NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENET MCCANN, Plaintiff-Appellant, v. WARD E. TALEFF, of the Commission on Practice, in his official and individual capacity; et al., Defendants-Appellees.	No. 19-35730 D.C. No. 4:18-cv-00115-BMM-JTJ MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted October 30, 2020 **

Before: TROTT, SILVERMAN, and N.R. SMITH, Circuit Judges

Genet McCann appeals the judgment entered in favor of the defendants in her civil rights lawsuit and the vexatious litigant order entered by the district court. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the Rule 12(b)(6)

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

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

dismissal de novo and denial of leave to amend for an abuse of discretion. *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017). We review the district court's vexatious litigant order for an abuse of discretion. *Ringgold-Lockhart v. Cnty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014). We affirm.

The district court properly took judicial notice of the previous lawsuits in state and federal court. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (holding that the court make take judicial notice of documents filed in federal or state courts or referenced in the complaint).

We apply state preclusion law to determine whether federal claims are barred by state court judgments. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1165 (9th Cir. 2005). Claims preclusion bars the claims against Paul Jr., Sheila, and William McCann, Wold, Parker, and Rogers. The claims in this case arise out of the same events and either were or could have been brought in *McCann v. McCann*, 425 P.3d 682, 686-91 (Mont. 2018) (*McCann 10*). *Reisbeck v. Farmers Ins. Exch.*, 467 P.3d 557, 561 (Mont. 2020) (setting forth the elements of claims preclusion); *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990) (holding that state courts have concurrent jurisdiction over RICO claims); *Felder v. Casey*, 487 U.S. 131, 139 (1988) (noting that state courts have concurrent jurisdiction over civil rights claims).

Issue preclusion bars the claims against Emerson and James because Ann Marie's travel was litigated in the state guardianship proceedings. *Reisbeck,* 467 P.3d at 561 (setting forth the elements of issue preclusion); *In re A.M.M.*, 380 P.3d 736 (Mont. 2016).

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. *Ashelman v. Pope*, 793 F.2d 1072, 1075-76, 1078 (9th Cir. 1986) (en banc). Similarly, Judge Manley's judicial assistant, Wold-McCauley, had quasi-judicial immunity. *Id.*; *Mullis v. U.S. Bankr. Ct. for Dist. of Nev.*, 828 F.2d 1385, 1390 (9th Cir. 1987).

Wold, Emerson, and Paul McCann, Jr. are entitled to quasi-judicial immunity for their actions taken as the court-appointed guardian and co-conservators in the state guardianship proceedings. *In re Castillo*, 297 F.3d 940, 947-48 (9th Cir. 2002); *Mosher v. Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978).

The individual capacity claims against Cotter, Moog, Taleff, and Axelberg for their actions in the state bar disciplinary proceedings are barred by quasi-judicial immunity. *Hirsh v. Justices of the Sup. Ct. of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995); *In re McCann*, 421 P.3d 265, 268 (Mont. 2018) (holding that the Office of Disciplinary Counsel and Montana Commission on Practice acted within the

EXHIBIT 2

Dec. 11, 2020 Order

(Dkt. 48)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENET MCCANN, Plaintiff-Appellant, v. WARD E. TALEFF, of the Commission on Practice, in his official and individual capacity; et al., Defendants-Appellees.	No. 19-35730 D.C. No. 4:18-cv-00115-BMM-JTJ District of Montana, Great Falls ORDER

Before: TROTT, SILVERMAN, and N.R. SMITH, Circuit Judges.

The panel has recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

GENET McCANN,

Plaintiff,

vs.

WARD TALEFF, et al.,

Defendants.

CV 18-115-GF-BMM-JTJ

FINDINGS AND RECOMMENDATIONS

INTRODUCTION

This lawsuit has its genesis in a family dispute. Plaintiff Genet McCann (McCann) alleges that three of her siblings have conspired to exert unlawful control over cash that belongs to family-owned corporations. The family dispute has been the subject of extensive litigation in state court. McCann has participated in numerous state court proceedings in either her personal capacity, or as legal counsel for one of her siblings. McCann's litigation efforts in state court have been unsuccessful. The Montana Supreme Court has disbarred McCann as a lawyer, declared McCann a vexatious litigant, and prohibited McCann from filing any further lawsuits in a state court without prior approval.

