ORIGINAL

No. 21- 55

In The
Supreme Court of the United States

Genet McCann,

Petitioner,

v.

Ward Taleff, et. al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

July 8, 2021

QUESTIONS PRESENTED

1. Whether the Ninth Circuit's departure from "the settled course of antecedent principles" in disregard of this Court's and its own well-established legal standards, to sanction the District Court's deliberate departure from the same, warrants this Court's supervisory power to reverse and preserve the rule of law and maintain the integrity of the judicial system, particularly in light of the record that demonstrates that the Defendant officers of the court filed Rule 11(b) deficient motions to dismiss and to declare Plaintiff a vexatious litigant, asserting intentionally false material misrepresentations in fact and law, to intentionally subvert the impartial decision-making function of the District Court, to obtain a fraudulent dismissal and an order declaring Plaintiff vexatious. *Arrow v. Gleason,* 129 U.S. 86, 9 S.Ct. 237 (1889)("[I]f a court finds that Defendants have been guilty of fraud in obtaining a judgment or decrees, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it").

PARTIES NOT MENTIONED IN CAPTION

Paul McCann, Jr., Sheila McCann, William McCann, Judge James Manley, Chantel McCauley, Doug Wold, Mark Parker, Guy Rogers, Casey Emerson, Amanda James, Michael Cotter, Tracy Axelberg, and Jon Moog.

ALL PROCEEDINGS DIRECTLY RELATED TO THIS CASE

In re A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474 (*A.M.M., I./McCann1)*

In re A.M.M., 2016 MT 213, 384 Mont. 413, 380 P.3d 736 (2016)(*A.M.M., II.*)(*McCann2*)

In re McCann, ODC No. 15-078/PR 16-0635, (Mont. June 5, 2018) (*McCann3)*

In re A.M.M., 2017 MT 227N, 389 Mont. 544, 403 P.3d 1254 (Mont. 2017)(*McCann4)*

In re McCann, No.CV18-02-H-SEH(D.Mont. Jan. 11, 2018)(PR 16-0635)(*McCann5)*

In re McCann No.CV 18-03-H-SEH(D.Mont.Jan. 11, 2018)(PR 17-0670)(*McCann6)*

In re McCann 2018 MT 140, 391 Mont. 443, 421 P.3d 265 (Case No. PR 17-0670)(*McCann7)*

McCann v. The Montana Supreme Court, before the U.S. District Court of the State of Montana, Helena Division, CV-18-42-H-SEH (D. Mont. June 11, 2018) (PR 16-0635) (*McCann8)*

McCann v. The Montana Supreme Court, before the U.S. District Court of the State of Montana, Helena Division, CV-18-57-H-SEH (D. Mont. June 11, 2018) (PR 17-0670)(*McCann9)*

McCann v. McCann, 2018 MT 207, 392 Mont. 385, 425 P.3d 682 (Mont. 2018) (*McCann10*).

In re A.M.M., 2020 MT 257N, 472 P.3d 1204 (2020), *writ of cert. denied, Genet McCann v. Douglas Wold, et. al.* (20-1310).

In the Estate of Anne Marie McCann, (DP 19-47), in the Twentieth Judicial District Court, Lake County, in the State of Montana, (pending).

TABLE OF CONTENTS

APPENDIX LIST

TABLE OF AUTHORITIES

U. S. Constitution

Federal Statutes and Rules

Federal Cases

Montana Statutes and Rules

Montana Cases

Other State Law Authority

Other Sources

PETITION FOR WRIT OF CERTIORARI

Petitioner-Plaintiff, Genet McCann, respectfully prays for a writ of certiorari to issue to review and reverse the Ninth Circuit's Memorandum affirming the District Court's Final Order and permit Petitioner leave to amend before a different U.S. District Court Judge.

OPINION AND ORDERS BELOW

On April 24, 2019, the United States District Court Magistrate Judge Johnston entered Findings and Recommendations on Defendants' Motion to Dismiss and Declare Plaintiff Vexatious. (Vol. I., pp.4-34). On July 23, 2019, United States District Court Judge Brian Morris affirmed Judge Johnston's Findings and entered Final Order dismissing the Complaint, denying opportunity to file an amended Complaint, and imposed a vexatious litigant pre-filing order against Plaintiff in *Genet McCann v. Ward Taleff, et. al.,* cause no. CV 115-BMM-JTJ. (Vol. I., pp.36-53) On August 28, 2019, the District Court entered Order denying Plaintiff's combined Rule 60(d) & Rule 15 Motions to Vacate Final Order and Grant Leave to File First Amended Complaint. (Vol. I., pp.56-57).

On August September 10, 2019 Plaintiff filed Amended Notice of Appeal of the Final Judgment and Post-Judgment to the United States Court of Appeal for the Ninth Circuit in *Genet McCann v. Ward Taleff, et. al.,* Case No. 19-35730. (Vol. III, pp.8-10) On November 3, 2020, a three Circuit Judge Panel issued a non-published Memorandum that affirmed the underlying judgments and denied Plaintiff-Appellant's Motion to Take Judicial Notice. (dkt. 45-1, pp.1-4) On Nov. 17, 2020, Plaintiff-Appellant filed a Petition for Re-hearing En Banc. (dkt.47) On December 11, 2020, the Petition was denied. (dkt. 48, p.1)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to hear this Petition for Writ of Certiorari and review the Three Circuit Judge Memorandum of the United States Court of Appeals for the Ninth Circuit, issued in *Genet McCann v. Ward Taleff, et al.,* Case No. 19-35730, and appealed from the Judgment and Post-Judgment Order rendered before the United States District Court for the District of Montana in CV-115-BMM-JTJ.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides that Congress shall make no law ... prohibiting [] the right of the people [] to petition the Government for a redress of grievances." U.S. const. amend. I.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. const. amend. XIV §1.

STATEMENT OF THE CASE

Trial and Direct Appeal Proceedings

On September 4, 2019, Petitioner Genet McCann filed a civil RICO, §1983 and §1985 Complaint in the U.S. District Court of Montana, and alleged, among other things, that the Defendants conspired and associated-in-fact to defraud the conservatorship proceedings to acquire full custody of A.M.M., exiled her out-of-state, misappropriate $45 million in ***estate assets***, defrauding the Plaintiff of her 14th Amendment right to privacy in family life and her beneficiary interest in estate assets, and retaliated against Plaintiff for her lawful exercise of her 1st and 14th Amendment rights to redress the wrongs, by intentionally defrauding the state courts to discredit, sanction, disbar Plaintiff, and, conceal the money trail by blocking Plaintiff's beneficiary statutory rights to access the management records of the estate. (Vol. II., pp.7-8,¶¶1-4; p.9,¶7; p. 11,¶13; p.12,¶15; p.15,¶35; pp.114-117, pp.129-133)

Plaintiff intended her initial complaint as a placeholder to meet RICO's four year statute of limitations and amend within the 90 days before the time to serve Defendants ended per Rule 4(m) of the Fed.R.Civ.P.

