. 1069.)"
David L. v. Superior Court
29 Cal.App.5th 359, 373 (2018)

C. The First, Second And Fifth Circuits Also Distinguish *Walden,* In Cases Where "Targeting" And "Fraudulent Misrepresentations" Are Alleged

First Circuit Court of Appeals

The case of *Murphy v. Erwin-Wassey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) states the following pertinent rule of law:

"Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state. (fn. 3) The element of intent also persuades us that there can be no constitutional objection to Massachusetts asserting jurisdiction over the out-of-state sender of a fraudulent misrepresentation, for such a sender has thereby 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' *Hanson*

> *v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958)."
> Murphy v. Erwin-Wassey, Inc.,
> 460 F.2d 661, 664 (1st Cir. 1972)

Murphy is still good law in the First Circuit, and is still cited by the District Courts within the First Circuit, post-*Walden,* such as in the case of *LaBolita v. Home Rental Connections Ltd.,* Civil No. 16-11433-LTS; USDC District Massachusetts (June 13, 2017)

Second Circuit Court of Appeals

Under the Second Circuit's "situs of injury test". The "situs" is not in the state from which the fraudulent misrepresentation is sent, but in the state where the intentional misrepresentation is received and, most importantly, detrimentally relied upon, as illustrated by the case of *Hargrove v. Oki Nursery, Inc.,* 636 F.2d 897, 899-900 (2nd Cir. 1980).

Hargrove is still good law in the Second Circuit, as illustrated by the following post-*Walden* District Court Order:

> "A number of cases in this Circuit, however, have held that the original event leading to the injury in a misrepresentation action is plaintiffs' reliance on defendant's misrepresentation. See *Bank Brussels,* 171 F.3d at 792 (holding that the original event causing injury was in New York where plaintiff relied on defendant's misrepresentation by disbursing funds in New York); *Hargrove v. Oki*

Nursery, Inc., 636 F.2d 897, 900 (2nd Cir. 1980) (holding that the original event causing injury was in New York where plaintiffs relied on defendant's misrepresentations by purchasing grape vines with funds in New York)"
Related Companies, LP v. Ruthling
Case No. 17-CV-4175
USDC SDNY (December 15, 2017)

Fifth Circuit Court of Appeals

Within the Fifth Circuit, intentional torts based upon fraudulent misrepresentations directed into the forum have also long been recognized, when the detrimental reliance takes place in the forum state.

One such case is *Wien Air Alaska, Inc. v. Brandt,* 195 F.3d 208, 212-213 (5th Cir 1999), where the court stated the following, in pertinent part:

> "When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment. The defendant is purposefully availing himself of 'the privilege of causing a consequence' in Texas. *Cf. Serras v. First Tennessee Bank National Ass'n,* 875 F.2d 1212 (6th Cir. 1989). It is of no use to say that the plaintiff 'fortuitously' resided in Texas. *See Holt Oil,* 801 F.2d at 778. If this argument were valid in the tort context, the defendant could mail a bomb to a person in Texas but claim Texas had no jurisdiction because it was fortuitous that the victim's zip code was in Texas. It may have been fortuitous, but the

> tortious nature of the directed activity constitutes purposeful availment."
> Wien Air Alaska, Inc. v. Brandt,
> 195 F.3d 208, 212-213 (5th Cir 1999)

More recently, in *Trois v. Apple Tree Auction Center, Inc.*, 882 F.3d 485, 487, 491 (5th Cir. 2018), the continuing validity of *Wien* was confirmed (*Id.* at 491).

Significantly, the *Trois* Court considered and discussed the *Walden* case, but found it to be readily distinguishable, as set forth below:

> "[7] . . . .But *Walden* is distinguishable because, unlike the defendant's mere knowledge of plaintiff's forum connections, the defendants here reached out to Texas and allegedly made false statements over the phone to a Texas citizen to induce him to conduct business with them. We focus on conduct, not mere knowledge."
> Trois v. Apple Tree Auction Center, Inc.,
> 882 F.3d 485, 492 (fn. 7) (5th Cir. 2018)

Clearly, the circuit courts are split on how to interpret, and when to apply, *Walden's* limitations, in tort actions alleging individualized targeting and fraudulent misrepresentations that cross state lines.

III. The Inter-Circuit Splits Over Whether Equitable Relief Is Available In A Private Civil RICO Action Should Be Addressed And Resolved

The importance of resolving the deep inter-circuit split concerning the availability of equitable relief to a private civil RICO plaintiff can hardly be doubted, given that two (2) prior petitions for a writ of certiorari were granted within the last 20 years, to address the equitable relief question.