The present lawsuit represents McCann's effort to litigate the family dispute in federal court. The named Defendants include: the state district court judge who presided over the guardianship and conservatorship proceedings for McCann's

Paul Sr.'s estate was probated in Montana Twentieth Judicial District Court, Lake County. Montana District Court Judge James A. Manley (Judge Manley) presided over the probate proceeding. Judge Manley's judicial assistant was Chantel Wold-McCauley (Wold-McCauley).

At the time of Paul Sr.'s death, Ann Marie was of advanced age. Ann Marie suffered from Alzheimer's type dementia. Her children agreed that she needed the assistance of a guardian and conservator due to her diminished capacity. A dispute arose, however, as to who should serve as guardian and conservator for Ann Marie. Timothy, with McCann as his lawyer, filed a petition with the state court requesting that he be appointed guardian and conservator. Paul Jr., Sheila and William filed a petition requesting that Paul Jr. be appointed guardian and conservator. Judge Manley appointed three co-conservators: Paul Jr., Timothy and attorney Doug Wold (Wold). Timothy later resigned, leaving Wold and Paul Jr. as Ann Marie's co-conservators.

Judge Manley appointed attorney Casey Emerson (Emerson) as Ann Marie's guardian. Emerson, in turn, hired Amanda James (James) of Comfort Keepers to provide in-home care services for Ann Marie.

McCann opposed the appointment of Emerson as guardian, and she opposed the appointment of Paul Jr. and Wold as co-conservators. McCann challenged the

guardian and conservator appointments, personally and as counsel for Timothy. McCann opposed the appointments in state district court and in three appeals to the Montana Supreme Court. *In re Guardianship & Conservatorship of A.M.M.*, 356 P.3d 474 (Mont. 2015) (*McCann* 1); *In re Guardianship & Conservatorship of A.M.M.*, 380 P.3d 736 (Mont. 2016) (*McCann* 2); and *In re Guardianship & Conservatorship of A.M.M.*, 403 P.3d 1254 (Mont. 2017) (*McCann* 4). All of McCann's challenges were unsuccessful.

McCann was accused of professional misconduct based upon her activities as legal counsel for Timothy in the guardianship and conservatorship proceedings. The Office of Disciplinary Counsel (ODC) investigated the matter. The ODC filed two disciplinary complaints against McCann with the Commission on Practice in Causes PR 16-0635 and PR 17-0670. Attorney Mike Cotter (Cotter) was the Chief Disciplinary Counsel for the ODC. Attorney Jon Moog (Moog) was the Deputy Disciplinary Counsel for the ODC.

The Montana Commission on Practice reviewed and considered the disciplinary complaints filed by the ODC. Attorney Ward Taleff (Taleff) was the Chairman of the Commission on Practice. Attorney Tracy Axelberg (Axelberg) was the Vice-Chairman of the Commission on Practice. The Commission on

Practice recommended that McCann be suspended in cause PR 17-0670, and disbarred in cause PR 16-0635.

The Montana Supreme Court adopted the recommendations of the Commission on Practice. *In re McCann*, 421 P.3d 265 (Mont. 2018) (*McCann* 7); *In re McCann*, No. PR 16-0635, Order (Mont. June 6, 2018) (*McCann* 3). The Montana Supreme Court disbarred McCann effective July 5, 2018. *In re McCann*, No. PR 16-0635, Order at 6.

McCann attempted to challenge the disciplinary proceedings in four federal lawsuits: *In re McCann*, No. CV 18-02-H-SEH (D. Mont. Jan. 11, 2018) (*McCann* 5); *In re McCann*, No. CV 18-03-H-SEH (D. Mont. Jan. 11, 2018) (*McCann* 6); *McCann v. Supreme Court of Montana*, No. CV 18-42-H-SEH (D. Mont. June 11, 2018) (*McCann* 8); and *McCann v. Supreme Court of Montana*, No. CV 18-57-H-SEH (D. Mont. June 11, 2018) (McCann 9). All of the federal lawsuits were dismissed for lack of jurisdiction.

