

Case: 18-56048, 11/20/2019, ID: 11504841, DktEntry: 50, Page 1 of 1

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

NOV 20 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

LARRY DOUGLAS KERNS,

Plaintiff - Appellant,

v.

MATHEW J. WENNER,

Defendant - Appellee.

No. 18-56048

D.C. No. 3:16-cv-02438-WQH-WVG

U.S. District Court for Southern  
California, San Diego

**MANDATE**

The judgment of this Court, entered July 24, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule  
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

By: Jessica F. Flores Poblano  
Deputy Clerk  
Ninth Circuit Rule 27-7

**APPENDIX A**

Council: Plaintiff - Appellant  
Larry Douglas Kerns  
Direct: 619-915-6808  
[Pro Se]  
3643 Spa Street  
San Diego, CA 92105

Council: Defendant - Appellee  
Robert M. Anderson, Attorney  
Direct: 213-443-5100  
Wilson Elser Moskowitz Edelman & Dicker LLP  
555 S. Flower Street - Suite 2900 - Los Angeles, CA 90071-2407

Originating Court Information:

District: Court No.: 3:16-cv-02438-WQH-WVG  
U.S. District Court for Southern California, San Diego  
District Judge William Q. Hayes,  
Date Filed: 09/28/2016  
Date Order:

"07/24/2018 208 ORDER: The motion for summary  
Judgment is Granted. (Entered: 07/25/2018)"

"07/25/2018 209 CLERK'S JUDGMENT. IT IS SO  
ORDERED AND ADJUDGED that the Defendant's motion  
for summary judgment is granted. (Entered: 07/25/2018)"

This Mandate States:

"The judgment of this Court, entered July 24, 2019, takes effect this  
date. This constitutes the formal mandate of this Court issued pursuant  
to Rule 41(a) of the Federal Rules of Appellate Procedure."

FILED NOV. 20 2019 - MOLLY C. DWYER, CLERK U.S. COURT OF  
APPEALS.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

NOV 12 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

LARRY DOUGLAS KERNS,

Plaintiff-Appellant,

v.

MATHEW J. WENNER,

Defendant-Appellee.

No. 18-56048

D.C. No. 3:16-cv-02438-WQH-  
WVG

Southern District of California,  
San Diego

ORDER

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

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

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

Kerns's petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos. 41 and 42) are denied.

All other pending motions and requests are denied.

No further filings will be entertained in this closed case.

Council: Plaintiff - Appellant  
Larry Douglas Kerns  
Direct: 619-915-6808  
[Pro Se]  
3643 Spa Street  
San Diego, CA 92105

Council: Defendant - Appellee  
Robert M. Anderson, Attorney  
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"07/24/2018 208 ORDER: The motion for summary  
Judgment is Granted. (Entered: 07/25/2018)"

"07/25/2018 209 CLERK'S JUDGMENT. IT IS SO  
ORDERED AND ADJUDGED that the Defendant's motion  
for summary judgment is granted. (Entered: 07/25/2018)"

The Judgement of the District Court: is RE-AFFIRMED, by this Final Order.

"In accordance with the decision of this court; Entered on this date. See Fed. R. App. P. 35.  
Kerns's petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos.  
41 and 42) are denied." **"All other pending motions and requests are denied."**

**Therefore:** Circuit Judges: SCHROEDER, SILVERMAN, and CLIFTON, **Denied:** United States

Court of Appeals for the Ninth Circuit; Case No. 18-56048:

"09/24/2019 Docket # 46  
60 pg, 1.06 MB Filed Appellant Mr. Larry Douglas Kerns Reporting: Fraud. **Deficiencies:**  
**None.** Served on 09/20/2019. [11442153] (JFF) [Entered: 09/24/2019 02:40 PM]"

**Violating:** Title 18 U.S.C. § 4. And Title 28 U.S.C. § 1361; and is **Fraud on the 9th Circuit**

**court of Appeals; as well.** - Add 90 days to file; PETITION FOR A WRIT OF CERTIORARI

Equals: approximately February 12, 2020.

Chief Judge Sidney Thomas; of the United States Court of Appeals for the Ninth Circuit; would not have allowed; the entry of 9th circuit; Dkt. No.: 46; Report of fraud on the District court; if that report, (he received 2 copies of, by Mail), lacked any kind of Merit or Creditability.

So; I am asking this Court; to overturn; 9th circuit November 12, 2019 dkt. no. 49; Order:

because that Order is VOID. - See, again:[ *Case: 18-56048, 11/12/2019, ID: 11496172, Dkt*

*Entry: 49, Page 1 of 1* ] - **"All other pending motions and requests are denied."** Dkt. No.:

46; Report of fraud on the District court; was the only remaining Legal Entry: to **DENY**.

