No. \

In The
Supreme Court of the United States

NORMAN BARTSCH HERTERICH, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *ET AL.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A — COURT OF APPEALS MEMORANDUM DISPOSITION IN NINTH CIRCUIT CASE NO. 20-16286 (NOVEMBER 12, 2021)

A

FILED NOV 12 2021

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. **CITY AND COUNTY OF SAN FRANCISCO; et al.,** Defendants-Appellees.	No. 20-16286 D.C. No. 4:19-cv-07754-SBA MEMORANDUM*

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

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted November 8, 2021**

Before: CANBY, TASHIMA, and MILLER, Circuit Judges.

Norman Bartsch Herterich appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations arising from California state court proceedings involving his father's estate. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 333 (9th Cir. 2015). We affirm.

The district court properly dismissed Herterich's action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because it was a "forbidden de facto appeal" of prior state court decisions and Herterich raised claims that were "inextricably intertwined" with those state court decisions. *See Noel v. Hall*, 341 F.3d 1148, 1163-65 (9th Cir. 2003) (discussing the *Rooker-Feldman* doctrine); *see also Cooper v.*

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

Ramos, 704 F.3d 772, 782 (9th Cir. 2012) (explaining that claims are "inextricably intertwined" with state court decisions where federal adjudication "would impermissibly undercut the state ruling on the same issues" (citation and internal quotation marks omitted)).

A

We reject as meritless Herterich's contention that the district court improperly relied on facts that conflicted with the complaint when it took judicial notice of prior state court decisions.

The district court did not abuse its discretion by dismissing Herterich's complaint without leave to amend because further amendment of Herterich's claims would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper if amendment would be futile).

AFFIRMED.

APPENDIX B — COURT OF APPEALS MEMORANDUM DISPOSITION IN NINTH CIRCUIT CASE NO. 20-17197 (NOVEMBER 12, 2021)

B

FILED NOV 12 2021

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. **ERNEST H. GOLDSMITH; et al.,** Defendants-Appellees.	No. 20-17197 D.C. No. 4:20-cv-03992-SBA MEMORANDUM*

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

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted November 8, 2021**

Before: CANBY, TASHIMA, and MILLER, Circuit Judges.

Norman Bartsch Herterich appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations arising from a California state court case involving his father's estate. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 333 (9th Cir. 2015). We affirm.

The district court properly dismissed Herterich's action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because it was a "forbidden de facto appeal" of prior state court decisions and Herterich raised claims that were "inextricably intertwined" with those state court decisions. *See Noel v. Hall*, 341 F.3d 1148, 1163-65 (9th Cir. 2003) (discussing the *Rooker-Feldman* doctrine); *see also Cooper v.*

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

Ramos, 704 F.3d 772, 782 (9th Cir. 2012) (explaining that claims are "inextricably intertwined" with state court decisions where federal adjudication "would impermissibly undercut the state ruling on the same issues" (citation and internal quotation marks omitted)).

B

We reject as meritless Herterich's contention that the district court improperly relied on facts that conflicted with the complaint when it took judicial notice of prior state court decisions.

The district court did not abuse its discretion by dismissing Herterich's complaint without leave to amend because further amendment of Herterich's claims would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper if amendment would be futile).

AFFIRMED.

APPENDIX C — DISTRICT COURT ORDER REGARDING MOTION TO DISMISS NORTHERN DISTRICT OF CALIFORNIA CASE NO. 4:19-CV-07754-SBA (JUNE 2, 2020)

C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIRICT OF CALIFORNIA
OAKLAND DIVISION

NORMAN BARTSCH HETERICH, Plaintiff, vs. **CITY AND COUNTY OF SAN FRANCISCO, SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, T. MICHAEL YUEN, CLAIRE A. WILLIAMS, GORDON PARK LI, SUE M. KAPLAN, MARY E. WISS, JOHN K. STEWART, GABRIEL P. SANCHEZ, SANDRA L. MARGULIES, KATHLEEN M. BANKE, AND DOES 1-20,** Defendants.	Case No: C 19-7754 SBA **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS** Dkt. 15, 18, 30, 40

Plaintiff Norman Bartsch Herterich ("Plaintiff") was omitted from the will of his biological father, Hans Huber Bartsch ("Bartsch"), who died on October 25, 2008. Beginning in 2009, Plaintiff commenced a series of legal challenges in the California Superior Court for the City and County of San Francisco ("Superior Court"), claiming entitlement to Bartsch's estate as his only heir. However, Plaintiff's multiple probate petitions, legal actions and appeals to the California Court of Appeal have failed. Finding no success in state court, Plaintiff has now filed the instant federal civil rights action under 42 U.S.C. § 1983 alleging that his constitutional rights were violated in the course of the state court proceedings. As Defendants, he names: the City and County of San Francisco (the "City"), the Superior Court; and six Superior Court judges and Court of Appeal justices who were involved with his state court actions as well as three Superior Court staff members. Plaintiff seeks a declaration that he is the rightful heir to Bartsch's estate along with an order directing Defendants to transfer the assets of the estate to him.

The parties are presently before the Court on the City and Judicial Defendants'[1] separate motions to dismiss for lack of subject matter

[1] The "Judicial Defendants" consist of: T. Michael Yuen, Executive Officer of the Superior Court; Claire A. Williams, interim Executive Officer of the Superior Court; Gordon Park-Li, Chief Executive Officer of the Superior Court; Superior Court Judges Sue M. Kaplan, Mary E. Wiss and John K. Stewart; and California Court of Appeal Justices Gabriel P. Sanchez, Sandra L. Margulies and Kathleen M. Banke.

jurisdiction or alternatively for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), respectively. Dkt. 15, 18. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motions for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

C

I. BACKGROUND

A. FACTUAL SUMMARY

Plaintiff was born in 1961 in San Francisco, California. Compl. ¶ 17, Dkt. 1. Shortly after giving birth, Plaintiff's mother commenced a paternity proceeding against Bartsch in the Superior Court. Id. ¶ 21. The proceedings concluded in 1963, at which time the Superior Court established Bartsch's paternity and ordered him to pay child support to Plaintiff's mother. Id. ¶ 22. Thereafter, Bartsch made approximately 228 monthly child support payments. Murphy Decl. Ex. A at 1-2, Dkt. 18-3.

On October 25, 2008, Bartsch died, leaving an estate containing, among other things, two pieces of real property located on Grand View Avenue in San Francisco ("Grand View properties"). Compl. ¶¶ 25, 106-107, 109-110. One of those properties was a vacant lot and the other was an apartment building. Id. ¶¶ 106-107. At the time of his death, Bartsch had a will, which left 14 percent of the estate to Arndt Peltner ("Peltner")

and named him as the executor of the estate. Id. ¶ 54. Bartsch left nothing to Plaintiff, who was not mentioned in the will. Id. ¶¶ 41, 53, 54.

On November 17, 2008, Peltner, represented by attorney Alice Traeg ("Traeg"), commenced a probate proceeding in the probate court, a department of the Superior Court, to administer the Estate. See San Francisco Super. Ct. No. PES-08-291846; Compl. ¶ 41. The probate petition made no mention of Plaintiff and indicated that Bartsch lacked any surviving issue. Compl. ¶¶ 44-46. As a result of said omission, Plaintiff did not receive notice of the probate proceeding. Id. ¶¶ 48-53. On December 8, 2008, Judge Kaplan granted Peltner's petition, established the validity of the will and appointed Peltner as the personal representative (executor) of the estate. Id. ¶¶ 60, 61.

A short time after Judge Kaplan's ruling, in December 2008, Plaintiff became aware of Bartsch's death and the related probate proceedings. Id. ¶ 65. Believing he was entitled to Bartsch's estate, Plaintiff filed a pretermission petition on April 1, 2009, in the probate court pursuant to California Probate Code § 11700 et seq. Jud. Defs.' Request for Jud. Not. ("RJN") Ex. A, Dkt. 17-1. The petition alleged that Plaintiff was Bartsch's "sole heir" and that Bartsch had unintentionally omitted Plaintiff from his will. Id. ¶¶ 6, 7. As relief, Plaintiff sought an order directing Peltner, in his capacity as personal representative, "to distribute the entire estate" to him. Id. at 5 (Prayer for Relief). Peltner countered that Bartsch was well aware of Plaintiff's existence when he

executed his will, and that Plaintiff's exclusion therefrom was intentional and not a mistake.

On December 20, 2011, the probate court rejected Plaintiff's petition and ruled in favor of Peltner by granting his motion for summary judgment. Plaintiff appealed.[2] On January 30, 2014, the California Court of Appeal affirmed the probate court's ruling, finding that Plaintiff was intentionally disinherited by Bartsch and therefore Plaintiff was not a pretermitted heir. See Estate of Bartsch, No. A135322, 2014 WL 338784, at *2 (Cal. Ct. App. Jan. 30, 2014) ("Bartsch II"). The court stated: "We conclude that the trial court properly found there is no triable issue of fact as to whether decedent was unaware of [Plaintiff]'s birth. It follows that the court properly concluded he is not entitled to a share of the estate as an omitted child." Id. at *6 (emphasis added).

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In 2014, the Grand View properties were sold to third parties. Compl. ¶ 111. Judge Mary E. Wiss signed Orders Confirming Sale of Real Property, approving the aforementioned sales on September 9, 2014. Id.; see Jud. Defs.' RJN Exs. 2, 3. Plaintiff had objected to the proposed sales on the grounds that "he wanted to inherit the properties...." Compl. ¶ 111. However, Judge Wiss overruled his objections, finding that Plaintiff had "no interest in the Estate and no standing to oppose the sales." Id.

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[2] This was Plaintiff's second of multiple appeals to the California Court of Appeal. In the first appeal, the appellate court rejected Plaintiff's objection to the probate court's order granting Peltner's motion for an award of interim fees. Estate of Bartsch, 193 Cal. App. 4th 885, 889 (2011).

In the meantime, while the above appeal (i.e., Bartsch II) was pending, Plaintiff filed a civil fraud action against Peltner and Traeg, alleging they filed a fraudulent probate petition to administer the Estate. See Herterich v. Peltner, San Francisco Super. Ct. No. CGC-12-523942. Specifically, he alleged that the probate petition had falsely asserted that Bartsch had no children. In addition, Plaintiff accused Pelter and Traeg of failing to serve him with notice of the petition when they knew or should have known that appellant was Bartsch's son and thus was entitled to notice. In separate orders, the Superior Court granted Peltner and Traeg's motions for summary judgment and entered separate judgments in their favor. In a published decision, the California Court of Appeal (No. A147554) affirmed the judgments. See Herterich v. Peltner, 20 Cal. App. 5th 1132, 1137 (2018).

On March 3, 2017, Plaintiff filed in the probate court a motion to set aside Judge Kaplan's December 10, 2008 Order, which, as discussed, admitted Bartsch's will to probate and appointed Peltner as executor. Jud. Defs.' RJN Ex. 4 at 3, Dkt. 17-4. Judge John K. Stewart denied the motion. Id. at 7. In reaching his decision, Judge Stewart ruled that the motion was untimely and that Plaintiff had otherwise waived any defects in notice of the original petition by making a general appearance in the probate proceeding with his April 2009 pretermission petition. Id. The court further found that the probate court's orders were not void because Plaintiff had been given many opportunities to appear and contest the petition, as

evidenced by his numerous legal challenges and related appeals. Id.

Plaintiff appealed Judge Stewart's ruling, which was affirmed by the Court of Appeal. Estate of Bartsch, No. A151783, 2019 WL 718865, at *7 (Cal. Ct. App. Feb. 20, 2019) ("Bartsch III"). Court of Appeal Justices Gabriel P. Sanchez, Sandra L. Margulies and Kathleen M. Banke unanimously agreed that the prior appeal in Bartsch II conclusively established as law of the case that Plaintiff is not entitled to a share of the Bartsch estate as an omitted child. Bartsch III, 2019 WL 718865, at *4. The court concluded that "[b]ecause [Plaintiff] has no cognizable interest in the Estate and has suffered no legal injury from the filing of the probate petition and the related judicial proceedings, [he] has no standing to appeal the probate court's order denying his motion to set aside probate orders that were entered more than 10 years ago." Id. The Court of Appeal ordered Plaintiff and his attorney to pay $5,950 to Peltner (in his capacity as executor) for bringing a "frivolous appeal." Id.

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B. THE INSTANT ACTION

On November 25, 2019, Plaintiff filed a 45-page Complaint against the City, the Superior Court and the Judicial Defendants. See n.1, supra. Plaintiff alleges that the respective decisions of the Superior Court Judges Kaplan, Wiss and Stewart and appellate court Justices Sanchez, Marguiles and Banke were decided incorrectly and violated his constitutional rights. Compl. ¶¶ 83-87, 90-93. In addition, Plaintiff faults Judges Kaplan, Wiss and

Stewart for failing to ensure that he received a fair, adversarial hearing on his various matters, thereby depriving him of due process and equal protection under the law. Id. ¶¶ 83-87, 112, 129.

The Complaint alleges Defendants Yuen, Williams and Park-Li are Superior Court "executive" staff who are responsible for managing and implementing unspecified "policies and procedures" of the Superior Court. Id. ¶¶ 7-9. The pleadings do not identify any particular alleged misconduct against these Defendants. However, Plaintiff avers that they and the other Judicial Defendants "had actual and/or constructive" notice of the Superior Court's 1963 paternity order establishing Bartsch's paternity, and therefore, they should have known that Plaintiff was Bartsch's son and sole heir. Id. ¶¶ 76-77.

As for the City, the Complaint alleges that it took various actions (i.e., recording the deeds after the Grand View properties were sold, reassessing the Grand View properties for property tax purposes, eliminating the right to convert the apartment to condominiums, etc.) that have rendered the Grand View properties less valuable than if Plaintiff had inherited the properties when Bartsch died. Id. ¶¶ 114-117.

The Complaint alleges five claims under 42 U.S.C. § 1983: (1) deprivation of procedural due process; (2) deprivation of substantive due process; (3) unreasonable seizure of property in violation of the Fourth Amendment; (4) failure to provide just compensation for private property taken for public use in violation of the Fifth Amendment; and (5) violation of the Equal Protection Clause under the

Fifth Amendment.[3] Compl. ¶¶ 121-158. In its Prayer for Relief, the Complaint seeks, inter alia, a declaration establishing that Plaintiff is entitled to inherit "all of Bartsch's assets as Bartsch's only heir" as well as an order compelling Defendants to take possession of Bartsch's assets "and then transfer Bartsch's assets to [P]laintiff...." Id. at 43-44.

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The City and Judicial Defendants have now filed motions to dismiss for lack of jurisdiction and for failure to state a claim pursuant to Rule 12(b)(1) and 12(b)(6), respectively. Defendants argue that Plaintiff's claims are barred by the Rooker-Feldman[4] doctrine and that Plaintiff lacks Article III standing; alternatively, they argue that none of the claims are viable. Judicial Defendants further assert that the judges and justices are entitled to absolute judicial immunity and the executive court staff are entitled to quasi-judicial immunity.[5] The

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[3] Plaintiff does not allege the basis of his due process claims but they presumably derive from the Fifth and Fourteenth Amendments.

[4] The Rooker-Feldman doctrine derives from D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). As will be discussed in greater detail below, the doctrine precludes lower federal courts from reviewing state court judgments.

[5] Judicial Defendants admittedly failed to comply with the Court's Standing Order to meet and confer before filing their motion. Jud. Defs.' Reply at 1 n.1, Dkt. 24. Judicial Defendants counsels' unexplained disregard of the Court's Standing Orders is unacceptable. Nevertheless, in view of the positions taken by Plaintiff, the Court is satisfied that meeting and conferring with Plaintiff would not have altered the issues presented.

motions are fully briefed and are ripe for adjudication.

II. PRELIMINARY MATTERS

A. DEFENDANTS' REQUESTS

The City and Judicial Defendants separately request that the Court take judicial notice of various documents filed in the underlying state trial court and appellate proceedings, including rulings by the Superior Court and California Court of Appeal. Pursuant to Federal Rule of Evidence 201, the Court is authorized to take judicial notice of filings and rulings relating to the underlying state court litigation. Dawson v. Mahoney, 451 F.3d 550, 551 n.1 (9th Cir. 2006) (taking notice of court "orders and proceedings"); Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of documents filed in the California Superior Court).

Plaintiff objects only to Exhibit A to the City's request for judicial notice, which is a copy of the Court of Appeal's unpublished decision in Bartsch III. Pl.'s Opp'n to City's Mot to Dismiss at 14-15, Dkt. 22. The objection is meritless. As noted, Ninth Circuit authority clearly authorizes the Court to take judicial notice of decisions by other courts. Dawson, 451 F.3d at 551 n.1. Judicial notice is also proper because that opinion forms the basis of his claims against Justices Sanchez, Margulies and Banke. Steinle v. City & Cty. of San Francisco, 919 F.3d 1154, 1163 (9th Cir. 2019) (upholding the

district court's judicial notice of matters incorporated by reference into the pleadings).

Plaintiff cites Civil Local Rule 7-4(e), which provides that an "uncertified" opinion or order "may not be cited to this Court, either in written submissions or oral argument, except when relevant under the doctrines of law of the case, res judicata or collateral estoppel." N.D. Cal. Civ. L.R. 7-4(e). That rule is inapt, since the City cites Bartsch III, not for its precedential value, but to establish the procedural history of the underlying dispute. See Illinois Union Ins. Co. v. Intuitive Surgical, Inc., 188 F. Supp. 3d 978, 984 n.7 (N.D. Cal. 2016) (noting that Local Rule 7-4(e) did not preclude citation to an unpublished case which was not cited as precedential); see also Emp'rs Ins. of Wausau v. Granite State Ins. Co., 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) ("[W]e may consider unpublished state decisions, even though such opinions have no precedential value.").

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The City and Judicial Defendants' respective requests for judicial notice are GRANTED in their entirety.

B. Plaintiff's Requests

1. Leave to File Surreply Briefs

Plaintiff has filed motions for leave to file a surreply brief in connection with the City and Judicial Defendants' respective motions to dismiss. Dkt. 30, 31. District courts have the discretion to permit surreply briefs, though such filings are disfavored. See Garcia v. Biter, 195 F. Supp. 3d 1131, 1134 (E.D. Cal. 2016). Here, Plaintiff seeks

leave to file a surreply to address new arguments and cases allegedly presented by Defendants for the first time in their reply. However, Defendants did not raise new arguments in their reply; rather, they merely addressed contentions made by Plaintiff in his opposition briefs. Although Defendants cite additional cases in their replies, there is no prohibition against their doing so. In addition, the Court does not rely on any of those authorities in reaching its decision. Nonetheless, the Court will permit the filing of the surreply briefs and consider them to the extent they are pertinent, if at all, to any of the issues presented. Plaintiff's motions for leave to file surreply briefs are therefore GRANTED.

2. Request for Judicial Notice

Plaintiff has also filed a Motion for Judicial Notice and Consideration of Recent Changes in Fact and Law, in which he requests that the Court take judicial notice of two exhibits, styled as Exhibits A and B. Dkt. 40, 41. Exhibit A is purported to be a copy of an Order by the probate court, filed February 26, 2020, approving the fourth and final accounting and the payment of attorney's fees and expenses. Dkt. 41-1. Exhibit B is a copy of the Court of Appeal's published opinion in Roth v. Jelley, No. A155742. Dkt. 41-2. Although both documents are subject to judicial notice, see Dawson, 451 F.3d at 551 n.1, neither exhibit is material or helpful to the Court's resolution of the instant motion. Plaintiff's request for judicial notice is therefore DENIED. See Escobedo v. Applebees, 787 F.3d 1226, 1228 n.2 (9th Cir. 2015)

(finding that even if a matter is one subject to judicial notice, a court is within its discretion to deny judicial notice of matters that are "immaterial to [the court's] analysis").

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III. DISCUSSION

A. SUBJECT MATTER JURISDICTION

1. Legal Standard

A complaint may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), 12(h)(3). A Rule 12(b)(1) motion may be either facial (as is the case here), where the court's inquiry is limited to the allegations in the complaint; or factual, where the court may look beyond the complaint to consider extrinsic evidence. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When reviewing a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, including one based on Rooker-Feldman, "[the Court takes] the allegations in the plaintiff's complaint as true." Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." Rattlesnake Coalition v. United States Envtl. Protection Agency, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007). Because subject matter jurisdiction is a threshold requirement in every federal action, a district court must generally "satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

2. Rooker-Feldman

Defendants argue that the action must be dismissed under the Rooker-Feldman doctrine, which provides that "federal district courts lack jurisdiction to hear direct or 'de facto' appeals from the judgments of state courts." Fowler v. Guerin, 899 F.3d 1112, 1119 (9th Cir. 2018). A federal action constitutes a de facto appeal where "claims raised in the federal court action are 'inextricably intertwined' with the state court's decision." Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). A federal claim is inextricably intertwined with a state court judgment if the federal court is called upon to "review the state court's decision, which the district court may not do." Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1029-30 (9th Cir. 2001). "If claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction." Bianchi, 334 F.3d at 898 (citing Feldman, 460 U.S. at 483 n.16 & 485).

a) Inextricably Intertwined

The Court finds that the claims alleged in this case are inextricably intertwined with the decisions of the state courts. In the probate court, Plaintiff filed a pretermission petition seeking to obtain assets of the Estate based on the theory that he is Bartsch's sole heir and had been unintentionally omitted from his father's will. In

December 2011, Judge Kaplan, acting for the probate court, rejected Plaintiff's contention. She granted summary judgment for the executor (i.e., Peltner) upon finding that Plaintiff was not a pretermitted heir and had been intentionally disinherited by Bartsch. In 2014, the Court of Appeal in Bartsch II affirmed the probate court's ruling, holding that "the [probate] court properly concluded [Plaintiff] is not entitled to a share of the estate as an omitted child." 2014 WL 338784, at *6.

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The probate and appellate courts reiterated the aforementioned conclusions in connection with Plaintiff's subsequent, unsuccessful motion to set aside Judge Kaplan's December 2008 ruling admitting Bartsch's will to probate and appointing Peltner as executor. The Court of Appeal found Plaintiff's appeal from the denial of said motion to be "patently frivolous." Bartsch III, 2019 WL 718865, at *5. The court held, inter alia, that Plaintiff lacked standing given that "Bartsch II resolved that appellant is not an intestate heir; he is an heir who was known to his father and was intentionally omitted from his father's will and therefore has no claim to the Estate." Bartsch III, 2019 WL 718865, at *6 (emphasis added); see also id., at *5 ("Bartsch II settled the question that appellant was intentionally disinherited and has no interest in the Estate.").

In direct contravention of the state trial and appellate courts' decisions, Plaintiff now seeks a declaration that he "had a right under California law to inherit all of Bartsch's assets as Bartsch's only heir"—as well as an injunction directing Defendants "to take possession or control of

Bartch's assets and then transfer Bartsch's assets to Plaintiff...." Compl. at 43-44 (Prayer for Relief). The relief Plaintiff requests in this action is precisely the same relief that he sought in his pretermission petition, which Judge Kaplan denied in 2011. See Jud. Defs.' RJN Ex. A at 5 & ¶¶ 6-7. A ruling by this Court granting Plaintiff the requested relief would thus effectively overrule the decisions of the state courts, which, under Rooker-Feldman, this Court has no power to do. E.g., Cooper v. Ramos, 704 F.3d 772, 779 (9th Cir. 2012) (holding that a claim is "inextricably intertwined where the relief requested in the federal action would effectively reverse the state court decision or void its ruling") (quotation marks omitted).[6]

Plaintiff counters that the claims in this action are grounded on federal law and therefore cannot be inextricably intertwined "with the issues resolved by the state court, which only concerned state law." Pl.'s Opp'n to City's Mot to Dismiss at 4. This contention is frivolous. It is well settled in this Circuit that federal claims are subject to dismissal under Rooker-Feldman, even if the state court judgment was based on state law. E.g., Bianchi, 334 F.3d at 898 (affirming dismissal of a plaintiff's federal civil rights claims which "attempt[ed] to obtain in federal court the very relief denied to him

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[6] Plaintiff also seeks damages and a declaration that the state court unconstitutionally deprived him of his right to inherit the Estate. Compl. at 43-44. The Court would be able to grant such relief only if it found that the underlying decisions by the Superior Court and Court of Appeal were erroneous. For that reason, such relief is also barred by Rooker-Feldman. See, e.g., Bianchi, 334 F.3d at 898.

in state court"); Cooper, 704 F.3d at 782 (holding that § 1983 claims that defendants conspired to deny the plaintiff due process in an underlying state court proceeding were inextricably intertwined with a state court ruling because the relief sought in the federal action "is contingent upon a finding that the state court decision was in error"); see also Remer v. Burlington Area Sch. Dist., 205 F.3d 990, 997 (7th Cir. 2000) ("A plaintiff may not circumvent the effect of the Rooker-Feldman doctrine simply by casting [his] complaint in the form of a federal civil rights action.") (internal quotation and citation omitted). The Court therefore rejects Plaintiff's assertion that the federal claims in this action are not subject to the Rooker-Feldman doctrine.

