

20-1447

ORIGINAL

IN THE

Supreme Court of the United States

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SUPREME COURT, U.S.

Kenneth R. Kunzer,

Petitioner,

v.

Lisa A. Hiniker, ET AL.,

Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

Kenneth R. Kunzer, Pro Se
9350 Lake Road
Woodbury, MN 55125
Cell Phone: 651-366-1369
Kenk2764@msn.com

April 7, 2021

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SUPREME COURT, U.S.

QUESTIONS

Under the direction of Albert P Herschler the law firm of Meier, Kennedy and Quinn created and executed the Last Will and Testament of Mr. Herschler dated April 5th, 1960, and Codicil dated January 16th, 1961, which included "Trust A and Trust B". On April 5th, 1960, U.S. bank, [f /k/a 'First Trust National Association"], became trustee of Trust A and Trust B. On the death of Mr. Herschler, Helen A. Herschler became beneficiary of Trust A and B. Mrs. Herschler passes away on Nov. 14, 1994.

Pursuant to the January 16th, 1961 Codicil of Albert P. Herschler, at First (d) "*This trust shall terminate upon the death of the last survivor of my said wife...*" The above Codicil is referring to Trust B. The last survivors of Mrs. Herschler and legal beneficiaries of Trust B are Audrey Heriot, Gary C. Kunzer, William P. Kunzer, Richard A. Kunzer and Kenneth R. Kunzer. Pet.App. 8a-9a. In violation of the above Codicil U.S. Bank terminated Trust B and gave the assets to St. Paul's on the Hill Episcopal Church on June 27th, 1995. Pursuant to the Last Will of Mr. Herschler, Fifth (f) "*The trust estate which my said wife disclaims or any portion of the trust estate remaining on the death of my said wife, which my said wife shall have failed to dispose of in an exercise of the power of appointment hereinbefore conferred upon her, shall be added to and become part of "Trust B."*" [A]s of June 27th, 1995, U.S. Bank can no longer add Trust A

to Trust B. U.S. Bank terminated Trust A on September 3, 1997.

On May 8, 1998, in Washington County, Minnesota, probate court, U.S. Bank admitted that they have kept the assets of Trust A. Pet.App. 14a-15a.

On July 14, 2003, Petitioner filed a petition by heir of testator seeking declaration of resulting trust on failure of express testament trust in Minnesota, Ramsey County District Court. The above petition was filed within six years pursuant to Minn. Stat. 501C.1005. The above petition was to make U.S. Bank account for the assets of Trust A.

On October 10th, 2003, U.S. Bank had ex parte communications with the above court. Pet.App. 16a Order n. 1. U.S. Bank lied and said they have "distributed all assets of Trust A". Pet.App. 16a Fact n. 5. On October 13, 2003, U.S. Bank obtained and order denying petitioner and legal heirs a hearing and access to the court. Petitioner's petition for a resulting trust is still on file in Ramsey Co. Dist. Ct. and yet to be heard. Pet.App. 16a Order n. 2.

The foregoing raises the following questions.

1. Why did Magistrate Judge Menendez refuse to look at the Last Will and Testament and Codicil of Albert P. Herschler?
2. Why did Judge Menendez refuse to look at the Ramsey County District Court June 27th, 1995 Order, terminating Trust B?

3. Why did Judge Menendez refuse to look at the Ramsey County District Court Sept. 3rd, 1997 Order, terminating Trust A?
4. Why did Judge Menendez refuse to look at the Wash. Co. Minn. Probate Ct., May 8th, 1998 Order, in which U.S. Bank admitted they did not honor the Court approved Settlement Agreement and kept the assets of Trust A? Pet.App. 14a-15a.
5. Why did U.S. Bank never file a final account of the Estate of Helen A. Herschler in Wash. Co. Probate Ct.?
6. Why did U.S. Bank never file a proper receipt, in Ramsey Co. Dist. Ct., showing the distribution of the remainder of Trust A to Saint Paul's Church?
7. Pursuant to the Last Will of Albert P. Herschler can Trust A be added to Trust B after Trust B was terminated on June 27, 1995?
8. Who did U.S. Bank distribute the remainder of Trust A assets too?
9. Why did Judge Menendez use the null and void ex parte October 13, 2003 Order, in her report and recommendation?
10. Did any of the above-named courts have personal and subject matter jurisdiction over petitioner and the other legal heirs?
11. Are defendants employed by U.S. Bank continuing to buy securities across state lines with Trust A assets in violation of 18 U.S.C. 1962(a) and Minn. Stat. 609.903 Subd. 1, (1)(3)?

**PARTIES TO THE PROCEEDING AND
RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

The parties to the proceedings include the Petitioner Kenneth R. Kunzer, for himself and all others similarly situated. The Respondents are not on file as being served the summons and complaint in United States District Court District of Minnesota, case no. 20-0882 (JRT/KMM), and are not parties.