09/24/2019 46 [Please read entire document and Exhibits]  
60 pg, 1.06 MB Filed Appellant Mr. Larry Douglas Kerns **Reporting: Fraud.**  
**Deficiencies: None.** Served on 09/20/2019. [11442153] (JFF) [Entered:  
09/24/2019 02:40 PM]

Proof of Fraud on the 9th Circuit Court; by Judges SCHROEDER, SILVERMAN, and CLIFTON: is

defined by Federal Law: See: [Case: 18-56048, 09/24/19, ID: 11442153, DktEntry: 46, Page 4 of 60]

- " 4. **2002 US Code Title 28 - CHAPTER 85 - Sec. § 1361.** "Action to compel an officer of the United States to perform his duty" "thereof to perform a duty owed to the plaintiff." (See Exhibit 4)
5. (See Exhibit 5) "FRAUD ON THE COURT BY AN OFFICER OF THE COURT" AND "DISQUALIFICATION OF JUDGES, STATE AND FEDERAL" Under Federal law which is applicable to all states, the U.S. Supreme Court stated that if a court is: "without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. " **Elliot v. Piersol** / "Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.. [29] **Mireles v. Waco** / A judge is not the court. **People v. Zajic** / 2. WHAT IS "FRAUD ON THE COURT"? Whenever any officer of the court commits fraud during a proceeding in the court, he she is engaged in fraud upon the court. / "Fraud upon the court has been defined by the 7th Circuit Court of Appeals to embrace that species of fraud which does, or attempts to, defile the court itself, or is a Fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its **impartial task** of adjudging cases that are presented for adjudication. **Kenner v. C.I.R.**
6. (See Exhibit 6) Citizens (people's) Tools: **Title 18 U.S.C. § 4. and Title 28 U.S.C. § 1361.** - "shall be fined under this title or imprisoned not more than three years, or both" 1 "A federal judge, or any other government official, is required as part of the judge's mandatory administrative duties, to receive any offer of information of a federal crime. **If that judge blocks**"

See: [Case: 18-56048, 09/24/2019, ID: 11442153, DktEntry: 46, Page 5 of 60]

**"such report, THAT BLOCK IS A FELONY under related obstruction off justice statutes, and constitutes a serious offense."**

“/ “That statute was also repeatedly blocked by federal judges and Justices of the U.S. Supreme Court.” **Since Federal Law; IS Federal Law; maybe Your Honor and/or the Supreme Court; WILL Honor the above 2 Laws; since times have changed; somewhat?**

7. (See Exhibit 7) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. Aider and abettor Liability is distinct from accessory after the fact under **18 U.S.C. § 3. United States v James**, / To convict as a principal of aiding and abetting the commission of a crime, a jury must find beyond a reasonable doubt that the defendant knowingly and intentionally aided and abetted the principal(s) in each essential element of the crime. **United States v. Bancalari**, 110 F.3d 1425, 1429 (9th Cir. 1997). / District of Columbia has ruled that an aider and abettor need not have the exact same intent as the principal, and the finding of overlapping intent between the accomplice and principal is sufficient to establish liability. **United States v. Washington**,
8. (See Exhibit 8) **1737. Civil Action To Enjoin The Obstruction Of Justice – 18 U.S.C. 1514:**”

See: [ Case: 18-56048, 09/24/2019, ID: 11442153, DktEntry: 46, Page 20 of 60 ]

**“Report: Fraud on court - Exhibit 6 - Federal Crime Reporting Statute**

The federal offense of failure to disclose a felony, if coupled with some act concealing the felony, such as suppression of evidence, harboring or protecting the person performing the felony, intimidation or harming a witness, or any other act designed to conceal from authorities the fact that a crime has been committed. **Title 18 U.S.C. § 4. Misprision of felony.** Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both. A federal judge, or any other government official, is required as part of the judge’s mandatory administrative duties, to receive any offer of information of a federal crime. If that judge blocks such report, that block is a felony under related obstruction of justice statutes, and constitutes a serious offense. Upon receiving such information, the judge is then required to make it known to a government law enforcement body that is not themselves involved in the federal crime.”

See: [ Case: 18-56048, 09/24/2019, ID: 11442153, DktEntry: 46, Page 21 of 60 ]

**“Misprision of a Felony**

Misprision of a felony is the offense of failure to inform government authorities of a felony that a person knows about. A person commits the crime of misprision of a felony if that person:

- Knows of a federal crime that the person has witnessed or that has come to the person’s attention, or failed to prevent.
- Fails to report it to a federal judge or other federal official (who is not themselves involved in the Crime).”

**“Another Federal Statute for Forcing A Federal Officer To Perform a Mandatory Duty**

Another federal statute exists for reporting high-level corruption in government:

**Title 28 U.S.C. § 1361.** Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

This federal statute permits any citizen to file a lawsuit in the federal courts to obtain a court order requiring a federal official to perform a mandatory duty and to halt unlawful acts.”