C

b) Not a Party

Plaintiff next argues that Rooker-Feldman does not preclude him from challenging decisions by the state court because he was not a party to the probate proceeding at the time that Judge Kaplan issued her initial probate order in December 2008. Dkt. 22 at 7. It is true that "[t]he Rooker-Feldman doctrine does not bar the exercise of federal court jurisdiction when the federal court litigant was not a party to the state court action." S. California Edison Co. v. Lynch, 307 F.3d 794, 805 (9th Cir.), modified, 307 F.3d 943 (9th Cir. 2002) (citing Johnson v. De Grandy, 512 U.S. 997, 1006 (1994)). That rule does not help Plaintiff's cause, however. Although Plaintiff did not receive notice of the initial probate proceedings prior to Judge Kaplan's December 2008 Order, he subsequently learned of

them and "appeared in the Probate Proceedings and began seeking state law remedies...." Compl. ¶¶ 68, 78. He thus effectively became a party to the probate proceedings upon submitting a pretermission petition to the probate court in April 2009. See Bartsch III, 2019 WL 718865, at *2. Thereafter, Plaintiff continued to vigorously litigate his alleged right to Bartsch's estate at both the trial and appellate level—losing at each turn. Id. In light of this state court procedural history, the Court rejects Plaintiff's contention that he was not a party to the probate proceeding or is otherwise immune from application of the Rooker-Feldman doctrine.

c) Improper Conduct

Plaintiff argues that the Rooker-Feldman doctrine does not bar claims that an adverse party "prevented a federal plaintiff from presenting his claim in court." Pl.'s Opp'n to City's Mot. to Dismiss at 4. An exception to the Rooker-Feldman doctrine is provided where a plaintiff is seeking to set aside a state court judgment on the grounds of extrinsic fraud. Kougasian v. TMSL, 359 F.3d 1136, 1140 (9th Cir. 2004). "Extrinsic fraud is conduct which prevents a party from presenting his claim in court." Wood v. McEwen, 644 F.2d 797, 801 (9th Cir. 1981)

With respect to the City, Plaintiff's argument fails summarily because there are no allegations of any extrinsic fraud or improper conduct. As to the Judicial Defendants, Plaintiff avers that they knew or should have known that Bartsch's paternity was established in 1963, and,

by extension, they knew or should have known that Plaintiff was Bartsch's heir. See Compl. ¶¶ 75-77; Opp'n to Jud. Defs.' Mot. at 4. The assertion that the Judicial Defendants should have known about a court ruling from 57 years ago is entirely speculative and untenable. Nor are there any facts alleged showing that the Judicial Defendants acted fraudulently to prevent Plaintiff from presenting his claims in court. See Kougasian, 359 F.3d at 1139. Far from being denied access to the courts, the record shows that Plaintiff was able to engage in ten years of litigation at the trial and appellate levels regarding his claim to inherit Bartsch's estate.

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d) "England Reservation"

Plaintiff makes a cursory, two-sentence argument that Rooker-Feldman does not preclude him from pursuing the federal claims alleged in the instant action because he "reserved all federal issues in [Bartsch III] for determination in federal court." See Pl.'s Opp'n to City's Mot. to Dismiss at 4.[7] The reservation to which Plaintiff refers derives from the Supreme Court's decision in England v.

[7] The Judicial Defendants argue that the Court of Appeal's opinion "reveals no reference to an 'England' reservation" and therefore no such reservation was made. Jud. Defs.' Reply at 3, Dkt. 24. However, the fact that the opinion did not mention a reservation does not ipso facto establish that no reservation was, in fact, made. In any event, for purposes of the instant motions to dismiss, the Court accepts as true Plaintiff's allegation that he "reserved all federal issues for determination in federal court." Compl. ¶ 88.

Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). In England, the Court held that where a federal court abstains from adjudicating a plaintiff's state claims, thereby forcing him or her to litigate in state court, the plaintiff may "reserve" the right to return to federal court to adjudicate any federal claims at the conclusion of the state court proceedings. Id. at 421. By asserting such reservation, a plaintiff may, upon the conclusion of the state case, return to federal court without facing the preclusive effect of a state court judgment. Id.[8] To make an effective reservation of federal issues, the party must "inform" the state court of its intent to reserve federal issues for adjudication in federal court. Lurie v. State of Cal., 633 F.2d 786, 788 (9th Cir. 1980) (citing England, 375 U.S. at 421).

As a threshold matter, the Court is unpersuaded by Plaintiff's conclusory and unsupported assertion that an England reservation forecloses application of the Rooker-Feldman doctrine. England is germane to the preclusive effects of a state court judgment. "Preclusion is not a jurisdictional matter." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005). Thus, an England reservation comes into play only if the plaintiff "properly invoked federal-court

[8] The ability to reserve a federal claim is limited to situations where the purpose of the federal court's abstention is to determine whether resolution of the federal question is necessary or to obviate the risk of a federal court's erroneous construction of state law. Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980).

jurisdiction in the first instance on a federal claim...." See Allen, 449 U.S. at 101 n.17.

In contrast, Rooker-Feldman is a jurisdictional doctrine which bars a district court from exercising subject matter jurisdiction over an action explicitly styled as a direct appeal of a state court judgment or the de facto equivalent of such an appeal. Fowler, 899 F.3d at 1119. When a court lacks subject matter jurisdiction, such as in cases where Rooker-Feldman is applicable, it cannot reach the merits of the plaintiff's claims. See Price v. United States General Services Admin., 894 F.2d 323, 324 (9th Cir. 1990). Thus, whether Plaintiff made a purported England reservation before the California Court of Appeal simply has no bearing on whether this Court is deprived of subject matter jurisdiction under Rooker-Feldman. See Szoke v. Carter, 974 F. Supp. 360, 366 n.4 (S.D.N.Y. 1997) (rejecting the plaintiff's contention that her England reservation necessarily precluded the Rooker-Feldman doctrine from divesting the court of subject matter jurisdiction over those federal claims); accord Canty v. Larhette, 201 F.3d 426, 1999 WL 1338347 (1st Cir. 1999) (citing Szoke and concluding that "the England reservation does not overcome a Rooker-Feldman jurisdictional bar in this case") (unpublished disposition).[9]

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[9] Plaintiff cites Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411 (3rd Cir. 2003), which stated, in dicta, that "a proper England reservation protects a federal action from dismissal under the Rooker-Feldman doctrine." Id. at 419. As support, Desi's Pizza relies on Ivy Club v. Edwards, 943 F.2d 270, 284 (3d Cir. 1991). Like Desi's Pizza, Ivy Club's remark is dicta, as the Third Circuit's decisions in both cases were not

Even if an England reservation precluded application of the Rooker-Feldman doctrine, England simply has no application here. As noted, an England reservation preserves the right of a litigant involuntarily relegated to state court to later return to federal district court to litigate his federal constitutional claims. England, 375 U.S. at 420-21. Here, Plaintiff was not involuntarily compelled to litigate in state court. But more fundamentally, he never asserted any affirmative federal constitutional claims before the Superior Court. Rather, Plaintiff raised the specter of federal claims for the first time on appeal in Bartsch III, presumably to assert, as he does now, that the state courts violated his constitutional rights by allegedly failing to address his claims in a manner favorable to him. To the extent that Plaintiff believed that the Superior Court's handling and resolution of his probate petitions and legal claims violated his constitutional rights, he should have raised those concerns in his appeal. Plaintiff cites no authority—nor has this Court been able to locate any—holding that a state court plaintiff has the right to reserve challenges to a state court judgment in a federal forum. Indeed, such a rule would upend the Rooker-Feldman doctrine, which bars a lower federal court from serving as a court of appeal from a state court judgment.

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predicated on the interplay between the Rooker-Feldman doctrine and England. Moreover, Ivy Club fails to cite any decisional authority or provide any reasoned analysis to support its remark. Aside from Desi's Pizza, no other case has cited Ivy Club for the proposition that a proper England reservation trumps the Rooker-Feldman doctrine. For those reasons, the Court finds both decisions unpersuasive.

3. Article III Standing

Defendants next contend that subject matter jurisdiction is lacking due to Plaintiff's lack of Article III standing. Under Article III of the United States Constitution, judicial power is limited to "Cases" and "Controversies." Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation." Id. "The irreducible constitutional minimum" of Article III standing contains three elements: (1) an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing" Article III standing. Id. at 561. " '[A] suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004).

In the instant case, Plaintiff cannot show that he has standing to bring the § 1983 claims alleged because he has not suffered an "injury in fact." Each of Plaintiff's claims derive from his purported "right" to inherit Bartsch's assets. Compl. ¶ 133 (procedural due process claim), ¶ 140 (substantive due process claim); ¶ 145 (Fourth Amendment claim); ¶ 147-48 (takings claim); ¶ 157-58 (equal protection claim). The question of whether Plaintiff had any right to those assets was previously litigated in the state court proceedings, which concluded that he did not.

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Ignoring the state court rulings, Plaintiff counters that whether he "still has an interest in the Bartsch estate is immaterial to his causes of action against the City regarding assets that were once but no longer are in the Bartsch estate." Pl.'s Opp'n to City's Mot. to Dismiss at 9. Though not entirely clear, Plaintiff appears to assert that his injury in fact is not solely the loss of the Bartsch's assets, but also the financial benefits he would have received had the properties been transferred to him in the first instance (i.e., a lower property tax basis and the right to convert the apartments to condominiums). Id. at 9, 10-12. That is a distinction without a difference. The collateral benefits cited by Plaintiff all derive from Plaintiff's right to inherit the Grand View properties. As the probate court and Court of Appeal made clear in Bartsch II and Bartsch III, Plaintiff has no such right. Under the Rooker-Feldman doctrine as well as the doctrine of collateral estoppel, the state courts' rulings cannot be revisited in this action.

B. Failure to State a Claim

1. Legal Standard

Alternatively, even if the Court has subject matter jurisdiction—which it clearly does not—Plaintiff's claims are subject to dismissal for failure to state a claim. "Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). To survive a motion to dismiss, a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The court is to "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

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2. The City

a) Monell Claim

All of Plaintiff's claims are grounded on § 1983, which provides a cause of action for the violation of a plaintiff's constitutional or other federal rights by "persons" acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092 (9th Cir. 2009). To maintain a § 1983 claim, the plaintiff bears the burden of pleading and proving two elements: (1) the conduct deprived the plaintiff of a right, privilege, or immunity protected by the Constitution or laws of the United States; and (2) the alleged deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). A plaintiff must "set forth specific facts" establishing each defendant's "individual fault." Leer v. Murphy, 844 F.2d 628, 633-34 (9th Cir. 1988).

A municipality may be held liable as a "person" under § 1983 when it maintains a policy, custom or practice that causes the deprivation of a plaintiff's federally protected rights. Monell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978). To

state a claim against a municipality, a plaintiff must allege facts sufficient to support a reasonable inference that the execution of a policy, custom, or practice was the "moving force" that resulted in the deprivation of his or her constitutional rights. Id. at 694; Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011).

Nowhere in his Complaint or opposition briefs does Plaintiff allege any facts identifying the policy, custom or practice that was the moving force behind the alleged constitutional deprivation. See Dougherty, 654 F.3d at 900 (conclusory Monell claim subject to dismissal). To the extent that Plaintiff is attempting to hold the City vicariously liable for the acts of its employees, such a claim fails because there is no respondeat superior liability under § 1983. Monell, 436 U.S. at 691. Therefore, none of Plaintiff's claims against the City state a claim upon which relief can be granted.

b) Collateral Estoppel

Plaintiff's claims also fail under the doctrine of collateral estoppel. Under California law, collateral estoppel bars the relitigation of an issue in a subsequent proceeding when: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Mills v. City of Covina, 921 F.3d

1161, 1169 (9th Cir.), cert. denied sub nom. Mills v. City of Covina, California, 140 S. Ct. 388 (2019) (citing Gikas v. Zolin, 6 Cal. 4th 841, 849 (1993)).

Here, all of the elements for collateral estoppel are present. The issue that Defendants seek to preclude from being relitigated is whether Plaintiff has a right to inherit the Bartsch estate. The identical issue was decided by the probate court in connection with Plaintiff's pretermission petition in which Plaintiff claimed he was entitled to inherit Bartsch's assets as a pretermitted (i.e., unintentionally omitted) heir. That issue was actually litigated when Judge Kaplan granted summary judgment for the executor and resulted in final judgment. That judgment was affirmed by the Court of Appeal, which held that "the court properly concluded [that Plaintiff] is not entitled to a share of the estate as an omitted child." See Bartsch II, 2014 WL 338784, at *6 (emphasis added). Finally, the person against whom preclusion is sought (i.e., Plaintiff) is the same party who filed the pretermission petition.

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Plaintiff argues issue preclusion should not apply because he "never had an opportunity to participate in a fair adversary hearing on the Will's validity" in state court. Pl.'s Opp'n to City's Mot. to Dismiss at 6. The record belies this contention. Although Plaintiff did not receive notice of the initial probate petition filed by Peltner, the procedural history of the state court probate proceedings show that Plaintiff not only had the opportunity to challenge the decision of whether he has an interest in the Bartsch estate, but that he did so vigorously over the course of the last decade.

He challenged the will—which left nothing to him—through his 2009 pretermission petition. That petition challenged whether Bartsch had mistakenly overlooked that Plaintiff was his child. Petitioner also had the opportunity to challenge the will in his 2017 motion seeking to set aside Judge Kaplan's December 2008 order establishing the will's validity. Plaintiff's participation in these disputes, which resulted in decisions on the merits against him, are sufficient to settle the question of whether Plaintiff is entitled to recover from the Bartsch estate. The doctrine of issue preclusion prevents him from relitigating those questions here.

3. Judges and Justices

The claims against Judges Kaplan, Wiss and Stewart arise from their handling of the probate proceedings relating to the Bartsch estate, while the claims against Justices Sanchez, Margulies and Banke are based on their appellate review of Judge Stewart's denial of Plaintiff's motion to set aside Judge Kaplan's December 2008 order.

It is well established that judges are absolutely immune from § 1983 liability for damages for their judicial acts, "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 356 (1978); Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996) (judicial immunity extends to declaratory and other equitable relief). Judicial acts entitled to absolute immunity are those in which a judge is "perform[ing] the function of resolving disputes

between parties, or of authoritatively adjudicating private rights." Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435-36 (1993) (citation and internal quotation marks omitted). "As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc).

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Judicial immunity is overcome only where (1) the actions in question are nonjudicial; or (2) the actions in question, though judicial in nature, were taken in complete absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 11 (1991). A nonjudicial act refers to "the administrative, legislative, and executive functions that judges may on occasion be assigned to perform." Duvall v. County of Kitsap, 260 F.3d 1124, 1133 (9th Cir. 2001). "Administrative functions are actions which are significant independent of the fact that the actor is a judge, such as the hiring or firing of staff members." Partington v. Gedan, 961 F.2d 852, 866 (9th Cir. 1992), as amended (July 2, 1992) (citing Forrester v. White, 484 U.S. 219, 228-30 (1988)).

As an initial matter, it is clear that the actions of the Superior Court judges and Court of Appeal justices were within the scope of their respective jurisdictions. Only Superior Court judge has the power to adjudicate matters concerning wills and the distribution of an estate. See Reed v. Hayward, 23 Cal.2d 336, 339 (1943); e.g., Cal. Prob. Code § 8006 (empowering the probate court to admit a will to probate and appoint a personal representative); id. § 10308 (requiring court to confirm the sale of real property assets in probate).

Likewise, it is axiomatic that only an appellate court justice may decide cases on appeal from a Superior Court. See Cal. Const. art. VI, § 11. Because the judges and justices were undeniably performing judicial functions within the scope of their jurisdiction, they are entitled to absolute judicial immunity. See Duvall, 260 F.3d at 1133 (defining judicial acts).

Plaintiff asserts the judges and justices functioned in a "nonjudicial" capacity and that "others who weren't judges" could have performed the same acts. Opp'n at 7. A nonjudicial act is one separate and apart from judicial activity, such as an administrative function. Partington, 961 F.2d at 866. In this case, none of the alleged misconduct attributed to the aforementioned Defendants is administrative in nature; rather, the Plaintiff's claims arise from the judges and justices' handling of court proceedings and rulings in the Bartsch probate dispute. As such, they undeniably were acting in a judicial capacity. Tellingly, Plaintiff cites no authority or facts nor provides any reasoned legal analysis to support his conclusory and patently erroneous assertion that a person other than a judge or appellate justice has the authority to preside over court hearings, enter court orders and issue appellate decisions.

Equally meritless is Plaintiff's ancillary contention that judicial immunity does not extend to claims that judicial officers violated the plaintiff's constitutional rights. Pl.'s Opp'n to Jud. Defs.' Mot. to Dismiss at 7. In fact, the Ninth Circuit has held that judicial immunity applies to claims that a judge violated the plaintiff's

constitutional rights in an underlying proceeding. See Ashelman, 793 F.2d at 1078 (holding that judicial immunity applied to a claim that the judge and prosecutor violated his constitutional rights by conspiring to predetermine the outcome of a judicial proceeding).

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As for the cases cited by Plaintiff, they are inapposite. Each of those decisions focused on the fact that the judge was engaged in a nonjudicial act, not that the claim alleged against the judge was based on a constitutional violation. See, e.g., Forrester v. White, 484 U.S. 219, 227-29 (1988) (holding that the demotion and termination of a court employee was a nonjudicial, administrative act); Meek v. Cty. of Riverside, 183 F.3d 962, 968 (9th Cir. 1999) (same); Harper v. Merckle, 638 F.2d 848, 859 (5th Cir. 1981) (no judicial immunity where the judge "acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives"); Gregory v. Thompson, 500 F.2d 59, 61-62 (9th Cir. 1974) (no immunity for a physical assault by judge on an individual who interjected himself into a matter in which he was not a party).

In sum, the Court finds that the conduct underlying Plaintiff's claims against the Superior Court judges and Court of Appeal justices arise from judicial acts, and therefore, these Defendants are entitled to absolute immunity.[10]

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[10] Irrespective of their immunity, the Judicial Defendants, like the City, are entitled to the shelter of collateral estoppel for the reasons discussed supra.

4. Court Executives

Defendants Yuen, Williams and Park-Li (collectively "Court Executives") are alleged to be Superior Court "executive" staff. Id. ¶¶ 7-9. The Complaint does not allege that these individuals engaged in particular conduct that caused Plaintiff to suffer an injury—as required to establish individual liability under § 1983. See Leer, 844 F.2d at 633-34 (requiring "specific facts" establishing each defendant's "individual fault"). Nevertheless, Plaintiff argues that Court Executives are liable: (1) for implementing the Superior Court's "policies and procedures"; and (2) because they had "actual and/or constructive knowledge of material facts [and omissions]" of their co-defendants.[11] Pl.'s Opp'n to Jud. Defs.' Mot. to Dismiss at 13.

Plaintiff's claims against the Court Executives are wholly without merit. As an initial matter, Plaintiff fails to identify the particular policies and procedures at issue. Even if he had identified those policies and procedures, causation is lacking. See Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009) (noting that a defendant is not liable under § 1983 absent a causal connection between the defendant's wrongful conduct and the deprivation). Plaintiff's alleged harm (i.e., the failure to receive anything from Bartsch's estate) is attributable to rulings by the Superior Court and Court of Appeal, not

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[11] The "actual and/or constructive knowledge" referred to by Plaintiff ostensibly pertains to the Superior Court's determination in 1963 establishing Bartsch's paternity. Compl. ¶¶ 76-77.

unspecified court policies and procedures or a court employee's alleged awareness of a ruling entered 57 years ago. See Ewing, 588 F.3d at 1235 (noting that liability under § 1983 requires "personal participation in the alleged rights deprivation"); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) ("A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights."). Finally, court staff are entitled to quasi-judicial immunity for actions that are integral to the judicial process. Briscoe v. LaHue, 460 U.S. 325, 334-35 (1983); accord Mullis v. U.S. Bankr. Ct., 828 F.2d 1385, 1390 (9th Cir. 1987) ("Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process.").

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The Court finds that Plaintiff has failed to state a claim against the Court Executives.

5. Superior Court

No appearance has been entered for Defendant Superior Court. Nonetheless, the Superior Court is not a proper party-defendant in this action, as a court is not a "person" subject to liability under § 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71 (1989). Even if the Superior Court were a proper party, any claims against it in this action are subject to dismissal for lack of subject matter jurisdiction. Silverton v. Department of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who

have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where the claims against such defendants are integrally related."). The Superior Court is dismissed as a party-defendant.

C. LEAVE TO AMEND

Leave to amend should be given freely except where further amendment to the pleadings would be futile. Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011). As set forth above, the Court lacks subject matter jurisdiction over Plaintiff's claims under the Rooker-Feldman doctrine and for lack of Article III standing. Even if the Court had subject matter jurisdiction, Plaintiffs' claims are fatally flawed and his opposition papers fail to persuade the Court that amendment to the pleadings would cure the numerous deficiencies discussed above. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003). The dismissal of Plaintiff's claims is therefore without leave to amend.

IV. CONCLUSION

For the reasons state above,

IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for leave to file surreply briefs is GRANTED.

2. Plaintiff's motion for judicial notice is DENIED.

3. The City and Judicial Defendants' respective motions for judicial notice are GRANTED.

4. The City and Judicial Defendants' respective motions to dismiss are GRANTED.

5. The Superior Court is dismissed as party-defendant.

6. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

Dated: June 2, 2020

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
Senior United States District Judge

C

APPENDIX D — DISTRICT COURT ORDER REGARDING MOTION TO DISMISS NORTHERN DISTRICT OF CALIFORNIA CASE NO. 4:20-CV-03992-SBA (OCTOBER 9, 2020)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIRICT OF CALIFORNIA
OAKLAND DIVISION

D

NORMAN BARTSCH HETERICH, Plaintiff, vs. **HON. ERNEST H. GOLDSMITH, et al.,** Defendants.	Case No: C 20-3992 SBA Related Case: No. 19-7554 SBA **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** Dkt. 7

The instant lawsuit is the latest in a series of actions brought by Norman Bartsch Herterich ("Plaintiff") to challenge his omission from the will of his biological father, Hans Herbert Bartsch ("Bartsch"), who died in 2008. In this action, Plaintiff, acting pro se, has sued various Superior Court judges, California Court of Appeal justices

and California Supreme Court justices who were connected to the underlying probate litigation.

This matter is now before the Court on Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6) for lack of subject matter jurisdiction and for failure to state a claim, respectively. Dkt. 7. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motion for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

I. BACKGROUND

A. FACTUAL SUMMARY

Pursuant to a paternity proceeding filed by Plaintiff's mother in 1963, the California Superior Court for the City and County of San Francisco ("Superior Court") ruled that Bartsch was Plaintiff's father and ordered him to pay child support. Compl. ¶ 19; Herterich v. City and Cnty. of San Francisco, No. C 19-7754 SBA, Dkt. 47 at 2. [1]

[1] Plaintiff's claim of entitlement to the Bartsch estate has been the subject of numerous decisions by the California Superior Court and the California Court of Appeal, as well as one by this Court. See Estate of Bartsch, 193 Cal. App. 4th 885 (2011); Estate of Bartsch, No. A135322, 2014 WL 338784 (Cal. Ct. App. Jan. 30, 2014); Herterich v. Peltner, 20 Cal. App. 5th 1132, 1139-147 (2018), as modified on denial of reh'g (Mar. 28, 2018), review denied (May 16, 2018); Estate of Bartsch, No. A151783, 2019 WL 718865, at *7 (Cal. Ct. App. Feb. 20, 2019); Herterich v. City and County of San Francisco,

On October 25, 2008, Bartsch died testate in San Francisco. Id. ¶ 20. On November 17, 2008, Arndt Peltner ("Peltner"), as executor of Bartsch's estate, filed a Probate Petition in the Probate Department of the Superior Court ("Probate Action") to administer the estate. See San Francisco Super. Ct. No. PES-08-291846; Compl. ¶ 26; No. C 19-7754 SBA, Dkt. 47 at 2. Peltner was represented by attorney Alice Traeg ("Traeg"). Compl. ¶ 33. Bartsch's will stated that he had no children and left nothing to Plaintiff. Compl. ¶¶ 28-29. In the Petition, Peltner and Traeg likewise represented that Bartsch had no surviving children. Id. ¶ 30. On December 10, 2008, Superior Court Judge Sue Kaplan granted the Petition, established the validity of the will and appointed Peltner as the executor of Bartsch's estate. Id.

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A short time after Judge Kaplan's ruling in December 2008, Plaintiff became aware of Bartsch's death and the related probate proceeding. No. C 19-7754 SBA, Dkt. 47 at 2. Thus, on April 1, 2009, Plaintiff filed a pretermission petition in probate court, claiming that he was a pretermitted heir entitled to share in Bartsch's estate. Compl. ¶ 43.; Defs.' Request for Jud. Not. ("RJN") Ex. 1, Dkt.

No. 19-7754 SBA, Dkt. 47 (N.D. Cal. June 2, 2020) (Order Granting Defendants' Motion to Dismiss). To provide context to the instant action and Defendants' motion, the Court sua sponte takes judicial notice of those decisions. See Fed. R. Evid. 201(c)(1) ("The court [¶] may take judicial notice on its own"); U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (noting that federal courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue").

9-2 at 6 (copy of Cal. Ct. of Appeal opinion in No. A151783). The pretermission petition alleged that Plaintiff was unintentionally omitted from his father's will. Id.

In December 2011, the probate court "granted executor Peltner's motion for summary judgment after finding that [Plaintiff] was not a pretermitted heir and had been intentionally disinherited by Bartsch." Id. Plaintiff appealed the probate court's ruling, which was later affirmed. See Estate of Bartsch, No. A135322, 2014 WL 338784, at *2 (Cal. Ct. App. Jan. 30, 2014). The Court of Appeal held that Plaintiff was not entitled to any part of Bartsch's estate: "We conclude that the trial court properly found there is no triable issue of fact as to whether decedent was unaware of [Plaintiff]'s birth. It follows that *the court properly concluded he is not entitled to a share of the estate as an omitted child.*" Id. at *6 (emphasis added).

In the meantime, while the above appeal was pending, Plaintiff filed a civil fraud action ("Civil Fraud Action") against Peltner and Traeg, alleging they had made false and misleading statements regarding whether Bartsch had any children. See Herterich v. Peltner, San Francisco Super. Ct. No. CGC-12-523942; Compl. ¶¶ 50, 52. His goal in filing the Civil Fraud Action was to set aside the Probate Court's decision in the Probate Action and establish his right to inherit part of Bartsch's estate. Id. ¶¶ 46, 157. In separate orders, issued by Judges Ernest H. Goldsmith and Harold E. Kahn, respectively, the Superior Court granted Peltner and Traeg's motions for summary judgment and entered separate judgments in their favor. Compl.

¶ 15. In a published decision, the California Court of Appeal affirmed the judgments, holding that Plaintiff's claims were barred by the litigation privilege under California Civil Code § 47(b). Herterich v. Peltner, 20 Cal. App. 5th 1132, 1139-147 (2018), as modified on denial of reh'g (Mar. 28, 2018), review denied (May 16, 2018). Plaintiff filed a petition for review, which the California Supreme Court denied. Compl. ¶ 107. It is the Superior Court's rulings in the Civil Fraud Action, the appellate court's affirmance of said ruling, and the state supreme court's denial of review that form the basis of the instant action.

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B. PROCEDURAL HISTORY

On June 11, 2020, Plaintiff filed the instant matter in this Court against Superior Court Judges Goldsmith and Kahn; California Court of Appeal Justices Sandra L. Margulies and Kathleen M. Banke; and California Supreme Court Justices Tani Cantil-Sakauye, Ming William Chin, Carol Ann Corrigan, Goodwin Hon Liu, Mariano-Florentino Cuéllar and Leondra Reid Kruger.

