ORIGINAL

19-8427

No. 19-55432

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

DILLARD JAMES MCNELEY,

*Petitioners*,

v.

SHEPPARD, MULLIN RICHTER & HAMPTON LLP; *et al.*, JASON W. KEARNAGHAN, an individual, a California Corporations, an individual, SWIFT TRANSPORTATION CO. OF Arizona LLC, ET AL., and DOES 1-10, inclusive,

*Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the District Court err in denying McNeley Request for an Evidentiary Hearing Motions in light of the 5th and 14th Amendment constitution rights violated (ECF No. 13, 17.) On 01/25/2019, Motion 18 re-set for hearing on 4/2/2019, at 10:00 AM before Magistrate Judge Maria A. Audero; *See* Order 30.

2. "Fraud upon the State Court" versus a frivolous lawsuit, within the meaning of Rule 60'(b)(3) saving clause by distinguishing from intrinsic and extrinsic fraud. The question presented is The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute "extrinsic fraud upon the court". intentionally and unintentionally or just intentionally protected or unprotected by immunity or is detected "fraud upon the court" predominantly voidable to set aside judgment within appellate courts' review of a state-courts' decree or final judgment order overrule frivolous defiance?

3. The question is whether the intentional perjury and/or concealment of documents by an attorney are actions which constitute extrinsic fraud. See *Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003) 579 S.E.2d 605. A lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." ABA Code, 102 (a) (3) States that while representing a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal... See *S. Williston, Life and Law* 271-72 (1940). [Bus. & PROF] CODE 6103

(West 1974), a violation of the Oath or Duties of an attorney is a cause for discipline. Section 6068 (d) Makes it the duty of an attorney ("[n]ever to seek to mislead the judge or any judicial officer by an artifice or false statement of a fact or law."

4. An allegedly tortious act occurring long after the state-court rendered its judgment cannot be [barred] by *Rooker-Feldman* because there was [no] opportunity to complain about the allegedly injurious act in the state-court proceedings. *See Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1141 (9th Cir. 2004). The underlying concept is that "[a] state-court judgment is subject to collateral attack if the state-court lacked jurisdiction over the subject matter or the parties, or the judgment was procured through ("extrinsic fraud.") *Lake v. Capps* (*In re Lake*), 202 B.R. 751, 758 (9th Cir. BAP 1996). Also see *Davis v. Davis*, 236 S.C. 277, 113 S.E.2d 819 (1960), the Court considered the effect of an attorney's statement to the lower court during a divorce action. The Court determined that, by representing to the court that a party was in default when she was not, "[t]his reasonably was held to have been "extrinsic fraud" upon her and upon the State-court" and vacated a prior judgment as a result. *Id.* S.C. at 281, 113 S.E.2d at 821 (1960). The Court [noted] the attorney's representation was a *"bona fide mistake"* and, "therefore, constructive, rather than actual, fraud." *Id.* at 281, 113 S.E.2d at 821-22. also *See Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n-* 55 Cal.4th 1169, 151 Cal.Rptr. 3d 93, 291

P.3d 316(2013). California law protecting against extrinsic fraud. The parol evidence rule should [not] be used as a shield to prevent the proof of extrinsic fraud.

5. When Fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds. "extrinsic evidence" to prove an agreement contract is void or voidable for mistake, extrinsic fraud, duress, undue influence, illegality, alteration, lack of consideration, or another invalidating cause does not contradict the terms of an effective integration, because it shows that the purported instrument has [no] legal effect.

> **Extrinsic fraud on a court is, by definition, not an error by that court. It is, Rather, a wrongful act committed by the party or parties who engaged in the Fraud. *Rooker-Feldman* There does not bar subject matter jurisdiction when a Federal plaintiff alleges a cause of action for extrinsic fraud on a state-court and Seeks to set aside a state-court judgment obtained by extrinsic evidence** *Kougasian v. TMSL Inc* 9th Cir.2004

## The Judgment Is "Void" on its Face Because The Personal Leave of Absent For 30-Days Did Not Comply With the Requirement of Section 664.6.