Unfortunately, the specific facts and legal holdings that were made in those other two (2) related cases (*Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 397 (2003) "*NOW I*"; and *Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 16 (2006) "*NOW II*"), made it unnecessary, and inappropriate, to resolve the equitable relief question (in private civil RICO actions).

Initially, the circuit split was between the first circuit to rule upon the matter, the Ninth Circuit (*Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986) and the Seventh Circuit (*National Organization for Women, Inc. v. Scheidler (NOW I)*, 267 F.3d 687, 695 (7th Cir. 2001).

Subsequently, however, the Second Circuit has joined the Seventh Circuit, in *Chevron Corp. v. Donziger*, 833 F.3d 74, 137-139 (2nd Cir. 2016), to also rule that the Ninth Circuit's methodology and analysis was flawed, not consistent with RICO's "Liberal Construction Clause" (See Pub. L. 91-452, title IX, § 904, Oct. 15, 1970, 84 Stat. 947), and equitable relief is available in private civil RICO actions, consistent with 18 U.S.C. § 1964(a), under appropriate circumstances, if the legal remedies are inadequate.

In pertinent part, the *Donziger* Court agreed with the reasoning set forth in *NOW I* (267 F.3d at 696) and stated the following:

> "Given this interpretation, we reject Donziger's contention that equitable relief is not available to Chevron under RICO."
> Chevron Corp. v. Donziger,
> 833 F.3d 74, 139 (2nd Cir. 2016)

Quite clearly, there is a deep split, upon an important subject, pertaining to the judicial tools that can be used, and the remedies that may be sought by a plaintiff, in a private civil RICO action.

IV. The Ninth Circuit's Decision Also Reflects an Existing Circuit Split With Regards To Other RICO Issues

The Ninth Circuit appears to be more resistant to giving the RICO statutes a liberal construction, and empowering "Private Attorney Generals", in private civil RICO actions, than the other circuits that have addressed the same questions of statutory construction.

A. The Circuit Splits Over Which Subsections Of 18 U.S.C. § 1965 Can Authorize Nationwide Service Of Process Should Be Resolved

At the current time, the circuit courts are split over which subsection of 18 U.S.C. § 1965 provides for nationwide service of process upon, and the

conferral of personal jurisdiction over, defendants residing beyond the federal court's district.

Four (4) circuits have concluded that 18 U.S.C. § 1965(b) is the controlling subsection. The first circuit was the Ninth Circuit, in *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986). Subsequently, the Seventh Circuit (*Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987), the Second Circuit (*PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 70 (2nd Cir. 1998), and the Tenth Circuit (*Cory v. Aztec Steel Building, Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006), have concurred with the Ninth Circuit's analysis.

On the other hand, two (2) circuits have concluded that 18 U.S.C. § 1965(d) can also authorize nationwide service of process. These are the Eleventh Circuit (*Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942-48 (11th Cir. 1997) (which interestingly cited *Lisak* for support), and the Fourth Circuit (*ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997).

B. The Circuit Splits Concerning The "Ends Of Justice" Standard Should Be Addressed And Resolved

At the current time, the circuit courts are also split over whether the "ends of justice" language contained in 18 U.S.C. § 1965(b) has only a single, rigid meaning, as first set forth in *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986); or, whether the standard should be more flexible, and decided on a case by case basis,

where other considerations can be taken into consideration, as set forth in *Cory v. Aztec Steel Building, Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006).

The *Cory* Court's split with the *Butcher's Union* Court, is set forth below, in pertinent part:

> "Accordingly, we conclude that the 'ends of justice' analysis is not controlled by the fact that all defendants may be amenable to suit in one forum. In so holding, we disagree with the Ninth Circuit, which reached the contrary conclusion by inadequately considering the congressional intent underlying RICO and by ignoring federal antitrust legislation. *See Butcher's Union,* 788 F.2d at 539 (stating, without elaboration, that the lower court had properly considered RICO's purpose 'and the phrase's location in the section providing for nationwide service of process'). We need not, however, offer a competing definition, as the 'ends of justice' is a flexible concept uniquely tailored to the facts of each case."
> Cory v. Aztec Steel Building, Inc.
> 468 F.3d 1226, 1233 (10th Cir. 2006)

In a similar vein, at least two District Court's within the Fifth Circuit have also adopted the more flexible approach advocated by *Cory,* and held that the ends-of-justice requirement can also be met when the defendants employed a common fraudulent scheme in multiple countries or in multiple states. (*See Rolls-Royce v. Heros, Inc.*, 578 F.Supp.2d 765, 779-80 (N.D. Texas 2008); *David v.*

Signal Int'l, 588 F.Supp.2d 718, 724 (E.D. La. 2008)).