This statute is **Title 28**”

See: [ Case: 18-56048, 09/24/2019, ID: 11442153, DktEntry: 46, Page 22 of 60 ]

**“U.S.C. § 1361.**

See: [ Case: 18-56048, 09/24/2019, ID: 11442153, DktEntry: 46, Page 22 of 60 ]

**“U.S.C. § 1361.**

**These two statutes are among the most powerful tools in the hands of the people, even a single person, to report corrupt and criminal activities by federal officials—including federal judges—and to circumvent the blocks by those in key positions in the three branches of government. That statute was also repeatedly blocked by federal judges and Justices of the U.S. Supreme Court.”**

Has this court **really**, repeatedly blocked; the above Federal Statutes? If so; why? If America is Of, By, and For the People: why would this court do that? Does this court consider Law School Graduates; to be above the law and above (We the People)? This case proves “Some Judges, an Officer of the Court, and a Law firm”; are Guilty of Fraud on Federal Courts:

President Clinton: **Clinton v The People**; was Impeached and lost his privilege to practice law in America (for life): for a MUCH LESS serious crime: (covering up the fact that he had a young girlfriend.) **Consequently**: ALL evidence entered by the (COURT’S - TRESPASSER - defence), and it’s Law firm and All Orders and Judgments by Judges in this case (Trespassers): are simply VOID: Leaving ONLY Mr. Kerns’ Evidence; to be considered; by this Supreme Court.

See: [ Case: 18-56048, 11/12/2019, ID: 11496172, DktEntry: 49, Page 1 of 1 ]

“Kerns’s petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos. 41 and 42) are denied.”

**Why**: I proved; that I provided **Adequate** Americans with Disabilities Act: Title information and Violations Information? The ERISA has no preemption over ADA violations and my proof would eliminate; Granting Summery Judgment to Mr. Wenner.

See: [ Case: 18-56048, 08/06/2019, ID: 11388366, DktEntry: 41-5, (Pages 11 -15) of 16 ]; for proof.

**(a)** (Page 14 (top)):

”Technical Assistance Manual: **Title I of the ADA**”:

**“III The Reasonable Accommodation Obligation”**:

Third dot down (middle of Sentence) **“Applies to ALL aspects of Employment”**

(Page 11): Exhibit K - 4 is **HIDDEN**; District Court: case No. 3:16cv02438; dkt. no. 149

“12/29/2017 dkt. no. 149;

MOTION to Reconsider Partial Summary Judgment (ECF No. 108 ) by Larry D.

Kerns. Nunc Pro Tunc 12/27/ 2017, per Order (ECF No. 148 ).(ajs) (Entered: 01/02/2018)”

(b) See Informal Opening Brief: [Case: 18-56048, 10/25/2018, ID: 11060822, DktEntry: 16-1, (Pages 1 thru 40) of 43] /AND [Case: 18-56048, 10/25/2018, ID: 11060822, DktEntry: 16-2, (Pages 1 thru 32)], for Proof: of ADA Violations.

Wenner, withheld **Disability Waiver information**; from me for twelve and one half years. That information: proved I was eligible for benefits; the first time I called in 2003; **ONLY because of that disability waiver**; and the fact, I was/am Disabled.

See next page ( page 9a )'s highlighted Areas; that apply to ALL **aspects of Employment**, Required: to comply; with the Americans with Disability Act.

If the Judges claim; they did not know; they should have known; “their Ignorance is not relevant!”

**United States v. Tolkow** 532 F.2d 853 (2nd Cir. 1976).

Circuit Judges: SCHROEDER, SILVERMAN, and CLIFTON: should have reported; Fraud on District court; but chose not to: making them conspirators in Fraud on court; and covering that fraud on Court up! Clinton was Impeached for much less serious crimes and President Trump would be a goner; if he committed equally disgusting crimes.