The Complaint alleges four federal claims for: denial of equal protection; denial of property without procedural or substantive due process; unreasonable seizure of property in violation of the Fourth Amendment; and violation of the Fifth Amendment's Takings Clause.[2] As relief, Plaintiff

[2] The Court liberally construes Plaintiff's claims under 42 U.S.C. § 1983, which is an enabling statute that allows him to seek redress for purported violations of his constitutional

seeks: (1) a declaration that "the [Civil Action] was not barred"; (2) a declaration that, in the Civil Fraud Action, Plaintiff should have obtained "ownership or inheritance of the residue of Bartsch's estate"; and (3) an injunction ordering Defendants to transfer to Plaintiff "the monetary value of the relief, and/or just compensation for the taking of the relief, which [he] would or should have obtained from a determination of the Civil Fraud Complaint on the merits." Compl. ¶¶ 168-170.

Defendants have now filed a motion to dismiss for lack of jurisdiction and for failure to state a claim pursuant to Rule 12(b)(1) and 12(b)(6), respectively. Defendants argue that Plaintiff's claims are barred by the Rooker-Feldman[3] doctrine, which precludes lower federal courts from reviewing state court judgments. In the alternative, Defendants contend that Plaintiff lacks Article III standing and that none of the claims are viable. The motions are fully briefed and are ripe for adjudication.[4]

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rights. See Thornton v. City of St. Helens, 425 F.3d 1158, 1164 (9th Cir. 2008) (citations omitted).

[3] See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923).

[4] This case was originally assigned to Magistrate Judge Joseph C. Spero but was subsequently deemed related to Herterich v. City and County of San Francisco, No. C 19-7754 SBA, pursuant to Civil L.R. 3-12. In his prior action, Plaintiff brought section 1983 claims against various Superior Court judges and court staff, and, like the instant case, sought to

II. DISCUSSION

A. LACK OF SUBJECT MATTER JURISDICTION

A complaint may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), 12(h)(3). A Rule 12(b)(1) motion may be either facial (as is the case here), where the court's inquiry is limited to the allegations in the complaint; or factual, where the court may look beyond the complaint to consider extrinsic evidence. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When reviewing a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, including one based on Rooker-Feldman, "[the Court takes] the allegations in the plaintiff's complaint as true." Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." Rattlesnake Coalition v. United States Envtl. Protection Agency, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007). Because subject matter jurisdiction is a threshold requirement in every federal action, a district court must generally "satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

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establish his entitlement to the Bartsch estate. The Court dismissed the earlier action for lack of subject matter jurisdiction under Rooker-Feldman and for lack of Article III standing, or alternatively, for failure to state a claim. Plaintiff has appealed the dismissal. See Ninth Circuit Ct. of App. No. 20-16286.

1. Rooker-Feldman

The Rooker-Feldman doctrine provides that "federal district courts lack jurisdiction to hear direct or 'de facto' appeals from the judgments of state courts." Fowler v. Guerin, 899 F.3d 1112, 1119 (9th Cir. 2018). In determining whether a plaintiff's claims are tantamount to a de facto appeal, a court first examines the relief sought in this action. See Cooper, 704 F.3d at 777-78 (citing Bianchi v. Rylaarsdam, 334 F.3d 895, 900 (9th Cir. 2003)). 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," the action is a de facto appeal. Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003). If the action is a de facto appeal, the Court then considers whether the federal plaintiff's claims are "inextricably intertwined" with an issue resolved by the state court decision from which the forbidden de facto appeal is taken. See Cooper v. Ramos, 704 F.3d 772, 778-79, 782 (9th Cir. 2012). A federal constitutional challenge is inextricably intertwined with a state court judgment where "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Id. (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (Marshall, J., concurring)).

In the state court proceedings, the Superior Court ruled against Plaintiff in the Civil Fraud Action; the Court of Appeal subsequently affirmed the judgment; and the Supreme Court denied review. In the instant action, Plaintiff seeks: (1) a declaration that the Civil Fraud Action "was not barred"; (2) a declaration that he is entitled to

receive an inheritance from Bartsch's estate (plus the recovery of fees expended in the Probate Action and Civil Fraud Action); and (3) an injunction requiring Defendants to transfer to Plaintiff the relief (or monetary value of the relief) that he should have obtained from a determination of the Civil Action on the merits. In view of the state courts' rejection of Plaintiff's Civil Fraud Action, it is clear based on the relief sought, that he, in fact, is seeking relief from those decisions. As such, this action is a de facto appeal. See Noel, 341 F.3d at 1164 (de facto appeal shown where the plaintiff seeks relief from a state court judgment).

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It is equally clear that Plaintiff's federal claims are inextricably intertwined with matters resolved by the state courts. As noted, a federal lawsuit is intertwined with the state court action where "the relief requested in the federal action would effectively reverse the state court decision or void its ruling." Id. (internal quotations and citation omitted); see also Bianchi, 334 F.3d at 898 (noting that claims are inextricably intertwined with state court decision where "the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules") (citation omitted). Here, the state courts rejected Plaintiff's fraud claims against Peltner and Traeg and determined that Plaintiff has no entitlement to Bartsch's estate. Thus, for this Court to grant Plaintiff the relief he seeks would require it to expressly review and reject the trial court's rulings granting summary judgment, the appellate decision affirming the trial court rulings, and the state

supreme court's denial of Plaintiff's petition for review. Under Rooker-Feldman, this Court has no authority to do so. See Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1029-30 (9th Cir. 2001) (explaining that a federal claim is inextricably intertwined with a state court judgment if the federal court is called upon to "review the state court's decision, which the district court may not do").

Plaintiff denies that he is seeking review of any state court ruling but is simply challenging "state statutes and rules governing the state court's decisions, which in this case were used to violate [his] constitutional rights." Pl.'s Opp'n at 3, Dkt. 12. As support, he relies on Skinner v. Switzer, 562 U.S. 521 (2011), which held that Rooker-Feldman did not preclude a condemned prisoner from raising a procedural due process claim challenging the constitutional adequacy of state procedures for postconviction DNA testing. 562 U.S. at 533. In reaching its decision, the Court explained that "an independent claim in federal court" is not within the purview of the Rooker-Feldman doctrine. Id. at 522.

Skinner is distinguishable. Here, Plaintiff fails to identify any state statutes or rules that are allegedly unconstitutional. Unlike Skinner, Plaintiff avers that the state court decisions themselves—as opposed to any particular statute—are the source of the purported infringement of his constitutional rights. Because Plaintiff is challenging the outcome of his state case, the "independent claim" exception relied upon in Skinner is inapt. See Cooper, 704 F.3d at 781

(distinguishing Skinner and holding that Rooker-Feldman barred the plaintiff's claims, which challenged "the particular outcome in his state case" and did "not actually launch a broadside against the constitutionality of [a state statute]").

Also without merit is Plaintiff's ancillary contention that he is focusing on Defendants' allegedly differential treatment in violation of the Equal Protection Clause as opposed to any court rulings. Even if a federal court plaintiff predicates his or her claims under federal law, the claims are barred by Rooker-Feldman where, as here, the relief being sought is the same as the relief that the state court declined to award. See Bianchi, 334 F.3d at 898 (affirming dismissal of a plaintiff's federal civil rights claims which "attempt[ed] to obtain in federal court the very relief denied to him in state court"); Remer v. Burlington Area Sch. Dist., 205 F.3d 990, 997 (7th Cir. 2000) ("A plaintiff may not circumvent the effect of the Rooker-Feldman doctrine simply by casting [his] complaint in the form of a federal civil rights action.") (internal quotation and citation omitted).

Finally, Plaintiff contends that the Rooker-Feldman doctrine is inapplicable where the plaintiff was not a party to the previous state court action. See Lance v. Dennis, 546 U.S. 459, 466 & n.2 (2006) (per curiam).[5] In particular, he complains that the appellate court affirmed the Superior Court's judgment based on the litigation

[5] Plaintiff was clearly a party to the state court action, since he was the party that filed the Civil Fraud Action in the first instance.

privilege, which the appellate court raised sua sponte. Pl.'s Opp'n at 7-8. To the extent that Plaintiff is claiming that he was not a party because he lacked the opportunity to dispute the applicability of the litigation privilege, the record does not support his claim. The Court of Appeal's opinion expressly states that it requested and received from the parties supplemental briefing on the issue. Herterich, 20 Cal. App. 5th at 1137 ("[W]e asked the parties to file supplemental briefing as to the applicability of the affirmative defense of the litigation privilege to plaintiff's complaint. We received supplemental briefing from all parties."). In addition, Plaintiff acknowledges in his Complaint that he submitted briefing on the litigation privilege issue. Compl. ¶¶ 95-96.[6] Thus, it is clear that Plaintiff had an opportunity to be heard on the litigation privilege issue before the Court of Appeal rendered its decision. Given that opportunity, Plaintiff is hard-pressed to claim that he was not a party to the underlying Civil Fraud Action.

2. Article III Standing

Defendants next contend that subject matter jurisdiction is lacking due to Plaintiff's lack of Article III standing. Under Article III of the United States Constitution, judicial power is limited to "Cases" and "Controversies." Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009). "The doctrine of standing is one of several doctrines that

[6] The record shows that Plaintiff was represented by counsel on appeal.

reflect this fundamental limitation." Id. "The irreducible constitutional minimum" of Article III standing contains three elements: (1) an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing" Article III standing. Id. at 561. " '[A] suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004).

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In the instant case, Plaintiff cannot show that he has standing to bring the section 1983 claims alleged because he has not suffered an "injury in fact." Each of Plaintiff's claims rests upon the notion that the state trial and appellate courts violated his constitutional rights by rejecting his claims in the Civil Fraud Action. As noted, Plaintiff's intention in pursuing the Civil Fraud Action was to set aside the Probate Court's order establishing the validity of Bartsch's will—which omitted Plaintiff as an heir—and ultimately to establish his right to inherit Bartsch's estate. E.g., Compl. ¶ 158 ("The relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits included ownership or inheritance of the residue of Bartsch's estate."); see also id. ¶¶ 47, 125, 144, 153. However, the question of whether Plaintiff had any right to the estate was previously litigated in the state court proceedings, which concluded that he did not. See

Herterich, 20 Cal. App. 5th at 1148 (affirming summary judgment in the Civil Fraud Action); Estate of Bartsch, No. A135322, 2014 WL 338784, at *6 (Cal. Ct. App. Jan. 30, 2014) (holding that Plaintiff "is not entitled to a share of the [Bartsch] estate as an omitted child."); Estate of Bartsch, No. A151783, 2019 WL 718865, at *7 (Cal. Ct. App. Feb. 20, 2019) ("Because [Plaintiff] has no cognizable interest in the [Bartsch] Estate and has suffered no legal injury from the filing of the probate petition and the related judicial proceedings, [he] has no standing to appeal the probate court's order denying his motion to set aside probate orders that were entered more than 10 years ago."). In view of the fact that the state courts have previously held that Plaintiff has no right to the Bartsch estate, there is no justiciable controversy underlying the instant action.

B. Failure to State a Claim

Alternatively, even if Plaintiff had carried his burden of demonstrating subject matter jurisdiction—which he clearly has not—his claims are subject to dismissal for failure to state a claim. "Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The

court is to "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

"A judge is generally immune from a civil action for damages.... The judicial or quasi-judicial immunity available to [judicial] officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief." Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996) (citations omitted). Such immunity applies "even when such [judicial] acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 356 (1978). Judicial acts entitled to absolute immunity are those in which a judge is "perform[ing] the function of resolving disputes between parties, or of authoritatively adjudicating private rights." Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435-36 (1993) (citation and internal quotation marks omitted). "As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc).

Judicial immunity is overcome only where (1) the actions in question are nonjudicial; or (2) the actions in question, though judicial in nature, were taken in complete absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 11 (1991). A nonjudicial act refers to "the administrative, legislative, and executive functions that judges may on occasion be assigned to perform." Duvall v. County of Kitsap, 260 F.3d

1124, 1133 (9th Cir. 2001). "Administrative functions are actions which are significant independent of the fact that the actor is a judge, such as the hiring or firing of staff members." Partington v. Gedan, 961 F.2d 852, 866 (9th Cir. 1992), as amended (July 2, 1992) (citing Forrester v. White, 484 U.S. 219, 228-30 (1988)).

Plaintiff does not dispute that the actions attributed to each of the Defendants were taken in the course and scope of their role as judicial officers and within the scope of their respective jurisdictions. He nonetheless argues that judicial immunity does not apply to claims that a judicial officer violated a litigant's constitutional rights under the Fourteenth Amendment. Pl.'s Opp'n at 15-16. However, the Ninth Circuit has held that judicial immunity applies to claims that a judge violated the plaintiff's constitutional rights in an underlying proceeding. See Ashelman, 793 F.2d at 1078 (holding that judicial immunity applied to a claim that the judge and prosecutor violated his constitutional rights by conspiring to predetermine the outcome of a judicial proceeding).

As for the cases cited by Plaintiff, they are inapposite. Each of those decisions focused on the fact that the judge was engaged in a nonjudicial act—such as those taken in an administrative capacity—not that the claim alleged against the judge was based on a constitutional violation. See, e.g., Forrester v. White, 484 U.S. 219, 227-29 (1988) (holding that the demotion and termination of a court employee was a nonjudicial, administrative act); Meek v. Cty. of Riverside, 183 F.3d 962, 968 (9th Cir. 1999) (same); Harper v. Merckle, 638 F.2d

848, 859 (5th Cir. 1981) (no judicial immunity where the judge "acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives"); Gregory v. Thompson, 500 F.2d 59, 61-62 (9th Cir. 1974) (no immunity for a physical assault by judge on an individual who interjected himself into a matter in which he was not a party).

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Plaintiff also argues that judicial immunity does not apply to official capacity claims or claims for damages. Pl.'s Opp'n at 17. Neither contention has merit. Judges are entitled to absolute judicial immunity for acts performed in their official capacity. See Olsen v. Idaho State Bd. of Medicine, 363 F.3d 916, 922 (9th Cir. 2004) ("Absolute immunity is generally accorded to judges and prosecutors functioning in their official capacities").[7] In addition, as noted above, judicial immunity applies to suits for damages. Stump, 435 U.S. at 356 (1978); Moore, 96 F.3d at 1243.

Judicial immunity notwithstanding, Defendants, who are sued herein in their official capacities, are not proper parties in a section 1983 action. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the violation was committed by a person acting under the color of

[7] To the extent that Plaintiff is suing Defendants in their official capacities as judicial officers, Plaintiff's claims for damages are barred by the Eleventh Amendment. Simmons v. Sacramento Cty. Super. Ct., 318 F.3d 1156, 1161 (9th Cir. 2003) (recognizing that claims against a court or its employees are barred by the Eleventh Amendment).

state law. West v. Atkins, 487 U.S. 42, 48 (1988). "[A] state and its officials sued in their official capacity are not considered 'persons' within the meaning of § 1983." Wolfe v. Strankman, 392 F.3d 358, 364 (9th Cir. 2004) (internal citations omitted, alterations in original). Moreover, the conduct attributed to Defendants by Plaintiff was undertaken in their respective adjudicative capacities. A judicial officer's actions in "adjudicating cases pursuant to state statutes" are insufficient to support a claim under section 1983. Id. at 365. As such, all of Plaintiff's claims are subject to dismissal for failure to state a claim.

C. LEAVE TO AMEND

Leave to amend should be given freely except where further amendment to the pleadings would be futile. Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011). As set forth above, the Court lacks subject matter jurisdiction over Plaintiff's claims under the Rooker-Feldman doctrine and for lack of Article III standing. Even if the Court had subject matter jurisdiction, Plaintiffs' claims are fatally flawed and his opposition papers fail' to persuade the Court that amendment to the pleadings would cure the numerous deficiencies discussed above. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003). The dismissal of Plaintiff's claims is therefore without leave to amend.

III. CONCLUSION

For the reasons state above,

IT IS HEREBY ORDERED THAT Defendants' Motion to Dismiss Plaintiff's Complaint is GRANTED.

IT IS SO ORDERED.

Dated: 10/09/20

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/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
Senior United States District Judge

APPENDIX E — COURT OF APPEALS ORDER DENYING REHEARING IN NINTH CIRCUIT CASE NO. 20-16286 (MARCH 4, 2022)

FILED MAR 4 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. **CITY AND COUNTY OF SAN FRANCISCO; et al.,** Defendants-Appellees.	No. 20-16286 D.C. No. 4:19-cv-07754-SBA Northern District of California, Oakland ORDER

E

Before: CANBY, TASHIMA, and MILLER, 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.

Herterich's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 46) are denied.

No further filings will be entertained in this closed case.

APPENDIX F — COURT OF APPEALS ORDER DENYING REHEARING IN NINTH CIRCUIT CASE NO. 20-17197 (MARCH 4, 2022)

FILED MAR 4 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. **ERNEST H. GOLDSMITH; et al.,** Defendants-Appellees.	No. 20-17197 D.C. No. 4:20-cv-03992-SBA Northern District of California, Oakland ORDER

F

Before: CANBY, TASHIMA, and MILLER, 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.

Herterich's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 29) are denied.

No further filings will be entertained in this closed case.

APPENDIX G — CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

G

28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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APPENDIX H — COMPLAINT FILED IN NORTHERN DISTRICT OF CALIFORNIA CASE NO. 4:19-CV-07754-SBA ON NOVEMBER 25, 2019

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Pro Se Plaintiff

FILED NOV 25 2019

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

H

NORMAN BARTSCH HERTERICH, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, T. MICHAEL YUEN, CLAIRE A. WILLIAMS, GORDON PARK-LI, SUE M. KAPLAN, MARY E. WISS, JOHN K. STEWART, GABRIEL P. SANCHEZ, SANDRA L. MARGULIES, KATHLEEN M. BANKE, AND DOES 1-20, Defendants.	Case No. CV-19-7754-JCS COMPLAINT FOR MONEY DAMAGES OR, ALTERNATIVELY, RETURN OF OR JUST COMPENSATION FOR PRIVATE PROPERTY UNREASONABLY SEIZED AND TAKEN WITHOUT DUE PROCESS DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. **Jurisdiction.** This action is brought under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. Jurisdiction is conferred under 28 U.S.C. §§ 1331 and 1343, as applicable to actions brought for the redress of violations of a plaintiff's constitutional and civil rights under the United States Constitution. This Court has authority to award plaintiff declaratory relief under

28 USC §§ 2201 and 2202. This Court has authority to award plaintiff attorney fees under 42 USC § 1988(b) and California Code of Civil Procedure § 1021.5.

2. **Venue.** Venue in the Northern District of California is proper under 28 U.S.C. § 1391(b) and (c) because the events giving rise to this claim occurred within the district, because real property that is a subject of the action is situated in the district, and because some or all defendants reside and/or maintain an office in the district.

3. **Intradistrict Assignment.** This matter should be assigned to the San Francisco Division of this Court because the events giving rise to this claim occurred in San Francisco County, and because some or all defendants reside and/or maintain an office in San Francisco.

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PARTIES

4. Plaintiff Norman Bartsch Herterich is, and was at all times relevant, a resident of San Francisco, California.

5. Defendant City and County of San Francisco is, and was at all times relevant, a California political and governmental entity which *inter alia* creates, records, maintains, and controls official records of the ownership and assessment of real property, and makes and enforces policies regarding the conversion of apartments to condominiums, for real property located in San Francisco, California. Defendant City and County of San Francisco maintains an office in San Francisco, California.

6. Defendant Superior Court of California for the County of San Francisco (hereafter "San Francisco Superior Court") is, and was at all times relevant, a California governmental entity which *inter alia* holds in custodial trust, as a fiduciary for the persons entitled to distribution thereof, the assets of decedents who at the time of their deaths were residents of San Francisco, California. Defendant San Francisco Superior Court maintains an office in San Francisco, California.

7. Defendant T. Michael Yuen is, and was at times relevant, the Court Executive Officer of the San Francisco Superior Court, and as such is responsible for managing the budget and implementing the policies and procedures of the San Francisco Superior Court. California Government Code § 955.9(a) provides that service of summons shall be made on the Court Executive Officer in actions on claims against a superior court or a judge thereof. Defendant T. Michael Yuen maintains an office in San Francisco, California.

8. Defendant Claire A. Williams was, at times relevant, the interim Court Executive Officer of the San Francisco Superior Court, and as such was responsible for managing the budget and implementing the policies and procedures of the San Francisco Superior Court. On information and belief, plaintiff alleges that defendant Claire A. Williams maintains an office or residence in San Francisco, California.

9. Gordon Park-Li was, at times relevant, the Court Executive Officer of the San Francisco Superior Court, and as such was

responsible for managing the budget and implementing the policies and procedures of the San Francisco Superior Court. On information and belief, plaintiff alleges that defendant Gordon Park-Li maintains an office or residence in San Francisco, California.

10. Defendant Sue M. Kaplan was at all times relevant a Probate Commissioner and a Judge Pro Tempore of the San Francisco Superior Court. On information and belief, plaintiff alleges that defendant Sue M. Kaplan maintains an office or residence in San Francisco, California.

11. Defendant Mary E. Wiss is, and was at all times relevant, a Judge of the San Francisco Superior Court. Defendant Mary E. Wiss maintains an office in San Francisco, California.

12. Defendant John K. Stewart is, and was at all times relevant, a Judge of the San Francisco Superior Court. Defendant John K. Stewart maintains an office in San Francisco, California.

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13. Defendants Gabriel P. Sanchez, Sandra L. Margulies, and Kathleen M. Banke are, and were at all times relevant, Justices of the First District Court of Appeal of the State of California. Defendants Gabriel P. Sanchez, Sandra L. Margulies, and Kathleen M. Banke each maintains an office in San Francisco, California.

14. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-20, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities

when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)

15. Defendants at all times herein mentioned were the agents and employees of their co-defendants and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their co-defendants.

16. Defendants at all times herein mentioned had actual and/or constructive knowledge of all material facts known to, and all material acts and omissions of, their co-defendants and the agents and employees of their co-defendants. Defendants' acts were informed by such knowledge.

COMMON ALLEGATIONS

A. After Bartsch's death, plaintiff was entitled to inherit all of Bartsch's assets as Bartsch's sole heir, and plaintiff's identity as a person interested in Bartsch's assets was known to or reasonably ascertainable by defendants.

17. Plaintiff was born in San Francisco, California, in 1961.

18. Plaintiff is the child and sole heir of Hans Herbert Bartsch ("Bartsch").

19. Bartsch was identified as plaintiff's father in plaintiff's birth certificate.

20. Plaintiff's birth certificate has been a matter of record in the continuous possession of the City and County of San Francisco since 1961. A copy of plaintiff's birth certificate is, and was at all times relevant, in the possession of the California Department of Public Health.

21. In 1961 plaintiff's mother initiated a paternity proceeding ("the Paternity Proceeding"), specifically case no. 508058, in the Superior Court of the State of California in and for the City and County of San Francisco ("the San Francisco Superior Court"). In the Paternity Proceeding, plaintiff's mother alleged and Bartsch denied that Bartsch was plaintiff's father.

22. On February 6, 1963, in the Paternity Proceeding, the San Francisco Superior Court entered findings of fact, conclusions of law, and judgment after trial by court (together, "the Paternity Order") establishing that Bartsch was the father of plaintiff and ordering Bartsch to pay child support for plaintiff to plaintiff's mother.

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23. The Paternity Order has been a matter of record in the San Francisco Superior Court continuously since February 6, 1963.

24. A copy of the judgment in the Paternity Proceeding was recorded by the San Francisco Recorder on or around March 1, 1963, in Book A550 on pages 305-306. That copy of the judgment in the Paternity Proceeding has thereafter continuously been a matter of record in the office of the San Francisco Recorder and his successors.

25. Bartsch died in San Francisco, California, on October 25, 2008.

26. Bartsch's death was promptly reported to government agencies as required.

27. At the time of his death Bartsch was a resident of San Francisco, California.

28. Bartsch was survived by plaintiff, had never married and had had no children other than plaintiff. Bartsch was not survived by any of his parents, grandparents, or siblings. Aside from plaintiff, Bartsch's closest living relatives at the time of his death were his alleged nieces and nephews residing in Germany.

29. When Bartsch died, all of his assets were his separate property. Bartsch had no interest in any community or quasi-community property.

30. Under California law plaintiff was Bartsch's sole heir and as such entitled to distribution of all of Bartsch's assets at the time of Bartsch's death,[1] unless one or more testamentary instruments providing otherwise was established to be valid.

31. Bartsch executed no testamentary instrument(s), except perhaps for one or more purported wills. Bartsch did not execute any testamentary trust instrument(s).

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[1] Under California law an heir's claim to a decedent's assets does not reach assets necessary to make legally required payments, such as for the decedent's debts and taxes. Plaintiff does not claim entitlement to any of Bartsch's assets which may have been necessary to make such legally required payments.

32. Under California law a purported will is not presumed to be valid, and such a will may not be given legal effect until and unless it has been judicially determined to be valid.

33. Immediately after Bartsch's death, plaintiff had a right under California law to inherit all of Bartsch's assets as Bartsch's sole heir. That right was secured by the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

34. Under California law, a person claiming an interest under a purported will has the burden to prove the will's validity in a judicial proceeding conducted in accordance with constitutional due process requirements.

35. At the time of Bartsch's death, plaintiff had a San Francisco address and telephone number which plaintiff had had for many years. Plaintiff has had the same address and phone number continuously ever since Bartsch's death.

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36. At the time of Bartsch's death, plaintiff's San Francisco address and phone number could easily be found online, in the phone book, and in documents which were in the possession of the San Francisco Superior Court in the Paternity Proceeding. The City and County of San Francisco, the California Department of Motor Vehicles, and the California Franchise Tax Board also had plaintiff's San Francisco address and phone number in their records.

37. Plaintiff's identity as a person interested in Bartsch's assets was known to or reasonably ascertainable by defendants.

B. Plaintiff was not given personal notice of Bartsch's death or the Probate Petition, and the Will which extinguished plaintiff's interest in Bartsch's assets was ostensibly determined to be valid without plaintiff's knowledge and without a fair adversary hearing.

38. Upon Bartsch's death, under California Health and Safety Code § 7100(a)(3) plaintiff acquired the exclusive right to control the disposition of Bartsch's remains, the location and conditions of Bartsch's interment, and arrangements for funeral goods and services to be provided.