- Lisa A. Hiniker, an individual predicate actor in schemes violating federal laws providing that fraud and embezzlement are *malum in se* offenses, an employee of U.S. Bank and as Trustee of Trust A & B Under the Last Will and Testament of Albert P. Herschler
- U.S. Bank, an enterprise affecting interstate commerce, and 18 U.S.C. 1961(4) association-in-fact
- Charles M. Bichler, Esq., individual predicate actor in schemes violating federal laws providing that fraud and grand larceny are *malum in se* offences, an employee of Meier, Kennedy & Quinn
- John C. Gunderson, Esq.; individual predicate actor in schemes violating federal laws providing that attempted extortion are *malum in se* offenses, an employee of Meier, Kennedy & Quinn

- Meier, Kennedy & Quinn, Chartered, an enterprise affecting interstate commerce, and 18 U.S.C. 1961(4) association-in-fact
- Denise Suzanne Rahne, Esq.; individually and employee of Robins Kaplan LLP
- Ena M. Kovacevic, Esq.; individually and employee of Robins Kaplan LLP
- Robins Kaplan LLP, an enterprise affecting interstate commerce, 18 U.S.C. 1964(4) association-in-fact
- Michael D. Johnson, Esq.; individual predicate actor in schemes violating federal laws providing that attempted extortion are *malum in se* offenses, employee of Lawgix Lawyers, LLC
- Lawgix Lawyers, LLC, an enterprise affecting interstate commerce, 18 U.S.C. 1964(4) association-in-fact

**LIST OF ALL PROCEEDINGS
DIRECTLY RELATED**

*In the Matter of Trust B Under the Will of
Albert P. Herschler, Deceased, No. CX-67-355788
Minn. Ramsey Co. Dist. Ct., Findings of Fact and
Order Allowing Accounts Terminating Trust B and
Discharging Trustee entered June 27th, 1995.*

*Estate of Helen A. Herschler, Deceased, No. PX-
95-400308, Minn. Wash. Co. Probate Ct., Order for
Judgment entered July 11, 1997.*

Estate of Helen A. Herschler, Deceased, No. PX-95-400308, Minn. Wash. Co. Probate Ct., Settlement Agreement and Mutual Releases entered July 21, 1997.

In the Matter of Trust, A Under the Will of Albert P. Herschler, Deceased, No. C8-67-355787, Minn. Ramsey Co. Dist. Ct., Findings of Fact and Order Allowing Accounts Terminating Trust A and Discharging Trustee entered Sept. 3rd, 1997.

Estate of Helen A. Herschler, Deceased, No. PX-95-400308, Minn. Wash. Co. Probate Ct., Order Allowing Amended Final Account and Settling Estate and Order of Distribution entered May 8, 1998.

In the Matter of Trust, A Under the Will of Albert P. Herschler, Deceased, No. C8-67-355787, Minn. Ramsey Co. Dist. Ct., Order entered Oct. 13, 2003.

In the Matter of Trust, A Under the Will of Albert P. Herschler, Deceased, No. 62-TR-CV-17-60, Minn. Ramsey Co. Dist. Ct., Judgment entered April 17th, 2018, Fact No. 15.

Kunzer v. Hiniker, et al., No. 20-CV-0882 (JRT/KMM) U.S. District Court District of Minnesota, Report and Recommendation entered June 6th, 2020.

Kunzer v. Hiniker, et al., No. 20-CV-0882 (JRT/KMM) U.S. District Court District of Minnesota, Order entered June 17, 2020.

Kunzer v. Hiniker, et al., No. 20-2386 Steven M. Colloton, Bobby E. Shepherd and Jonathan A. Kobes “judgment filed sua sponte affirmed” Judgment entered Nov 24, 2020.

Kunzer v. Hiniker, et al., No. 20-2386 U.S. Court of Appeals for the Eighth Circuit Order entered January 12, 2021.

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- I. Employees of the law firm Meier, Kennedy and Quinn and U.S. Bank blatantly violate the terms of The Last Will and Testament and Codicil of Albert P. Herschler**
 - A. U.S. Bank embezzles Trust B from the legal heirs of the Herschler Estate.**
 - 1. On June 27, 1995, U.S. Bank distributes Trust B to St. Paul's Church and terminates Trust B.**
 - 2. On June 26, 1995, Trust A can no longer pass-through Trust B.**
 - 3. On September 3, 1997, U.S. Bank terminates Trust A**

II. March 22, 1996, U.S. Bank becomes special administrator of the Estate of Helen A. Herschler in Washington County Probate Court

A. July 11, 1997, U.S. Bank agrees to a settlement agreement in which Trust A will go to St. Paul's Church

- 1. In a May 8th, 1998 Order, U.S. Bank admits that they did not honor the settlement agreement and kept the assets of Trust A**

III. July 14th, 2003, Petitioner files a petition for a resulting trust in Ramsey County District Court

A. October 10th, 2003, U.S. Bank has an ex parte hearing and lies to the court that they distributed all assets of Trust A