Technical Assistance Manual: Title I of the ADA	<a href="http://askjan.org/links/ADAtam1.html#III">http://askjan.org/links/ADAtam1.html#III</a>
<p><b>III. THE REASONABLE ACCOMMODATION OBLIGATION</b></p> <p><b>3.1 Overview of Legal Obligations</b></p> <ul style="list-style-type: none"> <li>• An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business.</li> <li>• Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.</li> <li>• The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.</li> <li>• An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless it would cause an undue hardship.</li> <li>• An employer does not have to make an accommodation for an individual who is not otherwise qualified for a position.</li> <li>• Generally, it is the obligation of an individual with a disability to request a reasonable accommodation.</li> <li>• A qualified individual with a disability has the right to refuse an accommodation. However, if the individual cannot perform the essential functions of the job without the accommodation, s/he may not be qualified for the job.</li> <li>• If the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of providing the accommodation or paying that portion of the cost which would constitute an undue hardship.</li> </ul> <p><b>3.2 Why is a Reasonable Accommodation Necessary?</b></p> <p>Reasonable accommodation is a key nondiscrimination requirement of the ADA because of the special nature of discrimination faced by people with disabilities. Many people with disabilities can perform jobs without any need for accommodations. But many others are excluded from jobs that they are qualified to perform because of unnecessary barriers in the workplace and the work environment. The ADA recognizes that such barriers may discriminate against qualified people with disabilities just as much as overt exclusionary practices. For this reason, the ADA requires reasonable accommodation as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities.</p> <p>People with disabilities are restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that make it difficult to get into and around a work site or to use necessary work equipment. Some are excluded or limited by the way people communicate with each other. Others are excluded because of rigid work schedules that allow no flexibility for people with special needs caused by disability. Many are excluded only by barriers in other people's minds; these include unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers.</p> <p>Under the ADA, when an individual with a disability is qualified to perform the essential functions of a job except for functions that cannot be performed because of related limitations and existing job barriers, an employer must try to find a reasonable accommodation that would enable this person to perform these functions. The reasonable accommodation should reduce or eliminate unnecessary barriers between the individual's abilities and the requirements for performing the essential job functions.</p> <p><b>3.3 What is a Reasonable Accommodation?</b></p> <p>Reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average similarly-situated employee without a disability. The ADA requires reasonable accommodation in three aspects of employment:</p> <ul style="list-style-type: none"> <li>• to ensure equal opportunity in the application process;</li> <li>• to enable a qualified individual with a disability to perform the essential functions of a job; and</li> <li>• to enable an employee with a disability to enjoy equal benefits and privileges of employment.</li> </ul> <p><b>Reasonable Accommodation in the Application Process</b></p> <p>Reasonable accommodation must be provided in the job application process to enable a qualified applicant to have an equal opportunity to be considered for a job.</p> <p>For example: A person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible. A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form. Without such accommodations, these individuals may have no opportunity to be considered for a job.</p> <p>(See Chapter V, for further discussion of accommodations in the application process).</p> <p><b>Accommodations to Perform the Essential Functions of a Job</b></p>	
17 of 69	10/22/2016 8:51 PM

No. 9<sup>th</sup> Cir.: 18-56048 / Dist. Ct.: 3:16 cv 2438

# The United States Courts



for the



**Ninth Circuit.**

**Chief Judge Sidney Thomas**

RECEIVED  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SEP 24 2019

FILED  
DOCKETED

DATE

INITIAL

LARRY DOUGLAS KERNS

*Plaintiff / Appellant,*

MATHEW WENNER

*Defendant / Appellee.*

LARRY DOUGLAS KERNS - *Plaintiff*, **Reporting:** Fraud on U.S. District Court - Southern District of California (San Diego) - CASE #: 3:16-cv-02438-WQH-WVG. **By:** Judge William Q. Hayes, Judge William V. Gallo, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, and their Attorney Robert Anderson. **To:** Chief Judge Sidney Thomas; of The United States Courts for the Ninth Circuit.

LARRY DOUGLAS KERNS; *Plaintiff / Appellant*, REQUEST: ALL ORDERS AND JUDGMENTS; REGARDING CASE NO.'S 9<sup>th</sup> Cir.: 18-56048 / Dist. Ct.: 3:16 cv 2438: Be Declared Void, be declared Undefended, and Mr. Kerns be Granted Judgment by Default of his three million dollar demand.

Larry Douglas Kerns  
3643 Spa Street  
San Diego CA (619) 915 - 6808  
Email: j.lak@att.net  
REPRESENTING HIMSELF

Date: 09/20/2019

*Larry Kerns*

LARRY KERNS  
Pro Se Appellant

Council: Plaintiff - Appellant  
Larry Douglas Kerns  
Direct: 619-915-6808  
[Pro Se]  
3643 Spa Street  
San Diego, CA 92105

Council: Defendant - Appellee  
Robert M. Anderson, Attorney  
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Originating Court Information:

District: Court No.: 3:16-cv-02438-WQH-WVG  
U.S. District Court for Southern California, San Diego  
District Judge William Q. Hayes,  
Date Filed: 09/28/2016  
Date Order:

"07/24/2018 208 ORDER: The motion for summary judgment is Granted. (Entered: 07/25/2018)"

"07/25/2018 209 CLERK'S JUDGMENT. IT IS SO ORDERED AND ADJUDGED that the Defendant's motion for summary judgment is granted. (Entered: 07/25/2018)"

District Court; 208 Order; and Clerk's Judgment: 209: are **the result of: Fraud on the U. S. District Court**, Obstruction of Justice, Aiding and Abetting, Bias, Abuse of Power, and Violations of Mr. Kerns' Constitutional Civil Rights: **that Mr. Kerns Reported by Mail**, to the United States Court of Appeals for the Ninth Circuit's, Chief Judge Sidney Thomas; and **Officially** entered on the 9th Circuit's Docket; 2 - 3 days after he mailed it.

See [Case: 18-56048, 09/24/19, ID: 11442153, DktEntry: 46, (Pages 1 - 60) of 60]

09/24/2019 46 [Please read entire document and Exhibits]  
60 pg, 1.06 MB Filed Appellant Mr. Larry Douglas Kerns **Reporting: Fraud.**  
**Deficiencies: None.** Served on 09/20/2019. [11442153] (JFF) [Entered:  
09/24/2019 02:40 PM]

Chief Judge Sidney Thomas; of the United States Court of Appeals for the Ninth Circuit; would not have approved; the entry of 9th circuit; Dkt. No.: 46; Report of fraud on the District court; if that report, (he received 2 copies of, by Mail), lacked any kind of Merit or Creditability.