McCann filed a lawsuit in the Montana Thirteenth Judicial District Court, Yellowstone County, in September of 2014, seeking a forced dissolution of the family corporations based on allegations of corporate oppression under Mont. Code Ann. § 35-1-938(2). See *McCann v. McCann*, 425 P.3d 682, 686 (Mont. 2018) (*McCann* 10). The named Defendants in that lawsuit included 18 family

corporations, McCann's siblings Sheila and Paul, Jr., and attorney Wold. Sheila and Paul Jr. were represented by attorney Mark Parker (Parker). Wold was represented by attorney Guy Rogers (Rogers).

The district court ruled in favor of the Defendants following a bench trial. McCann Appealed. The Montana Supreme Court affirmed the district court's decision on August 28, 2018. *McCann*, 425 P.3d at 694. The Court determined that McCann was a vexatious litigant. The Court prohibited McCann from filing any further pleadings with a Montana state court absent prior approval of the court. *Id.*

A. The Present Action

McCann filed the present action on September 4, 2018, just seven days after the Montana Supreme Court had declared her a vexatious litigant. McCann alleges that Sheila, Paul, Jr. and William have conspired to exert unlawful control over approximately $45 million dollars in cash that belongs to the family corporations. (Doc. 1 at 3).

McCann alleges that Judge Manley, judicial assistant Wold-McCauley, attorney Emerson, attorney Wold, and care giver James, joined the conspiracy by participating in Ann Marie's guardianship and conservatorship proceedings in state court.

McCann alleges that attorneys Cotter, Moog, Taleff and Axelberg, joined the conspiracy by participating in the state disciplinary proceedings that resulted in her disbarment as a lawyer.

McCann alleges that attorney Parker and attorney Rogers joined the conspiracy by assisting Sheila and Paul, Jr. with legal matters related to the family corporations, and by representing persons who she had sued in *McCann* 10. (Doc. 1 at 37). Parker represented Sheila and Paul, Jr. in *McCann* 10. Rogers represented attorney Wold in *McCann* 10.

McCann asserts federal claims against the Defendants under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. McCann also asserts state law claims against the Defendants for wrongful conversion and constructive fraud.

McCann seeks monetary relief in the form of compensatory damages, treble damages and punitive damages. (Doc. 1 at 41). McCann also seeks injunctive relief. McCann seeks an order directing the Commission on Practice to reinstate her license to practice law. McCann seeks an order terminating the guardianship and conservatorship appointments made by the state district court, and McCann seeks a forced dissolution of the family corporations. (Doc. 1 at 40-42).

Counts 3, 4 and 5 of McCann's Complaint assert criminal charges against the Defendants for mail fraud, obstruction of justice, and wire fraud. McCann conceded, during the hearing on March 12, 2019, that Counts 3, 4 and 5 should be dismissed. McCann agreed that she lacks standing to bring criminal charges against the Defendants.

MOTIONS TO DISMISS

Defendants have moved to dismiss all of McCann's claims under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. Rule 12(b)(1) Standard

Federal Rule of Civil Procedure 12(b)(1) authorizes a court to dismiss claims over which it lacks subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When evaluating a Rule 12(b)(1) motion, the court must accept all material factual allegations in the complaint as true. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The court may disregard legal conclusions that the plaintiff has cast in the form of factual allegations. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

B. Rule 12(b)(6) Standard

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d

729, 732 (9th Cir. 2001). The complaint must set forth sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A claim is plausible on its face when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Factual allegations that only permit the court to infer "the mere possibility of misconduct" are not sufficient. *Id.* at 679. Dismissal is appropriate under Rule 12(b)(6) if the complaint "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hospital Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

When evaluating a Rule 12(b)(6) motion, the court must accept all allegations of material fact contained in the complaint as true. *Johnson v. Lucent Technologies Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011). Matters outside of the pleadings are generally not considered by the court. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The court may consider, however, undisputed matters of public record such as "documents on file in federal or state courts." *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Here, the Court has taken judicial notice of the ten prior state and federal proceedings referred to above as *McCann* 1 through *McCann* 10.