However, unbeknownst to Plaintiff[1], Defendant Mark Parker improperly filed a knowingly false *pro se* Rule 12(b)(6) motion to dismiss and motion to declare Plaintiff a vexatious litigant, attaching *McCann v. McCann,* 2018 MT 207 (*McCann10*), to improper influence the District Court against Plaintiff at the onset of the case with material false misrepresentations and highly-inflammatory, *disputed* factual recitals Defendants obtained through fraud upon the state court proceedings, so that the District Court abandoned the rule of law and its function of impartial adjudication, to render a decision favorable for the Defendants.

Parker did not bother to make an argument based in law and fact for his bald res judicata defense on a motion to dismiss and provided even less to request a pre-filing ban. Rather, he simply made the false assertion that "[i]f one were to compare the table of contents of the Complaint with the Supreme Court case [*McCann10*], it becomes clear that Genet McCann is simply trying to relitigate matters that have been litigated many times." (Vol. II.,p.49, pp.58-59) He provided no legal basis for this novel approach.

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[1]At the time, Plaintiff did not know that Defendant Parker filed his motions since he did not serve Plaintiff and violated L. R. 7.1(c)(1) by not conferring with Plaintiff to determine Plaintiff's position on his motions before he filed. (Vol. II, pp. 57-58) As he filed three successive Joinder in his Motions, for his three McCann Defendant clients, he persisted in failing to confer with Plaintiff, per L.R. 7.1 (c)(1), F.R.Civ.P., and failed to correct his false misrepresentations to the District Court. (*Id.* at 58).

Parker cited ten proceedings to falsely assert that they are "Genet McCann's litigious efforts," when the public records demonstrate that *seven* of these ten cases were either *not* litigated by Genet McCann or there was *no* litigation.[2] (Vol., II., pp.7-8) (Petitioner requests this Court to take judicial notice of the entire brief of Parker's in this underlying case at dkt. 3 in cause no. 19-35730, which has been included in the Appendix for this Court's convenience.) Parker provided no facts, not even factual recitals other than his knowingly false statement that he made in the underlying proceedings and upon appeal in *McCann10*, namely, that "[t]he conservatorship claims have been litigate three, perhaps four times" by Plaintiff in the state court proceedings. (Vol. II., p.49) Parker does not identify the claims that were purportedly made in the Complaint or that were purportedly litigated three, perhaps, four times in other unidentified proceedings.

Parker's brief demonstrates that he did not have a factual or legal basis to make a res judicata defense or to use *disputed* factual recitals since the Complaint alleged that the Defendants used the state court proceedings to participate in the enterprise-in-fact through a pattern of criminal racketeering conduct, to intentionally obstructed the due administration of justice through defrauding the state court proceedings. (Vol. II., pp.7-8, ¶¶1-4; p.9,¶7; p.11,¶13; p.12,¶15;p.15,¶35)

Parker's motion to declare Plaintiff a vexatious litigant and his request that the District Court bar Plaintiff from litigating Defendants is another bald claim for unconstitutional relief interposed to improperly influence the District Court to improperly adopt *disputed* factual recitals in *McCann10,* (when the Complaint alleged that Defendants engaged in extrinsic fraud upon the court and Plaintiff disputed the inaccuracy of those highly inflammatory recitals, not substantiated by *any* court record, especially not the record before the *McCann10* Court.) (dkt. 3, pp.12-13)

In Parker's successive joinders to his two initial motions, on behalf of his three McCann Defendant clients, he failed to withdraw or correct his false statements. Rather, in his brief in support of Defendant Wm. McCann, he attached *McCann1 through McCann10,* to assert more false material misrepresentations in law and fact, **to falsely claim that these orders are not matters presented outside**

[2] *McCann1* was not appealed by Genet McCann. *McCann3* and *McCann7* are the two attorney disciplinary proceedings that were prosecuted by the Office of Disciplinary Counsel, one on behalf of Defendant Mark Parker and Doug Wold, as complaining witnesses. *McCann5 and McCann6* are Genet's defense to the bad faith attorney disciplinary proceedings: 1) for a good faith extension for a civil removal of the disciplinary cases into federal court, and 2) to enjoin the attorney disciplinary proceedings, in *McCann8 and McCann9,* based upon *Dobrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

the pleadings to support, his knowingly bald res judicata claim he made in his initial motion to dismiss. He asserted that Defendants were well within their rights to attached *McCann10,* under the knowingly false material misrepresentation that the Complaint discussed the proceedings in *McCann10* –without one single citation to the Complaint to support this claim (because he knew that the Complaint does *not* discuss *McCann10* or its proceedings). (Vol. II., p.53, pp.58-59)

He also misrepresented the incorporation by reference doctrine set out in *Branch v. Tunnell,*[3] as the legal basis to falsely state that the Defendants are well within their rights to attach the 10 prior orders and opinions, since the Complaint discussed the proceedings. (Vol. II., p.53; p.58:26—14; pp.60-61) The holding in *Branch* only extends to a complaint that discusses *the contents of an order.* Parker did not make out a good faith argument to extend *Branch v. Tunnell,* to include proceedings, rather he mislead the District Court and failed to correct it.

All of the other eleven Defendant officers of the court and their attorneys, joined in Parker's Rule 12(b)(6) motions to dismiss and declare Plaintiff a vexatious litigant, adopting the same knowingly false frivolous motions to use their strength in numbers, (undisclosed personal friendships) and prominence in the Montana Bar to compel improper influence upon the District Court to intentionally subvert the integrity of the court to impartially adjudicate.

Plaintiff timely objected in her response to these motions on the grounds that Defendants' misrepresentations of facts and legal citation are grounds for sanction under Rule 11 because Defendants signed their pleadings, and thereby, swore to it being well-founded in fact and law. *Multi-media Distributing Co., Inc. v. U.S.,*[4] and requested that Defendants motions be stricken and Plaintiff be permitted to amend her Complaint. (Vol. II., pp.57-61)

Nonetheless, on April 24, 2019, Magistrate Judge Johnston entered his Findings and Recommendations, taking judicial notice, *sua sponte,* for the first time, without notice to Plaintiff, of the contents of the ten orders attached to Defendants' motions to dismiss and to declare Plaintiff a vexatious litigant and adopted *disputed* factual recitals in *McCann10* and compared them to Defendants' false version of the facts or his own erroneous assumptions of both the Complaint and the factual recitals in *McCann10* --in disregard of the Complaint's actual allegations-- to dismiss claims against all non-state official Defendants.

The Magistrate also disregarded the same legal standards, to adopt Defendants' version of false facts set out in their memorandums of law, to create grounds to conclude that all of the state officials and their appointees are absolutely immune. (Vol. I, pp.18-25)(Vol. II, pp.119-134)

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[3] 14 F.3d 449, 454 (9th Cir. 1994) *overruled on other grounds in, Galbraith v. Cnty of Santa Clara,* 307 F.3d 1119 (9th Cir. 2002).
[4] 836 F.Supp.606 (N.D.Ind. 1993).

As a result, the Magistrate dismiss the Complaint, denied opportunity to amend and declared Plaintiff a vexatious litigant and imposed unconstitutional pre-filing bans that blocks Plaintiff's claims, including amended claims in her proposed First Amended Complaint alleged against the Defendants for fraud upon the state courts in the procurement of the state court orders. (Vol. I, pp.4-34)

Plaintiff timely filed her objections on all points re-asserted in this Petition. (Vol. II., pp.113-148)(dkt.71) Nonetheless, on July 23, 2019, the United States District Court Judge Brian Morris knowingly adopted the Magistrate's erroneous Findings and Recommendations. (Vol. I, pp.36-53)

On September 10, 2019, Ms. McCann filed amended notice of appeal to the Ninth Circuit to review and reverse the final judgment entered in favor of the Defendants, and to reverse the post-judgment order denying Plaintiff's Rule 60 & Rule 15 combined motions to set aside final judgment and permit leave to file Plaintiff's proposed First Amended Complaint, attached thereto. (Vol. III., pp.8-10) (Vol. IV.)