McNeley claims that the judgment filed in 2012 is void because it did not comply with the requirements of Code of Civil Procedure Section 664.6.... As a consequence, he contends, the court's ruling of Aug 12, 2013. McNeley contends the 30-Day Personal Leave of Absent is **void** because it was [not] signed by Mr. McNeley and, as a factual matter, the fabricated PLOA, agreement was executed without McNeley's Request; Knowledge; and/or Consent. "Section 664.6 governs the entry of judgment pursuant to the terms of an agreement." See (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583 (Levy).) *Williams v. Saunders* (1997) 55 Cal.App.4th

- ***judgment is void are subject to direct or collateral attack at any time.*** (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226.)
- **It is settled that "parties" as used in section 664.6 means the litigants personally, not their attorneys.** (*Levy, supra*, 10 Cal.4th at p. 586.)

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No. 19-55432

# IN THE
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SHEPPARD, MULLIN RICHTER & HAMPTON LLP; *et al.*,
JASON W. KEARNAGHAN, an individual, a California
Corporations, an individual, SWIFT TRANSPORTATION CO.
OF Arizona LLC, ET AL., and DOES 1-10, inclusive,

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## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. 1291 and 1331. Nonetheless, on March 26, 2019, the District Court issued its Opinion and Order dismissing the Complaint for lack of jurisdiction. (ECF No. 45) The Opinion was corrected on February 18, 2020. Federal courts, it has long been the law that a plaintiff in federal court can seek to set aside a state-court judgment obtained through extrinsic fraud. In *Barrow v. Hunton*, 99U.S. (9 Otto) 80, 25 L.Ed. 407 (1878). After-discovered Fraud, "Relief will be granted against judgments regardless of the term of their entry." *Marine Insurance Co. v. Hodgson, 7 Cranch 332; Marshall v. Holmes*, 141 U.S. 589. also see *Crosby v. Bradstreet* Co. 312 F2d 483 (2nd Cir.) 373 U.S. 911, 83 S.Ct. 1300, 10 L.Ed. 2d 412 (1963) Where the court vacated a judgment as *void* 30 years after entry. *Marquette Corp. v. Priester*, 234 F. Supp. 799 (E.D.S.C. 1964). Rule 60(b)(3), Federal Court has both the duty and the power to vacate its own judgment and to give the District Court appropriate directions. See *Hazel-Atlas Co. v. Harford Co.*, 322 US 238, 64 S, Ct. 997, 88L.Ed. 1250

## BACKGROUND

### A. The Allegations in McNeley's Complaint Support a Finding of Extrinsic Fraud Upon the State-Court

The underlying case resulted from Defendant Swift attorney Mr. Kearnaghan enforce an agreement contract... Title Request for Personal Leave of Absence for 30-Days. McNeley claims the agreement was executed without his knowledge or consent. The Defendant Sheppard Mullin Attorney Jason W. Kearnaghan, obtained those judgments through "extrinsic fraud on the state-court". The alleged extrinsic fraud primarily consisted of wrongful acts by Defendant Sheppard Mullin Attorney Jason W. Kearnaghan concealment of material facts is just as misleading as explicit false statements. [L]ike any other verified pleading, a "statement an allegation" and other factual contentions [must] have evidentiary support. Federal Rules of Civil Procedure (FRCP), Summary Judgment 56(c)(4). [Affidavits or Declarations. [must] be made on personal knowledge]. Here, the record strongly suggests to Plaintiff McNeley that neither requirement was met. McNeley was unable to find any substantial factual basis in the record for Defendant's Sheppard Mullin Attorney Jason W. Kearnaghan, misrepresentation of material facts, and/or concealment.

6. On August 16, 2012, Appearance before Judge; Ruth Ann Kwan, In the case, McNeley v. Swift Transportation. Co. of Ariz. Ct. BC464787. Defendant's Sheppard Mullin Attorney Jason W. Kearnaghan, concealment of the documents ("PLOA"), from the court. When he represented Defendant Swift, in violation of the professional conduct [Bus. & Prof. Code, 6068, subd (d). (*acts that misleads court's*)

**Extrinsic fraud- on a court is, by definition, not an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. Rooker- Feldman therefore does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state-court and seeks to aet aside a state-court judgment obtained by that extrinsic fraud.** See *Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1141 (9th Cir. 2004).