- 1. October 13th, 2003, Petitioner and legal heirs are denied access to the court**
- 2. U.S. Bank employees continue investing assets from Trust A**

**IV. April 6th, 2020, Petitioner files a RICO
complaint in the United States District
Court District of Minnesota**

A. Magistrate Judge Menendez erred in her Report and Recommendation that U.S. Bank, as trustee, distributed all assets of the trust

1. Judge Menendez used judgments and orders that clearly lacked personal and subject matter jurisdiction and are null and void
2. Judge Menendez erred in denying Petitioner's Motion to Vacate the Ramsey County District Court ex parte October 13, 2003 Order as moot
3. Without personal and subject matter jurisdiction Judge Tunheim dismissed Petitioner's complaint as frivolous

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OPINIONS BELOW

The Eighth Circuit did not have an opinion and acted on an order that lacked personal and subject matter jurisdiction. (Pet.App. 26a.-27a.).¹

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its order on January 12, 2021, Pet.App. 28a-29a. The Eighth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. This court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

¹ References to the attached Appendix are styled: "Pet.App. ____ a." References to ECF filings in the district court are preceded by "ECF."

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution state:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions from the U.S. Code and Minnesota Statutes are reprinted beginning at Pet. App. 30a.

STATEMENT OF THE CASE

Under the direction of Albert P. Herschler, the law firm of Meier, Kennedy & Quinn created and executed the Last Will and Testament of Albert P. Herschler, dated April 5th, 1960, and Codicil dated January 16th, 1961, which included Trust A and Trust B. In Ramsey County, Minnesota, on April 5th, 1960, U.S. Bank, ["f/k/a First Trust National Association"], became Trustee of Trust A & Trust B. On the death of Albert P. Herschler, Helen A. Herschler became beneficiary of Trust A and B. In April of 1992, Lisa A. Hiniker, employee of U.S. Bank, assumes administrative

responsibility of Trust A & B, and retains attorneys from Meier, Kennedy & Quinn for the Trusts.

Helen A. Herschler passes away on November 14, 1994. The assets in Trust A on November 14, 1994 were approximately \$1,135,998.00 and Trust B was approximately \$976,130.00.

I. Under the Codicil of Albert P. Herschler the Last Survivors of Helen A. Herschler are the Beneficiaries of Trust A & B.

The January 16th, 1961 Codicil of Albert P. Herschler, states in FIRST (d) "*This trust shall terminate upon the death of the last survivor of my said wife...*" Pet.App. 1a. The above Codicil is referring to Trust B. The last survivors of Mrs. Herschler and legal beneficiaries of Trust B where Audrey Heriot, Gary C. Kunzer, William P. Kunzer, Richard A. Kunzer and Kenneth R. Kunzer.² Pet.App.11a-12a.

II. U.S. Bank and its Lawyers Violate the Codicil of Albert P. Herschler

A. On June 27th, 1995, U.S. Bank Illegally Distributes Trust B to St Paul's on the

² Minn. Stat. 524.2-103 Share of Heirs Other Than Surviving Spouse, (5) If there is no surviving descendant, parent, grandparent, or descendant of a grandparent, to the next of kin in equal degree..."

**Hill Episcopal Church and Terminates
Trust B**

**1. As of June 27th, 1995, Trust A Can
No Longer Pass-through Trust B**

Pursuant to the Last Will and Testament of Albert P. Herschler, Fifth (f) *"The trust estate which my said wife disclaims or any portion of the trust estate remaining on the death of my said wife, which my said wife shall have failed to dispose of in an exercise of the power of appointment hereinbefore conferred upon her, shall be added to and become part of "Trust B".*

Pet.App. 3a.

As of June 27, 1995, Trust A can no longer be distributed in a manner specified in Trust B.³

On March 22, 1996, Lisa A. Hiniker is appointed Special Administrator of the Estate of Helen A. Herschler. On July 11, 1997, in Washington County Probate Court, U.S. Bank agrees to a settlement agreement in which the Bank will give Trust A to St. Paul's Church. The above settlement agreement was filed on July 21, 1997, in Wash. Co. Probate Ct.

Pet.App. 5a.

³ Minn. Stat. 501C.0801 Duty to Administer Trust, "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interest of the beneficiaries..."

U.S. Bank terminates Trust A on September 3, 1997, in Ramsey County District Court. Pet.App. 9a-10a.