On November 3, 2020, the United States Court of Appeals for the Ninth Circuit, in an unpublished Memorandum, a three judge panel affirmed the disregard for legal standards to uphold the judgments. (dkt. 45-1) On November 17, 2020, Genet filed Petition for Re-hearing En Banc that was denied on December 11, 2020. (dkt.47; dkt.48)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Disregarded Well-Established Legal Standards on a Rule 12(b)(6) Motion to Dismiss, to Affirm the Improper Notice of Another Court's *Disputed* Factual Recitals and Improperly Compare them to Defendant's Factual Version or Assumed Facts Favorable to the Defendants –In Disregard of the Complaint's Actual Allegations –to Fabricate Grounds to Dismiss the Complaint, Deny Opportunity to Amend and Impose an Unconstitutional Pre-filing Ban Upon Plaintiff.

A. Legal Standard on a Rule 12(b)(6) Motion to Dismiss

To determine the legal sufficiency of a complaint upon a rule 12(b)(6) motion to dismiss challenge, a court must accept as true all allegations in the complaint and construe them in the light most favorable to the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007); Fed. R. Civ. P. 12(b)(6). When "matters outside the pleading are presented to and not excluded by the court," the 12(b)(6) motion converts into a motion for summary judgment under Rule 56. Fed.R. Civ. P. 12(d). Then, both parties must have the opportunity "to present all the material that is pertinent to the motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

"A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *Lee*, 250 F.3d at 689." However, "a court cannot take judicial notice of *disputed* facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc.,* 899 F.3d 988, 999 (9th Cir. 2018)(Emphasis added).

B. Improper Judicial Notice of *Disputed* Facts.

The District Court abused its discretion when it judicially noticed, *sua sponte,* for the first time in its Findings and Recommendations the *disputed* factual recitals in a state court opinion, *McCann v. McCann,* 2018 MT 207, 392 Mont. 385, 425 P.3d 682 (*McCann10,),* and assumed the existence of facts favorable to Defendants, to manufacture grounds to grant Defendants' Rule 12(b)(6) dismissal for all of the non-state-official Defendants based upon claim and issue preclusion.

Lee v. L.A. is directly on point, mandating reversal in this case. In *Lee,* the Ninth Court reversed the granting of defendants' Rule 12(b)(6) motions because the district court "assumed the existence of facts that favored defendants based on evidence outside plaintiff's pleadings, took judicial notice of the truth of disputed factual matters [based upon a prior court's findings], and did not construe plaintiff's allegations in the light most favorable to him." *Lee,* 250 F.3d at 690.

1. Claims Preclusion

Here, the Complaint's allegations do not line up with the *disputed* factual recitals in *McCann10* for any of the (5) elements for claims preclusion. (Vol. II, pp.114-117, pp.129-133) For instance, to establish the second element of Montana's claim preclusion, --that the subject matter is the same in both actions--the District found that "McCann alleges that Sheila, Paul Jr. and William have conspired to exert unlawful control over cash that belongs to the family **corporations** (Doc.1 at 3)" (Vol. I., p.13)

Whereas, the Complaint alleges that the cash belongs to Plaintiff's ***father's estate***: Plaintiff alleged that the three McCann Defendants conspired to seize the $45 million held in *fictitious* corporations and foundations, to defraud Plaintiff, her mother A.M.M. ... of "**the wealth of Paul J. McCann**", to enrich themselves. (The corporations were not parties to this case.) (Vol. II., p.7)

To establish the third element of claims preclusion –that the issues are the same [], or are ones that could have been raised in the first action, and they relate to the same subject matter– the District Court adopted the findings in *McCann10* to conclude that:

> "Both *McCann10* and this action arise out of a common nucleus of operative facts. McCann alleges here, as she did in *McCann10,* that the Defendants have engaged in illegal, oppressive and fraudulent conduct

> with respect to the family corporations. McCann has alleged mismanagement of corporate records[ ]. McCann seeks the same relief here as she did in *McCann10."*

(Vol. I, p.16)

The Magistrate did not cite to the Complaint. Rather the Magistrate construed his findings to match the factual recitals in *McCann10*, to wit: *McCann10* concluded that Genet alleged that the Defendants engaged in illegal, oppressive, fraudulent conduct regarding ***the corporations,*** including oppressive "records mismanagement". (*McCann10,* ¶¶19-22)

Whereas, the Complaint actually alleged that the Defendants conspired and associated-in-fact to defraud the conservatorship proceedings to acquire full custody of A.M.M., exiled her out-of-state, misappropriate $45 million in ***estate assets***, defrauding the Plaintiff of her 14th Amendment right to privacy in family life and her beneficiary interest in estate assets, and retaliated against Plaintiff for her lawful exercise of her 1st and 14th Amendment rights to redress the wrongs, by intentionally defrauded the state courts to discredit, sanction, disbar Plaintiff, and, conceal the money trail by blocking Plaintiff's beneficiary rights to access the management records of the estate. (Vol. II., pp.7-8,¶¶1-4; p.9,¶7; p. 11,¶13; p.12,¶15; p.15,¶35)

The District Court disregarded the Complaint's RICO allegations regarding the estate assets and beneficiary rights to access the management records of estate assets, to assume against Plaintiff that the RICO claims could have been brought in *McCann10,* which was a minority shareholder statutory cause of action against corporations and those in control of them. See Mont. Code Ann. §35-1-938(2), M.C.A. (Vol. II., p.116,¶81)

The subject and capacity as a minority shareholder suing the corporations in the underlying action in *McCann10* for the illegal, fraudulent transfers of Plaintiff's shares is not the same subject-matter, issue or capacities as a successor-beneficiary claims against trustee-fiduciaries managing the estate assets and those who conspired and colluded with them to defraud the integrity of the state courts, to further their conspiracy to embezzle estate assets.

Furthermore, Plaintiff alleged after-discovered fraud upon the court by the Defendants — many of whom are officers of the court— in order to defraud the underlying proceedings and its appeal in *McCann 10.* Fraud upon the court claim is an exception to the application of the doctrine of res judicata, since fraud vitiates the most solemn of documents, including *judgments. U.S. v. Throckmorton*, 98 U.S. 80 (1878); *Wittich Law Firm P.C. v. O'Connell,* 304 P.3d 375, 380 Mont. 103 (2013) (the rule governing vacation of judgments is an exception to the doctrine of finality of judgments upon which res judicata is based.) *Barrow v.Hunton,* 99 U.S. (9 Otto)

80, 25 L.Ed 407 (1878) (Federal courts have jurisdiction to hear fraud upon the state court claims).

2. Issue Preclusion

a. The Issues are *Not Identical*.