7. On August 16, 2012, Appearance before the Honorable Ruth Ann Kwan, In the case, McNeley v. Swift Transportation BC464787. Mr. Kearnaghan acknowledged at oral argument on the motion to dismiss, that there was an Agreement contract... Title Request for Personal Leave of Absence for 30-ays, that required McNeley's signature in order to be binding on the Mr. McNeley. Attorney Mr. Kearnaghan made false representations and statements after adequately examining the document and discovering that there was [no] written informed consent in the [*Signature Block*] from Mr. McNeley. Attorney Mr. Kearnaghan, representing Swift transportation made false representations and statements on *behalf* of his client ("Swift") which can *prejudice* the tribunal and the opposing party and can also involve a conflict of interest. *See* Rule 3.7. At the last-minute Sheppard, Mullin, Attorney Mr. Kearnaghan, made himself a fact-witness.

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1. Only "testimonial statements" "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, (Fed. R. Evid. 802), is not subject to the Confrontation Clause." especially since the *Sixth Amendment* provides the right to confront (human) "witnesses." The Supreme Court held that the Confrontation Clause *bars* the 'admission of testimonial statements of a witness who will not appear at trial unless he was unavailable to testify, and the plaintiff had had a prior *opportunity* for cross-examination." 541 U.S. at 53-54. Only "testimonial statements" cause the declarant to be a 'witness' In *United States v. Washington*, 2007. and/or concealed documents from the Court and Plaintiff. A duty to disclose all

evidence to the Plaintiff and the Court. The admission of hearsay evidence sometimes results in depriving a party of their right to confront opposing witnesses, as the Supreme Court observed in *Delaney v. United States*, 263 U.S. 586 (1924).

**"We" GAVE HIM A 30-DAY PERSONAL LEAVE OF ABAENCE, WITH THE EXPRESSED INSTRUCTIONS TO REMAIN IN CONTACT WITH THE EMPLOYER. MR. MCNELEY FAILED TO DO SO, MCNELEY DID NOT CONTACT THE EMPLOTER, AGAIN, NO RESPONSE FROM MR. MCNELEY. SO, IT'S DEEMED A JOB ABANDONMENT [BASED] UPON HIS FAILURE TO COMMUNICATE WITH THE EMPLOYER, HE WAS TERMINATED FOR A VOLUNTARY RESIGNATION".**
See Report Transcript; Page;14, Line; 10-16.

8. "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony. 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony; in turn, is typically 'a *solemn* declaration or affirmation made for the purpose of establishing or proving some fact; *Ibid.* An accuser who makes a statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S., at 51. See *Trinsey v. Pagliaro, D.C. Pa.* (1964), 229 F. Supp. 647 "Statements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment."

**An "Unconscionable Scheme or Plan" Implies a Knowing and Intentional Misrepresentation Rather than a Reckless Disregard for the Truth**

On August 16, 2012, Defendant Sheppard Mullin Attorney Jason W. Kearnaghan, [T]estified on behalf of Swift transportation making himself a fact Witness which is prohibited by Rule 3.7. Lawyer as Witness. Defendant Sheppard, Mullin, Attorney, Jason W. Kearnaghan, testified that "[W]e gave him the Plaintiff McNeley a 30-Days Personal Leave of Absence. but conceal the document from the plaintiff and the court. [but what he did not know is that plaintiff was able to retrieve a copy from the [EDD-OFFICE] he implicated himself as a fact Witness at the last minute. I am not alleging a legal error by the state-court; rather. I am alleging a wrongful act by the Defendant Sheppard Mullin, Attorney Jason W. Kearnaghan. In doing this he "impeded" and/or violated, my constitutional right by denying plaintiff the opportunity properly prepare my case and also committed "extrinsic fraud on the state-court", which is defined as conduct which prevents a party from presenting his claim in Court. See *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1141 (9th Cir.2004). In the added allegations, McNeley claimed, inter alia, that the Defendants concealed

[critical] documents and gave false misleading facts to the court committing perjury. *See* Section 664.6. The documents were [not] signed by the parties in the manner contemplated by section 664.6. An agreement is [not] enforceable under section 664.6 [*Unless*] it is signed by [all] of the parties to the agreement, not merely the parties against whom the agreement is sought to be enforced. *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162 [64 Cal.Rptr.2d 571].) also see *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793. 810 [71 Cal.Rptr.2d 265].