V. The Instant Case, *Rupert II,* Would Allow Meaningful Consideration Of Any, Or All, Of The Circuit Splits Specified Above

In the instant case, the Ninth Circuit's short Memorandum Opinion is unpublished (App. A, 1a-4a), so it would seem to have little impact. However, it affirms a sweeping and comprehensive District Court Dismissal Order (App. C, 6a-57a), that itself is a published legal authority (*Rupert v. Bond,* 68 F.Supp.3d 1142 (2014)), that is relied upon, within the Ninth Circuit's jurisprudence.

Accordingly, it can fairly be said that either: (1) the Ninth Circuit adopts and ratifies the legal reasoning and judicial holdings expressed by the District Court; or, (2) the Ninth Circuit has not done an adequate job supervising the District Courts within its circuit, if it disagrees with the legal reasoning and judicial holdings expressed by the District Court, in the Dismissal Order.

In any event, the instant case, and particularly the District Court's sweeping Dismissal Order (including matters revealed by the Reporter's Transcript of the only hearing in the case), raises issues that would effectively allow meaningful consideration of all of the Circuit splits that are identified in the Questions Presented, section of this Petition for Writ of Certiorari, it is submitted.

A. The Circuit Splits Regarding Use Of FRCP 12(b)(6) Motions To Dismiss, The *Noerr-Pennington* Doctrine, And The "Sham Litigation" Exception Are All Involved In The Instant Case

The District Court's Dismissal Order (App. C, 6a-57a devotes 9 pages (23a-32a) to its discussion of why the *Noerr-Pennington* immunity affirmative defense bars all claims against the Zusman Defendants, based upon the District Court's determination that the "Sham Litigation" exception could not be claimed, and the allegedly dishonest FRCP 12(b)(2) MTD's from *Rupert I,* could not be considered "baseless" because the MTD was successful (and comparable to the "winning lawsuit" which is discussed in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.* ("*PRE*"), 508 U.S. 49, 60 n.5 (1993)).

The District Court's Dismissal Order further admits that the plaintiff objected to the timing, as premature, but rejected the objection by plaintiff, and the cases he cited as authority. (App. C, 26a-27a, fn. 7)

Additionally, the District Court's Order denying reconsideration (App. D, 58a-69a) again reaffirms its rulings as not premature at the pleadings stage (App. D, 64a), and again reaffirms the Court's reliance upon *PRE*, as authority for rejecting the "sham litigation" exception claim by the plaintiff (App. D, 63a).

Accordingly, the District Court's consideration of these legal topics and issues is fulling consistent with, and emblematic of, the views otherwise commonly expressed by and within the Ninth Circuit.

Whereas, the views upon the same legal topics and *Noerr-Pennington* issues by the Third Circuit, the Fourth Circuit and the Seventh Circuit are quite different, and not slanted so much in favor of judicial efficiency, through resolution of disputed issues of fact before the issues are even joined in a case. Therefore, if Certiorari were to be granted, the instant case would be a good vehicle to use to explore all aspects of these important legal questions.

B. The Circuit Splits Regarding The Impact, If Any, Of *Walden v. Fiore,* 134 S.Ct. 1115 (2014), To Torts Involving Fraudulent Misrepresentations Sent Into A Forum State, Can Be Effectively Reached And Resolved, Through Review Of The Instant Case

The District Court's Dismissal Order (App. C, 6a-57a devotes 15 pages (40a-54a) to its discussion of specific personal jurisdiction, and how the analysis has been significantly altered by *Walden v. Fiore,* 134 S.Ct. 1115 (2014)[11].