39. After Bartsch's death, no person, entity, or agency notified plaintiff of Bartsch's death or the rights which plaintiff had acquired upon Bartsch's death under California Health and Safety Code § 7100(a)(3), and plaintiff did not become aware of Bartsch's death or plaintiff's resulting rights until after those rights had been exercised by others and could no longer have been exercised by plaintiff.

40. If plaintiff had been timely notified of Bartsch's death or the rights which plaintiff acquired upon Bartsch's death under California Health and Safety Code § 7100(a)(3), then plaintiff could have timely filed a petition in the San Francisco Superior Court to commence administration of Bartsch's estate ("the Estate") and for appointment of plaintiff as personal representative of the Estate, and plaintiff also would have been on inquiry notice regarding the

possibility that others might file a petition to commence administration of the Estate.

41. On November 17, 2008, in case no. PES-08-291846 ("the Probate Proceedings"), Arndt Peltner ("Peltner") filed a petition ("the Probate Petition") in the San Francisco Superior Court to commence administration of the Estate by the San Francisco Superior Court and its officers, to appoint Peltner personal representative of the Estate, to establish the validity of Bartsch's purported will ("the Will"), and to admit the Will to probate. A copy of the Will was attached to the Probate Petition.

42. Attorney Alice Brown Traeg ("Traeg") filed the Probate Petition on Peltner's behalf as Peltner's attorney.

43. The Probate Petition did not indicate any need for prompt action, and in setting the Probate Petition for hearing the clerk of the San Francisco Superior Court did not depart from the court's normal procedures for setting the date of such hearings.

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44. The Probate Petition explicitly stated that Bartsch was survived by no child.

45. The Probate Petition did not in any way indicate that Bartsch had ever had a child.

46. The Probate Petition did not mention plaintiff. Though the Probate Petition attached a list of Bartsch's purported heirs and testate beneficiaries, plaintiff's name was not on that list and the purported heirs named on that list were not heirs of Bartsch.

47. Notice of the Probate Petition was sent by mail to the persons erroneously identified in the Probate Petition as Bartsch's heirs, as well as to the persons identified in the Probate Petition as beneficiaries under the Will.

48. Notice of the Probate Petition was not sent to plaintiff.

49. No person or entity gave plaintiff personal notice (i.e., notice by mail or other means as certain to ensure actual notice) of the Probate Petition.

50. Though the San Francisco Superior Court was authorized under California Probate Code § 1202 to require that plaintiff be given personal notice of the Probate Petition, the San Francisco Superior Court did not require that plaintiff be given such notice.

51. Though the San Francisco Superior Court was required by California Code of Civil Procedure § 389 to order that plaintiff be joined as a party to the Probate Petition, the San Francisco Superior Court did not order that plaintiff be joined as a party to the Probate Petition.

52. The Will explicitly declared that Bartsch had had no children.

53. The Will did not mention plaintiff.

54. The Will distributed all of Bartsch's assets to persons other than plaintiff. Peltner was the biggest beneficiary under the Will. The Will also appointed Peltner executor of the Estate.

55. On November 17, 2008, Peltner filed a petition in the Probate Proceedings for the issuance of letters of special administration to Peltner. As

with the Probate Petition, the petition for letters of special administration explicitly stated that Bartsch was survived by no child, attached a list of Bartsch's purported heirs and testate beneficiaries which did not include plaintiff, and did not mention plaintiff. Personal notice of the petition for letters of special administration was not given to plaintiff.

56. On November 24, 2008, defendant Sue M. Kaplan, acting as an officer of the San Francisco Superior Court in an *ex parte* proceeding, issued letters of special administration to Peltner, thereby temporarily appointing Peltner personal representative of the Estate. At that time Traeg became attorney for Peltner in Peltner's capacity as personal representative.

57. When defendant Sue M. Kaplan issued letters of special administration to Peltner on November 24, 2008, the San Francisco Superior Court and its officers – including its judicial officers (i.e., its judges, judges pro tempore, and commissioners) and its court executive officer – acquired the fiduciary duty to supervise and protect Bartsch's assets in a custodial trust for the benefit of the person(s) entitled to distribution thereof. That duty was not judicial in nature, did not need to be borne by judicial officers, and did not become judicial if or when borne by persons who were also judicial officers. That duty was similar to, and as relevant here indistinguishable from, the duties borne by private-sector and other public-sector fiduciaries, custodians, and trustees.

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58. An attorney is an officer of the court. An attorney has a duty fully to disclose to the court all unprivileged material facts known to the

attorney, and to disclose those facts without being prompted to do so. As an attorney, Traeg bore this duty of disclosure and shared the duty borne by the San Francisco Superior Court as to Bartsch's assets.

59. A personal representative is an officer of the court whose relation to the court is of a fiduciary nature. The court has supervisory control of all his acts and transactions and he owes a duty to the court fully to disclose all material facts known to him, and to disclose those facts without being prompted to do so. As personal representative, Peltner bore this duty of disclosure and shared the duty borne by the San Francisco Superior Court as to Bartsch's assets.

60. On December 10, 2008, defendant Sue M. Kaplan, acting as an officer of the San Francisco Superior Court, entered an order ("the Probate Order") which granted the Probate Petition, established the Will's validity, admitted the Will to probate, and appointed Peltner personal representative as executor of the Estate. Peltner's letters of special administration expired at that time.

61. The Probate Order ostensibly extinguished plaintiff's interest in Bartsch's assets.

62. Peltner has served continuously as personal representative of the Estate since the issuance to him of letters of special administration on November 24, 2008.

63. Traeg served continuously as Peltner's attorney in Peltner's capacity as personal representative from November 24, 2008, until 2015.

64. The San Francisco Superior Court and its officers – including Peltner and Traeg – have since November 24, 2008, continuously borne the fiduciary duty to supervise and protect Bartsch's assets in a custodial trust for the benefit of the person(s) entitled to distribution thereof.

65. Plaintiff did not learn of Bartsch's death, the Will, the Probate Petition, the Probate Order, the petition for issuance of letters of special administration, or the Probate Proceedings, until after the Probate Order had been granted, the Will had been determined to be valid, the Will had been admitted to probate, and plaintiff's right to inherit Bartsch's assets had been extinguished by the Probate Order.

C. The San Francisco Superior Court and its officers all had actual and/or constructive knowledge of plaintiff's right to inherit Bartsch's assets when the Probate Order was made.

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66. After plaintiff learned that his right to inherit Bartsch's assets had been extinguished without his knowledge, plaintiff pursued various state law remedies which plaintiff in good faith believed were available to him under California law. Notwithstanding that the Probate Petition had already been granted and the validity of the Will thereby ostensibly established, plaintiff nonetheless sought to be given an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will. Plaintiff also sought alternative relief which would

not have required that plaintiff be given such an opportunity.

67. In the course of seeking state law remedies, plaintiff discovered facts which indicated that the failure to give plaintiff personal notice of Bartsch's death and the Probate Petition, and the failure to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, were not the result of unintentional carelessness but were instead part of a deliberate effort, perpetrated under color of California law by the San Francisco Superior Court and its officers, to deprive plaintiff of Bartsch's assets without due process of law, to seize Bartsch's assets from plaintiff unreasonably, and/or to take Bartsch's assets from plaintiff for public use without just compensation.

68. After plaintiff appeared in the Probate Proceedings and began seeking state law remedies, Traeg testified that she had drafted the Will and knew important facts about plaintiff when she drafted the Will – facts from which it can be concluded that Traeg knew or should have known when she drafted the Will, and when she subsequently filed the Probate Petition and the petition for letters of special administration on Peltner's behalf, that plaintiff was or reasonably might be Bartsch's child and as such entitled to inherit from Bartsch if Bartsch died intestate. More specifically, Traeg testified that, many years before she drafted the Will, Bartsch gave Traeg a document in which Bartsch purportedly identified plaintiff by name as an illegitimate child who had a right to inherit from Bartsch if Bartsch died

intestate, and for whom Bartsch had made child support payments under compulsion for 21 years. Traeg testified that she had asked Bartsch about the document, and that Bartsch had then informed Traeg that: (1) Bartsch had had a sexual relationship with plaintiff's mother prior to plaintiff's birth; (2) after plaintiff's birth plaintiff's mother had alleged, and Bartsch had denied, that Bartsch was plaintiff's father; (3) Bartsch made child support payments for plaintiff to plaintiff's mother under compulsion for 21 years; and (4) Bartsch believed that plaintiff could claim a right to inherit Bartsch's assets if Bartsch died without a will.

69. Traeg testified that notwithstanding these facts Traeg concluded that plaintiff was not Bartsch's child. Traeg testified that Bartsch told Traeg that Bartsch believed that plaintiff was not Bartsch's child. Traeg testified that Bartsch could not recall having had vaginal intercourse with plaintiff's mother, but Bartsch nonetheless told Traeg that plaintiff's mother may have performed fellatio on Bartsch and then used Bartsch's ejaculate to inseminate herself. Traeg testified that she had no actual knowledge of the Paternity Proceeding or the Paternity Order before plaintiff appeared in the Probate Proceedings, and that Bartsch did not explicitly tell Traeg that Bartsch's paternity of plaintiff had been *judicially* determined or that Bartsch's 21 years of child support payments for plaintiff had been made under *court order*.

70. Traeg testified that, before she drafted the Will, she informed Bartsch that after Bartsch's

death plaintiff would be notified of the Probate Petition, and that plaintiff would be notified of the Probate Petition even if plaintiff were to be specifically disinherited by name in the Will. Traeg testified that Bartsch then instructed Traeg not to mention plaintiff in the Will and not to notify plaintiff of Bartsch's death or the Probate Petition.

71. Traeg testified that, pursuant to Bartsch's instructions and Traeg's conclusion that plaintiff was not Bartsch's child, Traeg drafted the Will in such a manner that the Will did not mention plaintiff and instead stated that Bartsch had had no children. After Bartsch died Traeg explicitly told the San Francisco Superior Court in the Probate Petition and in the petition for letters of special administration that Bartsch was survived by no child. Nothing in the record indicates that Traeg made any attempt after Bartsch died to obtain information about Bartsch's relationship with plaintiff. Traeg did not notify plaintiff of Bartsch's death and did not give plaintiff personal notice of the Probate Petition or the petition for letters of special administration on Peltner's behalf.

72. Peltner subsequently represented that, prior to filing the Probate Petition, he became aware of important facts about plaintiff – facts from which it can be concluded that Peltner knew or should have known when he filed the Probate Petition that plaintiff was or reasonably might be Bartsch's child. More specifically, Peltner testified and/or represented to the San Francisco Superior Court through counsel that Peltner and Traeg were both present when Bartsch referred to plaintiff as Bartsch's "son" and "child" and when Bartsch told

Traeg that: (1) Bartsch may have received fellatio from plaintiff's mother prior to plaintiff's birth, and plaintiff's mother may then have used Bartsch's ejaculate to inseminate herself; (2) Bartsch had denied the allegation by plaintiff's mother that Bartsch was plaintiff's father; (3) Bartsch made child support payments for plaintiff to plaintiff's mother under compulsion for 21 years; and (4) Bartsch believed that plaintiff could claim a right to inherit Bartsch's assets if Bartsch died without a will.

73. Like Traeg, Peltner nonetheless explicitly told the San Francisco Superior Court in the Probate Petition and in the petition for letters of special administration that Bartsch was survived by no child, and Peltner did not give plaintiff personal notice of those petitions. As with Traeg, nothing in the record indicates that Peltner made any attempt after Bartsch died to obtain information about Bartsch's relationship with plaintiff. Peltner invoked the protection of the attorney-client privilege as to any conversations which he may have had with Traeg about plaintiff.

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74. Peltner testified that, after he was appointed special administrator of the Estate but before plaintiff learned of Bartsch's death and the commencement of the Probate Proceedings, Peltner discovered amongst Bartsch's possessions some letters which plaintiff's mother had written to Bartsch and the envelopes in which those letters had been sent. In those letters plaintiff's mother made clear reference to the fact that Bartsch had been judicially determined to be plaintiff's father and had been ordered by a court to pay child

support for plaintiff. The envelopes showed plaintiff's still-current San Francisco mailing address. Peltner testified that after discovering those letters and envelopes he did not contact plaintiff to inform plaintiff of Bartsch's death and the commencement of the Probate Proceedings because Peltner "had enough to do" and "didn't want to."

75. By the time the Probate Order was made, both Peltner and Traeg were officers of the court who bore duties to disclose to the court all material facts known to them, and to disclose those facts without being prompted to do so. As a result of those duties, the San Francisco Superior Court and all its officers had actual and/or constructive knowledge of all facts which were material to the Probate Petition and known to Peltner or Traeg when the Probate Order was made.

76. When the Probate Order was made, the San Francisco Superior Court and all its officers also had actual and/or constructive knowledge of the Paternity Order and the fact that Bartsch had been named as plaintiff's father in plaintiff's birth certificate. The Paternity Order and plaintiff's birth certificate were both matters of record.

77. When defendant Sue M. Kaplan made the Probate Order as an officer of the San Francisco Superior Court, she and all other officers of the San Francisco Superior Court knew or should have known that plaintiff was or reasonably might be the son and heir of Bartsch, that plaintiff had not been served personal notice of the Probate Petition, and that plaintiff had not been given an

opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will.

D. Plaintiff diligently pursued and exhausted state law remedies without obtaining any relief.

78. After learning of the Probate Proceedings, plaintiff diligently pursued state law remedies until plaintiff exhausted state law remedies in 2019. In 2018 California's First Appellate District Court of Appeals held in *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, at 1146, that plaintiff had thus far "diligently pursued" his state law remedies. Nonetheless, notwithstanding his diligence plaintiff has not received any relief from California's state courts. Plaintiff has never had and will never be given an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. Plaintiff has similarly exhausted alternative state law remedies – i.e., remedies which do not require a determination of the Will's validity. Plaintiff was required to exhaust such alternative state law remedies because it was the policy of the San Francisco Superior Court not to set aside prior orders or conduct will contests when alternatives to such actions were available.

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79. California law can perhaps be construed as providing that, even after the Probate Petition had been granted, the San Francisco Superior Court was authorized or required to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition and the

validity of the Will. California Code of Civil Procedure § 389 required the San Francisco Superior Court to order that plaintiff be joined as a party in the proceeding on the Probate Petition, and such joinder if required even after the granting of the Probate Petition would perhaps have given plaintiff an opportunity to participate in a fair adversary hearing on that petition. The San Francisco Superior Court could perhaps also have given plaintiff such an opportunity after granting the Probate Petition by requiring *sua sponte* that plaintiff be given personal notice of the Probate Petition pursuant to California Probate Code § 1202. Additionally, the San Francisco Superior Court could perhaps *sua sponte* have given plaintiff such an opportunity by directing the personal representative to amend the Probate Petition after that petition had been granted, so that the Probate Petition would reflect plaintiff's status as Bartsch's child, and then serve and file the Probate Petition as amended. However, the San Francisco Superior Court did not ever order plaintiff joined as a party in the proceeding on the Probate Petition pursuant to California Code of Civil Procedure § 389, nor did the San Francisco Superior Court ever require that plaintiff be given notice of the Probate Petition pursuant to California Probate Code § 1202, and the San Francisco Superior Court also never directed the personal representative to amend the Probate Petition and then serve and file the Probate Petition as amended.

80. Similarly, California Code of Civil Procedure § 473(a)(1) can perhaps be construed as providing that Peltner, after becoming aware that

plaintiff was Bartsch's child, could at any time and on his own initiative have asked the San Francisco Superior Court to allow Peltner to amend the Probate Petition to reflect plaintiff's status as Bartsch's child. Had Peltner done so, plaintiff would perhaps have had an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will. Plaintiff served Peltner with a copy of the Paternity Order when plaintiff first appeared in the Probate Proceedings in 2009, and shortly thereafter in 2009 Peltner's counsel inspected the original Paternity Order in the files of the San Francisco Superior Court, and plaintiff subsequently requested through counsel that Peltner seek to amend the Probate Petition. However, Peltner did not ever seek to amend the Probate Petition to reflect plaintiff's status as Bartsch's child.

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81. After the San Francisco Superior Court and its officers failed to offer plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, plaintiff timely filed a motion ("the Set-Aside Motion") to set aside the Probate Order so that such a hearing could be held. The Set-Aside Motion argued (1) that plaintiff had a right to personal notice of the Probate Petition and an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, (2) that plaintiff's rights to such notice and opportunity had been violated, and (3) that plaintiff retained the right to such an opportunity even after the Probate Petition had been granted

and the validity of the Will had thereby purportedly been established.

82. The Set-Aside Motion was based on both state law and federal constitutional due process guarantees.

83. Defendant John K. Stewart, acting as an officer of the San Francisco Superior Court, denied the Set-Aside Motion on state law grounds after explicitly refusing to determine whether plaintiff had been entitled to personal notice of the Probate Petition. First, defendant John K. Stewart ruled that the Set-Aside Motion was premature because of the pendency of related litigation – litigation that could have provided plaintiff an alternative remedy not requiring that the Probate Order be set aside or the validity of the Will be determined. Second, defendant John K. Stewart ruled that plaintiff had in any event implicitly waived plaintiff's right to a fair adversary hearing on the Probate Petition and the validity of the Will. In making the latter ruling, defendant John K. Stewart effectively ruled that California waiver law created a Catch-22 situation which prevented plaintiff from obtaining relief from the Probate Order under any circumstances once the Probate Order was made, even if plaintiff had initially been entitled to personal notice of, and an opportunity to participate in a fair adversary hearing on, the Probate Petition and the validity of the Will. Defendant John K. Stewart ruled that under California law a person claiming a right to have a prior probate order set aside implicitly waives that right if the person makes a "general" appearance in the court that made that order, so a person who

wants to enforce such a right is effectively limited to the relief available when making a "special" appearance. If a person makes a general appearance for the purpose of enforcing a right to have a prior probate order set aside, as plaintiff did when plaintiff filed the Set-Aside Motion, then merely by doing so the person automatically, unavoidably, and paradoxically waives his right to the requested relief. As construed by defendant John K. Stewart, California waiver law has thus ensnared plaintiff in a classic Catch-22 which defeated plaintiff's right to an opportunity to participate in a fair adversary hearing on the Will's validity. Plaintiff could not enforce that right by moving to set aside the Probate Order, and the San Francisco Superior Court and its officers would not enforce that right without being so moved. Plaintiff was damned if he did and damned if he didn't.

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84. Defendant John K. Stewart ruled that, under California law, it is only by making a "special" appearance that plaintiff could have appeared in the Probate Proceedings without waiving his right to an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will. But plaintiff could not have made or benefitted from making such an appearance. Under California law a special appearance means an appearance for the limited purpose of challenging an assertion of personal jurisdiction over a party. California law only allows a special appearance to be made before a final order or judgment is entered, and only by a person who has been served with a summons, and only for the purpose of challenging the court's assertion of

personal jurisdiction over the person. Plaintiff was not served with a summons, had no legal basis on which to dispute that the San Francisco Superior Court could assert personal jurisdiction over him, and was not aware of the proceeding on the Probate Petition until after the Probate Order had been entered and it was too late to make a special appearance in the proceeding on the Probate Petition. California law does not provide for a special appearance made *after* a final order or judgment has been entered, or by a person who was not served with a summons, or by a person who does not dispute that the court may assert personal jurisdiction over him. And any special appearance made by plaintiff, even if authorized by law, could have provided no relief whatsoever to plaintiff, as the only possible outcome of such an appearance would have been to establish the undisputed fact that the San Francisco Superior Court may assert personal jurisdiction over plaintiff in the Probate Proceedings.

85. In denying the Set-Aside Motion, defendant John K. Stewart effectively ruled that once the Probate Order was made, California law did not allow the San Francisco Superior Court or its officers to provide plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will, even if plaintiff would have had a right to such an opportunity before the Probate Order was made.

86. Defendant John K. Stewart denied plaintiff the equal protection of the laws when defendant John K. Stewart ruled that under California law plaintiff implicitly waived plaintiff's

right to have the Probate Order set aside when plaintiff made a "general" appearance in the Probate Proceedings after the Probate Order was made. Persons situated similarly to plaintiff, such as the appellants in *Estate of Sanders* (1985) 40 Cal. 3d 607 ("*Sanders*"), did not waive such a right by making a general appearance. After the *Sanders* appellants made a general appearance in the *Sanders* probate proceedings, they nonetheless successfully moved to set aside an earlier order establishing the validity of the *Sanders* will. They argued that they had been prevented from contesting the validity of the *Sanders* will. The *Sanders* court did not rule that, by making a general appearance in the *Sanders* probate proceedings after the *Sanders* will had been determined to be valid, the *Sanders* appellants had waived their right to set aside the earlier order establishing the validity of the *Sanders* will. The *Sanders* appellants did not make or attempt or purport to make a special appearance. The *Sanders* appellants did not challenge an assertion of personal jurisdiction over them. The *Sanders* appellants were situated similarly to plaintiff but received relief which plaintiff was denied. Defendant John K. Stewart was aware of *Sanders* when he denied the Set-Aside Motion, because plaintiff had relied on *Sanders* in plaintiff's moving and reply briefs and in supplemental briefing requested by defendant John K. Stewart. Defendant John K. Stewart cited *Sanders* in his order denying the Set-Aside Motion. But in his order denying the Set-Aside Motion defendant John K. Stewart did not distinguish *Sanders* – i.e., he did

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not explain or in any way address why plaintiff, by making a general appearance in the Probate Proceedings after the Will had been determined to be valid, implicitly waived plaintiff's right to an opportunity to participate in a fair adversary hearing on the Will's validity, when the similarly situated *Sanders* appellants did not, by making a general appearance in the *Sanders* probate proceedings after the *Sanders* will had been determined to be valid, waive their right to an opportunity to participate in a fair adversary hearing on the *Sanders* will's validity.

87. In ruling on the Set-Aside Motion defendant John K. Stewart did not address, or even mention, the alternative federal constitutional due process basis of the Set-Aside Motion.

88. Plaintiff timely appealed the denial of the Set-Aside Motion, in First Appellate District Court of Appeal case no. A151783 ("case no. A151783"). In case no. A151783 plaintiff reserved all federal issues for determination in federal court. Plaintiff did not argue federal issues. Plaintiff argued that the San Francisco Superior Court had misconstrued California's statutory and case law, including California's waiver law and *Sanders*. The appeal was heard and decided by defendants Gabriel P. Sanchez, Sandra L. Margulies, and Kathleen M. Banke (collectively "the state appellate court defendants").

89. The state appellate court defendants dismissed plaintiff's appeal of the San Francisco Superior Court's denial of the Set-Aside Motion. In

an unpublished opinion[2] ("the Opinion in A151783") that did not address federal issues, the state appellate court defendants held that under California law plaintiff had suffered no legal injury from the granting of the Probate Petition and that California law did not give plaintiff the right to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. Furthermore, the state appellate court defendants sanctioned plaintiff and his attorney for appealing the denial of the Set-Aside Motion because it was well established that an heir like plaintiff does not have a right under California law to an opportunity to participate in a fair adversary hearing on a petition for probate or the validity of a will. The state appellate court defendants did not reach the waiver issue which was the basis of the San Francisco Superior Court's denial of the Set-Aside Motion, and the Opinion in A151783 did not

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[2] Under California Rules of Court, Rule 8.1115, the state appellate court's unpublished opinion in case no. A151783 may not be cited or relied on in the instant complaint or in the proceeding on the instant complaint. See Civil Local Rules, Rule 3-4(e). Here the material facts regarding that opinion can nonetheless be established from matters outside that opinion, without citing or relying on the opinion itself. These material facts include that: (1) plaintiff appealed the denial of the Set-Aside Motion; (2) the state appellate court dismissed the appeal on the grounds that plaintiff lacked standing to appeal; (3) the state appellate court decided the appeal in an unpublished opinion signed by defendants Gabriel P. Sanchez, Sandra L. Margulies, and Kathleen M. Banke; and (4) unpublished opinions do not meet any of the standards of certification set forth in California Rules of Court, Rule 8.1105(c).

mention *Sanders*. Remittitur issued in case no. A151783 on May 31, 2019.

90. In the Opinion in A151783, the state appellate court defendants denied plaintiff the equal protection of the laws when it ruled that under California law (1) plaintiff had no interest in Bartsch's assets as Bartsch's heir after Bartsch's death, (2) plaintiff had never had the right to an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, and (3) plaintiff suffered no injury from the granting of the Probate Petition or the determination that the Will was valid. Other California courts have recognized that persons situated similarly to plaintiff suffered injuries to such interests and rights, and those courts protected the interests, enforced the rights, and remedied the injuries of those similarly situated persons. As to such similarly situated persons, California courts have consistently recognized that upon a decedent's death California law bestows upon the decedent's heirs property interests in and rights related to the decedent's assets, and where such interests and rights are to be adversely affected by establishing the validity of a will or a portion thereof those heirs have a right to an opportunity to participate in a fair adversary hearing on the will's validity, and where those heirs were denied such an opportunity – such as where, as here, extrinsic fraud was present in the procurement of an order establishing the validity of such a will or a portion thereof – those heirs have a right to a remedy, which can include setting aside an order establishing the will's validity. Such

similarly situated persons include the defrauded heirs in *Granzella v. Jargoyhen* (1974) 43 Cal. App. 3d 551, *Estate of Poder* (1969) 274 Cal.App.2d 786, *Stevens v. Torregano* (1961) 192 Cal. App. 2d 105, *Sears v. Rule* (1941) 45 Cal.App.2d 374, *Estate of Ivory* (1940) 37 Cal.App.2d 22, *Zaremba v. Woods* (1936) 17 Cal.App.2d 309, *Caldwell v. Taylor* (1933) 218 Cal. 471, and *Campbell-Kawannanakoa v. Campbell* (1907) 152 Cal. 201. The state appellate court defendants were aware of these cases when they issued the Opinion in A151783. Plaintiff had cited all of these cases in his appellate briefs in case no. A151783 and/or in the prior related appeal in *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132.