For issue preclusion to apply in Montana, the issue raised in complaint must be *identical* to the issue presented in the prior case. *Berlin v. Boedecker*, 268 Mont.268 Mont. 444, 444, 887 P.2d 1180 (1994); *Brilz v. Metro.Gen. Ins. Co.,* 2012 MT 184, ¶19, 336 Mont. 78, 285 P.3d 494.

Here, the Court adopted Defendants' false version of the allegations that Genet asserted claims against Emerson and James for the decision to allow Anne Marie to travel to California. (dkt. 45-1, p.3)

However, the Complaint actually alleged, *inter alia,* that Emerson engaged in ex parte communications to defraud the hearing on petitions for guardianship and conservatorship to secure her undisclosed pre-arranged nomination and appointment, and, with James, tampered with two subpoenaed witnesses to intentionally cause them not to appear and blocked their testimony against Emerson at the preliminary injunction hearing requested by Emerson, to further the conspiracy to commit fraud upon the court in the guardianship proceeding, to conspire in the misappropriation of estate assets for personal gains. (Vol. II., Complaint, ¶¶52-55,60,61-65,68).

b. Plaintiff Was Denied a Full and Fair Opportunity to Litigate

Montana's issue preclusion also requires that the party against whom issue preclusion is asserted must have been afforded a full and fair opportunity to litigate the issue in the prior action. *Baltruschv Balstrusch,* 1380 P.3d 1267, 1274 (Mont. 2006).

The Complaint's allegations of criminally tampering with subpoenaed witnesses to block testimony against Emerson establishes that there was not "a full and fair opportunity to litigate" in that proceeding.

For these reasons, reversal is warranted.

II. The Ninth Circuit Disregarded Legal Standards on a Motion to Dismiss to Affirm the Improper Adoption of Defendants' Intentional False Material Misrepresentations, in Disregard of the Complaint's Actual Allegations, to Manufacture Immunity Grounds to Dismiss the Guardian, Conservators, Private Care-taker, and State Official Defendants, Deny Plaintiff the Opportunity to Amend and impose an Unconstitutional Pre-Filing Band upon Plaintiff.

A. The Standard of Review

In determining immunity on a motion to dismiss, we accept the allegations in the complaint as true. *Buckley v. Fitzsimmons,* 509 U.S. 259, 261 (1993). In other words, "to earn the protections of absolute immunity" at the motion-to-dismiss stage, "a defendant must show that the conduct triggering absolute immunity 'clearly appear[s] on the face of the complaint.'" *Weimer v. Cnty of Fayette,* 972 F.3d 177, 187 (3rd Cir. 2020).

Here, the Court disregarded the Complaint's allegations against Defendant Judge Manley that alleged personal liability (1) for *nominating* his undisclosed life-long friend of 53+ years, Defendant Doug Wold, (2) for *engaging in ex parte communication to conspire to nominate* his undisclosed family friend Defendant Casey Emerson after the close of the hearing and after her misleading, unethical testimony as the ostensible independent court investigator, when she was secretly packing the record with self-serving testimony in anticipation of her nomination and pre-arranged, ex parte appointment as custodial guardian; (3) for *administering* A.M.M.'s Conservatorship Estate; (4) for *conspiring ex parte* to misappropriate $45 million of McCann Estate assets; and (5) for *instituting* malicious Rule 11 proceedings, *as a complaining witness,* to then preside over it to intentionally suborned false testimonial evidence from the bench in collusion with his undisclosed life-long friend Defendant Doug Wold to block the due administration of justice in the Rule 11 proceeding, and procure a fraudulent order to discredit Plaintiff and use the order to defraud the other state and federal court proceedings. (Vol. II, pp.19-23)

Rather, the Courts affirmed the Magistrate's intentional adoption of Defendants' false material factual assertions to fabricate the conclusion that "Judge Manley had absolute immunity for his authorized judicial acts of appointing the guardian and co-conservators, quashing subpoenas, and entering other orders in the state court proceedings." (Vol. I, pp.21) As a result, the Panel affirmed the District Court's Departure from this Court's functional approach. (dkt. 45-1, p.3) (citing *Ashelman v. Pope*, 793 F.2d 1072, 1075-76, 1078 (9th Cir. 1986) (en banc).

B. Non-Judicial Acts Alleged in the Complaint Are *Not* Subject To Absolute Judicial Immunity.

A judge is not immune for non-judicial conduct or actions taken in complete absence of jurisdiction. *Mireles v. Waco,* 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

1. *Nominating* the Judge's Undisclosed Life-long Friend Doug Wold is Not a Judicial Function.

The statutory power to *nominate* a person in a proceeding to determine a conservatorship is relegated to specific lay persons as defined in Montana Probate Code, §72-5-410, M.C.A.(such as, the alleged protected person, or close family

members). The statute does not permit the presiding judge to nominate. (Rather, it is the function of the Court to appoint one of the nominees.) Because the statute defines the function of nomination as a function performed by laity, the act of *nominating*, according this Court's functional approach, is *not* a judicial function. *Forrester v. White*, 484 U.S. 219 (1988); *Supreme Court of Va. v. Consumers Union of Untied States, Inc.,* 446 U.S. 719 (1980); *Ex Parte Virginia*, 100 U.S. 339 (1880).

For this reason, Defendant Judge Manley is not immune for *nominating* his undisclosed life-long friend, Doug Wold, which was a pivotal overt act in the furtherance of the conspiracy to misappropriate $45 million in McCann Estate assets. (Vol. II., p.8, ¶4;p.9,¶5;p.21,¶58)

2. *Conspiring Ex Parte* for the *Nomination* of the Judge's Undisclosed Friend Casey Emerson

Engaging in ex parte communications, one and day days before the final hearing, *to conspire for the nomination of Defendant Casey Emerson* with undisclosed family friends Casey Emerson and Bob Long (also an undisclosed long-time friend, lessee, and attorney of record for the three McCann Defendants), to intentionally defraud the entire proceedings is not a judicial function. It is fraud upon the court. Because fraud upon the court is the unconscionable scheme to subvert judicial functioning of the court, it is clearly not a judicial function subject to judicial immunity. Moreover, Nominating is not a function of the Judge per §72-5-312.

3. Administering Estate Assets is not a Judicial Function.

Judges are not entitled to absolute immunity when acting in their administrative capacity. *Forrester v. White,* 484 U.S. 219, 229 (1988). Judges are also not entitled to absolute immunity when their conduct, although it may be essential to the proceeding, it may be accomplished by private persons or non-judicial officials. *Ex Parte Virginia,* 100 U.S. 339, 348 (judge not entitled to judicial immunity for jury selection because it may be performed by private persons)

In this case, Judge Manley is not immune for the administration of the Estate of A.M.M. because the administration of a person's estate is an administrative function specifically defined under Mont. Code Anno., §72-5-421(3) as a function normally performed by the owner of the estate or her hired agents. It states that "the court has, for the benefit of the person ... all the powers over the person's estate and affairs that the person could exercise if present and not under disability, except the power to make a will." Because the statute defines Judge Manley role as one that is normally performed by the owner of the estate in managing assets, it is not a judicial function for purposes of immunity analysis under this Court's precedence.

Because the administration of the estate may be delegated to lay persons according to M.C.A., §72-5-410, who are then subject to heightened fiduciary duties

and personal liability for the breach thereof under §72-5-436 (2), M.C.A., the function of administering the estate of A.M.M. is clearly not a judicial function subject to immunity.