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[11] Interestingly, *Walden* was raised by, and relied upon by, the District Court on a *sua sponte* basis, although: (1) it had not been mentioned by any of the defendants in their papers, or at oral argument upon their motions to dismiss; and, (2)

In affirming the District Court, the Ninth Circuit relied upon *Walden's* holding that "the plaintiff cannot be the only link between the defendant and the forum." (*Id.* at 1123) (App. A, 2a)

The District Court ruling includes the following reasoning, that was used to disregard all matters pertaining to contacts with, or pertaining to matters involving, Plaintiff William (regardless of location, or the tortious nature of the conduct):

> "*Walden v. Fiore,* 134 S.Ct. 1115, 1122 ('[The] minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts *with persons who reside there* . . . . [T]he plaintiff cannot be the only link between the defendant and the forum.') (emphasis added)." (See App. C, pp. 51a)

The District Court also ruled that the unilateral actions of Plaintiff William, in commencing *Rupert I* on June 22, 2009, caused the defendants in that action to thereafter file their dishonest declarations and joint motion to dismiss (on November 4, 2009), and to present their dishonest oral argument to Judge Fogel (on January 8, 2010), that was used to perpetrate a knowing and intentional fraud on the court, through concealment of the jurisdictional

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supplemental briefing upon *Walden* was not suggested, permitted, or ordered by the District Court. The AOB (ECF 8; p. 28) suggested this was prejudicial error, but this assignment of error was not commented upon by the Ninth Circuit (App. A, 1a-4a)

facts that were found to be significant in *Hanson v. Denckla,* 357 U.S. 235, 251-253 (1958). (See App. C, pp. 44a, 51a)

As stated by the District Court:

> "Here, Plaintiff created Defendants' contacts with the forum by virtue of filing suit here." (App. C, 52a)

The views expressed by the District Court, and affirmed by the Ninth Circuit, are basically consistent with the previously discussed Ninth Circuit cases of *Morrill v. Scott Financial Corp.,* 873 F.3d 1136, 1150-1155 (9th Cir. 2017), and the majority opinion in *Axiom Foods, Inc. v. Acerchem International, Inc.,* 874 F.3d 1064, 1070 (9th Cir. 2017).

However, the views expressed by the Ninth Circuit are sharply at odds with the views expressed by the First Circuit, the Second Circuit, the Fifth Circuit the Sixth Circuit, and the dissenting Opinion in *Morrill,* upon how, and if, *Walden* should be applied to torts involving "targeting" and "fraudulent misrepresentations".

As such, if Certiorari were to be granted, the instant case would be a good vehicle to use to explore all sides of these important legal questions, concerning how *Walden* should be applied, when a defendant's jurisdictional contacts with a forum resident plaintiff, and the forum itself, are alleged to have been "intertwined" (as in the instant case, where this unresolved issue of first impression was

set forth in the AOB that was filed with the Ninth Circuit, after it was also raised below, in a trial court reconsideration motion (CD 107), after *Walden* was initially raised *sua sponte* by the District Court, in the Dismissal Order). (ECF 8; AOB, p. 25-31)

C. The Circuit Splits Regarding The Availability Of Equitable Relief In Private Civil RICO Actions Can Be Effectively Reached By Review Of The Instant Case

Seemingly because the Ninth Circuit is one of the circuits that holds equitable relief cannot be obtained in a private civil RICO action, both the District Court and the Ninth Circuit have entirely disregarded the SAC's Prayer, that seeks equitable relief by way of its Prayer for declaratory judgments upon a number of subjects and issues.

However, in the instant case of *Rupert v. Bond II,* the Reporter's Transcript (ECF 72; pp. 4-89) shows that the *Chevron Corp. v. Donziger* case was mentioned 3 times (ECF 72; 19:5-20:7; 21:22-22:5 & 83:2-5), and a Statement of Recent Decision, with *Chevron Corp. v. Donziger,* 974 F.Supp.2d 362 (2014) attached, was filed (DC 157) with the District Court. District Court Judge Kaplan's ruling was ultimately affirmed by the Second Circuit in *Chevron Corp. v. Donziger,* 833 F.3d 74, 137-139 (2nd Cir. 2016).

The *Donziger* Case was presented as authority for the injunctive relief that was being sought, by the operative pleading, from *inter alia* the alleged

corrupt and invalid Oregon state court judgments (that were tainted by alleged extra-judicial Officer of the Court misconduct, and the failure to join all necessary parties).

The alleged extra-judicial Officer of the Court misconduct schemes included an entirely improper off-the-record *ex parte* telephone conference hearing with Presiding Judge Maurer, by Defendant Whitman (CD 106; SAC ¶ 87), upon Plaintiff's last minute request for a continuance (of both CV10030497 and CV10030498) (due to the lack of any advance notice of trial, due to the need to conduct discovery and obtain Irene Rupert's medical records, and due to the need to retain replacement counsel, after the law firm he hired unexpectedly abandoned Plaintiff William, following a phone conversation with Defendant Whitman, where he made material misrepresentations and interfered with Plaintiff Williams attorney-client relationship. (CD 106; SAC ¶ 85)

Following the "Bum's Rush Ambush Bench Trial that ensued, over Plaintiff's objections, before Oregon Judge Welch, a tainted judgment was entered in CV10030497, that failed to adjudicate Plaintiff William's Affirmative Defenses and Counter-Claims, such as Defendant Susan Bond's "unclean hands" as an intermeddling trustee *de son tort.* (CD 106; SAC ¶¶ 86-88) Plaintiff William's issues were simply dismissed, for lack of standing, so the merits were not reached, after his civil death was declared.