A misrepresentation may by verbal, written or implied by conduct. "*Thirty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567.) "....False representation made recklessly and without regard for the truth in order to induce action by another are the equivalent of misrepresentation knowingly and intentionally uttered." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55. "Causation requires proof that the defendant's conduct was a "substantial factor" in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132.) also see *Weddington Productions Inc v. Flick* (1998) "Order Enforcing Agreement, ETC. This order purported to impose upon appellants numerous material agreement terms to which appellants had [n]ever agreed. Section 664.6 authorizes none of this. *Before* Judgment can be entered, Two Key prerequisites must be satisfied, both of which were missing in McNeley's Case. First, there must be contract formation. The litigant must first agree to the material terms of an agreement. Agreement is a contract, and the *legal principles* which apply to contracts generally apply to settlement agreement contracts *Levy v. Superior Court* 896 P.2d 171 Docket No. S035538. Agreement must be signed by the parties.

**It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline.**

9. A lawyer should not conceal or suppress evidence that he or his client has a legal obligation to reveal or produce. ABA Code, 102(A) states that while representing a client, A lawyer shall not [conceal or knowingly fail to disclose] that which he is required by law to reveal...*See* S. Williston. Life and Law 271-72 (1940). [Bus. & PROF.] CODE 6103 (West 1974), a violation of the oath or duties of an attorney is a cause for discipline. Section 6068 (d) makes it the duty of an attorney never to seek to mislead the court or any judicial officer by an artifice or false statement of a fact or law. See *Sullins v. State Bar* 542 P.2d 631, 15 Cal.3d 609, 125 (1975). Attorneys were held in contempt for failing to disclose to the judge.

TO SET ASIDE A JUDGMENT OBTAINED BY
EXTRINSIC FRAUD ON A STATE-COURT

In considering collateral attacks on final judgments, a court [must] balance the interest of finality against the need to provide a fair and just resolution of the dispute. See *Hagy v. Pruitt*, 399 S.C.425, 529S.E.2d 714 (2000). In most circumstances, there is no statute of limitations when a party who seeks to aside a judgment due to [extrinsic] fraud upon the court. Rule 60(b)(3)(4), SCRCP, provides, in part:

"Extrinsic fraud" is "fraud that induces a parson not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." See *Hazel-Atlas Co. v. Harford Co* 322 U.S. 238, 64 S, Ct. 997, 88 L.Ed. 1250. It is fraud which misleads a court in determining issues and [induces] the court to find for the party perpetrating the extrinsic fraud. In order to secure equitable relief on the [basis] of extrinsic fraud, the fraud [must] be extrinsic. *Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003) 579 S.E.2d 605. The subornation of the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud on a state-court. Extrinsic fraud on a court is, by definition, [n]ot an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. *Rooker-Feldman* therefore does [not] bar federal jurisdiction. In order to secure equitable relief on the basis of fraud, the fraud [must] be extrinsic. *Bryan v. Bryan, 220* S.C. 164, 66S.E.2d 609 (1951). (extrinsic fraud is necessary in order to secure equitable relief vacating a prior judgment) ... ***"EXTRINSIC FRAUD"***

## I.
## ARGUMENT
## THE ROOKER-FELDMAN DOCTRINE

The District Court held that *Rooker-Feldman* doctrine deprived it of jurisdiction over Plaintiff McNeley's "extrinsic fraud" upon the state-court claims, Wrongful Termination in violation of public policy claims, and Failure to Accommodate under the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, an intentional infliction of emotional distress. Because those claims effectively sought review of a prior state-court judgment. See *Zamora v. Clayborn Contracting Group., Inc.*, 28 Cal.4th 249, 121 Cal.Rptr.2d 187, 47 P.3d 1056, 1063 (2002). *Wood v. McEwen*, 644 F.2d 797, 801(9th Cir.1981). also see *Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1141 (9th Cir. 2004). and added McNeley allegations of conspiracy between Defendant Sheppard, Mullin, Attorney, Jason W. Kearnaghan, to obstruct justice and to deny constitutional rights. In the added allegations, McNeley claimed, inter alia, that the Defendant Mr. Kearnaghan, had intentional mislead the Court in determining issues. nondisclosure; misrepresentation; concealment of documents by attorney Jason W. Kearnaghan, are actions which constitute extrinsic fraud. See *Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003) 579 S.E.2d 605. McNeley was deprived the opportunity to challenge Defendants "Fabricated evidence", despite his request for production of documents, The false "Fabricated Document" Request for Personal Leave of Absent. See ***Brady v. Maryland***. 273 U.S. 83 (1963), was a

landmark United States Supreme Court case that established that the attorney [must] turn over [all] evidence that might exonerate the defendant (exculpatory evidence) to the defense. In ***Brady***, the Court held failure to disclose evidence favorable violates the due process rights when the evidence is [material] to guilt or punishment.