2. U.S. Bank Admits They Kept the Assets of Trust A

On February 10, 1998, Lisa A. Hiniker and attorney Charles M. Bichler petition Washington County Probate Court to Allow “Final Account”, Distribute Assets and Discharge Special Administrator. Pet.App. 11a-13a. Hiniker and Bichler admit under “penalty for perjury”, that U.S. Bank did not honor the settlement agreement that was approved by the Washington County Probate Court on July 11, 1997. Pet.App. 13a n.17. Hiniker and Bichler lie under penalties for perjury that a final account is filed in Washington County Probate Court. Pet.App. 13a n. 18. On May 8th, 1998, Hiniker and Bichler attend a petition hearing on an **“Amended Final Account”**. Pet.App. 15a, n. Order 4. **No final account** of the Estate of Helen A. Herschler is ever filed in Washington County Probate Court. Pet.App. 15a Order n. 4. In Violation of 18 U.S.C. 1956(a)(1)(B)(i), Pet.App. 32a, only an amended final account is filed. **No proper receipt** showing the distribution of the remainder of Trust A to St Paul’s Church is filed in Ramsey County, Minnesota. Pet.App. 10a, n. 6. U.S. Bank terminated Trust A on September 3, 1997 and

admit they kept the assets of Trust A on May 8, 1998.⁴ Pet.App. 15a, Order no. 4. Pet.App. 31a, RICO 18 U.S.C. 656, Pet.App. 34a -35a, RICO MN Stat. 609. 903, 609.05, & 609.52.

U.S. Bank continues to invest assets of Trust A across state lines.⁵ Pet.App. 33a, RICO 18 U.S.C. 1962(a), Pet.App. 34a-36a. Minn. RICO 609.

B. U.S. Bank Lies to the Court and Denies Petitioner and Heirs Access to the Court

On July 14, 2003, Petitioner filed a “Petition by Heir of Testator Seeking Declaration of Resulting Trust on Failure of Express Testament Trust”, in Ramsey County District Court. Petitioner’s petition was filed within six years pursuant to Minn. Stat. 501C.1005,⁶ to make U.S. Bank account for the assets of Trust A.

⁴ Minn. Stat. 501C.0817 Distribution Upon Termination, (b) “Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it...”

⁵ 18 U.S.C. 1962(a) “It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity...in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income...”

⁶ Minn. Stat. 501C.1005 Limitation of Action Against Trustee. (c) “If paragraph (a) does not apply, a judicial proceeding by a beneficiary against a trustee must be commenced within six years after the first to occur of: (3) the termination of the trust.”

On October 10th, 2003, U.S. Bank has ex parte communications with Ramsey County District Court. U.S. Bank violates the court approved settlement agreement. Then uses the null and void July 11, 1997 Washington County Probate Court Order for Judgment, to get the Ramsey County District Court October 13, 2003 ex parte Order. The above Order has denied Petitioner and legal heirs' access to the court and the right to be heard.⁷ U.S. Bank lied to the court when they said in their findings of fact no. 5, "U.S. *Bank Trust has distributed all assets of Trust A as ordered by this Court.*" Pet.App. 18a, Fact n. 5. As of today's, date Petitioner's Petition for a Resulting Trust has yet to be heard.

There is [n]o documentation or evidence that U.S. Bank distributed the assets of Trust A to St. Paul's on the Hill Episcopal Church. Since Trust B was terminated on June 26, 1995, U.S. Bank is now unable, and it is illegal for the bank to distribute

⁷ Minn. Code of Judicial Conduct Rule 2.2 Impartiality and Fairness, A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.
Rule 2.6 Ensuring the Right to be Heard (A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Trust A to St. Paul's Church without a valid settlement agreement.⁸ MN Stat. 609.52.

As of 2015, St. Paul's Church is no longer in existence because of a lack of a congregation.

1. Petitioner Learns of Identity Thief and Mail Fraud

In 2019, Petitioner discovered letters in which Hiniker informed the Internal Revenue Service ["IRS"], that Hiniker and Petitioner are Co-Executors of the Estate of Helen A. Herschler. Petitioner was [n]ever appointed the Executor of the Estate of Helen A. Herschler in Washington County Probate Court.⁹

⁸ Uniform Probate Code 524.3-1102 Procedure for Securing Court Approval of Compromise. The procedure for securing court approval of a compromise is as follows: (1) "The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise...".

⁹ 18 U.S.C. 1342 Fictitious name or address. "Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or

Defendants opened a P.O. Box 64713, in Saint Paul, MN, 55164-0713 addressed to Helen A. Herschler state, Kenneth R. Kunzer.¹⁰ Petitioner [n]ever opened P.O. Box 64713, in St. Paul, Minnesota 55164-0713.¹¹

Petitioner discovered in 2019, that Richard L. Ditto, signed an Examining Officer's Report Transmittal, in which Kenneth R. Kunzer is named the Executor, and there is an overassessment of \$115,916.00 that belongs to him. U.S. Bank and its employees are using the United States Postal Service or wire to make false representations to the IRS and hiding the assets that belong to the legal heirs. The above acts utilized the United States Postal Service and constitute mail fraud to wit: on or about the dates indicated in the exhibits J, K, L, and M in Petitioner's RICO complaint filed in Minnesota Federal Court, case No. 0:20-cv-00882-JRT-KMM, in April of 2020. ECF Doc. 1. U.S. Bank and their attorneys, employees and/or agents on their behalf, aided and abetted by each other, used the USPS in furtherance of the schemes to defraud Petitioner and heirs of money and property and/or to

name other than his own proper name, shall be fined under this title or imprisoned..."