91. The holding in the Opinion in A151783 – that under California law plaintiff had no interest in Bartsch's assets as Bartsch's heir after Bartsch's death – is incompatible with the contrary holdings in two related prior appellate opinions regarding plaintiff's claims. In *Estate of Bartsch* (2011) 193 Cal.App.4th 885, at 890-891, it was explicitly held that, where plaintiff asserted standing on the basis of a then-pending claim that he was a pretermitted child whose interest in Bartsch's assets was defined (by California Probate Code § 21622) as being identical to the interest plaintiff would have had as an heir if Bartsch had died intestate, plaintiff had standing to appeal an order of the San Francisco Superior Court concerning the administration of Bartsch's assets. In *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132 it was implicitly held (by failing to dismiss plaintiff's appeal on jurisdictional grounds for lack of standing) that, where plaintiff alleged that he

had been fraudulently deprived of his right to inherit Bartsch's assets as Bartsch's heir after Bartsch's death, that right to inherit conferred upon plaintiff standing to appeal and therefore required a decision on the merits. Thus, in the Opinion in A151783 plaintiff was treated differently from the way he had been treated in *Estate of Bartsch* (2011) 193 Cal.App.4th 885 and *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132 despite remaining similarly situated. In the Opinion in A151783, the state appellate court defendants effectively denied plaintiff the protection of the laws equal to that which it had previously extended to plaintiff in *Estate of Bartsch* (2011) 193 Cal.App.4th 885 and *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132.

92. If at any time after the making of the Probate Order the San Francisco Superior Court or its officers had ordered that plaintiff be joined as a party in, or given personal notice of, the Probate Petition, or if Peltner had amended the Probate Petition to reflect plaintiff's status as Bartsch's child, or if the San Francisco Superior Court had granted the Set-Aside Motion, or if the state appellate court defendants had reversed the San Francisco Superior Court's denial of the Set-Aside Motion, then plaintiff would have had an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, notwithstanding the fact that the Probate Petition had already been granted and the Will had already been admitted to probate. But plaintiff never had such an opportunity and under California law plaintiff will never have such an

opportunity. Despite plaintiff's diligent best efforts, the San Francisco Superior Court, its officers, and the state appellate court defendants have not given and will never give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will.

93. The fact that the San Francisco Superior Court did not give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will was not the result of any determination that such a hearing was unwarranted. The San Francisco Superior Court did not determine that the Will must be valid or that there was no evidence of the Will's invalidity. To the contrary, the San Francisco Superior Court was aware of numerous facts which strongly indicated that the Will was invalid. But notwithstanding its awareness of these facts,[3] the

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[3] Bartsch was in exceptionally poor physical and mental health and lacked testamentary capacity when the Will was executed. He was unable to remember that plaintiff was his child. An inability to remember one's children is a clinical indicator of a profound mental or cognitive disability and is legally sufficient to establish testamentary incapacity and the invalidity of a will. And in addition to Bartsch's *actual* inability to remember his child, Bartsch's successors in interest are also estopped *as a pure matter of law* from disputing that Bartsch was unable to remember that plaintiff was Bartsch's child when the Will was executed. This is because Bartsch stated in the Will and to others that he did not have and could not remember having had any children and he thereby caused the San Francisco Superior Court, its officers, and numerous other persons to rely on that representation to their detriment. Furthermore, under several separate statutes the Will is presumed to have been the product of undue influence, and therefore invalid, because

San Francisco Superior Court did no more than determine that it was unwilling and/or unable to give plaintiff an opportunity to participate in a fair adversary hearing on the Will's validity.

94. As a result of plaintiff's diligent best efforts, he has exhausted all state law procedures for obtaining a fair adversary hearing on the Probate Petition and the validity of the Will. Separately, plaintiff has also exhausted state law procedures for obtaining alternative relief not requiring a determination of the Will's validity.[4]

Peltner, in addition to being a transferee under the Will, was also Bartsch's fiduciary, Bartsch's care custodian, the person who drafted the Will, and a person who transcribed the Will. The presumption of undue influence is conclusive because Peltner was a drafter-transferee. Additionally, according to Peltner's own testimony one of the two persons who purportedly formally witnessed the execution of the Will was not actually present at the time the Will was executed, so the Will is also invalid due to faulty execution. Finally, only Peltner and his attorney were present with Bartsch when the Will was executed, and in that circumstance the Will was executed by stamping a facsimile of Bartsch's signature onto the Will using a rubber stamp because Bartsch was too sick, weak, and blind to sign his name, or even add his initials, to the Will.

[4] After the Probate Order became final and plaintiff learned of the Probate Proceedings, plaintiff initiated a pretermission proceeding and a proceeding to remove Peltner as executor of the Estate, and plaintiff also participated in proceedings initiated by Peltner concerning the administration of the Estate. Under California law the proceeding on the Probate Petition was separate and distinct from the pretermission, removal, and administration proceedings. The pretermission, removal, and administration proceedings did not and could not concern the merits of the Probate Petition or the validity of the Will. Plaintiff also initiated a civil fraud action against

California has no more "process" available to plaintiff. California's courts did not and will not provide plaintiff an opportunity to participate in a fair adversary hearing or any other relief. There does not exist any adequate state remedy for the deprivation which plaintiff has suffered. Plaintiff accordingly seeks a federal remedy for the resulting *de facto* deprivation of plaintiff's rights and confiscation of Bartsch's assets under color of state law.[5]

E. Defendants deprived plaintiff of his constitutional rights under color of state law when they made, and subsequently failed to set aside, the Probate Order.

95. The proceeding on the Probate Petition was not a judicial proceeding but was instead "mere sham" and "wholly sham", within the meaning of *Campbell-Kawannanakoa v. Campbell* (1907) 152 Cal. 201, 208-210 ("*Campbell*"). In *Campbell*, a purported court proceeding disposed of a decedent's assets without notice to the decedent's adversely affected heirs, who did not learn of the proceeding until after their property interest in

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Peltner and Traeg. The civil fraud action was separate and distinct from the Probate Proceedings and did not concern the merits of the Probate Petition or the validity of the Will.

[5] To be clear, plaintiff does not here ask this Court to speculate whether the San Francisco Superior Court *would have* concluded in a fair adversary hearing that the Will was invalid, nor does plaintiff here ask this Court to compel the San Francisco Superior Court to make a determination of the Will's validity in a fair adversary hearing.

those assets had been extinguished. The California Supreme Court held that the trial court proceeding in *Campbell* was "mere sham" and "wholly sham" because it was "a scheme devised and carried into effect ... under color of proceedings ... for the purpose of depriving plaintiffs without consideration of the property to which they had succeeded under our law – a mere cloak to cover what was in fact simply the bodily taking of plaintiffs' property without consideration and without any authority of law", and "a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was in fact nothing but" such a taking. The proceeding on the Probate Petition was such a scheme, such a cloak, and such a fraudulent contrivance, and therefore sham.

96. Plaintiff was situated similarly to the defrauded heirs in *Campbell* but was treated differently when plaintiff was denied the same relief as the *Campbell* heirs. By failing to recognize the proceeding on the Probate Petition as sham when the trial court proceedings in *Campbell* had been recognized as sham, the San Francisco Superior Court and its officers denied plaintiff the equal protection of the laws.

97. The Probate Order and the purported validity of the Will were and are also sham because they were the product of the sham proceeding on the Probate Petition.

98. All of defendants' acts and omissions were sham to the extent that those acts or omissions concerned the making or enforcement of,

or depended or were taken in reliance on, the sham Probate Order or purported validity of the Will.

99. When defendant Sue M. Kaplan issued letters of special administration temporarily appointing Peltner personal representative of the Estate, and when defendant Sue M. Kaplan subsequently made the Probate Order, her actions were not judicial acts within her subject matter jurisdiction. Her actions were not adjudicative. Her actions were administrative or executive actions which could have been performed by persons who were not judicial officers. Her actions were taken in uncontested and non-adversarial sham proceedings in which plaintiff, who was the only person adversely affected by the proceedings' outcome, was not given constitutionally required notice or a constitutionally required opportunity to be heard. Her actions were sham. Her actions were not lawful state action, because they violated the Constitution's prohibition of state action which unreasonably seizes plaintiff's property or deprives plaintiff of his property without due process of law, and therefore her actions were not judicial acts within her subject matter jurisdiction even if purportedly designated as such by state law. And when Congress enacted 42 U.S.C. § 1983 Congress mandated that, regardless whether or not defendant Sue M. Kaplan's actions were judicial acts or within her subject matter jurisdiction under state law, she shall in any event be liable to plaintiff if those actions subjected plaintiff, or caused plaintiff to be subjected, to the deprivation under color of state law of plaintiff's property rights secured by the Constitution.

100. When the San Francisco Superior Court and its officers failed to give plaintiff personal notice of the Probate Petition, and when they failed ever to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition and the validity of the Will, either before or after the Probate Petition was granted, the actions of the San Francisco Superior Court and its officers were not judicial acts within their subject matter jurisdiction. Their actions were not adjudicative. The Constitution required that such notice and opportunity be given. Neither the San Francisco Superior Court, its officers, nor any party raised any reason why the San Francisco Superior Court and its officers were not required by the Constitution to give plaintiff personal notice of the Probate Petition. Neither the San Francisco Superior Court, its officers, nor any party raised any reason why the San Francisco Superior Court and its officers were not required by the Constitution to give plaintiff an opportunity at some point to participate in a fair adversary hearing on the Probate Petition and the validity of the Will. The actions of the San Francisco Superior Court and its officers were not lawful state action, because those actions violated the Constitution's prohibition of state action which unreasonably seizes plaintiff's property or deprives plaintiff of his property without due process of law, and therefore the actions of the San Francisco Superior Court and its officers were not judicial acts within their subject matter jurisdiction even if purportedly designated as such by state law. And when Congress enacted 42 U.S.C. § 1983 Congress

mandated that, regardless whether or not the actions of the San Francisco Superior Court and its officers were judicial acts or within their subject matter jurisdiction under state law, the San Francisco Superior Court and its officers shall in any event be liable to plaintiff if those actions subjected plaintiff, or caused plaintiff to be subjected, to the deprivation under color of state law of plaintiff's property rights secured by the Constitution.

101. When defendant John K. Stewart omitted to rule on the federal constitutional due process issues raised in the Set-Aside Motion, his omission to rule on those issues was not a judicial act within his subject matter jurisdiction. Those issues were properly brought before him for his determination. Having had those issues properly brought before him for his determination, defendant John K. Stewart had no discretion to omit ruling on those issues. His omission to rule was not adjudicative, as neither he nor any party had raised any grounds for such an omission to rule and no party had requested such an omission. His omission to rule could not have been a judicial act within his subject matter jurisdiction because it was not a lawful state action, given the Constitution's requirement that state action must respect and effectuate the Constitution's protections against unreasonable seizure of property and the deprivation of property without due process, and given the fact that his omission to rule effectively left plaintiff without any process or procedure to enforce those constitutional requirements and protections through state action.

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And when Congress enacted 42 U.S.C. § 1983 Congress mandated that, regardless whether or not defendant John K. Stewart's omission to rule was a judicial act or within his subject matter jurisdiction under state law, he shall in any event be liable to plaintiff if that omission subjected plaintiff, or caused plaintiff to be subjected, to the deprivation under color of state law of plaintiff's property rights secured by the Constitution.

102. When defendant John K. Stewart treated plaintiff differently than the similarly situated *Sanders* appellants had been treated, defendant John K. Stewart did not perform a judicial act within his subject matter jurisdiction. The unequal treatment and denial of equal protection were not adjudicative. As to whether a general appearance causes the implied waiver of the right to have a prior probate order set aside, neither defendant John K. Stewart nor any party raised any grounds for treating plaintiff differently from the *Sanders* appellants. The denial of equal protection could not have been a judicial act within defendant John K. Stewart's subject matter jurisdiction because it was not a lawful state action, given the Constitution's requirement that state action must respect and effectuate the Constitution's prohibition of unequal treatment under the law. And when Congress enacted 42 U.S.C. § 1983 Congress mandated that, regardless whether or not defendant John K. Stewart's denial of equal protection was a judicial act or within his subject matter jurisdiction under state law, he shall in any event be liable to plaintiff if that denial subjected plaintiff, or caused plaintiff to be

subjected, to the deprivation under color of state law of plaintiff's equal protection rights secured by the Constitution.

103. When the state appellate court defendants (i.e., defendants Gabriel P. Sanchez, Sandra L. Margulies, and Kathleen M. Banke) dismissed plaintiff's appeal of the order denying the Set-Aside Motion in case no. A151783, they did not perform a judicial act within their subject matter jurisdiction. The dismissal was not adjudicative. Neither the San Francisco Superior Court, its officers, nor any party had raised any grounds for concluding that under California law plaintiff suffered no injury from the granting of the Probate Petition or the determination of the Will's validity, had no interest in Bartsch's assets as Bartsch's heir after Bartsch's death, and never had a right to an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. Neither the San Francisco Superior Court, its officers, the state appellate court defendants, nor any party raised any grounds for treating plaintiff differently from similarly situated heirs who were injured by the determination of the validity of wills, had an interest in their decedents' assets after their decedents' deaths, and had the right to an opportunity to participate in fair adversary hearings on the validity of wills. To the contrary, it was undisputed between the parties that plaintiff initially had a right to inherit Bartsch's assets as Bartsch's heir, as well as a right to a fair adversary hearing on the Probate Petition and the validity of the Will, and the dispute in case no. A151783

concerned whether under California law plaintiff implicitly waived his right to such a hearing by making a general appearance in the Probate Proceedings after the Probate Order was entered. The dismissal in case no. A151783 denied plaintiff the equal protection of the laws by treating plaintiff differently than similarly situated persons. The dismissal in case no. A151783 could not have been a judicial act within the state appellate court defendants' subject matter jurisdiction because the dismissal was not a lawful state action, given the Constitution's requirement that state action must respect and effectuate the Constitution's prohibition of unequal treatment under the law. And when Congress enacted 42 U.S.C. § 1983 Congress mandated that, regardless whether or not the dismissal was a judicial act or within the state appellate court defendants' subject matter jurisdiction under state law, the state appellate court defendants shall in any event be liable to plaintiff if that dismissal subjected plaintiff, or caused plaintiff to be subjected, to the deprivation under color of state law of plaintiff's property and equal protection rights secured by the Constitution.

F. Defendants deprived plaintiff of Bartsch's assets under color of state law in reliance on the Probate Order and the ostensible validity of the Will.

104. Upon the commencement of the Probate Proceedings, the San Francisco Superior Court and its officers had a duty to administer Bartsch's assets pending the distribution of those assets to the person(s) ultimately determined to be

entitled to such distribution. The San Francisco Superior Court and its officers could and should have maintained the *status quo* as to Bartsch's assets pending the determination of the person(s) entitled to distribution so as not to prejudice such person(s). The San Francisco Superior Court and its officers did not maintain the *status quo* as to Bartsch's assets and instead acted in reliance on, and for the purpose of giving effect to, the Probate Order. In so acting the San Francisco Superior Court and its officers deprived and caused others to deprive plaintiff of Bartsch's assets under color of state law.

105. The Probate Order provided that the beneficiaries named in the Will, and not plaintiff, were entitled to distribution of Bartsch's assets. Defendants' actions administering Bartsch's assets were intended to give effect to the Probate Order by causing or promoting distribution of Bartsch's assets to the beneficiaries named in the Will and preventing or hindering distribution of Bartsch's assets to plaintiff.

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106. When Bartsch died, he owned real property which was given the Block-Lot designation "2754-013" by the Recorder-Assessor of the City and County of San Francisco. The property designated "2754-013" was located at and commonly referred to as 164-170 Grand View Ave., San Francisco, California. The property designated "2754-013" included apartments that at the time of Bartsch's death and for some years thereafter could have been converted to condominiums. Converting the apartments to condominiums would have increased their market value, so the right to

convert was a valuable property right. That property right survived Bartsch's death.

107. When Bartsch died, he owned real property which was given the Block-Lot designation "2754-052" by the Recorder-Assessor of the City and County of San Francisco. The property designated "2754-052" consisted of a landscaped vacant lot located north of and immediately adjacent to the property designated "2754-013." The property designated "2754-052" was at the time of Bartsch's death commonly referred to as 150 Grand View Ave., San Francisco, California, and is now commonly referred to as 162 Grand View Ave., San Francisco, California.

108. When Bartsch died, he was paying unusually low property taxes every year because of the low valuation assessments associated with "2754-013" and "2754-052" as a result of Proposition 13. These low assessments were Bartsch's "property", in that he had a legal right to keep them for as long as he owned "2754-013" and "2754-052." As Bartsch's child, plaintiff had a legal right to inherit Bartsch's low assessments along with "2754-013" and "2754-052" after Bartsch died.

109. When Bartsch died he owned TD Ameritrade account # XXX-XX8463 and all the cash and securities therein, collectively worth approximately $175,263.16.

110. When Bartsch died he owned Bank of America account # XXXXX-X0360 and Bank of America account # XXXXX-X0036, and all the cash therein, collectively worth approximately $2,236.58.

111. The properties designated "2754-013" and "2754-052" were sold in 2014 under color of state law, including under color of the Probate Order, after defendant Mary E. Wiss, acting as an officer of the San Francisco Superior Court, approved two sale confirmation petitions. In the proceedings on the sale confirmation petitions, plaintiff objected on the grounds that the sales were unnecessary and he wanted to inherit the properties as such and therefore did not want the properties sold while litigation concerning his rights to Bartsch's assets remained pending. Defendant Mary E. Wiss nonetheless approved the sale confirmation petitions without considering plaintiff's objections. Defendant Mary E. Wiss overruled plaintiff's objections on the grounds that plaintiff had no interest in the Estate and no standing to oppose the sales. Defendant Mary E. Wiss ruled that the sales were necessary to effect distribution to the beneficiaries named in the Will. The sales were not alleged or found to be necessary for any purpose consistent with plaintiff's entitlement to distribution of Bartsch's assets. For example, the sales were not necessary to generate cash for the payment of debts or taxes owed by the Estate.

112. When defendant Mary E. Wiss approved the sale of the properties designated "2754-013" and "2754-052", her actions were not judicial acts within her subject matter jurisdiction. Her actions were not adjudicative. Her actions were administrative or executive actions which could have been performed by persons who were not judicial officers. Her actions were taken in

effectively uncontested and non-adversarial proceedings in which plaintiff, who was the only person adversely affected by the sales, was not given a constitutionally required opportunity to be heard. Her actions were not lawful state action, because they violated the Constitution's guarantee to plaintiff against state action which unreasonably seizes plaintiff's property or deprives plaintiff of his property without due process of law, and therefore those actions were not judicial acts within her subject matter jurisdiction even if purportedly designated as such by state law. And when Congress enacted 42 U.S.C. § 1983 Congress mandated that, regardless whether or not defendant Mary E. Wiss's actions were judicial acts or within her subject matter jurisdiction under state law, she shall in any event be liable to plaintiff if those actions subjected plaintiff, or caused plaintiff to be subjected, to the deprivation under color of state law of plaintiff's property rights secured by the Constitution.

113. After defendant Mary E. Wiss approved the sale of the properties designated "2754-013" and "2754-052", the Assessor-Recorder of the City and County of San Francisco ("the Assessor-Recorder") subsequently officially recorded deeds transferring title to the properties designated "2754-013" and "2754-052" to Toufan Razi and 150 Grand View LLC, respectively. In doing so, the Assessor-Recorder – who is an agent and employee of defendant City and County of San Francisco – acted in reliance on the sale confirmation orders and in response to requests by Toufan Razi and 150 Grand View LLC and their

agents who similarly relied on those orders. Toufan Razi and Carmel ERA LLC have at various times thereafter been in possession of and/or have claimed title to the real property designated "2754-013." 150 Grand View LLC and 162 Grand View LLC have at various times been in possession of and/or have claimed title to the real property designated "2754-052."

114. By recording the deeds which transferred title after Bartsch's death to the properties designated "2754-013" and "2754-052", the Assessor-Recorder placed an official government imprimatur upon those deeds, holding those deeds out publicly as authorized by law to be recorded. Consequently, plaintiff cannot recover title to those properties without a court order authorizing and directing the Assessor-Recorder to record new deeds transferring title to those properties to plaintiff.

115. After the Assessor-Recorder recorded the deeds which transferred title after Bartsch's death to the properties designated "2754-013" and "2754-052", the Assessor-Recorder reassessed the properties designated "2754-013" and "2754-052", increasing the properties' assessed valuations for property tax purposes to the sale prices of the properties as required by state law whenever real property is sold. Under state law, the sales and resulting reassessments permanently extinguishing the Prop. 13 property tax benefits which plaintiff had a right to inherit along with the properties.

116. The San Francisco Superior Court and its officers caused the forfeiture of plaintiff's right to convert to condominiums the apartments

included in the property designated "2754-013." More specifically, when the laws regarding condominium conversions were changed several years after Bartsch's death, the San Francisco Superior Court and its officers had custody of the apartments, ample time and opportunity to preserve and protect the right to convert, a fiduciary duty to protect that right, and the ability to protect that right at least temporarily simply and inexpensively by timely submitting an application to initiate the multi-year process of converting apartments to condominiums. Plaintiff had indicated to Peltner through counsel that he wanted the right to convert preserved and protected. However, the San Francisco Superior Court and its officers failed timely to act and thereby forfeited the right to convert. That right effectively reverted to defendant City and County of San Francisco and its agencies. Plaintiff knows of no justification for the forfeiture of that right.

117. On June 28, 2018, the City and County of San Francisco through one of its agencies approved permit application no. 201712085884 and issued a permit authorizing work necessary to initiate construction of residential buildings on the vacant lot designated "2754-052." Plaintiff timely appealed the issuance of that permit to the Board of Appeals of the City and County of San Francisco in appeal no. 18-094. In a brief filed by plaintiff in appeal no. 18-094 on or around July 18, 2018, plaintiff explained that: (1) ownership of the subject property was disputed in then-pending litigation; (2) as a result of that litigation plaintiff could retroactively be declared the owner of the

property; (3) plaintiff did not want anything built on the property; and (4) the City and County of San Francisco should maintain the *status quo* on the property, pending resolution of the litigation, by suspending all construction activity on the property. The Board of Appeals denied the appeal, and construction was not suspended. Construction of residential buildings was subsequently initiated, and is currently ongoing, on the vacant lot designated "2754-052."

118. Bartsch's TD Ameritrade and Bank of America accounts have been closed and the securities and cash therein transferred for reasons and to persons unknown to plaintiff. Plaintiff knows of no justification for such actions consistent with his right to inherit the assets in those accounts, and plaintiff therefore alleges that the actions were taken for the purpose of depriving plaintiff of those assets under color of state law.

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119. Defendants are subject to the Supremacy Clause of the United States Constitution and the declaration in Article III Section 1 of the California Constitution that the United States Constitution is the supreme law of the land. Officers of the City and County of San Francisco, the San Francisco Superior Court, and the state appellate court take an oath to support and defend the Constitution of the United States and the Constitution of the State of California and to bear true faith and allegiance to the Constitution of the United States.

120. Some of the issues raised by the above-described facts are perhaps novel in the federal courts. Where, as here, property interests

are revealed to have been unconstitutionally appropriated in sham state court proceedings, the state courts will normally provide an appropriate remedy eventually, so there is usually no need to invoke the jurisdiction of the federal courts in such circumstances. Here, however, the state courts have proven themselves unable or unwilling to provide plaintiff with any remedy whatsoever, so to the extent this Court can provide plaintiff with an appropriate remedy the duty falls upon this Court to do so.

CLAIM 1: FOR MONEY DAMAGES FOR, OR RETURN OF, PRIVATE PROPERTY OF WHICH PLAINTIFF WAS DEPRIVED WITHOUT PROCEDURAL DUE PROCESS

Against All Defendants

121. Paragraphs 1–120 are part of this claim.

122. Under California law a decedent's children are entitled to inherit some or all of the decedent's assets unless a valid testamentary instrument directs otherwise. Where, as here, the decedent had only one child, was survived by that child, was not survived by a spouse, had no interest in community or quasi-community property, and executed no testamentary instrument other than one or more purported wills, California law provides that the child has a right to inherit all of the decedent's assets unless a court determines that a will directing otherwise is valid. Thus, after Bartsch's death plaintiff had a right to inherit all of Bartsch's assets unless a court determined that the

Will (or some other will executed by Bartsch) was valid.

123. The Probate Petition and the Will were adverse to plaintiff's right to inherit all of Bartsch's assets. That right would have been extinguished by granting the Probate Petition or determining the Will to be valid.

124. At the time of the proceeding on the Probate Petition, the San Francisco Superior Court and its officers had constructive knowledge, and at least two of its officers (i.e., Traeg and Peltner) had actual knowledge, of plaintiff's status as the child and heir of Bartsch, entitled as such to inherit Bartsch's assets and receive distribution of the Estate. The San Francisco Superior Court had the Paternity Order in its files, and Traeg and Peltner both had actual personal knowledge that plaintiff was or reasonably might be an heir of Bartsch. As an attorney Traeg was an officer of the court and her knowledge was imputed to her client, Peltner. As personal representative Peltner was an officer of the court.

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125. At the time of the proceeding on the Probate Petition, plaintiff's identity as a person interested in Bartsch's assets was known to or reasonably ascertainable by the San Francisco Superior Court and its officers. Therefore, under the Due Process Clause of the United States Constitution plaintiff had a right to receive notice of the Probate Petition by mail or other means as certain to ensure actual notice, and the San Francisco Superior Court and its officers had a duty to give plaintiff such notice.

126. Plaintiff was not given notice of the Probate Petition by mail or other means as certain to ensure actual notice. Plaintiff had no actual knowledge of the Probate Petition until after the Probate Petition had been granted and plaintiff's right to inherit Bartsch's assets had thereby been extinguished.

127. California law conflicted with the Due Process Clause of the United States Constitution because California law permitted a determination to be made on the Probate Petition without giving plaintiff notice of the Probate Petition by mail or other means as certain to ensure actual notice of the Probate Petition.

128. Under the Due Process Clause of the United States Constitution, plaintiff had a right to a fair adversary hearing on the Probate Petition and the validity of the Will, and the San Francisco Superior Court, its officers, and the state appellate court defendants had a duty to give plaintiff an opportunity to participate in such a hearing. Granting the Probate Petition without giving plaintiff such an opportunity did not affect plaintiff's right to have, or the duty of the San Francisco Superior Court, its officers, or the state appellate court defendants to provide to plaintiff such an opportunity. Where, as here, the opportunity was not provided before the granting of the Probate Petition, the San Francisco Superior Court, its officers, and the state appellate court defendants had a duty to provide such an opportunity to plaintiff at some time after the granting of the Probate Petition.

129. Through no fault of his own, plaintiff did not have and was at no time given an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. The San Francisco Superior Court, its officers, and the state appellate court defendants did not, could not, or would not give plaintiff such an opportunity.