So; I am asking this Court; to overturn; 9th circuit November 12, 2019 dkt. no. 49; Order:

because that Order is VOID. - See, again:[ *Case: 18-56048, 11/12/2019, ID: 11496172, Dkt*

*Entry: 49, Page 1 of 1* ] - **“All other pending motions and requests are denied.”** Dkt. No.:

46; Report of fraud on the District court; was the only remaining Legal Entry: to **DENY**.

09/24/2019 46 [Please read entire document and Exhibits]

60 pg, 1.06 MB Filed Appellant Mr. Larry Douglas Kerns **Reporting: Fraud.**

**Deficiencies: None.** Served on 09/20/2019. [11442153] (JFF) [Entered:

09/24/2019 02:40 PM]

## NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 24 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

LARRY DOUGLAS KERNS,

No. 18-56048

Plaintiff-Appellant,

D.C. No. 3:16-cv-02438-WQH-  
WVG

v.

MATHEW J. WENNER,

MEMORANDUM\*

Defendant-Appellee.

Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding

Submitted July 15, 2019\*\*

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

Larry Douglas Kerns appeals pro se from the district court's summary judgment in his Employee Retirement Income Security Act ("ERISA") action relating to his application for benefits under a Retirement Benefit Plan of the GCIU-Employment Retirement Fund. We have jurisdiction under 28 U.S.C.

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

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

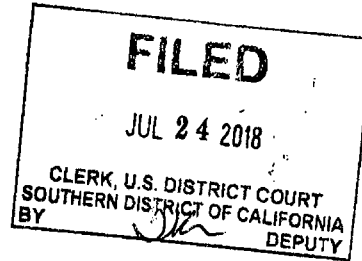
Case: 18-56048, 07/24/2019, ID: 11374767, DktEntry: 35-1, Page 2 of 2

§ 1291. We review de novo. *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment because Kerns seeks only punitive damages, and ERISA does not allow recovery of punitive damages. *See Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1009 (9th Cir. 1998) (“Extracontractual, compensatory and punitive damages are not available under ERISA.”); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (the civil enforcement provisions of ERISA are “the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits . . .”).

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

**AFFIRMED.**



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LARRY D. KERNS,

Plaintiff,

v.

MATHEW J. WENNER,

Defendant.

Case No.: 16cv2438-WQH-AGS

**ORDER**

HAYES, Judge:

The matter before the Court is the motion for summary judgment filed by Defendant Mathew Wenner. (ECF No. 152).

**I. BACKGROUND**

On September 28, 2016, Plaintiff Larry D. Kerns initiated this action by filing a Complaint against Defendants Mathew J. Wenner, Hugh Gaylord, Edward Treacy, Thomas Sarnecki, George Tedeschi, Charles Kamen, and John D. Bachler. (ECF No. 1). Plaintiff brings causes of action for mail fraud and a violation of the Americans with Disabilities Act ("ADA") and seeks \$3,000,000 in punitive damages. The allegations of the Complaint relate to Plaintiff's benefits under a Retirement Benefit Plan of the GCIU-Employment Retirement Fund. *Id.* Defendants Gaylord, Treacy, Sarnecki, Tedeschi, Kamen, and Bachler were dismissed from this action with prejudice. (ECF No. 39). Defendant Mathew Wenner ("Defendant") is the only defendant remaining in this action.

1 On January 18, 2018, Defendant filed a motion for summary judgment. (ECF No.  
2 152). On January 22, 2018, Defendant filed a certificate of service of the motion for  
3 summary judgment asserting that service was completed by mail and email on January 22,  
4 2018. (ECF No. 159).

5 On January 24, 2018, Plaintiff filed a letter in response to the motion for summary  
6 judgment. (ECF No. 161). Plaintiff asserted that the motion was untimely because  
7 Defendant failed to file proof of service with the motion and missed the January 19, 2018  
8 filing deadline set in the Court's Scheduling Order (ECF No. 105).

9 On February 15, 2018, Defendant filed a reply in support of the motion for summary  
10 judgment. (ECF No. 176). Defendant asserted that service was not completed on the same  
11 day the motion was filed because an employee at defense counsel's firm "did not realize  
12 that Plaintiff could not be served via the court's ECF system." (ECF No. 176-1 at 3).

13 On February 21, 2018, Plaintiff filed an objection to Defendant's reply. (ECF No.  
14 178). Plaintiff reasserts his position that "Defendant's motion for sum[a]ry judgement;  
15 [sic] did not; and has not; met proof of service, required by; Local Civil Rule 5.4 Electronic  
16 Case Filing; (c); on or before; the 1/19/2018, deadline for filing motions." (ECF No. 178  
17 at 1).