4. Conspiring to Misappropriate $45 million in Estate Assets is *Not* a Judicial Function.

The allegations of conspiring to and acquiring and administering A.M.M.'s estate to misappropriate funds entrusted to the care of Judge Manley is therefore also conduct subject to personal liability. Underlying the immunity analysis is the fact that misappropriating funds for personal use is theft (not a judicial act), and judges should be made to account for any funds they have stolen from others. Jeffrey Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 San Diego L. Rev. 1, p. 17 (1990).

In the following cases, the judges were civilly liable for misappropriation of funds entrusted to their care: *Brown v. Rutledge,* 20 Ga. App. 118, 92 S.E. 774 (1916); *King County v. United Pac. Ins. Co.*, 72 Wash.2d 604, 434 P.2d 554 (1967); *Braatelien v. United States* 147 F.2d 888 (8th Cir., 1945) (judicial immunity does not shield Braatelien, a judicial officer, for corruptly procuring and administering the Frazier Lemke Act that is enacted to aid distressed farmers.); Immunity does not cover ministerial acts by judges that result in negligent loss of an estate. *Truesdale v. Bellinger*, 172 S.C. 80, 87-88, 172 S.E. 784, 787 (1934). Ministerial acts are usually regarded as nonjudicial in character and, hence, not within the ambit of immunity. *American Surety Co. v. Skaggs' Guardian*, 247 Ky. 687, 57 S.W.2d 495 (1983); *Heyn v. Massachusetts Bonding & Ins. Co.*, 110 S.W.2d 261 (Tex. 1937).

Here, immunity is not warranted for the administration of and misappropriation of A.M.M.'s Estate assets, because administering A.M.M.'s Estate is non-judicial, and the above-mentioned statutes clearly impose personal liability for wrongs in the administration of the estate assets. *Wallace v. Powell*, 2009 WL 40551974 (conspiratorial agreement to buy judgment in the courts is an administrative act not subject to judicial immunity).

C. The Judicial Assistant is Not Quasi-Judicial Immune for Non-Judicial Acts.

The Ninth Circuit Disregarded this Court's legal standards to affirm the District Court determination that Defendant Chantel Wold-McCauley, the judicial assistant, is entitled to quasi-judicial immunity, citing *Ashelman v. Pope,* and *Mullis v. U.S. Bankr.Ct. for Dist. of Nev.,* 828 F.2d 1385, 1390 (9th Cir. 1987). (dkt. 45-1, p.3) Accordingly, it affirmed the District Court's disregard for the Complaint's actual allegations to adopt Defendant's false allegations.

The Complaint alleged that Wold-McCauley engaged in ex parte communication between and among Judge Manley and her father Doug Wold, the key witness, counsel and conservator in the case about substantive matters,

including the conspiracy to cause subpoenaed witnesses to not appear at the preliminary injunction hearing so that they would not testify against the guardian. (Vol. II, p.9, ¶6; p.127, ¶¶168-172) The Complaint further alleged that Wold-McCauley conspired with her father Doug Wold and Judge Manley in the misappropriation of the $45 million in McCann estate assets. (Id., p.9, ¶6) The Court erred in adopting the Defendant's version of the facts that "Genet alleges that Wold-McCauley is liable as a co-conspirator merely because she is Judge Manley's assistant." (Vol. I., pp.21-22)

Because the Court failed to follow the standard of review on a motion to dismiss that required it to take the Complaint's allegations as true and required Defendant to bear the burden of proving that she is entitled to immunity for the conduct alleged in the Complaint, the Court erred in concluding that Wold-McCauley is immune for the *ministerial* conduct of a judicial assistant that was never asserted in the Complaint.

D. Custodial Guardian and Conservators are Fiduciaries Not Subject to Quasi-Judicial Immunity.

The Ninth Circuit –contrary to this Court's "functional approach" – affirmed the District Court's determination that the custodial guardian Casey Emerson and the co-conservators Doug Wold and Paul McCann, Jr. are entitled to quasi-judicial immunity. *In re Castillo,* 297 F.3d 940, 947-48 (9th Cir. 2002); *Mosher v. Saalfeld,* 589 F.2d 438, 442 (9th Cir. 1978) (*Id.*)." (dkt. 45-1, p.3)

This Court announced that absolute quasi-judicial immunity will be extended to nonjudicial officers only if they perform official duties that are functionally comparable to those of judges, i.e., duties that involve the exercise of discretion in resolving disputes." *Antoine v. Byers Anderson, Inc.,* 508 US. 429, 435, 113 S.Ct. 2167 (1993). "Under this approach, to determine whether a nonjudicial officer is entitled to absolute quasi-judicial immunity, courts must look to the nature of the function performed". *Buckley,* 509 U.S. at 269, 113 S.Ct. 2606 (quoting *Forrester,* 484 U.S. at 229, 108 S.Ct. 538); *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S.Ct. 1099 (1978).

The functions of the guardian and the co-conservators are prescribed by the probate code. "[A] full guardian of an incapacitated person has the same powers, *duties,* and rights of a parent respecting an unemancipated minor child".) See §72-5-321(2), M.C.A. Because the guardian's roles is the functional equivalent of the role of a parent to an unemancipated minor, the Defendant guardian's duties are not "functionally comparable" to those of a judge in the exercise of discretion in adjudicating disputes.

Section 2-5-421, M.C.A. defines the conservator's role over estate' assets as one that is normally performed by the owner of the estate and enumerates the specific powers of the conservator to manage the financial affairs of the estate

assets, the conservator's role is *not* "functionally comparable to the judicial exercise of discretion in adjudicating disputes."

Moreover, Montana Probate Code recognizes that both the guardian and the conservators are fiduciaries subject to personal liability. A conservator acts as a fiduciary and is required to observe the stringent standards applicably to trustees. §72-5-423, M.C.A. *Estate of Clark,* 237 Mont. 179, 184-85 (Mont. 1989).

Section 72-5-436(2), M.C.A. states that a "conservator is individually liable for obligations arising from the ownership or control of property of the estate or for torts committed in the course of administration of the estate if personally at fault". "Conservators are thus under the same duties as trustees." *In re Guardianship of Saylor,* 2005 MT 236, ¶14, 328 Mont. 415, 121 P.3d 532; *In re Estate of Stukey,* 100 P.3d 114, 323 Mont. 241 (Mont. 2004) (Conservator of estate breached her fiduciary duties to estate by failing to fully disclose all financial information concerning estate to trial court and other parties.).

The Probate Code also recognizes that a guardian is a fiduciary exposed to personal liability for fault, even after termination of the guardianship. See §72-5-324(2) The Montana Supreme Court affirmed that a custodial guardian is personally liable for her acts and omission in her capacity as the guardian who is, by law, a fiduciary, held to fiduciary duties and liabilities. *Redies v. Cosner,* 2002 MT 86, ¶27, 309 Mont. 315, 48 P.3d 697 (Mont. 2002).

For these reasons, the Court erred in affirming the grant of quasi-judicial immunity to Emerson, Paul McCann, Jr. and Doug Wold.

E. The Ninth Circuit Disregarded Legal Standards to Affirm the Improper Judicial Notice of *Disputed* Factual Recitals in a Prior Case and to Affirm the Improper Adoption of Defendant's Version of the Facts or the Court's Assumed Facts, to Fabricate Dismissal of the Individual Capacity Claims Against State Bar Officials.