¹⁰ Minn. Stat. 609.83 Falsely Impersonating Another. (2) by falsely impersonating another with the intent to defraud the other..."

¹¹ 18 U.S.C. 1341 Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations..."

unjustly enrich defendants through monies converted from third parties on the false or otherwise misleading information in violation of 18 U.S.C. 1341, and 18 U.S.C. 2.¹² MN RICO 609.52 Subd. 2 (a)(1).

C. Minnesota Federal Court Dismisses Petitioner's RICO Complaint as Frivolous

Without a valid Washington County Probate Court settlement agreement, that was confirmed and approved on July 11, 1997, all other State and Federal Court orders and judgments are themselves null and void for lack of personal and subject matter jurisdiction. Pet.App. 15a, n. 7.

Petitioner's Federal case *Kunzer v. Hiniker* case No. 0:20-cv-00882-JRT-KMM, raises question of fact: When Judge Menendez ruled in her report and recommendation that U.S. Bank, "as trustee, distributed all assets of the trust." *Sees In the Matter of Trust A Under the Will of Albert P. Herschler*, No. 62-TR-CV-17-60 (Minn. Dist. Ct. Apr. 17, 2018), was she correct on relying on the State Court judgment as being valid, when Petitioner's verified complaint and objection prove otherwise? ECF Doc 1. Pet.App. 16a, Order n. 2. (**Does not say U.S. Bank distributed Trust A.**)

¹² 18 U.S.C. 2 Principle (b) "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."

Judge Menendez's report and recommendation has no proposed finding of fact and is based on null and void state court orders and judgments. Pet.App. 22a-23a. A magistrate judge's findings adopted by the district court are also reviewed for clear error. *See Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas). Judge Menendez has authority to get certification of a legal issue in a state court, *See Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995), but refused to do so. A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed by this court for an abuse of discretion *See Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (habeas).

Pursuant to Rule 12(b)(6), FED R. Civ. P., in considering a motion to dismiss a complaint for alleged failure to state a claim, the court must view the factual allegations in the complaint in the light most favorable to the plaintiff, and those allegations must be presumed to be true. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). *See also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("What Rule 12 (b)(6) does not countenance are dismissals based on judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds by *Davis v. Sherer*, 468 U.S. 183, 191 (1984); *Harris*, 127 F.3d at 1123; *Shear v. National Rifle Ass'n of America*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). As the Supreme Court stated in *Scheuer*, 416 U.S. at 236: "When a federal court reviews the

sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to pleader." *Accord Caribbean Broad. Sys.*, 148 F.3d at 1086. Indeed, the United States Court of Appeals for the District of Columbia pointedly stated: "The rule that the allegations of the complaint must be construed liberally and most favorably to the pleader is so well recognized that no authority need be cited."

Moreover, it is also well established "that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41m 47 (1957) (quoting Rule 8(a) (2), Fed. R. Civ. P.) *Accord Sinclair*, 711 F.2d at 293 ("notice pleading is sufficient"). "[U]nder Rule 8(a) complaint need not state facts or ultimate facts or

facts sufficient to constitute a cause of action.” *United States v. Private Sanitation Indus. Ass’n*, 793 F. Supp. 1114, 1124 (E.D.N.Y. 1992) (internal quotations and citation deleted). *Accord Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790 (3d Cir. 1984). All that is required is that the complaint “provides enough factual information to make clear the substance of the claim.” *Caribbean Broad. Sys.*, 148 F.3d at 1086. Plaintiffs...need only ‘adduce a set of facts’ supporting their legal claims to survive a motion to dismiss” under Rule 12(b)(6). *Wells v. United States*, 851 F.2d 1471, 1473 (D.C. Cir. 1988). For more details and facts, the Court must rely upon “the liberal opportunity for discovery and other pretrial procedures established by the Rules of disclosure more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Conley*, 355 U.S. at 47-48. *Accord Seville Indus. Mach. Corp.*, 742 F.2d at 790.

**1. Petitioner’s Complaint is Dismissed
Without Answers to Complaint or
Motions to Dismiss**

Petitioner’s case raises matters of discretion and is reviewable for “abuse of discretion”: Judge Menendez refused to consider verified evidence presented before her before making a ruling against Petitioner. When Defendants no longer need to file answers to complaints or motions to dismiss, and the Magistrate Judge will act as a witness and recommend

dismissing the case for them. The case of, *Kunzer v. Hiniker, et al., Minn. Fed. Dist. Ct.*, File no. 20-cv-0882, has established an entirely new and erroneous legal principle. *See, e.g. infra* Section II.A.3. Of these factors, perhaps the most “fundamental notion behind a standard of review is that of defining the relationship and power shared among judicial bodies.” CHILDRESS & DAVIS, *supra* note 4, 1.01, at 1-3 (citing James D. Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 1 (1984)); Edward H. Cooper, *Civil Rule 52(a); Rationing & Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 649 (1988) (concluding that standards of review serve a vital institutional role in allocating the responsibility and the power of decision between trial tribunals and the courts of appeals).