130. Through their acts and omissions, the San Francisco Superior Court, its officers, and the state appellate court defendants violated plaintiff's procedural rights under the Due Process Clause of the United States Constitution. The City and County of San Francisco violated plaintiff's procedural Due Process rights by depriving plaintiff of some of Bartsch's assets in reliance on those acts and omissions.

131. California law conflicted with the Due Process Clause of the United States Constitution because California law permitted a determination to be made on the Probate Petition and the validity of the Will without ever giving plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will.

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132. California did not provide a fair procedure or adequate process when depriving plaintiff of his constitutionally protected property rights. California's process for depriving plaintiff of his right to inherit Bartsch's assets violated plaintiff's procedural due process rights because of the constitutional inadequacy of California's procedures for effecting the deprivation initially

and remediating the erroneous deprivation subsequently.

133. Defendants are persons who, under color of state law, caused plaintiff to be subjected to the deprivation of plaintiff's right to inherit Bartsch's assets. Plaintiff's right to inherit Bartsch's assets was a right and a property interest secured by federal law. Therefore, defendants are liable to plaintiff for plaintiff's injuries resulting from the deprivation.

CLAIM 2: FOR MONEY DAMAGES FOR, OR RETURN OF, PRIVATE PROPERTY OF WHICH PLAINTIFF WAS DEPRIVED WITHOUT SUBSTANTIVE DUE PROCESS

Against All Defendants

134. Paragraphs 1–133 are part of this claim.

135. The failure of the San Francisco Superior Court and its officers to give plaintiff constitutionally required notice, by mail or other means as certain to ensure actual notice, was arbitrary, capricious, and without any legitimate governmental objective.

136. The failure of the San Francisco Superior Court, its officers, and the state appellate court defendants to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will was arbitrary, capricious, and without any legitimate governmental objective.

137. Through their acts and omissions, the San Francisco Superior Court, its officers, and the

state appellate court defendants violated plaintiff's substantive rights under the Due Process Clause of the United States Constitution. The City and County of San Francisco violated plaintiff's substantive Due Process rights by depriving plaintiff of some of Bartsch's assets in reliance on those acts and omissions.

138. California's process for depriving plaintiff of his right to inherit Bartsch's assets violated plaintiff's substantive due process rights under the United States Constitution.

139. California took plaintiff's property interest purely for the private purpose of benefitting the persons named as beneficiaries in the Will, including Peltner, and therefore the taking is void.

140. Defendants are persons who, under color of state law, caused plaintiff to be subjected to the deprivation of plaintiff's right to inherit Bartsch's assets. Plaintiff's right to inherit Bartsch's assets was a right and a property interest secured by federal law. Therefore, defendants are liable to plaintiff for plaintiff's injuries resulting from the deprivation.

CLAIM 3: FOR MONEY DAMAGES FOR, OR RETURN OF, PRIVATE PROPERTY UNREASONABLY SEIZED FROM PLAINTIFF

Against All Defendants

141. Paragraphs 1–140 are part of this claim.

142. It was not reasonable, and there was no legally valid reason, for the San Francisco

Superior Court and its officers not to give plaintiff notice of the Probate Petition by mail or other means as certain to ensure actual notice. Such notice was given to other persons interested in the Probate Petition. There was no urgency or governmental interest as would justify not giving plaintiff the same notice given other interested persons.

143. It was not reasonable, and there was no legally valid reason, for the San Francisco Superior Court, its officers, and the state appellate court defendants not to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. Even if *arguendo* it had been reasonable to grant the Probate Petition initially without notice to plaintiff or a fair adversary hearing, no legitimate governmental interest was advanced by the failure thereafter ever to give plaintiff an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will. At some point in time, the failure to give plaintiff such an opportunity became unreasonable.

144. By granting the Probate Petition and admitting the Will to probate, and by subsequently transferring possession of and title to Bartsch's assets in reliance on the Probate Order, defendants meaningfully interfered with plaintiff's possessory interest in Bartsch's assets after Bartsch's death. By taking such actions without ever at any time giving plaintiff constitutionally required notice or a fair opportunity to be heard, defendants unreasonably seized plaintiff's houses, papers, and effects, within the meaning of the Fourth

Amendment to the United States Constitution, and violated plaintiff's right to be secure against the unreasonable seizure of his houses, papers, and effects. Those houses, papers, and effects consisted of plaintiff's interest after Bartsch's death in Bartsch's assets. Plaintiff is not in possession of his houses, papers, and effects.

145. Defendants are persons who, under color of state law, caused plaintiff to be subjected to the deprivation of plaintiff's right to inherit Bartsch's assets. Plaintiff's right to inherit Bartsch's assets was a right and a property interest secured by federal law. Therefore, defendants are liable to plaintiff for plaintiff's injuries resulting from the deprivation.

CLAIM 4: FOR JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FROM PLAINTIFF FOR PUBLIC USE

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Against All Defendants

146. Paragraphs 1–145 are part of this claim.

147. By granting the Probate Petition and admitting the Will to probate without giving plaintiff constitutionally required notice or ever at any time giving plaintiff a fair opportunity to be heard, and by subsequently transferring the title and possession of Bartsch's assets to persons other than plaintiff, the defendants have taken plaintiff's private property for public use, within the meaning of the Fifth and Fourteenth Amendments to the Constitution.

148. Bartsch's assets have been put to public use and made to serve public purposes and policies of the City and County of San Francisco because: (1) tax revenues were increased when the Proposition 13 tax reduction benefits which plaintiff otherwise would have inherited from Bartsch were eliminated; (2) housing stocks were increased when the vacant lot which plaintiff would have inherited from Bartsch and kept as open space was sold to developers who are now constructing housing units on that lot under permits granted to those developers by the City and County of San Francisco; (3) property values were kept affordable, rental stock was preserved, rents were kept below market rates, tenant evictions were prevented, and housing units were kept under rent control as a result of the forfeiture of the Estate's right, which plaintiff would have timely exercised if he had inherited Bartsch's assets, to convert Bartsch's apartments to condominiums while it was still possible to do so; (4) rents were kept low by failing timely to exercise the Estate's right, which plaintiff would have timely exercised if he had inherited the Estate, to raise the rents as allowed by San Francisco's rent control ordinance; and (5) wealth inequality and intergenerational wealth transfer were reduced by distributing Bartsch's assets amongst approximately 20 individuals and charitable institutions instead of transferring the entire Estate intact to a single individual who was the decedent's child, namely plaintiff.

149. Although the Constitution provides that private property may not be taken for public

use without just compensation, such compensation has not been provided to plaintiff. Plaintiff's right to just compensation is secured by the Constitution. Plaintiff has not received just compensation.

150. Defendants are able and required by the Constitution to provide just compensation for the taking of plaintiff's property for public use, but under color of state law and in violation of the Constitution they have not done so.

CLAIM 5: FOR MONEY DAMAGES OR JUST COMPENSATION FOR, OR RETURN OF, PRIVATE PROPERTY APPROPRIATED FROM PLAINTIFF BY DENYING PLAINTIFF EQUAL PROTECTION OF THE LAWS

Against All Defendants

151. Paragraphs 1–150 are part of this claim.

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152. Under California law, persons situated similarly to plaintiff: (1) had property rights to decedents' assets as the decedents' heirs after the decedents' deaths; (2) had the right to notice of and the opportunity to participate in a fair adversary hearing on a petition to deprive them of those property rights; (3) had the right to a remedy if they were deprived of such notice or opportunity; and (4) did not waive those property rights, or their right to an opportunity to participate in a fair adversary hearing on a petition to deprive them of those rights, by making a general appearance in a proceeding held after the petition had been granted without such a hearing. Where those similarly situated persons were deprived of those rights in

proceedings in which those persons were denied an opportunity to participate in a fair adversary hearing, those proceedings were subsequently held to have been sham and without legal effect as to those persons.

153. The San Francisco Superior Court, its officers, and the state appellate court defendants denied plaintiff the equal protection of the laws, within the meaning of the Fourteenth Amendment to the United States Constitution, when they knowingly and intentionally treated plaintiff differently from others similarly situated by determining that plaintiff: (1) had no property right or interest in Bartsch's assets as Bartsch's heir after Bartsch's death; (2) had no right to notice of or the opportunity to participate in a fair adversary hearing on the Probate Petition; (3) had no right to a remedy after he was deprived of such notice and opportunity; and (4) waived his property rights to Bartsch's assets and his right to an opportunity to participate in a fair adversary hearing on the Probate Petition by making a general appearance in the Probate Proceedings after the Probate Petition had been granted without such a hearing. Unlikely similar proceedings involving similarly situated persons, the proceeding on the Probate Petition was not subsequently held to have been sham and the Probate Order was given effect against plaintiff.

154. There was no rational basis for this difference in treatment of plaintiff and those similarly situated. The difference in treatment was not rationally related to a legitimate state interest.

155. The difference in treatment amounted to, and cannot reasonably be explained as anything other than, intentional and arbitrary discrimination.

156. The difference in treatment caused plaintiff to be deprived of his property interest in Bartsch's assets, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Persons situated similarly to plaintiff were not similarly deprived of their property interests in decedents' assets.

157. The difference in treatment was in part a difference in the process of law. That difference in the process of law deprived plaintiff, or caused plaintiff to be deprived, of his property interest in Bartsch's assets without due process of law within the meaning of the Due Process Clause of the United States Constitution.

158. Defendants are persons who, under color of state law, caused plaintiff to be subjected to the deprivation of plaintiff's right to the equal protection of the laws pertaining to plaintiff's property interest in Bartsch's assets. Plaintiff's right to the equal protection of the laws was a right secured by federal law, and the denial and violation of that right deprived plaintiff of plaintiff's property interest in Bartsch's assets. Therefore, defendants are liable to plaintiff for plaintiff's injuries resulting from the deprivation.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Norman Bartsch Herterich prays for relief, as follows:

1. A declaration that upon Bartsch's death plaintiff had a right under California law to inherit all of Bartsch's assets as Bartsch's only heir;

2. A declaration that plaintiff's right to inherit all of Bartsch's assets could only be defeated if a judicial proceeding conducted in accordance with federal constitutional requirements (including the requirements that plaintiff be given personal notice of the proceeding and the opportunity to participate in a fair adversary hearing) resulted in the determination that a will providing that Bartsch's assets would pass to others, in whole or in part, was valid;

3. A declaration that such a judicial proceeding has not taken place and under California law will not and cannot take place;

4. One or more of the following:

a. A declaration that plaintiff's right to inherit Bartsch's assets was "property" of which plaintiff was "deprived ... without due process of law", within the meaning of the Fifth and Fourteenth Amendments to the Constitution;

b. A declaration that plaintiff's right to inherit Bartsch's assets was amongst plaintiff's "houses, papers, and effects" and was unreasonably seized, within the meaning of the Fourth Amendment to the Constitution;

c. A declaration that plaintiff's right to inherit Bartsch's assets was

"private property ... taken for public use" within the meaning of the Fifth and Fourteenth Amendments to the Constitution;

d. A declaration that, as to plaintiff's right to inherit Bartsch's assets, plaintiff was denied the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution;

5. A declaration that defendants, under color of California law, subjected plaintiff or caused plaintiff to be subjected to the deprivation of his inheritance rights secured by the Constitution;

6. A declaration that there does not exist any adequate state remedy for the deprivation of plaintiff's right to inherit Bartsch's assets;

7. A declaration of defendants' liability to plaintiff for plaintiff's injuries, and injunctive relief ordering defendants to provide such relief, which may include one or more of the following, in whole or in part:

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a. Money damages, in an amount to be determined according to proof;

b. An injunction ordering defendants to take possession or control of Bartsch's assets and then transfer Bartsch's assets to plaintiff by: (1) recording deeds transferring to plaintiff full title to the real properties which were given Block-Lot designations of "2754-013" and "2754-052" by the Recorder-

Assessor of the City and County of San Francisco; (2) restoring to the real properties designated "2754-013" and "2754-052" the assessments which those properties had when Bartsch died in 2008; (3) issuing permits authorizing the conversion of the apartments in the real property designated "2754-013" to condominiums; (4) removing any and all alterations made after Bartsch died to the properties designated "2754-013" and "2754-052", and restoring those properties to their state at the time of Bartsch's death; and (5) transferring to plaintiff the securities and cash which were in TD Ameritrade account # XXX-XX8463, Bank of America account # XXXXX-X0360, and Bank of America account # XXXXX-X0036 when Bartsch died;

c. An injunction ordering defendants to pay plaintiff just compensation, in an amount to be determined according to proof;

8. Attorney's fees in an amount to be determined according to proof; and

9. For such other and further relief as the Court deems appropriate and just.

Dated: November 25, 2019

/s/ Norman Herterich
NORMAN BARTSCH HERTERICH
Pro Se Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on each claim.

Dated: November 25, 2019

/s/ Norman Herterich
NORMAN BARTSCH HERTERICH
Pro Se Plaintiff

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APPENDIX I — COMPLAINT FILED IN NORTHERN DISTRICT OF CALIFORNIA CASE NO. 4:20-CV-03992-SBA ON JUNE 11, 2020

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FILED JUN 11 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

I

NORMAN BARTSCH HERTERICH, Plaintiff, vs. ERNEST H. GOLDSMITH, HAROLD E. KAHN, ROBERT L. DONDERO, SANDRA L. MARGULIES, KATHLEEN M. BANKE, TANI GORRE CANTIL-SAKAUYE, MING WILLIAM CHIN, CAROL ANN CORRIGAN, GOODWIN HON LIU, MARIANO-FLORENTINO CUÉLLAR, AND LEONDRA REID KRUGER, Defendants.	Case No. CV-20-3992-JSC COMPLAINT FOR TRANSFER OF, OR JUST COMPENSATION OR MONEY DAMAGES FOR, PRIVATE PROPERTY UNREASONABLY SEIZED AND TAKEN WITHOUT DUE PROCESS DEMAND FOR JURY TRIAL

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JURISDICTION AND VENUE

1. **Jurisdiction.** This action is brought under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. Jurisdiction is conferred under 28 U.S.C. §§ 1331 and 1343, as applicable to actions brought for the redress of violations of a plaintiff's constitutional and civil rights under the United States Constitution.

2. **Venue.** Venue in the Northern District of California is proper under 28 U.S.C. § 1391(b) and (c) because the events giving rise to this claim occurred within the district, and because some or all defendants reside and/or maintain an office in the district.

3. **Intradistrict Assignment.** This matter should be assigned to the San Francisco Division of this Court because the events giving rise to this claim occurred in San Francisco County, and because some or all defendants reside and/or maintain an office in San Francisco.

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PARTIES

4. Plaintiff Norman Bartsch Herterich ("Plaintiff" or "Herterich") is, and was at all times relevant, a resident of San Francisco, California.

5. Defendant Ernest H. Goldsmith ("Goldsmith") was at all times relevant a Judge of the San Francisco Superior Court.

6. Defendant Harold E. Kahn ("Kahn") is, and was at all times relevant, a Judge of the San Francisco Superior Court. Kahn is employed and maintains an office in San Francisco, California.

7. Defendant Robert L. Dondero ("Dondero") was at all times relevant a Justice of the First District Court of Appeal of the State of California.

8. Defendants Sandra L. Margulies ("Margulies") and Kathleen M. Banke ("Banke") are, and were at all times relevant, Justices of the First District Court of Appeal of the State of California. Margulies and Banke are employed and each maintains an office in San Francisco, California.

9. Dondero, Margulies, and Banke are collectively referred to herein as "the Appellate Justices."

10. Defendants Tani Gorre Cantil-Sakauye, Ming William Chin, Carol Ann Corrigan, Goodwin Hon Liu, Mariano-Florentino Cuéllar, and Leondra Reid Kruger (collectively "the Supreme Court Justices") are, and were at all times relevant, Justices of the Supreme Court of the State of California. The Supreme Court Justices are employed and each maintains an office in San Francisco, California.

11. Goldsmith, Kahn, the Appellate Justices, and the Supreme Court Justices (collectively, "the Defendants") are all parties defendant in both their individual capacities and their official capacities as judicial officers.

12. The Defendants at all times herein mentioned were the agents and employees of their co-defendants and in doing the things hereinafter alleged were acting within the course and scope of

such agency and the permission and consent of their co-defendants.

13. The Defendants at all times herein mentioned had actual and/or constructive knowledge of all material facts known to, and all material acts and omissions of, their co-defendants and the agents and employees of their co-defendants. Defendants' acts were informed by such knowledge.

INTRODUCTION

14. The instant federal case arises from a prior state court civil fraud action wherein the conduct of the presiding state court judges and justices is alleged to have been so egregious that the conduct amounts to a violation of Plaintiff Herterich's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The state court civil fraud action in turn arose from state court probate proceedings concerning the estate of Herterich's father, Hans Bartsch ("Bartsch"). Bartsch's purported will was admitted to probate without personal notice to Herterich and without Herterich's actual knowledge after the petitioner for probate and his attorney (Peltner and Traeg, respectively) stated under penalty of perjury that Bartsch was survived by no issue. But Peltner and Traeg subsequently revealed that Bartsch had indicated to them Bartsch's awareness that Herterich was Bartsch's child, and in reliance on that revelation the probate court denied a pretermission claim which Herterich had filed after gaining knowledge of the probate proceedings. Herterich concluded that either: (1)

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Peltner and Traeg had falsely represented to the court that Bartsch had no issue, when in fact they knew that Herterich was Bartsch's child; or (2) Peltner and Traeg had falsely represented to the court that Bartsch had indicated to them that Herterich was Bartsch's child, when in fact Bartsch had not done so. Herterich then filed the civil fraud action so that the harm which Herterich had suffered from such flagrant fraud could be remedied.

15. Defendants Goldsmith and Kahn granted summary judgment in favor of Peltner and Traeg, respectively. Goldsmith's ruling was grounded solely on the conclusion that as a matter of law Herterich could not establish damages, but Kahn ruled on the same facts that Herterich could establish damages. Kahn's ruling was grounded solely on matters which had not been briefed. Herterich appealed the summary judgments entered by Goldsmith and Kahn, but the reviewing courts did not reach the grounds on which those judgments had been based. Herterich here in part contends that the grounds on which the summary judgments were based are not binding on Herterich because the reviewing courts never reviewed those grounds, or alternatively those summary judgments are void on due process and equal protection grounds.

16. In the appeal of Goldsmith and Kahn's summary judgment rulings, Defendant Appellate Court Justices ruled that the civil fraud action was barred by the litigation privilege. But Peltner and Traeg had waived the affirmative defense of the litigation privilege by failing to plead it in their

answers to the civil fraud complaint, and no party or court raised the litigation privilege until after the appeal had been fully briefed. At the last minute, the Appellate Court Justices *sua sponte* raised the litigation privilege for the first time on appeal and then decided the appeal to Herterich's detriment solely on the grounds of the litigation privilege. Defendant Supreme Court Justices subsequently denied Herterich's ensuing petition for review.

17. Herterich now contends in part that the Appellate Court Justices denied Herterich the equal protection of the laws by raising the litigation privilege *sua sponte* and deciding the appeal adversely to Herterich on the basis of the litigation privilege after Peltner and Traeg had waived that affirmative defense. Similarly situated plaintiffs had appeals decided in their favor. In those appeals the reviewing court did not bar complaints by raising the litigation privilege *sua sponte* for the first time on appeal after the affirmative defense had been waived and the appeal had been fully briefed. Herterich should not have had his civil fraud action barred by the litigation privilege when similarly situated plaintiffs did not have their actions barred by the litigation privilege. By pulling the proverbial rabbit out of a hat in Herterich's appeal after having not done so in the appeals of others similarly situated, the Appellate Court Justices violated Herterich's Equal Protection rights, and the Supreme Court Justices subsequently violated Herterich's Equal Protection rights by allowing the Appellate Court Justices' ruling to stand. Alternatively, Herterich contends

that the Defendants denied Herterich the due process of the laws, unreasonably seized Herterich's property interest, or took Herterich's property interest for public use without just compensation.

18. Herterich here asks the Court to determine, and then award to him, the relief which he would or should have received from the determination of his civil fraud complaint on the merits if the Defendants had not deprived him of that relief in violation of federal law.

COMMON ALLEGATIONS

A. The Probate Court established the validity of Bartsch's purported Will after Peltner and Traeg failed to give Herterich notice by mail and before Herterich had actual notice of the Probate Petition.

19. On February 6, 1963, the San Francisco Superior Court entered an order in case no. 508058 establishing that Hans Herbert Bartsch ("Bartsch") was Herterich's father.

20. Bartsch died in San Francisco, California, on October 25, 2008.

21. Bartsch was a resident of San Francisco at the time of his death. Bartsch had had no children other than Herterich. Bartsch had never married. When Bartsch died all of his property was separate property and none of his property was held in trust.

22. Under California law, Herterich was Bartsch's "child" when Bartsch died. See California Probate Code §§ 6450(a) and 6453(b)(1).

23. Under California law, Herterich was entitled after Bartsch's death to inherit the entire residue of Bartsch's estate unless a will providing otherwise was determined by a court to be valid. See California Probate Code § 6402(a). The residue of Bartsch's estate consisted of the remainder after Bartsch's debts were paid from the assets Bartsch owned when he died.

24. Under California law, Herterich was Bartsch's sole heir when Bartsch died. See California Probate Code § 44.

25. Under California law, a decedent's purported will is presumed not to be valid, and any person claiming an interest in the residue of a decedent's estate under such a will has the burden to prove to a court that the will is valid. See California Probate Code § 8006(a).

26. On November 17, 2008, Arndt Peltner ("Peltner"), through his attorney Alice Brown Traeg ("Traeg"), filed a petition ("the Probate Petition") in San Francisco Superior Court case no. PES-08-291846 ("the Probate Proceedings") to probate and establish the validity of Bartsch's purported will ("the Will").

27. The Will provided that the entire residue of Bartsch's estate would be distributed to persons other than Herterich.

28. The Will did not mention Herterich.

29. The Will explicitly stated that Bartsch had had no children.

30. In the Probate Petition, Peltner and Traeg explicitly stated under penalty of perjury that Bartsch was survived by no child.

31. Notice of the Probate Petition was not given to Herterich by mail or by other means as certain to ensure actual notice. Herterich did not have actual notice of the Probate Petition while the Probate Petition was pending. Herterich did not appear in the proceeding on the Probate Petition. The Probate Petition was unopposed.

32. Herterich was not given an opportunity to participate in a fair adversary hearing on the Probate Petition or the validity of the Will.

33. On December 10, 2008, the probate department of the San Francisco Superior Court ("the Probate Court") made an order ("the Probate Order") granting the unopposed Probate Petition. The Probate Order admitted the Will to probate, established the Will's validity, and appointed Peltner executor of Bartsch's estate. Traeg become the estate's attorney at that time – i.e., she became the attorney for Peltner in his capacity as executor of Bartsch's estate.

34. Herterich did not learn of the Will, the Probate Petition, the Probate Proceedings, or the Probate Order until after the Probate Petition had been granted, the Probate Order had been made, and the Will had been judicially determined to be valid.

B. Pursuant to federal exhaustion doctrine, Herterich filed the Pretermission Petition in the Probate Proceedings.

35. Herterich's address and telephone number, and the fact that Herterich was a child

and an heir of Bartsch, were matters of public record at the time of Bartsch's death and at all times thereafter.

36. When Bartsch died and at all times thereafter, Herterich's identity as a person interested in the residue of Bartsch's estate was known to or reasonably ascertainable by Peltner, Traeg, the Probate Court, and the Defendants herein, within the meaning of federal law.

37. Under the United States Constitution, Herterich had a right to notice of the Probate Petition by mail or other means as certain to ensure actual notice.

38. Under the United States Constitution, Herterich had a right to an opportunity to be heard in the proceeding on the Probate Petition.

39. Under federal judicial doctrines and policies applicable at all times here relevant, Herterich was required to exhaust all available state law remedies before Herterich could seek a federal remedy for the unconstitutional deprivation of his right to inherit the residue of Bartsch's estate or otherwise vindicate his Constitutional rights to notice of, and to be heard in, the proceeding on the Probate Petition.

40. Herterich was advised by counsel to seek a state law remedy by pursuing a pretermission claim in the Probate Proceedings. Herterich was advised that on the facts known to him at that time such a claim could potentially be granted as a matter of law. Herterich was advised that other state law remedies, such as setting aside

the Probate Order and contesting the validity of the Will, would likely require more time and resources.

41. Under California law, a decedent's child may claim his or her intestate share of the residue of the decedent's estate as a *pretermitted* or *omitted* child, notwithstanding that the decedent left a valid will that bequeaths the entire remainder of the decedent's estate to others, if the decedent was unaware of the child when the decedent executed the will. Such a claim requires a showing that the decedent was unaware of the child when the decedent executed the will. See California Probate Code § 21622. If the showing is successfully made then the pretermitted child receives the same share of the residue which the child would have received if the decedent had died without having executed the will. *Id.* In that circumstance the bequests made in the will abate accordingly but the will otherwise remains fully effective. See California Probate Code § 21623. The pretermission claimant does not and cannot by filing the pretermission claim seek to set aside the order admitting the will to probate or contest the validity of the will. See, e.g., *Estate of Smith* (1973) 9 Cal.3d 74, 80 ("Pretermitted heirs do not contest or challenge a will but take in spite of it.").

42. The fact that the Will stated on its face that Bartsch had had no children indicated that on the date of the Will Bartsch was unaware that Herterich was his child.

43. On April 1, 2009, Herterich filed a petition ("the Pretermission Petition") in the Probate Proceedings for a determination that Herterich was Bartsch's pretermitted child. The

Pretermission Petition alleged that when the Will was executed Bartsch was unaware that Herterich was Bartsch's child. If granted, the Pretermission Petition would have provided Herterich relief from the adverse effects of the Probate Order, and would have done so without requiring that the Probate Order be set aside or the validity of the Will contested.

44. Before filing the Pretermission Petition, Herterich conducted informal interviews with persons who had known Bartsch around the time the Will was executed. The interviewed persons all stated that Bartsch had never indicated to them that he had had a child. Several persons stated that they had asked Bartsch if he had ever had any children, to which Bartsch responded that he had not ever had any children.

45. When Herterich filed the Pretermission Petition he was not aware of any evidence which indicated that when the Will was executed Bartsch was aware that Bartsch had a child, or that Bartsch was aware that Herterich was Bartsch's child, or that Peltner and Traeg knew of Herterich.

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C. After Peltner revealed facts indicating that he and Traeg had perpetrated extrinsic fraud when procuring the Probate Order, Herterich promptly filed the Removal Petition in order to preserve his right under California law to move to set aside the Probate Order and contest the validity of the Will.