Over Plaintiff's timely objection, the Court intentionally adopt the Magistrate's erroneous conclusion that the claims against COP/ODC "*are based on acts the Defendants undertook in the performance of their official duties in the disciplinary proceedings",* in disregard of the actual allegations in the Complaint that the disciplinary officials engaged in non-judicial, administrative, or investigative acts or acts in clear absence of all jurisdiction. (Vol. I, p43)(dkt.71 ¶¶122-124)

Plaintiff alleged §1983, §1985, civil RICO and state claims against Defendant bar officials for, *inter alia,* their participation in the association-in-fact enterprise to *conspire* to use the state attorney disciplinary proceedings, in bad faith, to cover up the misappropriation of millions of estate assets by the other Defendant officers of the court, and retaliate and silence Plaintiff's lawful exercise of 1st & 14th

Amendment litigation speech to expose Defendants' conduct. (Vol. II., Complaint, ¶¶11-12, ¶16, ¶¶69-72, ¶¶93-103, ¶¶108-113, ¶140).

ODC Cotter and COP Axelberg

The Complaint alleged that in retaliation for Genet McCann's request that COP Axelberg recuse himself, Axelberg instituted, one day before the final hearing, an additional Rule 8.2 professional conduct charge against Genet McCann for impunging his integrity, when COP Axelberg had no prosecutorial authority to charge Genet with a professional misconduct, and then, Axelberg presided over the charge, as her adjudicator, after he had colluded with ODC Cotter, ex parte, to intentionally subvert the integrity of hearing by improperly suppressing Genet's evidence that Axelberg has personal knowledge that the ODC was knowingly pursuing false malicious allegations against Genet, since Axelberg personally knew that Genet's recusal allegations against Judge Manley –the subject of the disciplinary proceeding—were true, since Axelberg has personal knowledge that Judge Manley and Doug Wold are, in fact, personal life-time friends for 50 some years. Thereby, Axelberg intentionally defrauded the proceeding, in conspiracy with ODC Cotter, to suppress the evidence of Genet's innocence and Axelberg's disqualifying facts. (Vol. II, Complaint, ¶¶69-73, ¶107, ¶111-112)

The Complaint also alleged that ODC Cotter knowingly investigated false charges against Genet and failed to investigate Defendants Wold, Parker, Paul, Jr., and Emerson for their criminal racketeering conduct. (Vol. II., Complaint, ¶¶101-102).

COP Ward Taleff and ODC Jon Moog

Pursuant to Rule 2(A)(G)(6), Montana Rules of Lawyer Disciplinary Enforcement (M.R.L.D.E.), COP Taleff, chairperson of the adjudicatory panel had no subject-matter jurisdiction to preside over the Elkhorn Review Panel that deliberated at the October 12, 2017 hearing on show cause order to issue an order compelling Genet to produce privileged emails pursuant to ODC Moog's false assertions, coupled with ODC Moog lack of investigative jurisdiction to subpoena privileged emails of Genet. (Vol. IV, dkt.82-1, ¶¶315-316) (M.R.L.D.E., Rule 2)

ODC Moog did not have investigative authority under Rule 5(A)(2)(3), M.R.L.D.E., since the incoming layperson's complaint against Tina Morin did not allege any facts to constitute an ethical rule violation, and did not assert *any* allegations against Genet. Rule 5(A)(3) only grants ODC investigative authority if the "information coming to the attention of the Office which if true, would be grounds for discipline". (Vol. IV., dkt.82-1, ¶¶317-318) (M.R.L.D.E., Rule 5(A)(2)(3)).

Upon Genet timely-compliance, ODC Moog, as a complaining witness, without investigative jurisdiction, falsely alleged that Genet did not comply with Taleff's void-for-lack-of-jurisdiction order to produce privileged emails, when he and

Taleff knew Genet had timely complied. (Vol. IV., dkt.82-1, ¶¶317-318)

Thereby, COP Taleff and ODC Moog intentionally instituted an illegal investigation of privileged emails to conspire to manufacture false grounds to institute false malicious contempt proceedings when neither had subject-matter jurisdiction. Therefore, Taleff and Moog also lacked subject-matter jurisdiction to institute malicious contempt proceedings against Genet.

Taleff also did not have subject-matter jurisdiction to preside over the contempt proceeding, because only the Montana Supreme Court has jurisdiction to direct the adjudicatory panel to issue show cause or hold the hearing for contempt proceedings. (M.R.L.D.E., Rule 9(D))

The Court, therefore, erred in dismissing Genet's personal capacity claims against Defendant COP/ODC officials for the allegedly non-judicial, non-jurisdictional or investigative criminal racketeering conduct that is not subject to immunity.

The Ninth Circuit disregarded the Complaint's allegations to dismiss them by improperly affirming the judicial noticing (without notice or opportunity to Plaintiff) of the disputed factual recitals in *In re McCann,* 421 P.3d 265, 268 (Mont. 2018)(*McCann I*). (dkt. 45-1, pp.3-4)

F. The Ninth Circuit Affirmed the Disregard for the Complaint's *Ex Parte Younger* Official Capacity Claims Against the Montana Bar Officials for Prospective Relief to Erroneously Dismiss Them.

The Ninth Circuit erred in affirming the District Court's disregard of the legal standard to consider the Complaint's *Ex Parte Younger* official capacity claims for injunctive and declaratory relief against the state bar officials for their on-going federal constitutional violations to the law, to arrive at the false positive conclusion that the Eleventh Amendment bars the Complaint's official capacity claims for *monetary* damages, when injunctive relief was asserted. (dkt. 45-1, p.4)

Ms. McCann alleged facts and a prayer for prayer for declaratory and injunctive and such other relief for COP/ODC's joint ongoing pattern and practice of violating the federal constitutional rights of targeted respondent attorneys. (Vol. II, dkt. 12-2, Prayer of Relief (e), p. 45) ("For injunctive or other relief directing the re-organization of ODC/COP".) (Id. ¶8, ¶¶11-12,¶16, ¶¶69-74, ¶¶101-113, ¶¶134-137, ¶¶138-145)

At the March 12, 2019 hearing, Plaintiff specifically testified that her claims for prospective relief against Defendants Cotter, Moog, Taleff and Axelberg in their official capacities is legally justified, based upon the doctrine first announced in *In Ex Parte Young,* 209 U.S. 123, 159-60, 28 S.Ct. 441 (1908). (Vol. II, dkt. 12-2, Hearing Tr., p.110:6-15).

Because 11th Amendment protects states and state entities, and not individuals, the claim for prospective relief against an official is not barred by the 11th Amendment. Therefore, under the *Ex Parte Young* doctrine, "federal courts [may] enjoin state officials to conform their conduct to requirements of federal law". *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002). This reasoning has been extended to prospective declaratory judgments. See *Pulliam v. Allen*, 466 U.S. 522, 544, 104 S.Ct. 1970, 1982 (1984)(dissenting opinion).