**2. Petitioner’s Complaint is Dismissed
Without Personal and Subject Matter
Jurisdiction**

Without personal jurisdiction over Petitioner, and without personal and subject matter jurisdiction over Defendants, Judge Tunheim make a clear error of judgment and exceeded the bounds of his authority when he dismissed petitioner’s complaint with prejudice. [N]one of the defendants are on file as being served the summons and complaint. The district court’s determination regarding personal jurisdiction is reviewed *de novo*. *See Axiom Foods, Inc. v.*

Acerchem Int'l, Inc., 874 F.3d 1064, 1067 (9th Cir. 2017); *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007); *Dow Chemical Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Likewise, the district court's decision whether there is subject matter jurisdiction is reviewed *de novo*. See *Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016), cert. denied sub nom. *Mera v. City of Glendale, Cal.*, 137 S. Ct. 1377 (2017); *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002). The district court's factual findings on jurisdictional issues are reviewed for clear error. See *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 n.9 (9th Cir. 2017); *Schnabel*, 302 F.3d at 1029.

3. Petitioner's Complaint is Dismissed Without the Opportunity to Amend His Complaint

Judge Tunheim was clearly erroneous in his order denying Petitioner an opportunity to amend his complaint. The trial court's decision denying amendment to a complaint is reviewed for an abuse of discretion. See *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017); *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2020). A party is entitled to amend pleadings once "as a matter of course" at any time before a responsive pleading is served. See Fed. R. Civ. P. 15(a); *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002).

**4. Petitioner's Motion to Vacate the
Ramsey County District Court Ex Parte
October 13, 2003 Order, is Dismissed as
Moot**

Judges Menendez and Tunheim made a clear error of judgment when they refused to vacate the Oct. 13, 2003 ex parte Order, *In the Matter of Trust A Under the Will of Albert P. Herschler*, No. C8-67-355787 (Minn. Dist. Ct. 2003). Pet.App. 16a-17a. The appellate court reviews *de novo*, the denial of a Rule 60(b)(4) motion to set aside an order as void, because the question of the validity of a judgment or order is a legal one. *See Fid. Nat. Fin., v. Friedman*, 803 F.3d. 999, 1001 (9th Cir. 2015); *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995). Thus, whether a judgment or order is void is a legal issue subject to *de novo* review. *See Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr., Inc.*, 938 F.2d 136, 137 (9th Cir. 1991).

Petitioner is requesting an independent determination of the issues, giving no special weight to the Federal court's decision. "*Salve Regina College v. Russell*", 499 U.S. 225, 238 (1991). This court reviews the order of dismissal *de novo*, applying the same standards as the district court. *See Young v. Pollock Eng'g Grp., Inc.*, 428 F.3d 786, 788 (8th Cir. 2005). In theory, the appellate court decides the issue in a *de novo* review, “[a] new; afresh; a second time,” as if the trial tribunal had not before rendered

a decision on the issue. *BLACK'S LAW DICTIONARY* 435 (6TH ed. 1990).

This court has subject matter jurisdiction to consider the motion to vacate the Ramsey County District Court ex parte October 13, 2003 Order. Pet.App. 16a-17a. Although this claim tenders for review of a state court order, this court is noticed: the state court order is void as articulated *infra*. There are exceptions to the *Rooker/Feldman* doctrine when the state court order was **procured through fraud, deception, accident or mistake**, *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.* 801 F.2d 186, 189 (6th Cir. 1985) (quoting *Resolute Ins. Co. v. North Carolina* 397 F.2d 586, 589 (4th Cir. 1968)). In *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004) the Ninth Circuit found that, although the plaintiff sought relief from the state court judgment, she did not complain of a legal wrong committed by the state court. Instead, she alleged that wrongful acts of the defendants were responsible for the court's erroneous judgment. *Rooker/Feldman* will not apply when the party had no reasonable opportunity to raise his federal claim in state proceedings, *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983), cert. Denied, 467 U.S. 1210, 104 S. Ct. 2398, 81 L. Ed. 2d 355 (1984). If the state court did not have subject matter jurisdiction over the prior action, its orders would be void *ad initio* and subject to attack notwithstanding *Rooker/Feldman*, *James v. Draper* (In re. Lake), 202 B.R. 754, 758 (B.A.P. 9th Cir. 1996).