18 On May 4, 2018, the Court entered an Order stating in part:

19 Defendant filed the motion for summary judgment prior to the Court's  
20 January 19, 2018 deadline and submits sufficient evidence to establish that  
21 the short delay in completing service of the motion was inadvertent. The Court  
22 will consider the motion for summary judgment to be timely filed and will  
23 rule on the substantive arguments raised in the motion. See Eitel v. McCool,  
24 782 F.2d 1470, 1472 (9th Cir. 1986) (noting "the strong policy underlying the  
25 Federal Rules of Civil Procedure favoring decisions on the merits"). However,  
the Court will provide Plaintiff the opportunity to file another response to  
Defendant's motion for summary judgment which addresses the substantive  
issues raised by Defendant.

26 **IT IS HEREBY ORDERED that Plaintiff shall file any response in**  
27 **opposition to the motion for summary judgment on or before May 17,**  
28 **2018. Defendant shall file any reply on May 24, 2018.**

1 (ECF No. 191).

2 On May 15, 2018, Plaintiff filed a response in opposition to the motion for summary  
3 judgment. (ECF No. 194).

4 On May 24, 2018, Defendant filed a reply. (ECF No. 203).

5 **II. LEGAL STANDARD**

6 “A party may move for summary judgment, identifying each claim or defense—or  
7 the part of each claim or defense—on which summary judgment is sought. The court shall  
8 grant summary judgment if the movant shows that there is no genuine dispute as to any  
9 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
10 56(a). A material fact is one that is relevant to an element of a claim or defense and whose  
11 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*  
12 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The materiality of a fact is determined  
13 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby,*  
14 *Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).  
15 The moving party has the initial burden of demonstrating that summary judgment is proper.  
16 *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The burden then shifts to the  
17 opposing party to provide admissible evidence beyond the pleadings to show that summary  
18 judgment is not appropriate. *See Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322, 324.

19 The opposing party’s evidence is to be believed, and all justifiable inferences are to be  
20 drawn in his favor. *See Anderson*, 477 U.S. at 255. To avoid summary judgment, the  
21 opposing party cannot rest solely on conclusory allegations of fact or law. *See Berg v.*  
22 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). The nonmovant must designate which  
23 specific facts show that there is a genuine issue for trial. *See Anderson*, 477 U.S. at 256.

24 **III. CONTENTIONS**

25 Defendant contends that “Plaintiff’s claims relate to the Retirement Benefit Plan of  
26 the GCIU Employer Retirement Fund, which is governed [by] the Employee Retirement  
27 Income Security Act (“ERISA”).” (ECF No. 152 at 2). Defendant contends that he is  
28

1 entitled to summary judgment because ERISA provides the exclusive remedy available to  
 2 Plaintiff and Plaintiff has already recovered the maximum relief allowable under ERISA  
 3 for a delay in receiving a benefit. *Id.* Defendant asserts that Plaintiff cannot recover  
 4 punitive damages under ERISA. Defendant contends that Plaintiff cannot “plead around  
 5 the **exclusive** nature of ERISA’s civil enforcement scheme” by characterizing his claims  
 6 as mail fraud and violations of the Americans with Disabilities Act. (ECF No. 152-1 at 2).

7 Plaintiff contends that “there is a genuine dispute and the ERISA; does not even  
 8 come close; to Superseding; any FEDERAL LAW; or have any exclusive; right to do  
 9 anything but; “Get First Dibs”; they forfeited their First Dibs, by their own choice.” (ECF  
 10 No. 194) at 3. Plaintiff contends that all federal law, including mail fraud “will continue  
 11 to be applicable to any victim.” *Id.* Plaintiff attaches copies of numerous documents to his  
 12 response in opposition, including publications from the National Criminal Justice  
 13 Reference Service and an article from the Cornell Law Review.<sup>1</sup>

#### 14 IV. FACTS

15 Defendant provides a declaration by Mathew Wenner and a Memorandum of Action  
 16 on Appeal from the Board of Trustees of the GCIU-Employer Retirement Fund to establish  
 17 the following undisputed facts. Plaintiff is a participant in the Retirement Benefit Plan of  
 18 the GCIU-Employer Retirement Fund. (Wenner Decl., ECF No. 152-3 at 2). The  
 19 Retirement Benefit Plan is a “multiemployer defined benefit plan governed by . . . ERISA  
 20 29 U.S.C. Section 1001 et seq.” (Memo of Action from Trustees of the GCIU Retirement  
 21 Benefit Plan, ECF No. 152-4 at 3). It provides “retirement benefits (service retirement  
 22 benefits – early or normal – and disability retirement benefits)” to eligible participants in  
 23 the Graphic Communications Industry. *Id.* Defendant is “employed by the Benefit  
 24  
 25  
 26

27 <sup>1</sup> The Court has previously considered and ruled on Plaintiff’s objections related to the service of  
 28 Defendant’s motion for summary judgment. (ECF No. 191). Accordingly, the Court does not address the  
 parties’ contentions on this issue.