46. California law allows a probate court to set aside an order admitting a will to probate upon a showing of extrinsic fraud by the petitioner for probate. See California Probate Code § 8007(b)(1). To make such a showing, an adversely affected heir of the decedent must show that his identity as an heir was actually known to or reasonably ascertainable by the petitioner for probate when the petitioner for probate was required to give notice of the petition to the decedent's heirs. See California Probate Code § 8110(a).

47. Prior to August 8, 2011, Herterich knew of no facts on which to ground a claim that extrinsic fraud had been present in the procurement of the Probate Order within the meaning of California law. To the contrary, the sworn statement by Peltner and Traeg in the Probate Petition that Bartsch was survived by no child indicated that extrinsic fraud had not been present within the meaning of California law.

48. On August 8, 2011, Peltner filed a motion seeking summary judgment denying the Pretermission Petition. The motion was grounded on the contention and supported by evidence that when the Will was executed Bartsch was aware that Herterich was his child. The motion did not

ssert that Herterich would not have shared in the residue of Bartsch's estate if Bartsch had died without having executed the Will.

49. In his moving papers filed with his summary judgment motion Peltner for the first time revealed facts which indicated that when he filed the Probate Petition he knew that Herterich was or reasonably might be Bartsch's child and heir and was thus entitled under California law to notice by mail of the Probate Petition. More specifically, Peltner claimed in his moving papers that when the Will was being drafted Bartsch informed Peltner and Traeg that: (1) Herterich claimed to be Bartsch's son; (2) Bartsch had made child support payments for Herterich under court order for 21 years; and (3) Herterich would be entitled to inherit from the residue of Bartsch's estate after Bartsch's death unless Bartsch executed a will disinheriting Herterich.

50. Peltner's revelation, that when the Will was being drafted Bartsch had in the presence of Peltner and Traeg shown awareness of Herterich as Bartsch's child and heir, was essential for Peltner's opposition to the Pretermission Petition. The revelation was the only indication in the record that when the Will was executed Bartsch was aware that Herterich was his child. The revelation provided the only fact which contradicted the inference, drawn from Bartsch's declaration in the Will that he had had no children, that when he executed the Will he was unaware that Herterich was his child. If Peltner had not made that revelation then he would have had no ground on which to oppose the Pretermission Petition.

51. A claim of extrinsic fraud could reasonably be based on the facts newly revealed by Peltner on August 8, 2011, in his summary judgment motion seeking denial of the Pretermission Petition. Herterich believed that, to preserve his right to bring such a claim, it would be prudent for him to bring the facts supporting such a claim before the court without unreasonable delay.

52. On August 17, 2011, Herterich filed a petition ("the Removal Petition") in the Probate Proceedings to remove Peltner as executor of Bartsch's estate. The Removal Petition in part argued that Peltner was unfit to serve as executor because when Peltner filed the Probate Petition he knew that Herterich was or reasonably might be Bartsch's child and heir and thus entitled to notice by mail of the Probate Petition, yet Peltner perpetrated extrinsic fraud in the proceeding on the Probate Petition by failing to give Herterich such notice. The Removal Petition thus brought the question of extrinsic fraud before the Probate Court without unreasonable delay.

53. Though in the Removal Petition Herterich in part asked the Probate Court to determine that extrinsic fraud had been present in the procurement of the Probate Order, Herterich did not in the Removal Petition ask the Probate Court to set aside the Probate Order on the ground of that extrinsic fraud. But if the Probate Court had in adjudicating the Removal Petition determined that Peltner had perpetrated extrinsic fraud in the proceeding on the Probate Petition, then Herterich could properly have subsequently relied on that

determination in a motion to set aside the Probate Order. Alternatively, after making that determination the Probate Court could have set aside the Probate Order *sua sponte*.

54. On September 23, 2011, Peltner filed an opposition to the Removal Petition in which he denied that Bartsch had informed Peltner and Traeg that: (1) Herterich was Bartsch's son; (2) Bartsch had made child support payments for Herterich under court order for 21 years; and (3) Herterich would be entitled to inherit from the residue of Bartsch's estate after Bartsch's death unless Bartsch executed a will disinheriting Herterich. In making these denials Peltner contradicted the facts which he had himself previously set before the Probate Court in his summary judgment motion as to the Pretermission Petition.

55. Peltner verified his opposition to the Removal Petition on October 17, 2011.

56. The Probate Court granted Peltner summary judgment as to the Pretermission Petition on December 30, 2011, and on February 15, 2012, entered judgment denying the Pretermission Petition. Citing Peltner's claims regarding the information which Bartsch had allegedly given Peltner and Traeg when the Will was being drafted, the Probate Court concluded that when the Will was executed Bartsch was aware that Herterich was Bartsch's child. The Probate Court did not address whether Herterich would have shared in the residue of Bartsch's estate if Bartsch had died without having executed the Will. The Probate Court did not determine

whether prior to the Probate Order Herterich had an interest in Bartsch's intestate estate as an heir.

57. Herterich timely appealed the judgment denying the Pretermission Petition.

58. On March 22, 2012, the Probate Court ordered the Removal Petition stayed pending a final determination of the Pretermission Petition.

59. On April 24, 2014, remittitur issued affirming the Probate Court's judgment denying the Pretermission Petition.

D. Herterich filed the Civil Fraud Complaint seeking alternative relief grounded on the conflicting yet binding representations which Peltner and Traeg had made in the Probate Proceedings.

60. Under California law a petitioner for probate, an executor, and an attorney all have duties not owed by other participants in probate proceedings. A petitioner for probate has a duty to include in the petition for probate the name, age, address, and relation to the decedent of each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner. Probate Code § 8002(a)(3). The petitioner for probate also has a duty to serve notice of the hearing by mail or personal delivery on each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner. Probate Code § 8110(a). An executor is an officer of the court, occupies a fiduciary relation toward all parties having an interest in the estate, and bears a duty to disclose all the facts. See *Estate of Sanders* (1985) 40 Cal.3d 607, 616. An attorney

has a duty not to mislead a judge or make fraudulent statements. See California Business and Professions Code § 6068(d); *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 75.

61. Because of these duties, Herterich concluded that a civil fraud action against Peltner and Traeg could be grounded on the circumstance that Peltner and Traeg had set forth conflicting and inconsistent facts in the proceedings on the Probate Petition, the Pretermission Petition, and the Removal Petition. The circumstance that the Probate Court and Herterich had relied on Peltner's and Traeg's purported facts in the proceedings on the Probate Petition and the Pretermission Petition meant that Peltner and Traeg would be estopped in such a civil fraud action from denying the truth of those facts notwithstanding that some of those facts were in conflict. Such a civil fraud action could potentially have provided Herterich relief from the adverse effects of the Probate Order, and would have done so without requiring that the Pretermission Petition or Removal Petition be granted, the Probate Order be set aside, or the Will be determined to be invalid.

62. On September 4, 2012, while the Pretermission Petition was pending on appeal and the Removal Petition was stayed pending a final determination of the Pretermission Petition, Herterich filed a civil complaint ("the Civil Fraud Complaint") for fraud, concealment, intentional and negligent misrepresentation, and punitive damages against Peltner and Traeg individually in San

Francisco Superior Court case no. CGC-12-523942 ("the Civil Fraud Action").

63. The Civil Fraud Complaint effectively alleged that the conflicting and inconsistent facts set forth by Peltner and Traeg in the Probate Proceedings were all true. The Civil Fraud Complaint described the pertinent facts set forth by Peltner and Traeg in the Probate Proceedings. The Civil Fraud Complaint also described the circumstances which would estop Peltner and Traeg from denying those facts.

64. The Civil Fraud Complaint in essence asked the court to determine which of Peltner's and Traeg's conflicting and inconsistent facts were legally binding on Peltner and Traeg and then provide Herterich any and all relief resulting from that determination. If the court were to determine that when Peltner and Traeg filed the Probate Petition they knew that Herterich was or reasonably might be Bartsch's child then Peltner and Traeg could be liable for falsely representing in the Probate Petition that Bartsch was survived by no child and for failing to mail required notice of the Probate Petition to Herterich. Such a determination could also: (1) be the basis for imposing a constructive trust on the residue of Bartsch's estate; and (2) establish extrinsic fraud by the probate petitioner sufficient under California law to warrant setting aside the Probate Order. Conversely, Peltner and Traeg could be liable if the court were to determine that Peltner and Traeg had falsely represented to the Probate Court in the proceeding on the Pretermission Petition that Bartsch had informed Peltner and

Traeg that: (1) Herterich was Bartsch's son; (2) Bartsch had made child support payments for Herterich under court order for 21 years; and (3) Herterich would be entitled to inherit from the residue of Bartsch's estate after Bartsch's death unless Bartsch executed a will disinheriting Herterich. Such a determination could also be the basis for imposing a constructive trust on the residue of Bartsch's estate. The Civil Fraud Complaint effectively accused Peltner and Traeg *inter alia* of perpetrating fraud on the court – i.e. making self-serving factual representations to the court and/or under oath without regard to the truth of those representations or whether Peltner and Traeg had previously caused the court to rely on contrary representations – and asked the court to craft an appropriate remedy for the harm which Herterich had thereby suffered.

65. The Civil Fraud Complaint in part required the civil department of the San Francisco Superior Court to consider matters which at the time the Civil Fraud Complaint was filed were pending before the Probate Court, in a different department of the San Francisco Superior Court, in the proceedings on the Pretermission Petition and the Removal Petition.

66. Pursuant to stipulation and order filed in the Civil Fraud Action on July 26, 2013, the Civil Fraud Action was stayed until 120 days after the issuance of the remittitur in Herterich's then-pending appeal of the Probate Court's judgment denying the Pretermission Petition.

67. On April 24, 2014, remittitur issued in the Probate Proceedings affirming the Probate

Court's judgment denying the Pretermission Petition. The stay on the Civil Fraud Action automatically expired 120 days later.

68. On October 30, 2014, Peltner moved the Probate Court to abate the Civil Fraud Action on the ground that the issues to be decided in the Civil Fraud Action were pending in the Removal Petition and should be determined in the Probate Proceedings.

69. On December 11, 2014, the Probate Court entered an order in the Probate Proceedings denying Peltner's motion to abate the Civil Fraud Action. In that order the Probate Court determined that the Removal Petition was no longer pending in the Probate Proceedings.

70. After the conclusion of the proceedings on the Pretermission Petition and the Removal Petition, all the matters raised in the Civil Fraud Complaint were properly before the court in the Civil Fraud Action and ripe for determination by that court.

E. Goldsmith granted Peltner summary judgment in the Civil Fraud Action on the ground that Herterich had not suffered damages.

71. On September 8, 2015, Peltner moved for summary judgment in the Civil Fraud Action in pertinent part on the ground that it had been determined in the proceeding on the Pretermission Petition that Herterich had no interest in Bartsch's estate as a pretermitted child, and therefore

Herterich was not harmed by his delayed discovery of the Probate Proceedings.

72. Peltner's moving papers did not explain why the determination that Herterich had no interest in Bartsch's estate as a pretermitted child implied that Herterich was not harmed by his delayed discovery of the Probate Proceedings. The only harm alleged in the Civil Fraud Complaint to have resulted from Herterich's delayed discovery of the Probate Proceedings was the termination of Herterich's interest in Bartsch's intestate estate as an heir. That harm resulted from the determination that the Will was valid. The Probate Court's determination that Herterich was not a pretermitted child: (1) only concerned whether Bartsch was aware that Herterich was his child when the Will was executed; (2) did not concern whether the Will was valid; (3) did not concern whether Herterich would have shared in the residue of Bartsch's estate if Bartsch had died without having executed the Will; and (4) did not concern whether Herterich had been harmed, either by his delayed discovery of the Probate Proceedings or by the determination that the Will was valid. Peltner offered no contrary facts or authorities.

73. The Civil Fraud Complaint alleged harm that did not result from Herterich's delayed discovery of the Probate Proceedings, and Peltner's moving papers did not explain why the denial of the Pretermission Petition negated that harm. For example, the Civil Fraud Complaint alleged that Herterich was harmed by misrepresentations made by Peltner and Traeg in the proceeding on the

Pretermission Petition, and in the causes of action related to that allegation the resulting denial of the Pretermission Petition *was* the harm alleged.

74. In timely opposition to Peltner's summary judgment motion Herterich argued that the evidence and legal argument presented in Peltner's moving papers was insufficient to warrant the grant of summary judgment.

75. Defendant Goldsmith granted Peltner's summary judgment motion on November 25, 2015, on the ground that Herterich could not establish that he suffered damages because the determination that Herterich had no interest in Bartsch's estate as a pretermitted child established that Herterich had not suffered any damage as a result of Peltner's alleged tortious conduct.

76. In the order granting Peltner summary judgment in the Civil Fraud Action, Goldsmith did not explain why the determination that Herterich had no interest in Bartsch's estate as a pretermitted child established that Herterich had not suffered any damage as a result of Peltner's alleged tortious conduct. Goldsmith did not rule that, in determining that Herterich was not a pretermitted child, the Probate Court decided anything more than that Bartsch was aware that Herterich was Bartsch's child when the Will was executed. Goldsmith cited no legal authority that, and offered no reason why, Bartsch's awareness of Herterich eliminated the possibility that Herterich was harmed by the granting of the Probate Petition or by Peltner's failure to mail notice of the Probate Petition to Herterich. Goldsmith also cited no legal authority that, and offered no reason why, the

Probate Court's ruling that Bartsch was aware of Herterich eliminated the possibility that Herterich was harmed by Peltner's misrepresentations made in securing that ruling.

77. Goldsmith entered judgment for Peltner in the Civil Fraud Action December 9, 2015.

F. Kahn ruled that Herterich had suffered damages, but Kahn nonetheless granted Traeg summary judgment in the Civil Fraud Action on the unbriefed grounds that Herterich's reliance and decision to pursue the Pretermission Petition were unreasonable as a matter of law.

78. On December 3, 2015, Defendant Kahn made an order in the Civil Fraud Action granting a stipulated *ex parte* application. The order and stipulated application provided in pertinent part that the court would on shortened time hear a summary judgment motion, to be filed by Traeg, based solely on the same grounds as those on which Peltner had been granted summary judgment.

79. On January 4, 2016, Traeg moved for summary judgment in the Civil Fraud Action solely on the same grounds as those on which Peltner had been granted summary judgment. Traeg argued only that Herterich had not suffered damages from Traeg's alleged misconduct. Traeg did not argue that Herterich could not demonstrate reasonable reliance as a matter of law or that Herterich's

decision to pursue the Pretermission Petition was unreasonable as a matter of law.

80. In his timely opposition to Traeg's summary judgment motion, Herterich argued only that he had suffered damage as a result of Traeg's alleged tortious conduct.

81. On February 3, 2016, Kahn ruled from the bench that, for purposes of the Civil Fraud Action, Herterich had suffered damages.

82. On February 3, 2016, Kahn made an order granting Traeg summary judgment on the grounds that Herterich could not demonstrate reasonable reliance as a matter of law, and that Herterich's decision to pursue the Pretermission Petition was unreasonable as a matter of law, because: (1) Bartsch must have been aware when he executed the Will that Herterich was his child because of child support payments which Bartsch had made more than 25 years earlier, and (2) the Will's boilerplate general disinheritance clause purports to disinherit all heirs not mentioned therein.

83. The grounds on which Kahn granted Traeg summary judgment were a surprise. Those grounds had not been raised by the parties and had not been briefed. After raising those grounds *sua sponte* Kahn did not order supplemental briefing or provide Herterich an opportunity to submit supplemental briefing as to those grounds for granting Traeg summary judgment.

84. The order granting Traeg summary judgment in the Civil Fraud Action did not mention Herterich's damages and did not indicate whether

or not Herterich did or could have suffered damages as a result of Traeg's alleged conduct.

85. The order granting Traeg summary judgment in the Civil Fraud Action did not explain why the matters that were the basis of the order – i.e., Herterich's reasonable reliance and the reasonableness of the Pretermission Petition – were properly before the court given that Traeg's motion only addressed, and pursuant to Kahn's stipulated order was only allowed to address, whether Herterich had suffered damages as a result of Traeg's alleged conduct.

86. The order granting Traeg summary judgment in the Civil Fraud Action did not explain why Herterich's reliance and his decision to pursue the Pretermission Petition were unreasonable as a matter of law. To the extent the order concluded that when the Will was executed Bartsch must have been aware that Herterich was his child because of child support payments which Bartsch had allegedly made under court order more than 25 years earlier, the order: (1) cited no legal authority that, and offered no reason why, as a matter of law such payments conclusively and notwithstanding contrary evidence established Bartsch's awareness of Herterich as Bartsch's child 25 years later when the Will was executed; and (2) did not distinguish, or even mention, the published California cases wherein a child's pretermission claim was successful notwithstanding that the decedent had supported the child financially, or had otherwise acknowledged the pretermission claimant as his child, many years before executing his final will. To the extent the order concluded that the Will's

boilerplate general disinheritance clause precluded reliance or a pretermission claim, the order: (1) cited no legal authority that, and offered no reason why, as a matter of law such a clause precluded reliance or a pretermission claim; and (2) did not distinguish, or even mention, the published California cases wherein a child's pretermission claim was successful notwithstanding the presence of a general disinheritance clause in the operative will.

87. To the extent that the order granting Traeg summary judgment in the Civil Fraud Action was grounded on Bartsch's alleged child support payments, that order must have effectively ruled that Bartsch had informed Peltner and Traeg that Bartsch had made such payments. Aside from the claims of Peltner and Traeg that Bartsch had informed Peltner and Traeg of such payments, there was no evidence in the record that Bartsch made or said he made child support payments.[1] In ruling that Bartsch had made or had said he made child support payments for Herterich, the order: (1) ignored the denials by Peltner and Traeg that Bartsch had informed them of such payments; (2) cited no legal authority that, and offered no reason why, Herterich should be denied a trial on the issue whether Bartsch had informed Peltner and Traeg that Bartsch had made child support payments for

[1] Herterich makes no allegation that Bartsch either did, or did not, pay child support. Herterich alleges only that Peltner and Traeg have claimed, and have also denied, that Bartsch informed Peltner and Traeg that Bartsch had paid child support for Herterich, and that the courts and Herterich have relied on both the claim and the denial.

Herterich; (3) failed to explicitly state its implied conclusion that Bartsch had informed Peltner and Traeg that Bartsch had made child support payments for Herterich; (4) failed to grant Herterich the relief which could have resulted from such a conclusion, such as a declaration that extrinsic fraud had been present in the procurement of the Probate Order; and (5) cited no legal authority that, and offered no reason why, Herterich was not entitled to a declaration that extrinsic fraud had been present in the procurement of the Probate Order.

88. The order granting Traeg summary judgment in the Civil Fraud Action did not explain why the reasonableness of Herterich's reliance and his decision to pursue the Pretermission Petition were dispositive regarding, or even relevant to, the Civil Fraud Complaint's causes of action arising from the failure to mail Herterich notice of the Probate Petition. The order cited no legal authority that, and offered no reason why, Traeg could not be liable for failing to mail Herterich notice of the Probate Petition. The order cited no legal authority that, and offered no reason why, Traeg's liability for the resulting termination of Herterich's intestate inheritance rights hinges on the reasonableness of Herterich's reliance and his decision to pursue the Pretermission Petition.

89. The order granting Traeg summary judgment in the Civil Fraud Action did not address whether: (1) after Bartsch died Herterich had an interest in Bartsch's intestate estate as an heir; (2) Herterich's interest as Bartsch's heir was extinguished by the Probate Order; or (3) Traeg

had a duty, given the facts available to her at the time, to give Herterich notice by mail of the Probate Petition.

90. After Kahn granted Traeg summary judgment in the Civil Fraud Action, Herterich timely moved for a new trial as to Traeg on the grounds of: (1) irregularity in the proceedings of the court; (2) irregularity in the proceedings caused by an adverse party; (3) improper orders of the court; (4) abuse of discretion by the court; (5) accident or surprise, which ordinary prudence could not have guarded against; (6) insufficiency of the evidence to justify the decision; (7) decision contrary to law; and (8) error in law occurring at the trial and objected to by the moving party.

91. On March 16, 2016, Kahn denied Herterich's motion for a new trial as to Traeg.

92. Kahn entered judgment for Traeg in the Civil Fraud Action on March 16, 2016.

G. In the Appeal of the summary judgments entered by Goldsmith and Kahn in favor of Peltner and Traeg, the Appellate Justices ruled that all claims in the Civil Fraud Complaint were barred by the litigation privilege notwithstanding that plaintiffs situated similarly to Herterich had not had their complaints barred by the litigation privilege.

93. Herterich timely appealed the summary judgments entered in the Civil Fraud Action in favor of Peltner and Traeg. The appeals of the two judgments were taken separately but were

heard together in one consolidated case, First Appellate District Court of Appeal of the State of California case no. A147554 ("the Appeal"), by the Appellate Justices.

94. In his opening and reply briefs filed in the Appeal Herterich *inter alia* argued, and in their respondent's briefs filed in the Appeal Peltner and Traeg in part disputed, that: (1) the determination in the Probate Proceedings that Herterich was not a pretermitted child did not compel summary judgment in favor of Peltner and Traeg in the Civil Fraud Action; (2) the summary judgment motions were legally insufficient because they did not negate all breaches of duty, eliminate all causes of action stated in the Civil Fraud Complaint, or meet Peltner's and Traeg's burdens to negate all damages – including damages resulting from Peltner's and Traeg's failure to give Herterich notice by mail of the Probate Petition, damages resulting from the denial of the Pretermission Petition on the basis of purported facts which were subsequently controverted under oath by Peltner and Traeg, and tort-of-another damages; (3) the summary judgment motions were legally insufficient because they relied on hearsay, to which Herterich properly objected, and on purported factual representations which Peltner and Traeg should have been judicially estopped from making because the Probate Court had relied on contrary representations made by Peltner and Traeg; (4) the summary judgments were error because there were triable issues of material fact regarding causation, credibility, breach of duty, and the information which Bartsch did or did not

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provide to Peltner and Traeg; (5) it was error for Goldsmith to conclude that Herterich's expenses in the proceeding on the Pretermission Petition, including Herterich's attorney's fees, were as a matter of law unrecoverable from Peltner as tort-of-another damages; (6) Herterich was at a minimum entitled to nominal damages if Peltner or Traeg breached one or more of their duties; (7) it was error for Kahn to conclude that Herterich's reliance in the Pretermission Petition on representations made by Traeg in the Probate Petition was unreasonable as a matter of law; and (8) Kahn should have granted Herterich's motion for a new trial as to Traeg because the trial court's proceedings were irregular and amounted to surprise, the evidence was insufficient to support the findings, and the trial court made numerous errors of law.

95. On November 15, 2017, after the Appeal was fully briefed, the Appellate Justices requested supplemental briefing as to whether or not the affirmative defense of the litigation privilege, as codified in California Civil Code § 47(b), applied to the causes of action set forth in the Civil Fraud Complaint. Prior to that request, no party or court had raised the litigation privilege in the Civil Fraud Action or the Appeal.

96. On December 8, 2017, Herterich timely filed a supplemental brief in the Appeal, as requested by the Appellate Justices. In his supplemental brief Herterich in pertinent part argued that the litigation privilege was inapplicable to the Civil Fraud Complaint because: (1) the litigation privilege is an affirmative defense

which can be waived, and Peltner and Traeg had waived that defense by failing to raise it in their answers to the Civil Fraud Complaint; and (2) the litigation privilege does not bar causes of action for breaches of duty owed to a plaintiff. Herterich argued that in the Probate Proceedings Peltner and Traeg owed duties to Herterich which most probate litigants don't owe to their litigation adversaries, because as the executor of Bartsch's estate and his attorney Peltner and Traeg were officers of the court and had fiduciary obligations to the persons potentially interested in Bartsch's estate. Herterich cited several published California opinions in which plaintiffs situated similarly to Herterich had prevailed in their claims. In those published opinions there was either: (1) no indication that any party or court had raised the litigation privilege as applicable to the plaintiff's claims; or (2) a holding that the litigation privilege did not bar the plaintiff's causes of action for breaches of duty owed to the plaintiff.

97. On March 1, 2018, the Appellate Justices issued a published opinion in the Appeal. That opinion was subsequently modified on March 28, 2018, and as modified may be cited as *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132 ("the Opinion").

98. The Appellate Justices held in the Opinion that all of Herterich's claims in the Civil Fraud Complaint were barred by the litigation privilege.

99. The Opinion did not reach the merits of the grounds on which Goldsmith and Kahn had granted summary judgment to Peltner and Traeg,

respectively, nor any of the arguments which the parties had raised in the appellant's, respondents', or reply briefs in the Appeal. As a result of the Opinion's failure to reach any of these matters, under California law no final determination has been made in any matter considered by Goldsmith or Kahn or raised by the parties in the trial court or in the appellant's, respondents', or reply briefs in the Appeal. See, e.g., *Samara v. Matar* (2018) 5 Cal.5th 322, 334.[2]

100. As to the argument made in Herterich's supplemental brief that Peltner and Traeg had waived the litigation privilege, the Opinion stated only that when a defendant raises the litigation privilege for the first time on appeal the reviewing court may consider it when the issue raises only a pure question of law. The Opinion did not state or suggest that it was a defendant who had raised the litigation privilege for the first time on appeal. The Opinion stated, without citing authority on the point, that the application of the litigation privilege raises a question of law, but the Opinion did not identify that question, either in general or in its application to the Civil Fraud Complaint. And the Opinion did not explain why, given that the litigation privilege is an affirmative defense, the application of the litigation privilege to

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[2] Even if a final determination had been made, courts in subsequent actions would not necessarily be bound by that determination because the determination only concerned a question of law. Under California law, collateral estoppel does not bar relitigating a question of law determined in a prior action if injustice would result from such a bar or if the public interest requires that relitigation not be foreclosed. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64.

the Civil Fraud Complaint did not also raise questions of fact which would preclude the litigation privilege from being raised for the first time on appeal.[3]

101. As to the argument made in Herterich's supplemental brief that the litigation privilege does not bar causes of action for breaches of duty owed to a plaintiff, the Opinion stated only that the parties and courts in almost all of the cases that Herterich cited to for this proposition did not invoke the application of the litigation privilege, and that the sole exception was a case wherein the litigation privilege was not held to bar a cause of action for a breach of duty.