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. Exception to the *Rooker/Feldman* rule comes into play when the state proceedings are considered a legal nullity, and thus are void *ab initio*. See *Kalb v. Fuerstein*, 308 U.S. 433, 438-40 (1940). Where specific federal statute (such as 18 U.S.C. 1964(a) specifically authorizes review, the *Rooker/Feldman* doctrine is inapplicable. See *Plyer v. Love*, 129 F. 3d 728, 723 (4th Cir. 1997), *Young v. Murphy*, 90 F.3d 1225, 1230 (7th Cir. 1992), and *In re: Gruntz*, 202 F.3d 1074, 1079 (9th Cir. 2000)).

III. The Decisions Below

A. District Court

The Petitioner invoked the district court's federal question jurisdiction by raising claims arising under the Racketeering and Corrupt Practices Act, 18 U.S.C. 1961, 1962 (a), (c), 1964 (a), and 18 U.S.C. 1341. ECF Doc. 1 (Complaint). None of the Defendants are on file as being served the summons and complaint pursuant to FRCP rule 4. Without personal jurisdiction over Petitioner or personal and subject matter jurisdiction over Defendants the court dismissed this case as frivolous on June 17, 2020. *Kunzer v. Hiniker*, Civil No. 20-0882 (JRT/KMM), (Minn. Fed. Dist. Ct. June 17, 2020). Pet.App. 24a-25a.

B. Eighth Circuit Court of Appeal

The Eighth Circuit refused to accept Petitioner's appeal brief. Pet.App. 26a-27a. Also, refused to hear Petitioner's petition for rehearing. *Kunzer v. Hiniker* Case No. 20-2386, (U. S. Ct. of Appeals for the 8th, Cir., Jan. 12, 2021). Pet.App. 28a-29a.

REASONS FOR GRANTING THE WRIT

This Court should address the Eighth Circuit's departure from the First Amendment of the United States Constitution to petition the Government for redress of grievances, and Fourteenth Amendment of the United States Constitution of due process and equal protection.

The panel decision conflicts with a decision of the United States Supreme Court and consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of the courts' decisions.

First, Petitioner has demonstrated that after terminating Trust B on June 26th, 1995, Trust A can [n]o longer pass-through Trust B. On May 8, 1998, in Washington County Probate Court, U.S. Bank admitted they did not honor the court approved July 11, 1997 settlement agreement and [k]ept the assets of Trust A. Pet.App. 15a, n. 7.

Second, Petitioner was denied a hearing and due process and equal protection on October 13, 2003, in Ramsey County District Court. Pet.App. 16a-17a. Petitioner is entitled to a declaration that the October 13, 2003 Order is unconstitutional and is void. Under the 14th Amendment and 18 U.S.C. 242.¹³ Petitioner is entitled to a hearing to make U.S. Bank account for the assets of Trust A.

I. The Lower Courts Decisions are Null and Void for Lack of Jurisdiction

The below state and federal court orders and judgments are themself null and void for lack of personal and subject matter jurisdiction. As the Supreme Court held in *The State of Rhode Island v. The State of Massachusetts*, 37 U.S. (12 Pet.) 657 (1838). The Supreme Court is one of limited and special original jurisdiction. Its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non judice*, and its action a

¹³ 18 U.S.C. 242 Deprivation of rights under color of law
“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States...shall be fined by this title or imprisoned not more than one year...”

nullity. Once the question of jurisdiction is raised it must be considered and decided before the court can move one step further. Jurisdiction cannot be assumed by a district court nor conferred by agreement of parties. It is only when a Tennessee judge has jurisdiction over both the parties and the subject matter that he is immune from a suit for money damages for deprivation of civil rights.

Smithson v. Ray, D.C.Tenn. 1976, 427 F.Supp. 11. Judgment is a void judgment if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process, Fed. Rules Civ. Proc., Rule 60(b)(4), 28 U.S.C.A.; U.S.C.A. Const. Amend. 5 – *Klugh v. U.S.*, 620 F.Supp. 892 (D.S.C. 1985). A void judgment is one which from the beginning was complete nullity and without any legal effect, *Hobbs v. U.S. Office of Personnel Management*, 485 F.Supp. 456 (M.D. Fla. 1980).

A. Minnesota Federal Court Lacks Personal and Subject Matter Jurisdiction

The appellate court overlooked or misunderstood the fact that [n]one of the defendants are on file as being served the summons and complaint pursuant to FRCP rule 4, in the United States District Court District of Minnesota, Case No. 20-cv-0882(JRT/KMM). The above Court does not have personal or subject matter jurisdiction over the defendants. The above Court

does not have personal jurisdiction over the plaintiff. Therefore, Judge Tunheim's June 17, 2020 Order is null and void for lack of personal and subject matter jurisdiction.