1 Programs Administrator and [is] the Administrator of the GCIU Retirement Plan.”  
2 (Wenner Decl., ECF No. 152-3 at 2).

3 The Board of Trustees of the GCIU-Employer Retirement Fund reviews appeals  
4 requested by participants or beneficiaries and issues decisions affirming, modifying, or  
5 setting aside the decision or action being appealed. (Memo of Action from Trustees of the  
6 GCIU Retirement Benefit Plan, ECF No. 152-4 at 3). On February 8, 2016, Plaintiff  
7 submitted a “signed Application for Retirement – Part I” to the Administrative Office of  
8 the GCIU-Employer Retirement Fund” and requested “a disability retirement benefit.” *Id.*  
9 at 2. The Administrative Office denied his request on March 25, 2016 after concluding  
10 that Plaintiff was not entitled to a disability retirement benefit. *Id.* at 2, 6–8. The denial  
11 letter “indicated that the response served as a benefit claim denial under ERISA Section  
12 503, 29 U.S.C. Section 1133” and advised Plaintiff of his appeal rights under the  
13 Retirement Plan. *Id.* at 2. Plaintiff appealed the denial of his request for a disability  
14 retirement benefit on April 9, 2016. *Id.* On August 16, 2016, the Board of Trustees  
15 affirmed the Administrative Office’s decision that Plaintiff was not entitled to a disability  
16 retirement benefit under the Retirement Plan. *Id.* at 7. However, the Board of Trustees  
17 determined that Plaintiff was “entitled to a Service Retirement Benefit” under the  
18 Retirement Plan. *Id.* The decision of the Board of Trustees stated that Plaintiff “is,  
19 however, awarded an early retirement benefit retroactive to October 1, 2003, with interest,  
20 in accordance with the provisions of the Retirement Plan.” *Id.* at 8; *see also* Wenner Decl.,  
21 ECF No. 152-3 at 2. “Plaintiff was then paid his normal service retirement benefits  
22 retroactively as awarded in the Memorandum of Action, and he has been and is continuing  
23 to be paid his monthly service retirement benefit.” (Wenner Decl., ECF No. 152-3 at 2).

### 24 III. ANALYSIS

25 ERISA comprehensively regulates employee welfare benefit plans “maintained for  
26 the purpose of providing for its participants . . . through the purchase of insurance or  
27 otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of  
28 sickness, accident, disability, death or unemployment . . .” 29 U.S.C. § 1002(1). ERISA

1 comprehensively regulates employee pension benefit plans “established or maintained by  
 2 an employer or by an employee organization, or by both, to the extent that by its express  
 3 terms or as a result of surrounding circumstances such plan, fund, or program . . . provides  
 4 retirement income to employees.” 29 U.S.C. § 1002(2)(A)(i).

5 “Congress enacted ERISA to ‘protect . . . the interests of participants in employee  
 6 benefit plans and their beneficiaries’ by setting out substantive regulatory requirements for  
 7 employee benefit plans and to ‘provid[e] for appropriate remedies, sanctions, and ready  
 8 access to the Federal courts.’” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004)  
 9 (quoting 29 U.S.C. § 1001(b)). ERISA “provide[s] a uniform regulatory regime over  
 10 employee benefit plans” through its “integrated enforcement mechanism,” ERISA § 502,  
 11 29 U.S.C. § 1132(a).<sup>2</sup> *Id.*

12 [T]he detailed provisions of § 502(a) set forth a comprehensive civil  
 13 enforcement scheme that represents a careful balancing of the need for prompt  
 14 and fair claims settlement procedures against the public interest in  
 15 encouraging the formation of employee benefit plans. The policy choices  
 16 reflected in the inclusion of certain remedies and the exclusion of others under  
 17 the federal scheme would be completely undermined if ERISA-plan  
 18 participants and beneficiaries were free to obtain remedies under state law that  
 19 Congress rejected in ERISA. “The six carefully integrated civil enforcement  
 20 provisions found in § 502(a) of the statute as finally enacted . . . provide strong  
 21 evidence that Congress did *not* intend to authorize other remedies that it  
 22 simply forgot to incorporate expressly.” *Russell, supra*, at 146, 105 S.Ct., at  
 23 3092 (emphasis in original).

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24 <sup>2</sup> ERISA includes “expansive pre-emption provisions, see ERISA § 514, 29 U.S.C. § 1144, which are  
 25 intended to ensure that employee benefit plan regulation would be ‘exclusively a federal concern.’” *Aetna*  
 26 *Health*, 542 U.S. at 208 (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). “A state  
 27 law claim is preempted by ERISA if it has a ‘connection with’ or a ‘reference to’ an ERISA-governed  
 28 benefit plan.” *Wise v. Verizon Commc’ns, Inc.*, 600 F.3d 1180, 1190 (9th Cir. 2010) (citing *Metro. Life*  
*Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)). Plaintiff does not bring any state law claims in his  
 Complaint.