102. As to the argument made in Herterich's supplemental brief that the Civil Fraud Action should proceed notwithstanding the litigation privilege because similarly situated plaintiffs had been allowed to proceed (and prevail) in similar actions, the Opinion stated only that none of the cases cited by Herterich addressed the application of the litigation privilege. The Opinion did not explain why or on what authority the Appellate Justices could *sua sponte* invoke the litigation privilege for the first time on appeal as a bar to the Civil Fraud Complaint when similarly

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[3] Though the Opinion stated generally that for purposes of the Appeal the Appellate Justices assumed that the Civil Fraud Complaint's allegations were true, the Opinion did not explain how it was possible to make such an assumption in the unusual circumstances of the Appeal. As explained above, the Civil Fraud Complaint alleged the conflicting and inconsistent facts that had been set forth by Peltner and Traeg in the Probate Proceedings. All of those alleged facts cannot be true simultaneously.

situated plaintiffs litigating similar complaints did not have their complaints barred by appellate courts that *sua sponte* invoked the litigation privilege for the first time on appeal.

H. The Supreme Court Justices refused to consider whether the Opinion treated Herterich differently from other similarly situated plaintiffs.

103. On April 10, 2018, Herterich timely filed a petition for review of the Opinion, in California Supreme Court case no. S248133.

104. In his petition for review of the Opinion, Herterich in pertinent part argued that the California Supreme Court should grant review of the Opinion because: (1) the Opinion created a conflict in the law in that the Opinion barred the Civil Fraud Complaint while similarly situated plaintiffs had previously been allowed to proceed and prevail in similar actions; and (2) the Appellate Justices were not legally authorized to raise the litigation privilege as a defense *sua sponte* for the first time in the Appeal after Peltner and Traeg had waived that defense by failing to raise it in the Civil Fraud Action.

105. The Supreme Court Justices had the power under California law, and as government officials had the duty under the United States Constitution, to take appropriate actions that would have prevented Herterich from being treated differently from others similarly situated by the Opinion.

106. When considering the petition for review of the Opinion, the California Supreme Court had available and considered all of the documents which had been filed in the Appeal.

107. On May 16, 2018, the California Supreme Court denied Herterich's petition for review of the Opinion *en banc*. At that time, the Supreme Court Justices were all justices of the California Supreme Court.

108. On June 12, 2018, remittitur issued in the Appeal. The remittitur was filed in the Civil Fraud Action on June 13, 2018.

109. No determination was ever made in the Civil Fraud Action regarding: (1) whether extrinsic fraud was present in the procurement of the Probate Orders; (2) which if any of the conflicting and inconsistent facts set forth by Peltner and Traeg legally bind them, such that they are liable for harm resulting from those facts and are estopped from denying those facts or asserting contrary facts; or (3) whether Peltner or Traeg breached one or more duties.

110. No determination was ever made in the Probate Proceedings, in a fair adversary hearing in which Herterich was given an opportunity to participate, that the Will is valid. On information and belief Herterich alleges that after conducting a fair adversary hearing a reasonable trier of fact would conclude that the Will is not valid because: (1) Bartsch lacked testamentary capacity; (2) the Will was the product of undue influence; and (3) the Will was not properly witnessed.

111. On information and belief Herterich alleges that, if the Defendants had not ruled that the Civil Fraud Complaint was barred for the reasons stated by the Defendants in their rulings in the Civil Fraud Action, then the reasonable adjudication on the merits of the causes of action stated in the Civil Fraud Complaint would have resulted in a determination that: (1) extrinsic fraud was present in the procurement of the Probate Orders; (2) all of the conflicting and inconsistent facts set forth by Peltner and Traeg legally bind them, such that they are liable for all of the harm resulting from those facts; and (3) Peltner and Traeg breached all duties alleged in the Civil Fraud Complaint to have been breached. As a result of such a determination, Herterich would have been entitled to: (1) ownership or inheritance of the residue of Bartsch's estate; (2) recovery of the attorney's fees which Herterich expended in the Probate Proceedings and the Civil Fraud Action; and (3) punitive damages.

CLAIM 1: FOR DENYING HERTERICH EQUAL PROTECTION OF THE LAWS

Against all Defendants

112. All preceding paragraphs herein are part of this claim.

113. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("the Equal Protection Clause") provides that no state may deny to any person within its jurisdiction the equal protection of the laws.

114. At all times relevant Herterich was within the jurisdiction of the State of California, and the Defendants were prohibited by the Equal Protection Clause from denying Herterich the equal protection of the laws.

115. Goldsmith denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause, when Goldsmith ruled that Herterich could not establish that Herterich suffered damage as a result of Peltner's alleged tortious conduct. Kahn ruled that Herterich *had* suffered damage as a result of *Traeg's* alleged tortious conduct. Herterich's claims against Peltner and Traeg were similar and should have resulted in similar rulings. There was no material difference in the claims Herterich made against Peltner and Traeg that could reasonably justify the difference in rulings as to damages. The Civil Fraud Complaint alleged tortious conduct by Peltner that was similar to that of Traeg. At all times relevant, Peltner and Traeg had an attorney-client relationship pursuant to which all material knowledge by either was imputed to the other. Peltner's alleged tortious conduct was effected by Traeg acting as Peltner's agent. Traeg's alleged tortious conduct was effected on Peltner's behalf as Peltner's agent. Peltner and Traeg were both officers of the court who owed similar duties to each other, the court, and Herterich. Goldsmith denied Herterich the equal protection of the laws by ruling that Herterich could not establish that Herterich suffered damage as a result of Peltner's alleged tortious conduct when on similar facts Herterich could establish

that he suffered damage as a result of Traeg's alleged tortious conduct.

116. Kahn denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause, when Kahn ruled that the Pretermission Petition was unreasonable because a pretermission claim is unreasonable as a matter of law if: (1) the decedent made child support payments for the pretermission claimant many years before executing his final will; and (2) the decedent's final will contains a boilerplate general disinheritance clause which purports to disinherit all heirs not mentioned therein. Pretermission claims made by others have been successful when: (1) the decedent had supported his child financially, or had otherwise acknowledged the pretermission claimant as his child, many years before executing his final will; and (2) the decedent's final will contained a boilerplate general disinheritance clause which purported to disinherit all heirs not mentioned therein. In such claims by others the pertinent inquiry was the decedent's awareness of his child at the time the will was executed. In that inquiry the decedent's awareness of his child at some other time was not dispositive, and the will's disinheritance clause was not dispositive if the clause did not specifically mention the child. Kahn ruled that Herterich's pretermission claim was unreasonable as a matter of law when similar claims made by similarly situated claimants were reasonable and successful. Kahn denied Herterich the equal protection of the laws by treating Herterich differently from those similarly situated pretermission claimants had been treated.

117. The Appellate Justices denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause, when they knowingly and intentionally treated Herterich differently from others similarly situated by raising the litigation privilege *sua sponte* for the first time on appeal and then ruling that the Civil Fraud Complaint was barred by the litigation privilege. Persons situated similarly to Herterich – i.e., plaintiffs who pursued claims similar to those in the Civil Fraud Complaint and whose litigation adversaries did not raise the litigation privilege as an affirmative defense in trial court proceedings – did not have their claims barred by the litigation privilege. Where as here the adversaries of such similarly situated persons failed to raise the litigation privilege in trial court proceedings or in an ensuing appeal, the reviewing court in the ensuing appeal did not consider the litigation privilege, raise the litigation privilege *sua sponte*, or rule that the litigation privilege barred the claims. Herterich was treated differently from those similarly situated persons and was detrimentally affected by the difference in treatment.

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118. The Supreme Court Justices denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause, when they knowingly and intentionally failed to take any action within their power to prevent or mitigate the unequal treatment to which Herterich was or would be subjected by the Opinion, thereby causing Herterich to be treated differently from others similarly situated, to Herterich's detriment. The

Supreme Court Justices had the opportunity and power to take reasonable actions to prevent or mitigate the unequal treatment to which Herterich was or would be subjected by the Opinion and, as state officials having such opportunity and power, had the duty under federal law to take such actions.

119. The difference in the treatment of Herterich and those similarly situated caused Herterich to be deprived of his property interest in the relief he would otherwise have obtained from a ruling on the merits of the Civil Fraud Complaint – i.e., the relief Herterich would have obtained if Defendants had not ruled that the Civil Fraud Complaint was barred for the reasons stated by Defendants. This deprivation violated the Equal Protection Clause. Persons situated similarly to Herterich were not similarly deprived of their property interests arising from their claims.

120. There was no rational basis for the difference in treatment of Herterich and those similarly situated. The difference in treatment was not rationally related to a legitimate state interest.

121. The difference in the treatment of Herterich and those similarly situated amounted to, and cannot reasonably be explained as anything other than, intentional and arbitrary discrimination.

122. The Equal Protection Clause gave Herterich the right to be treated similarly to other similarly situated persons.

123. The Defendants had a duty to abide by and give effect to the guarantees of the Equal Protection Clause to equal treatment.

124. The Defendants had a duty to treat Herterich similarly to other similarly situated persons.

125. The Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the equal protection of the laws pertaining to his property interest in the relief he would otherwise have obtained from a ruling on the merits of the Civil Fraud Complaint. Herterich's right to the equal protection of the laws was a right secured by federal law, and the denial and violation of that right deprived Herterich of his property interest in the relief he would otherwise have obtained from a ruling on the merits of the Civil Fraud Complaint. Therefore, the Defendants are liable to Herterich for Herterich's injuries resulting from the deprivation.

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CLAIM 2: FOR DEPRIVING HERTERICH OF PROPERTY WITHOUT PROCEDURAL AND/OR SUBSTANTIVE DUE PROCESS OF LAW

Against All Defendants

126. All preceding paragraphs herein are part of this claim.

127. The Due Process Clause of the Fourteenth Amendment to the United States Constitution ("the Due Process Clause") provides that no state may deprive any person of property without due process of law. The Due Process Clause

gives owners of property the right to a fair adversary hearing before being deprived of that property.

128. The damages or other relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits is property within the meaning of the Due Process Clause. The Due Process Clause gave Herterich the right not to be deprived of that property by any state without due process of law.

129. The Defendants had a duty to abide by and give effect to the guarantees of the Due Process Clause. They had a duty not to deprive any person of property without due process of law. They had a duty not to deprive Herterich without due process of law of the relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits.

130. Under California law, a judge has a duty to decide any proceeding in which he or she is not disqualified. See California Code of Civil Procedure § 170. Accordingly, every party to such a proceeding has a corresponding right to have the judge decide the proceeding. Herterich was such a party and the Civil Fraud Action was such a proceeding.

131. Goldsmith and Kahn had jurisdiction over the Civil Fraud Action. Neither Goldsmith nor Kahn was disqualified.

132. In granting Peltner summary judgment, Goldsmith deprived Herterich of Herterich's property interest in the Civil Fraud Complaint as to Peltner without due process of law,

within the meaning of the Due Process Clause. Goldsmith's ruling, that as a matter of law Herterich had suffered *no* damage, was inconsistent with Kahn's ruling that Herterich *had* suffered damage. Goldsmith's ruling, which relied only on the outcome of the Pretermission Petition for its conclusion that Herterich suffered no damage, did not and could not reach any of the damage alleged in the Civil Fraud Complaint to have occurred prior to the final determination of the Pretermission Petition, such as the damage that resulted from Peltner's failure to mail Herterich notice of the Probate Petition or the tort-of-another damages Herterich sustained in litigating the Pretermission Petition. Such damage did not depend on and could not have been negated by the outcome of the Pretermission Petition. Furthermore, Goldsmith's ruling did not and could not reach the causes of action stated in the Civil Fraud Complaint for misrepresentations that prevented the Pretermission Petition from being granted. The denial of the Pretermission Petition *was* the damage alleged in those causes of action, and the denial of the Pretermission Petition could not negate the possibility of damage. By granting judgment against Herterich on grounds which could not reach the causes of action stated in the Civil Fraud Complaint, Goldsmith denied Herterich the right to have the causes of action stated in the Civil Fraud Complaint decided as to Peltner, and in doing so Goldsmith denied Herterich of his property right in the outcome of that determination without due process of law.

133. In granting Traeg summary judgment, Kahn deprived Herterich of Herterich's property interest in the Civil Fraud Complaint as to Traeg without due process of law, within the meaning of the Due Process Clause. Kahn did not determine any of the causes of action stated in the Civil Fraud Complaint. Kahn determined the damages issue raised in Traeg's summary judgment motion in favor of Herterich, but Kahn's written ruling did not reflect that determination. To the extent that Kahn's ruling reached matters other than Herterich's damages, reaching those matters was barred by Kahn's earlier order limiting Traeg's summary judgment motion to the question of Herterich's damages. Herterich was denied a fair adversary hearing on the matters other than damages reached in Kahn's ruling. Kahn's ruling, which relied solely on the reasonableness of Herterich's reliance and decision to file the Pretermission Petition, did not and could not reach any of Herterich's causes of action concerning events that occurred prior to the filing of the Pretermission Petition, such as the failure to mail Herterich notice of the Probate Petition. To the extent Kahn grounded his summary judgment ruling on the purported fact that Bartsch had informed Peltner and Traeg that Bartsch had paid court-ordered child support for Herterich, Kahn denied Herterich a fair adversary hearing on whether or not Bartsch had so informed Peltner and Traeg. To the extent that Kahn ruled that Herterich's decision to file the Pretermission Petition was unreasonable because Bartsch actually had informed Peltner and Traeg that

Bartsch had paid court-ordered child support for Herterich, Kahn denied Herterich a fair adversary hearing on (1) whether or not Herterich was aware when he filed the Pretermission Petition that Bartsch had informed Peltner and Traeg that Bartsch had paid court-ordered child support for Herterich, and (2) whether or not the information purportedly given to Peltner and Traeg by Bartsch required the Probate Court to conclude as a matter of law that when Bartsch executed the Will Bartsch was aware that Herterich was his child, where the Will and the Probate Petition explicitly stated that Bartsch had had no children. To the extent that Kahn determined in his ruling that Bartsch had in fact informed Peltner and Traeg that Bartsch had paid court-ordered child support for Herterich, Kahn denied Herterich the relief that could and should have resulted from such a determination, such as a declaration that extrinsic fraud had been present in the procurement of the Probate Order within the meaning of California law. To the extent that Kahn ruled that Herterich's decision to file the Pretermission Petition was unreasonable as a matter of law because of the presence in the Will of a boilerplate general disinheritance clause which did not mention Herterich, Kahn denied Herterich a fair adversary hearing on whether or not a pretermission claim may be granted notwithstanding the presence in a will of general disinheritance language that does not mention the pretermission claimant.

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134. By treating Herterich differently from those similarly situated, as set forth in Claim 1 above, the Defendants deprived Herterich of his

property interest in the Civil Fraud Complaint without due process of the law, within the meaning of the Due Process Clause.

135. Decisions of the Supreme Court and courts of appeal that determine causes must be in writing with reasons stated. See California Constitution, Article VI, § 14. As explained above, the purported reasons stated in the Opinion are not legally valid under federal law. By determining Herterich's causes without stating legally valid reasons, the Appellate Justices and the Supreme Court Justices deprived Herterich of his right to have those causes determined in writing with reasons stated. In doing so the Appellate Justices and the Supreme Court Justices deprived Herterich of his property interest in the Civil Fraud Complaint without due process of the law, within the meaning of the Due Process Clause.

136. By improperly deciding the Appeal solely on the question of the litigation privilege, the Appellate Justices and the Supreme Court Justices deprived Herterich without due process of law of Herterich's right to appellate review of the grounds on which Goldsmith and Kahn had decided the summary judgment motions in favor of Peltner and Traeg, respectively.

137. Under California law, a party adversely affected by a trial court ruling usually has the right to appellate review of that ruling. See California Code of Civil Procedure §§ 901 and 902. The right to such review protects that party from erroneous rulings by providing that, where a judicial tribunal errs, that error can be corrected by a second tribunal acting independent of the first

tribunal. After the Appellate Justices raised the litigation privilege *sua sponte* for the first time on appeal, they or the Supreme Court Justices could have remanded the issues concerning the litigation privilege for determination in the trial court, and in that circumstance Herterich could have exercised his right to appellate review of any adverse determination made by the trial court. But California law does not guarantee the right to independent review of rulings made *sua sponte* by an appellate court. Herterich petitioned for review of the Opinion but was not granted review. Herterich could not have the issues concerning the litigation privilege independently reviewed by a second tribunal because the Appellate Justices decided those issues themselves instead of remanding those issues to the trial court for determination, and because the Supreme Court Justices denied Herterich's petition for review. By their acts and omissions, the Appellate Justices and the Supreme Court Justices deprived Herterich of the procedural due process protections afforded by independent review.

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138. As to the grounds on which Goldsmith and Kahn entered summary judgment in favor of Peltner and Traeg, respectively, the rulings by Goldsmith and Kahn are not final and may not be given res judicata effect because: (1) Herterich had a right to, and did properly request, appellate review of the grounds on which Goldsmith and Kahn decided the summary judgment motions; and (2) the Opinion did not reach the grounds on which Goldsmith and Kahn decided the summary judgment motions.

139. As a proximate result of the actions and omissions of the Defendants, none of the causes of action stated in the Civil Fraud Complaint were determined on the merits, and Herterich was without due process of the law denied the relief which he would have obtained from a determination of those causes on the merits.

140. The Defendants did not provide a fair procedure or adequate process when depriving Herterich of his constitutionally protected property rights.

141. Denying Herterich the relief which he would have obtained from a determination on the merits of the Civil Fraud Complaint was arbitrary, capricious, and without any legitimate governmental objective.

142. The Defendants took Herterich's property interest purely for the private purpose of benefitting Peltner and Traeg, and therefore the taking is void.

143. Through their acts and omissions, the Defendants violated Herterich's procedural and substantive due process rights under the Due Process Clause.

144. The Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the relief which he otherwise would have obtained from a determination on the merits of the Civil Fraud Complaint. Herterich's right to that relief was a right and a property interest secured by federal law. Therefore, the Defendants are liable to

Herterich for Herterich's injuries resulting from the deprivation.

CLAIM 3: FOR UNREASONABLE SEIZURE OF HERTERICH'S PROPERTY

Against All Defendants

145. All preceding paragraphs herein are part of this claim.

146. The Fourth Amendment to the United States Constitution ("the Fourth Amendment") provides that the right of the people to be secure in their houses, papers, and effects against unreasonable seizures shall not be violated. The Fourth Amendment protects property from unreasonable seizure by the government.

147. The relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits was protected by the Fourth Amendment from unreasonable seizure by the government. The Fourth Amendment gave Herterich the right not to have the government unreasonably seize that property interest.

148. The Defendants had a duty to abide by and give effect to the guarantees of the Fourth Amendment. They had a duty not to unreasonably seize property. They had a duty to prevent and mitigate the unreasonable seizure of property by the government. They had a duty not to unreasonably seize, and a duty to prevent and mitigate the unreasonable seizure by the government of, the relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits.

149. As explained above, the Defendants ruled that the Civil Fraud Action was barred for purported reasons that were not legally valid under federal law. There was no legally valid reason to bar the Civil Fraud Action. It was unreasonable to rule that the Civil Fraud Action was barred.

150. It was not reasonable, and there was no legally valid reason, for the Defendants to deprive Herterich of Herterich's property interest in the Civil Fraud Complaint without determining the causes of action stated in the Civil Fraud Complaint.

151. It was not reasonable, and there was no legally valid reason, for the Defendants through their actions and omissions to treat or cause Herterich to be treated differently than other persons similarly situated and seize Herterich's property interest in the Civil Fraud Complaint on the basis of that difference.

152. By unreasonably depriving Herterich of his property interest in the Civil Fraud Complaint, and by unreasonably treating Herterich differently than other persons similarly situated, Defendants meaningfully interfered with Herterich's possessory interest in the relief which Herterich otherwise would have obtained from a determination of the causes of action stated in the Civil Fraud Complaint. The unreasonable and meaningful interference with Herterich's possessory interest in such relief was an unreasonable seizure of Herterich's houses, papers, and effects, within the meaning of the Fourth Amendment to the United States Constitution, and violated Herterich's right to be secure against the

unreasonable seizure of his houses, papers, and effects.

153. The Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the relief which he would have obtained from a determination on the merits of the Civil Fraud Complaint. Herterich's right to that relief was a right and a property interest secured by federal law. Therefore, the Defendants are liable to Herterich for Herterich's injuries resulting from the deprivation.

CLAIM 4: FOR JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FROM HERTERICH FOR PUBLIC USE

Against All Defendants

154. All preceding paragraphs herein are part of this claim.

155. The Fifth Amendment to the United States Constitution ("the Fifth Amendment") provides that private property shall not be taken for public use without just compensation.

156. The relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits is property within the meaning of the Fifth Amendment. The Fifth Amendment gave Herterich the right to just compensation if that property was taken for public use.

157. After the Appellate Justices raised the litigation privilege *sua sponte* for the first time on appeal, they could have ruled that Peltner and

Traeg waived the affirmative defense of the litigation privilege. Having so ruled, the Appellate Justices could then have stated in *dicta* that the litigation privilege would have barred the Civil Fraud Action if the litigation privilege had not been waived. If the Appellate Justices had done so they would have alerted future defendants to timely raise the litigation privilege as an affirmative defense, but the Appellate Justices would not have created a binding precedent that would dissuaded future potential plaintiffs from filing complaints similar to the Civil Fraud Complaint. By deciding the Appeal to Herterich's detriment on the basis of the litigation privilege the Appellate Justices created a binding precedent. That binding precedent provided a public benefit by establishing the applicability of an affirmative defense which all prior similarly situated litigants had overlooked. But after Peltner and Traeg waived the affirmative defense of the litigation privilege the Appellate Justices could not decide the Appeal to Herterich's detriment on the basis of the litigation privilege without providing Herterich just compensation. Deciding the Appeal to Herterich's detriment on the basis of the litigation privilege violated the Constitution as set forth above, except to the extent that by deciding the Appeal on that basis Herterich's private property was taken for public use within the meaning of the Fifth Amendment. By raising the litigation privilege *sua sponte* for the first time on appeal and deciding the Appeal to Herterich's detriment on that basis, the Appellate Justices caused Herterich's private property to be taken for public use without just compensation.

158. The relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits included ownership or inheritance of the residue of Bartsch's estate. That residue contained real estate and liquid assets. At the time of his death, Bartsch owned an apartment building and an adjacent vacant lot, both of which had been assigned Proposition 13 tax benefits which only Herterich could have inherited and which would have expired upon Bartsch's death if not inherited by Herterich. The apartments could have been converted to condominiums at the time of Bartsch's death, but the right to convert the apartments to condominiums has since expired. The apartments were under rent control when Bartsch died, and because of rent control the tenants in those apartments paid rents far below market rates. Converting the apartments to condominiums would have removed the apartments from rent control.

159. If Herterich had inherited the residue of Bartsch's estate, Herterich would have: (1) converted the apartments to condominiums; (2) raised the rents paid by the tenants of those apartments; and (3) left the vacant lot undeveloped.

160. The reside of Bartsch's estate has been put to public use and made to serve public purposes and policies because: (1) government tax revenues were increased when the Proposition 13 tax reduction benefits which Herterich otherwise would have inherited from Bartsch were eliminated; (2) housing stocks were increased when the vacant lot which Herterich would have inherited from Bartsch and kept as open space was sold to developers who

are now constructing housing units on that lot; (3) property values and rents were kept affordable, rental stock was preserved, tenant evictions were prevented, and housing units were kept under rent control as a result of the forfeiture of the right, which Herterich would have timely exercised if he had inherited the residue of Bartsch's estate, to convert the apartments to condominiums; and (4) wealth inequality and intergenerational wealth transfer were reduced by distributing the residue of Bartsch's estate amongst approximately 20 individuals and charitable institutions instead of transferring the residue intact to a single individual who was the decedent's child, namely Herterich.

161. By their acts and omissions regarding Herterich's property interest in the relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits, the Defendants have taken Herterich's private property for public use, within the meaning of the Fifth Amendment.

162. Herterich has not received just compensation.

163. Herterich's right to just compensation is secured by the Constitution.

164. Defendants are able and required by the Constitution to provide just compensation for the taking of Herterich's property for public use, but under color of state law and in violation of the Constitution they have not done so.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Norman Bartsch Herterich prays for relief, as follows:

165. A declaration that the relief which Herterich would have obtained from a determination of the Civil Fraud Complaint on the merits, if the Civil Fraud Complaint were not barred for the reasons stated by the Defendants in their rulings in the Civil Fraud Action, was: (1) an interest that was subject to the equal protection of the laws under the Equal Protection Clause; (2) property within the meaning of the Due Process Clause and the Fifth Amendment; and (3) protected by the Fourth Amendment from unreasonable seizure by the government;

166. A declaration that the Defendants, by their acts and omissions in ruling that the Civil Fraud Complaint was barred: (1) denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause; (2) deprived Herterich of property without due process of law, within the meaning of the Due Process Clause; (3) unreasonably seized Herterich's property, within the meaning of the Fourth Amendment; and (4) took Herterich's private property for public use without just compensation, within the meaning of the Fifth Amendment;

167. A declaration that the Civil Fraud Action was not barred, and that the reasons stated by the Defendants in their rulings in the Civil Fraud Action did not properly bar the Civil Fraud Action;

168. A declaration that the relief which Herterich would and should have obtained from a determination of the Civil Fraud Complaint on the merits included: (1) ownership or inheritance of the residue of Bartsch's estate; (2) recovery of the attorney's fees which Herterich expended in the Probate Proceedings and the Civil Fraud Action; and (3) punitive damages;

169. A declaration determining according to proof the relief, the monetary value of the relief, and/or just compensation for the taking of the relief, which Herterich would or should have obtained from a determination of the Civil Fraud Complaint on the merits;

170. An injunction ordering Defendants to transfer to Herterich the relief, the monetary value of the relief, and/or just compensation for the taking of the relief, which Herterich would or should have obtained from a determination of the Civil Fraud Complaint on the merits;

171. Attorney's fees in an amount to be determined according to proof; and

172. Such other and further relief as the Court deems appropriate and just.

Dated: June 11, 2020

/s/ Norman Herterich
NORMAN BARTSCH HERTERICH
Pro Se Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff Norman Bartsch Herterich demands a trial by jury on each claim.

Dated: June 11, 2020

/s/ Norman Herterich
NORMAN BARTSCH HERTERICH
Pro Se Plaintiff

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