The alleged extra-judicial Officer of the Court misconduct schemes also included obtaining the entry of a judgment (Case No. CV10030498), from Judge Welch, that she never rendered, after either a trial or a dispositive motion. (CD 106; SAC ¶ 90).

The alleged extra-judicial Officer of the Court misconduct schemes also included an impromptu bench trial (in Case No. CV10050251), in the absence of Plaintiff William and without any advance notice of trial (upon the Petition to Remove Trustee, in an action where the Trustee was never made a party to the action, and never appeared in the action, so fundamental jurisdiction was never acquired). (CD 106; SAC ¶ 92)

The Reporter's Transcript also shows (ECF 72; 22:9-13) that plaintiff William additionally informed the District Court that he had exhausted all his legal remedies from the allegedly corrupt, invalid, and dishonest Oregon judgments, as of June 9, 2014, because of the denial of Plaintiff William's Petition For Writ of Certiorari, by this Court, in related Supreme Court Case No. 13-1322 (*Rupert v. Bond, et al.,* 134 S.Ct. 2738 (2014))

However, the District Court shrugged off *Donziger,* stating the Court lacked any "equitable powers" (ECF 72; 82:20-21), and also stating:

> "But please be clear, RICO claims are not within the inherent equitable powers of the Court. That is statutory and there is decisional law that I have to apply."
> (ECF 72; 82:24-83:1)

Similarly, before the Ninth Circuit, a Petition for Rehearing and Rehearing *En Banc* was timely filed (ECF 77), that pointed out the operative pleading sought a declaratory judgment that Petitioner lawfully created his Successor Trusteeship of the irrevocable Samuel J. Rupert Trust, located in Ben Lomond, CA, by formal Notices of Acceptance of Trust that were delivered in Michigan and Oregon on July 8, 2009. (ECF 77, pp. 17-18).

Accordingly, a grant of certiorari in the instant case, to consider if, and when, equitable relief is available, would allow this Supreme Court to reach and actually decide the question.

D. The Circuit Splits Concerning RICO's Nationwide Service Of Process Provisions, And RICO's "Ends Of Justice" Jurisdiction, Are Well Presented By The Instant Case

The District Court's Dismissal Order (App. C, 6a-57a devotes 6 pages (35a-40a) to its discussion of "ends of justice" jurisdiction, under 18 U.S.C. § 1965(b) of the RICO statutes.

The Dismissal Order states:

> "A plaintiff seeking to exercise jurisdiction pursuant to RICO's 'ends of justice' provision faces a high hurdle. It is the plaintiff's burden to affirmatively show that no other district could exercise jurisdiction over all the alleged co-conspirators." (App. C, 39a-40a)

Then the Dismissal Order acknowledges that the SAC (CD 106; SAC ¶ 1, fn. 1, ¶ 7) sufficiently alleges that Oregon could not exercise jurisdiction over Defendant Edward S. Zusman, who resides and practices law only in California, and whose representation of Oregon clients in *Rupert I*, after they sought him out, only took place in California. (App. C, 38a-40a). However, these allegations were deemed insufficient by the District Court, as it ruled:

> "The burden is on the plaintiff to 'adduce evidence that there is no other district' that could hale all of the alleged co-conspirators before its courts" (App. C, 37a).

It appears the District Court set an impossible standard, by demanding evidence of something that doesn't exist, because it is impossible to prove a negative. Especially, at the pleadings stage, prior to any discovery or an evidentiary hearing (when only a *prima facie* showing was supposed to be required, under FRCP 12(b)(2)).

The Ninth Circuit should not have affirmed the impossible "ends of justice" standard that was adopted by the District Court.

CONCLUSION

The Writ of Certiorari should be granted, to resolve circuit splits and to exercise necessary supervisory powers, under Rule 10(a), of the Rules of the Supreme Court of the United States, which states the following, in pertinent part:

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;"

Rule 10(a); Rules of the Supreme Court
(Effective July 1, 2019)

Dated: October 15, 2019

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