1 *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). “ERISA’s civil enforcement  
 2 provision outlines the possible claims by a participant or beneficiary.” *Bast v. Prudential*  
 3 *Ins. Co. of America*, 150 F.3d 1003, 1008 (9th Cir. 1998), *as amended* (Aug. 3, 1998)  
 4 (citing 29 U.S.C. § 1132; ERISA § 502(a)).

5 Under ERISA, a participant or beneficiary to an ERISA-regulated plan may bring a  
 6 civil action: (1) “to recover benefits due to him under the terms of his plan, to enforce his  
 7 rights under the terms of the plan, or to clarify his rights to future benefits under the plan,”  
 8 29 U.S.C. § 1132(a)(1)(B); (2) for a breach of fiduciary duties, 29 U.S.C. § 1132(a)(2), or;  
 9 (3) or to enjoin violations of ERISA or terms of the plan or to obtain other appropriate  
 10 equitable relief, 29 U.S.C. § 1132(a)(3). *See also Bast*, 150 F.3d at 1008. However,  
 11 “[e]xtracontractual, compensatory and punitive damages are not available under ERISA.”  
 12 *Id.* at 1109 (citing *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)); *Sokol v.*  
 13 *Bernstein*, 803 F.2d 532 (9th Cir. 1986)).

14 Plaintiff seeks relief based on the denial of benefits owed to him under the  
 15 Retirement Benefit Plan of the GCIU Employer Retirement Fund between 2003 and 2016.  
 16 Plaintiff seeks three million dollars in punitive damages from Defendant, the administrator  
 17 of the Retirement Plan, based on the delay in receiving his benefit under the Retirement  
 18 Plan. It is undisputed that Retirement Benefit Plan is regulated under ERISA.  
 19 Accordingly, Plaintiff’s request for relief for the delay in receiving certain benefits under  
 20 his ERISA-regulated Retirement Plan arises under ERISA.

21 Plaintiff, a participant in an ERISA-regulated plan, cannot recover punitive damages  
 22 in this civil suit as a matter of law. *See Bast*, 150 F.3d at 1109; *Russell*, 473 U.S. at 148  
 23 (“Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative  
 24 history all support the conclusion that in § 409(a) Congress did not provide, and did not  
 25 intend the judiciary to imply, a cause of action for extra-contractual damages caused by  
 26 improper or untimely processing of benefit claims.”); *Concha v. London*, 62 F.3d 1493,  
 27 1504 (9th Cir. 1995) (“[T]he Supreme Court held that relief under ERISA section  
 28 1132(a)(3) is limited to remedies available in equity, such as injunction, mandamus, and

1 restitution. Such relief does not include compensatory or punitive damages.”). Under  
 2 ERISA and binding authority from the Supreme Court of the United States and Ninth  
 3 Circuit Court of Appeals, Plaintiff cannot recover punitive damages from the administrator  
 4 of the Retirement Plan based on his delay in receiving benefits under the Retirement Plan.


5 Alternatively, Defendant is entitled to summary judgment as a matter of law on  
 6 Plaintiff’s claims for mail fraud and a violation of the ADA. Plaintiff asserts that the  
 7 communications related to the delay in receiving his benefits under the Retirement Plan  
 8 support a mail fraud cause of action under 18 U.S.C. § 1341. (ECF No. 1; ECF No. 194 at  
 9 7, 30). However, the criminal mail fraud statute does not provide authority for a private  
 10 cause of action. *See Ross v. Orange Cty. Bar Ass’n*, 369 F. App’x 868, 869 (9th Cir. 2010)  
 11 (citing *Wilcox v. First Int’l Bank of Oregon*, 815 F.2d 522, 533 n.1 (9th Cir. 1987)) (“Ross  
 12 had no separate private right of action for mail fraud under 18 U.S.C. § 1341.”). With  
 13 respect to the ADA claim, Plaintiff asserts that he has suffered a brain injury and is disabled  
 14 but provides no admissible evidence to support a cause of action under the ADA. 42 U.S.C.  
 15 §§ 12101 *et seq.* Plaintiff does not identify a Title of the ADA supporting a cause of action  
 16 against Defendant, the administrator of the GCIU Retirement Fund. Further, Plaintiff fails  
 17 to provide any admissible evidence to establish that the conduct of Defendant violated any  
 18 provision of the ADA.

19 The Court concludes that Defendant is entitled to summary judgment as a matter of  
 20 law on all claims.

#### 21 IV. CONCLUSION

22 IT IS HEREBY ORDERED that the motion for summary judgment is GRANTED.  
 23 (ECF No. 152). The Clerk of Court is directed to enter judgment on behalf of Defendant  
 24 Wenner and against Plaintiff as to all claims.

25  
 26 DATED: 7/27/18

  
 WILLIAM Q. HAYES  
 United States District Judge

**Additional material  
from this filing is  
available in the  
Clerk's Office.**