**Specifically, California's Law Against Filing False Instruments applies To [Any] False or Forged Document If Either of The Following is True:**

(1) The information contained in the document is of such a nature that the government [EEOC] is required or permitted by law to rely on it; or

(2) The information contained in the document materially affects the rights of third parties, in a way that is contemplated by the law or regulation providing for the document to be filed in public office.

Even if the contract appears to be valid, extrinsic fraud is a defense to enforcement of the agreement. If a party wishes to sue the party whose [signature] was forged. Forgery is considered [extrinsic fraud execution]. McNeley Alleged that on July 23, 2009, The Defendant ("Swift") Terminal manager Branndon R. Obray, [committed forgery] by using Plaintiff McNeley's Employment Information to Request the 30-Day Personal Leave of Absent. Without McNeley ***knowledge*** or ***consent***. See *Levy v. Superior Court* 896 P.2d 171 Docket No. S035538. also see

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2. ***Black's Law*** definition of Fabricate evidence; Is to arrange or manufacture circumstances or indicia, after the fact committed, with the purpose of using them as evidence, and of deceitfully making them appear as if accidental or undersigned; to devise falsely or contrive by artifice with the intention to deceive.

"The *ad-hoc* addition of a party's signature that was neither contemplated in the original document nor bargained for is simply insufficient to render the document enforceable under Section 664.6. Under California Procedure failure to get written informed consent. Which is a primary element of an agreement. Even apart from statute or constitutional protection, however, the employer's right to terminate employees is not absolute. The mere fact that an agreement contract is terminable [at will] does not give the employer the absolute right to terminate in all cases. *Patterson v. Philco Corp.* (1967) 252 Cal.App.2d 63, 65 [60 Cal.Rptr. 110].) McNeley's Extrinsic fraud action are based on alleged wrongful acts by the Defendant Swift attorney Kearnaghan who concealed the request for personal leave of absent from the plaintiff and the court.

**Now Litigant May Offer Any Evidence to Prove "Extrinsic Fraud" If it Contradicts A Written Agreement Contract. When Fraud is Proven, It Cannot be Maintained That the Parties Freely Entered into an Agreement Reflecting A Meeting of the Minds.** *See Riverisland Cold Storage, Inc, v. Freson-Madera Production Credit Assn.,* 55 Cal.4th 1169, 1171 (2013).

(1) On July 17, 2009, Written Notice was given to Swift, Manager Branndon R. Obray [via Fax] 310-549-3119. That McNeley was on an Authorized-90-Day Medical Leave of Absent Pursuing to his Doctor's orders. Thomas A. Curtis, M.D., Inc., from July 17, 2009, to October 17, 2009. This was McNeley second leave of absence while working for this defendant Swift. *See* Appendix — B C

3. P.12(b)(6), the ("issue") is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim." See *Sienkiewicz v. Sarema N. A.* 534 U.S. 506 (2002) ...Title VII of the Civil Rights Act of 1964. (FEHA), Prohibits employer from failing to make reasonable accommodation for ("Known") Physical or Mental Disability (12940, subd) (m).)

McNeley is [n]ot asking the District Court to review a state-court judgment and/or, instead, asserting an independent constitutional challenge to the Due process claim, of the 5th 6th and 14th Amendment constitution rights. *Rooker-Feldman*... applies [only] when the federal plaintiff both asserts as her injury legal error or errors by the state-court and seeks as her remedy relief from the state-court judgment. See *Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1141 (9th Cir. 2004). The *Rooker-Feldman* doctrine does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for [extrinsic fraud on a state court] and seeks to set aside a state court judgment [obtained by that extrinsic fraud upon the state-court].