1. Federal Judges Violate Code of Conduct for United States Judges

The appellate court overlooked or misunderstood the fact that Judge Menendez is in violation of the Code of Conduct for United States Judges *Canon 2 (A) &(B)*. Judge Menendez lacked discretion to proceed where the record shows no personal or subject matter jurisdiction over the defendants. Defendants never filed an answer to Appellant's verified complaint, or motion to dismiss. Where there are no answers, affidavits, depositions, admissions, or interrogatories, the court is without factual basis to rule judicially in favor for the defendants. Judge Menendez used no Proposed Finding of Fact in her Report and Recommendation. ECF Doc. 16. In the Code of Conduct for United States Judges, *Canon 2: B*. "A judge should not testify voluntarily as a character witness". Not only did Judge Menendez lie in her Report that U.S. Bank has distributed the Trust assets, she is testifying as a character witness. In violation of: *18 U.S.C. 1001(a)(1)(2)(3)*.¹⁴ Pet.App. 22a-23a.

The appellate court overlooked or misunderstood the fact that Judge Tunheim has dismissed this case without giving Appellant the right to be heard, and without the personal and subject matter jurisdiction of the defendants. *Canon 3: A.* (4) “A judge should accord to every person who has a legal interest in a proceeding, the full right to be heard according to law.” Based on a May 5th, 2020 letter, Judge Tunheim received from attorney Richard B. Allyn who is not a defendant and does not have one client that is a defendant in this case at this time, Judge Tunheim dismissed this case with prejudice. In violation of *Canon 2: (B) Outside Influence*, *Canon 3A* (4) “*The restriction on ex parte communications concerning the proceeding includes communication from lawyers...*” *Canon 3A* (5) “*a judge must demonstrate due regard for the rights of the parties to be heard...*”

The appellate court overlooked or misunderstood the fact that Appellant’s case is a question of law and is

¹⁴ 18 U.S.C. 1001 Statements or entries generally, (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-(1) “falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain and materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years...”

therefore a *de novo* issue. Federal Judges in the State of Minnesota are not consistent in their rulings, which raises the questions of can a Judge dismiss a case, without personal jurisdiction over Petitioner and without personal and subject matter jurisdiction over the Defendants?

2. No Evidence Filed that U.S. Bank Distributed the Assets of Trust A

The appellate court overlooked or misunderstood the fact that when the Petitioner challenges the bank's standing in court, is the bank required to have a [f]iled proper receipt showing the distribution of the remainder of the Trust A property to Saint Paul's Church? ECF Doc. 1, pp. 13-14, *61-63. Also, Petitioner asserts that U.S. Bank must provide a [f]iled final account of the Herschler Estate, from Washington County Probate Court, ECF Doc. 1, pp. 17, *79-80). RICO MN Stat. 609.52 Subd. 2 (a) (1)(2).

3. Magistrate Judge Uses Judgment that was Procured by Fraud

The appellate court overlooked or misunderstood the fact that Petitioner's case raises question of fact: When Judge Menendez ruled in her report and recommendation that U.S. Bank, "as trustee, distributed all assets of the trust." *See In the Matter of Trust A Under the Will of Albert P. Herschler*, No. 62-TR-CV-17-60 (Minn. Dist. Ct. Apr. 17, 2018, Fact no.

12), was she correct in relying on the State Court judgment as being valid? Appellant's verified complaint and objection prove otherwise, ECF Doc. 1, pp. 20, *98-99. *See In the Matter of Trust A Under the Will of Albert P. Herschler, Deceased*, C.A. No. C8-67-355787 (Ramsey County), Order, at *2 (October 13, 2003). Pet.App. 16a. The October 13, 2003 Order *2 says, "Kenneth R. Kunzer's Petition by Heir of Testator Seeking Declaration of Resulting Trust on Failure of Express Testamentary Trust is hereby dismissed with prejudice." It does [n]ot say U.S. Bank, "as trustee, distributed all assets of the trust". "... whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into. The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal. Attorney-General v. Lord Hotham, Turn. & Russ. 219." *Williamson v. Berry*, 8 How. 945, 542 12 L.Ed. 1170, 1189 (1850), Supreme Court Case.

The appellate court overlooked or misunderstood the fact that Judge Menendez's report and recommendation has no proposed finding of fact and is based on null and void State Court orders and judgments, (ECF Doc. 1, pp. 16, *75-80). A magistrate judge's findings adopted by the district court are also

reviewed for clear error. *See* certification *Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas).

II. This Court Should Hold the Minnesota State and Federal Court Judgments and Orders Null and Void and Allow Petitioner Due Process and Equal Protection

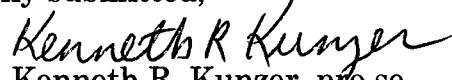
The United States Eighth Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Supreme court on the same important matter. *See, Williamson v. Berry*, 8 How. 945, 542 12 L.Ed. 1170, 1189 (1850).

Petitioner seeks a remedy specifically authorized by 18 U.S.C. 242 and U.S. Const. amend. I and XIV. Pet.App 30a.-36a. Const. and Stat. Provisions Involved.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,


Kenneth R. Kunzer, pro se
9350 Lake Road
Woodbury, Minn. 55125
(651) 366-1369
Kenk2764@msn.com

April 7th, 2021