III. The Ninth Circuit Disregarded Legal Standards to Dismiss the Complaint and Deny the Opportunity to Amend.

Since the District Court's conclusion that "[t]he deficiencies in McCann's Complaint cannot be cured by amendment" is founded upon the consistent and intentionally disregard of the complaint's actual allegations to improperly assume facts to favor Defendants, adopt Defendant's version of the facts or improperly take judicial notice of *disputed* facts in prior state court orders that the Complaint never discussed, it was error to deny opportunity to amend.

The record demonstrates that Genet alleged facts that entitled her to the relief. In particular, Plaintiff timely filed Motion for Leave to File First Amended Complaint that attached First Amended Complaint, as an exhibit, to demonstrate that her claims are meritorious but for the defrauding of the District Court's ability to fairly administrate justice in the case. (Vol. IV.)

Reversal is therefore warranted, with instruction to permit Petitioner to amend.

IV. The Ninth Circuit Disregarded Procedural and Substantive Mandates To Affirm the Imposition of an Unconstitutional Pre-Filing Order.

The Ninth Circuit affirmed the District Court's disregard for the legal standards for imposition of a pre-filing order and affirmed the improper taking of judicial notice of *disputed* factual recitals in *McCann10* (never discussed in the Complaint) to impose an unconstitutional pre-filing order. (dkt.45-1, p.2, p.4)

A. Legal Standard for Impose a Pre-filing Order

"Out of regard for the constitutional underpinnings of the right to court access, 'pre-filing orders should rarely be filed, and only if courts comply with certain procedural and substantive requirements. *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (citation omitted).

When a district court seeks to impose pre-filing restrictions, it must: (1) give litigants notice and "an opportunity to oppose the order before it [is] entered"; (2) compile an adequate record for appellate review, including "a listing of all the cases and ***motions*** that led the district court to conclude that a vexatious litigant order was needed"; (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as "to closely fit the specific vice encountered." *Id.* (citing *De Long v. Hennessey,* 912 F.2d 1144, 1147-48 (9thCir.1990)(emphasis).

B. The Ninth Circuit Disregarded the Legal Standards For Imposition of a Pre-Filing Order, to Affirm the Improper Noticing of *Disputed* Factual Recitals in *McCann10*.

1. District Court Denied Notice and Opportunity to Oppose the Order

Because the District Court judicially noticed *disputed* factual recitals in *McCann10, sua sponte*, for the first time in its Findings, it denied notice and opportunity to Plaintiff to oppose the factual recitals in *McCann10,* before imposing the pre-filing order.

Rule 201(e), F.R.E. does not permit the taking of judicial notice without notice and opportunity to be heard since it denies the party the opportunity to dispute with countervailing evidence. *Merzbacher v. Shearin*, 732 F. Supp. 2d 527 (D. Md. 2010), *rev'd*, 706 F.3d 356 (4th Cir. 2013). "[T]aking judicial notice of findings of fact from another case exceeds the limits of Rule 201", *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003)*overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014)(citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir.1983) (stating general rule that "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it").

The District Court further abused its discretion at the hearing on Defendants' motions to declare Plaintiff a vexatious litigant, a hearing Plaintiff requested. (dkt. 53) The Magistrate denied Plaintiff her due process opportunity to call her witness and present testimonial and documentary evidence of her filings to show that they are not frivolous or harassing or abusive. To wit:

PLAINTIFF: May I call my witness?

THE COURT: "NO."

(Vol. II, dkt. 12-2, pp.134-135, ¶¶240-243; pp.108-109)

A plaintiff's assertion that he was denied due process by the district court's issuance of a pre-filing injunction against his litigation activities was upheld *when* the party was *not* given adequate notice and opportunity to be heard *at a hearing* on the issuance of the pre-filing injunction. *De Long v. Hennessey,* 912 F.2d 1144,

1147.(Vol. II., dkt. 12-2, p.135, ¶241).

Because the District Court engaged in multiple abuses of discretion to deny Plaintiff notice and opportunity, coupled with the total disregard of well-established legal standards, the record demonstrates that the Court was unduly influenced by Defendants' intentional filing of bald res judicata claims and intentional material misrepresentations in law and fact, to inundate the District Court with inflammatory and false commentary about Plaintiff's federal claims and obtain a dismissal and pre-filing order through fraud on the court.

2. The District Court Failed to Compile a Record of Plaintiff's Filings.

"When Courts seek to impose pre-filing restriction, they must [] compile an adequate record for appellate review, including 'a listing of all the cases and ***motions*** that led the district court to conclude that a vexatious litigant order was needed". *Ringgold-Lockhart v. Cnty. of L.A.,* 761 F.3d 1047, 1062 (9th Cir. 2014) (citing *Hennessey*, 912 F.2d at 1146 (emphasis added).While the Court must compile of list of cases, **it must compile the documents that it deemed frivolous or vexatious.** *Id.*

The District Court abused its discretion by *not* compiling one single motion or filing from the other state and federal cases that it relied upon to impose its pre-filing order. Rather, it judicially noticed the bald factual conclusion in *McCann10,* that "McCann's history of litigation includes ten vexatious, harassing, and duplicative proceedings filed in both state court and federal court." (Vol. I., dkt. 12-1, p.30); *see also McCann10,* ¶40.

Moreover, when Plaintiff asked to call her shepparding witness to introduce her filings in the 10 prior cases, the Magistrate denied it, the District Court adopted it and the Ninth Circuit upheld it. (dkt.45-1 p.4)

A district court record that failed to set forth in any form the filings of cases and motions that support the conclusion that Plaintiff's filings are "so numerous or abusive that they should be enjoined" must be reversed. *Hennessey,* 912 F.2d at 1147-1148. Nonetheless, the reviewing courts in the instant case affirmed and sanctioned imposition of a pre-filing order without a record of Plaintiff's filings from the 10 prior orders. (dkt.45-1 p.4)

3. The District Court Failed to Make *Any* Substantive Findings on Plaintiff's Filings; Rather It Improperly Judicially Noticed *Disputed* Factual Conclusions in *McCann10.*

"When district courts seek to impose pre-filing restrictions, they must [] make substantive findings of frivolousness or harassment". *Ringgold-Lockhart*, 761 F.3d at 1062. "To determine whether the litigation is frivolous, district courts must look

at both the *number* and the ***content*** **of the filings** as indicia of the frivolousness of the litigant's claims." *Riggold-Lockhart*, 761 F.3d at 1064 (emphasis added).

Here, the District Court improperly judicially noticed the *disputed* unsubstantiated factual conclusion from *McCann10* that "Genet's history of litigation [] consistently entail[s] vexatious, harassing, and duplicative lawsuits and filings." *McCann10,* ¶40. "Genet's history exhibits duplicative litigation, including three appeals in the guardianship and conservatorship case, In re A.M.M. I, II, and III, and repeated litigation of her disbarment in federal court, In re McCann II and IV, and twice suing this Court, McCann v. Supreme Court I and II." *Id.* (Vol. I., dkt 12-1, p.31)

It also improperly noticed the *disputed* factual conclusion from *McCann10* that the *McCann10* improperly noticed from COP Tracey Axelberg's findings in the attorney disciplinary proceeding based upon the Rule 8.2 charge Axelberg instituted two days before the hearing because Genet asked him to voluntarily recuse since he engaged in ex parte communications with ODC to strike McCann's key attorney witness set to disclose the truth of Genet's allegations (that Judge Manley and Doug Wold are life-time personal friends and Axelberg knows it because he is also close friends with Doug Wold) (Vol. I., dkt. 12-1, p.31) After reading these orders and opinion, it is self-evident that there is no underlying factual findings to substantiate the adoption upon adoption upon adoption of one bald conclusion upon another.