- It is not... necessary that the court reliance upon the misrepresentation

be the sole decisive factor in influencing the court Decision... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing the Court decision. (*Engalla, sura*, 15 Cal.4th at pp. 976—977, internal citations omitted.) justifiable reliance is an essential element of a claim for fraudulent misrepresentation, and the reasonableness of the reliance is a question of fact. (*Guido v. Koopman* (1991) 1 Cal.App. 4th 837, 843 [2 Cal.Rptr.2d 437] internal citations omitted.) A complete causal relationship between the fraud or deceit and the plaintiff's damages is required... Causation requires proof that the Defendant's conduct was a substantial factor in bringing about the harm to the plaintiff. *See Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658].

## II. Legal Standard

A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. See *Platsky v. CIA*, 953 F. 2d. 26 – Court of Appeals, (2nd Cir.1991) *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); see also *Wright v. Newsome*, 795 F.2d 964, (11th Cir. 1986) (citation omitted) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief."). In considering a motion to dismiss, the court [must] accept as true [all] well-pleaded factual allegations and view them in a light most favorable to the plaintiff. See *Hishon*, 467 U.S. at 73. This standard imposes an "exceedingly low" threshold for the nonmoving party to survive a motion to dismiss for failure to state a claim. See *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th 1985).

Federal Rule of Civil Procedure 9(b) requires that "[i]n all averments of fraud..., the circumstances constituting fraud... shall be stated with particularity." The particularity requirement, however, [must] be read in conjunction with Federal Rule of Civil Procedure 8(a), which provides that a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." See *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985).

The court [must] review [all] of the evidence in the record but make no credibility determinations or weigh any evidence. A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying or concealing evidence before a claim is actually filed. *Trevino v. Ortega*, 969 S.W. 2d at 955. In most every jurisdiction, there are also civil consequences based upon the loss of extrinsic evidence resulting in the ability to prove valid claims or develop defenses. The theory behind imposing sanctions for spoliation of evidence is that when a party destroys or concealing evidence, it is reasonable to infer that the party had "*Consciousness Of Guilt*" or other motivation to avoid the extrinsic evidence being seen by the Courts.

## Defendant Swift Transportation Was Disqualified From Litigation At The Unemployment Appeals Board Hearing

On March 07, 2011, In the California Unemployment Insurance Appeals Board Hearing, McNeley v. Swift Transportation, Case No. 3553633 at the Inglewood Office Of Appeals 9800 South La Cienega Blvd – Ste 901, Inglewood CA 90301.

**FINDINGS OF FACT:** *Benjamin Kim...* Administrative Law Jude
*Absence Caused By Illness Does Not Constitute Misconduct.*

**Here, since the evidence of record establishes the claimant was not able to return to work due to disability and was subsequently discharged for not having returned to work due to continuing disability, it is found the claimant did not abandon his job and was effectively discharged for being absent due to illness. *Based* on the expiration of personal leave. The claimant did [n]ot Quit.** Appendix B—(***EDD***)

## III.
## THE MCNELEY IS NOT ASKING THE DISTRICT COURT TO REVIEW A STATE COURT JUDGMENT. INSTEAD, HE IS ASKING THE FEDERAL COURT TO SET ASIDE A JUDGMENT THAT WAS OBTAIN BY EXTRINSIC FRAUD

Swift contended McNeley could not prevail on his claim of wrongful termination because McNeley was not terminated, but instead he voluntarily abandoned his job. Defendant's attorney Jason W. Kearnaghan, ("Testified") on *behalf* of his client ("Swift") [making himself a fact-witness] which is prohibited by Rule 3.7. That ("He") gave McNeley the Requested for Personal Leave of Absence for 30-Days. Which McNeley denies. Because in the [signature block]

*Which said*: ***Cannot Reach Driver***. Is what Swift Manager Branndon R. Obray writing on the Document Title: Requested for Personal Leave of Absence *See* EDD-Employment Development State of California Voluntary Quit VQ 285-LEAVES OF ABSENCE. *Which said*: Title 22, Section 1256-16(b) provides: the claimant and employer [must] mutually agreeing that the claimant is expected to return to work at the end of the leave. The employment relationship is temporarily suspended, but not terminated. All three conditions [must] be present for a finding of a true leave. If all [three conditions] are [not present], a true leave does not exist.

McNeley is NOT asking the District Court to Review a State-Court Judgment. But what McNeley is asking the Federal courts to do set aside a state-Court judgment that was [*obtained*] by [*extrinsic fraud*] because [e]xtrinsic fraud on

a state-court is, by definition, not an error by that court. See *Wood v. McEwen*, 644 F.2d 797, 801(9th Cir.1981). Under California law, extrinsic fraud is a basis for setting aside an earlier judgment. See *Zamora v. Clayborn Contracting Group., Inc.*, 28 Cal.4th 249, 121 Cal.Rptr.2d 187, 47 P.3d 1056, 1063 (2002). At First glance, a federal suit alleging a cause of action for extrinsic fraud on a state-court might appear to come within the *Rooker-Feldman* doctrine. It is clear that in such a case the plaintiff is seeking to set aside a state-court judgment. But for *Rooker-Feldman* to apply, a plaintiff [must] seek not only to set aside a state-court judgment; he or she [must] also allege a legal error by the state-court as the basis for that relief. See *Noel*, 341 F.3d at 1164 ("If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court *and* seeks relief from a state-court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal court.") (emphasis added). A plaintiff alleging extrinsic fraud on a state-court is not alleging a legal error by the state-court; Rather, he or she is alleging a [Wrongful Act] by the Defendants and/or the adverse party. See *id.* ("If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction."). *See Riverisland Cold Storage, Inc, v. Freson-Madera Production Credit Assn.,* 55 Cal.4th 1169, 1171 (2013). The parol evidence rule [protects] the terms of a [valid] written agreement, although it does [*not bar evidence*] challenging the validity of the agreement itself

if the plaintiff wishes to prove that the instrument and/or agreement is ***Void*** or voidable because it was procured by extrinsic fraud. Furthermore, fraud on the court under Rule 60(d)(3) does not encompass "ordinary fraud," and [must] also be distinguished from "fraud" under Rule 60(b)(3)—i.e., those frauds which are not directed to the judicial machinery itself. Rule 60(b)(3) provides relief from judgment where is "fraud... misrepresentation, or misconduct by an opposing party. Under Rule(b)(3) must be made, a claim based upon fraud on the court under Rule(b)(3) is intended "to protect the integrity of the judicial process" and, therefore, *is not time barred.* McNeley alleged that Defendant Sheppard Mullin Attorney Jason W. Kearnaghan concealment of the document Title; Request for Personal Leave of Absent from the Plaintiff and the Court are actions which constitute extrinsic fraud. However, in this case, as in Evans, there was a showing that one has acted with an intent to deceive or defraud the state-court. See *Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003) 579 S.E.2d 605. The subornation of *perjury* by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Attorney [must] refrain from any act that [misleads] the Court. See (Bus. & Prof. Code, Rules Prof. Conduct), 6068 subd. (d), extrinsic fraud on a court is, by definition, not an error by that court. It is, rather, a wrongful act committed by the party or parties who engaged in the fraud. *Rook-Feldman* therefore does not bar subject matter jurisdiction when a federal plaintiff alleges a cause of action for extrinsic fraud on a state court and seeks to set aside a state court judgment....

## REASONS FOR GRANTING THE PETITION

**This Case presents the question whether a ("single judge") Not a three-panel judge district lower court may "Refuse" a plaintiff Request For Evidentiary Hearing without giving the reason for refusal. Moreover, the ruling of the lower court decided in this case is in conflict with the decisions of another appellate Court's. (explaining *Rooker-Feldman* doctrine barred plaintiff's claim because alleged *legal injuries* arose from the "state-court's purportedly erroneous judgment" and the relief he sought "would require the district court to determine that the state-court's decision was wrong and thus void").**

See *Noel*, 341 F.3d at 1164 ("If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court *and* seeks relief from a state-court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal court.") (emphasis added). ("A Plaintiff alleging extrinsic fraud on a state-court is not alleging a legal error by the state-court; rather, he or she is alleging a wrongful act by the Defendants and/or the adverse party"). See *id.* ("If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, Rooker-Feldman does not bar jurisdiction.").