In Plaintiff's timely filed Objections to the Magistrate's Findings, she additionally disputed the inaccuracy of these conclusions on the additional ground that only three of the ten cases arise out of Plaintiff's litigation efforts. *See* footnote 3, *supra.*

Finally, the Magistrate makes the erroneous finding that "[Plaintiff's] repeated unsuccessful legal challenges in state and federal court demonstrate her intent to harass both opposing litigant and the courts." *Id.* Litigating and losing is not the hallmark of a vexatious litigant. If that were so, then all losers would be designated vexatious litigants. "An injunction cannot issue merely upon a showing of litigiousness. The plaintiffs' claims must not only be numerous, but also be patently without merit." *Molski v. Evergreen Dynasty,* 500 F.3d 1047, 1059 (9th Cir. 2007) (Molski filed 400 lawsuits and that was not enough in-and-of-itself to sustain vexatious litigant determination) *Id.*

The District Court, therefore, disregarded all legal standards, failed to make a single substantive finding to support the conclusion of frivolous or harassing filings, but rather improperly noticed *disputed* factual conclusions in *McCann10* in place of performing the four factored test. The Ninth Circuit, nonetheless, sanctioned the disregard of its own test. (dkt. 45-1, p.4)

4. The District Court Erred in Entering an Unconstitutional Pre-Filing Order.

"An order limiting [ ] access to the courts must be designed to preserve [the] right to adequate, effective and meaningful access [to the courts] . . . while preserving the court from abuse." *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir. 1990). "The final consideration –whether other remedies 'would be adequate to protect the courts and other parties' is particularly important.'" *Ringghold,* at 1062.

The Ninth Circuit violated this Command. It affirmed an impermissibly over-broad and vague ban in violation of First and Fourteenth Amendments that *bars* legitimate claims. The pre-filing order states, in part, verbatim:

a. McCann is *barred* from filing any further actions in this Court arising from, or related to conduct described in the Complaint filed in this lawsuit; and

b. McCann is *barred* from challenging the jurisdictional authority, validity or enforceability of *any* prior federal or state decision in *any* case in which McCann has been *legal counsel* or a party.

(dkt. 12-1, p.ER-2, p.52) (emphasis added).

Subsection (a) & (b), *supra,* unconstitutionally block Plaintiff's access to the court for two reasons. First, it does not permit leave of court for valid, lawful claims. It does not permit Plaintiff the right to challenge jurisdictional authority when it is the federal court's obligation to determine jurisdictional issues. *Jackson v. Sargent*, 394 F. Supp. 162 (D. Mass.), *aff'd*, 526 F.2d (1st Cir. 1975)(It is always the obligation of federal court to determine if it has jurisdiction.) The Order also bars Plaintiff's challenge to the "validity or enforceability of *any* prior order; that is, the order bars all legitimate Rule 60(b) or (d) claims that the orders were obtained through Defendants' extrinsic fraud upon the court. "It has long been the law that a plaintiff in federal court can seek to set aside a state court judgment obtained through extrinsic fraud. *Kougasian v. Tmsl, Inc.,* 359 F.3d 1136, 1141 (9th Cir. 2004); "The Supreme Court distinguished between errors by the state court, which could not be reviewed in federal court, and fraud on the state court, which could be the basis for independent suit in [federal] court." *Barrow v. Hunton*, 99 U.S. (9 Otto) 80, 25 L.Ed. 407 (1878).

It also does not permit Plaintiff to challenge *any* prior order in which she was an attorney of record. This conflict with Ninth Circuit precedence which states that vexatious litigant order cannot be maintained or enforced against attorneys of record since they are not a party and vexatious litigant orders are only enjoin parties, not attorneys. *Riggold-Lockhart*, 761 F.3d at 1061 (citing *Weissman v. Quail Lodge Inc.,* 179 F.3d 1194 (9thCir.1999) (an attorneys could not be sanctioned as vexatious litigants, because they are merely appearing on behalf of a client.)

Finally, the Order unconstitutionally interferes with Plaintiff's present due process rights to defend against the loss of her beneficiary property interests in the pending probate of her mother's estate vis-à-vis Defendant Paul McCann, Jr., the personal representative of the Estate of A.M.M. in *In re Estate of Anne Marie McCann,* before the Twentieth Judicial District Court of Montana, Hon. John Warner presiding, Cause No.19-47. The nature of Defendant-fiduciaries' misconduct is on-going; that is, there are subsequent and on-going predicate acts due to the fact that the McCann Defendants continue to owe fiduciary duties to Genet who is a successor to estate assets and Defendants are continuing to breach their trustee duties to conceal the records thereof, from lawful requests for statutory rights of access under §72-38-813, M.C.A. (trustee's duty to inform beneficiary and report to them) and to withhold estate asset distribution to gain an unfair personal advantage over Plaintiff in violation of their trustee duty to a beneficiary of the estate under §72-38-802, M.C.A. (A trustee shall administer the trust solely in the interest of the beneficiaries.) *In re Estate of Stukey,* 100 P.3d 114, 323 Mont. 241 (Mont. 2004) (Conservator of estate breached her fiduciary duties to estate by failing to fully disclose all financial information concerning estate.)

Thus, the pre-filing order violates First and Fourteenth's Amendment right to court access since the subsequent RICO acts of Defendants "arise[] from, or relate to" the same on-going criminal racketeering conduct that has been "described in the Complaint filed in this lawsuit." *O'Loughlin v. Doe*, 920 F.2d at 617 (pre-filing order must preserve adequate, effective and meaningful court access.)

The Order's final provision to the Clerk of Court unconstitutionally sweeps to broadly because it imposes a pre-filing requirement upon ***any*** **and** ***all*** **filings** by Plaintiff regardless of who is the other party and what the case is about; that is, it is not narrowly tailored, and it interferes with effective, timely access.

It commands:

"The Clerk of Court shall be informed that if McCann attempts to file *any* further lawsuits with this Court, the Clerk of Court shall lodge McCann's pleadings in a miscellaneous civil case entitled *In re Genet McCann* until the [*indefinite time when*] Court determines whether the action should be allowed to proceed. (dkt. 12-1, p. 53) (emphasis added).

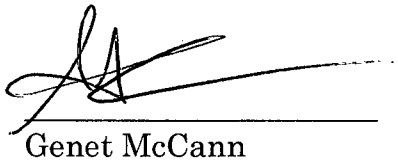
It is *not* designed to preserve Genet's "right to adequate, *effective* and meaningful access to the courts." There is no provision for timely granting leave upon a determination that the proposed filing has an arguably basis in law or fact. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Circ. 1984) (A complaint is not frivolous if it has "arguable basis in fact or law.")

Therefore, the pre-filing order should be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted and the order dismissing complaint reversed with instruction to permit Plaintiff to amend her complaint before a different sitting U.S. District Judge, since Judge Brian Morris should have disqualified himself as the undisclosed former employer of the bar official Defendants, as a former Montana Supreme Court Justice.

Respectfully submitted with requested corrections on July 9, 2021.



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