Federal Rule of Civil Procedure 60(b)(3) allows a court, upon motion of a party, to relieve a party from a final judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." In addition, Rule 60(b) states that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding... or to set aside a judgment for fraud upon the court." In *Beggerly*, the United States Supreme Court noted that there [must] be a difference

between the type of fraud that could be the basis for a Rule 60(b)(3) motion for relief from judgment and the type of fraud necessary to maintain an independent Rule 60(b) action. Otherwise, the one-year time limit on Rule 60(b)(3) motion "would be set at naught." *Beggerly*, 524 U.S. at 46, 118 S. Ct. at 1867. Thus, "[i]ndependent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand departure' from rigid adherence to the doctrine of *res judicata*." *Id.* (quoting *Kougasian v. TMSL, Inc.*, 359 F. 3d 1136, 1141 (9th Cir. 2004) also see *Hazel-Atlas Glass Co. v. Harford-Empire Co.,* 322 U.S. 238, 244, 64 S. Ct. 997, 1000, 88 L.Ed. 1250 (1944)). Therefore, the Court stated, "an independent action should be available to prevent a grave miscarriage of justice." *Id.* at 47, 118 S. Ct. at 1868. The Court of Appeals for the Eleventh Circuit has defined "fraud upon the court" as "only 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 cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985).

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4. This clause is commonly referred to as the *"savings clause." See, e.g., In Re Lawrence*, 293 F.3d 615, 622 n.5 (2d Cir. 2002). also see *Hagy v. Pruitt*, 339 S. C. 425, 430, 529 S.E. 2d 714, 717 (2000); *Evans*, 294 S.C. at 529, 366 S.E.2d at 46. After the period to claim relief under Rule 60(b)(3), *SCRCP*, has expired, Courts have required a showing of extrinsic fraud to vacate a judgment. A federal court has inherent equitable power to vacate a judgment that is *obtained* by extrinsic fraud on the court. See *Noel v. Hall,* 341 F.3d 1148, 1163-65(9th Cir.2003), also see *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir.2004)

**Generally speaking, only the most egregious conduct, such as bribery of a judge or members of a jury, or the [f]abrication of Evidence by a party in which an attorney is implicated will constitute a Fraud on The Court.**

*Chewning v. Ford Motor Co.*, 354 S.C. 72 (2003) 579 S.E.2d 605. Subornation of *perjury* by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. The evidence is overwhelming, beyond clear and convincing, and even beyond any reasonable doubt that Employer Swift, discharged McNeley within 30-Days, while on a temporary disability and with a valid *Workers' Compensation Claim was Pending* and/or *Active*. *See* Appendix B— McNeley Second 90-Day Authorized Medical Doctor Notice And/or Workers' Compensation Claim. *The Americans with Disabilities Act* (ADA) became law in (1990). The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

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5. Government Code, 12940(a)(c)(h)(j)(k)(m) and (n), along with Labor Code, 132(a), commonly known as ("*FEHA*"), make it absolutely clear that an employer cannot discharge a person from employment while disabled from a workplace injury and/or while a Workers' Compensation Case is pending. *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1150. Section 132(a) Provides: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. (A) Any employer who discharges, and/or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor. On September 28, 2009, McNeley was wrongfully terminated by Swift, within 30-Days, while still-on an Authorized by his doctor Protected Medical Leave. The essential elements of a claim of failure to accommodate are: (1) the plaintiff has a disability covered by FEHA;(2) the plaintiff is a qualified individual; and (3) the employer failed to reasonably accommodate the plaintiff's disability. See *Jensen v. Wells Fargo Bank*, 102 Cal.Rptr.2d 55 (2000) 85 Cal.App.4th 245.

"The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter; 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision [citation]." ' "(*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 5d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- ***"We...conclude a supervisor is a 'person' subject to liability under FEHA....As supervisors, we conclude the language of FEHA is unambiguous in imposing personal liability for harassment or retaliation in violation of FEHA."*** (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1208, 1212 [37 Cal.Rptr.2d 529].)

Defendant Swift, herein did, in fact, discharge plaintiff McNeley on September 28, 2009, within 30-Days of McNeley's Authorized 90-Days Medical Leave. Good Cause Rule the California Wrongful Discharge from Employment Act of 1987 (FEHA) created a cause of action for employee who believe that they were terminated without good cause. Although similar legislation has been introduced elsewhere, California is so far the only state to have passed a law with such far-reaching effects. The statute prohibits discharge for other than good cause after a designated probationary period and gives the employee the right to challenge a termination in court. The statute also limits damages to up to four years of lost wages, including the value of fringe benefits, with interest. *See* U.S.C. 2000(e). The second time 07/17/09. Defendant Swift never even attempted to contact McNeley treating Dr. Thomas Curtis, the way Defendant Swift, did the first time 01/29/2008.