C. **Claims Against Sheila McCann, Paul McCann, Jr., William McCann, Mark Parker and Guy Rogers**

McCann has asserted claims for monetary relief against her siblings Sheila, Paul Jr. and William, and attorneys Parker and Rogers. 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). McCann alleges that Parker and Rogers assisted Sheila, Paul, Jr. and William by participating in "illegal meetings" related to the family corporations, and by "fraudulently report[ing] trusts in JMC [Inc.] as loans, to the detriment of stockholders . . . when [they] knew that they were not loans." (Doc. 1 at 28, 37).

Defendants argue that all of McCann's claims are barred by doctrine of *res judicata*. Defendants argue that the doctrine of *res judicata* operates to bar the claims because McCann could have asserted the claims in the state court action referred to above as *McCann* 10.

The doctrine of *res judicata*, also known as claim preclusion, bars a party from re-litigating claims that were raised or could have been raised in a prior action. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001); *Wiser v. Montana Bd. of Dentistry*, 251 P.3d 675, 676 (Mont. 2011). The doctrine of *res judicata* is premised on the policy that there must be some end

to the litigation. *Wiser*, 251 P.3d at 676. *Res judicata* deters "plaintiffs from splitting a single cause of action into more than one lawsuit." *Asarco LLC v. Atlantic Richfield Co.*, 369 P.3d 1019, 1023 (Mont. 2016).

When considering the preclusive effect of a state court judgment, federal courts must apply the *res judicata* law of the state from which the state court judgment emerged. *Adams Brothers Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010). This Court must therefore look to Montana law to determine whether the state court judgment in *McCann* 10 operates to bar the claims that McCann asserts here. See *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81 (1984).

Montana's *res judicata* doctrine has five elements:

1. The parties or their privies must be the same in the first and second actions;

2. The subject matter of the actions must be the same;

3. The issues must be the same in both actions, or they must be issues that could have been raised in the first action, and they must relate to the same subject matter;

4. The capacities of the parties in both actions must be the same in reference to the subject matter and the issues raised in the actions; and

5. The first action must have ended with a final judgment on the merits.

Brilz v. Metropolitan General Ins. Co., 285 P.3d 494, 501 (Mont. 2012).

a. Same Parties or Privies to Parties

The first element of *res judicata* is met if the parties in the second action are named parties in the first action, or they are privies to parties named in the first action. *Brilz*, 285 P.3d at 501. For purposes of *res judicata*, privies are persons whose interests have been legally represented by a litigant in a prior lawsuit. *Wamsley v. Nodak Mutual Ins. Co.*, 178 P.3d 102, 114 (Mont. 2008); *Holtman v. 4–G's Plumbing & Heating, Inc.*, 872 P.2d 318, 321 (Mont. 1994).

Here, all of the Defendants in this lawsuit are either parties in *McCann* 10 or they are privies with persons or entities who were parties in *McCann* 10. Sheila McCann and Paul Jr. McCann were parties in *McCann* 10. William McCann is a privy with his siblings Sheila and Paul, Jr. as they share the same interests as officers, directors and shareholders of the family corporations. William is also a privy with the corporate defendants named in *McCann* 10 given his status as a shareholder. See *Brault v. Smith*, 679 P.2d 236, 239 (Mont. 1984) (shareholders in closely-held corporations are in privity with the corporation). Attorney Parker is a privy with Sheila, Paul Jr. given that he was their attorney in *McCann* 10. Lawyers are privies with their clients for purposes of *res judicata*. See *Flock v. JP Morgan Chase Bank, N.A.*, 2015 WL 1279407, at *6 (W.D. Tenn. Mar. 20, 2015);

Pincus v. Law Offices of Erskine & Fleisher, 2010 WL 286790, at *2 n.1 (S.D. Fla. Jan. 19, 2010) (collecting cases). Attorney Rogers is similarly a privy with *McCann* 10 defendant Doug Wold given that he was Wold's attorney.

b. Same Subject Matter

The second element requires that the subject matter be the same in both actions. Here, both cases arise from the same family dispute.

c. Same Issues Relating to the Same Subject Matter

The third element requires that the issues in the second action are the same as the issues in the first action, or are issues that could have been raised in the first action, and relate to the same subject matter. The third element requires that the issues in the first and second action arise from "a common nucleus of operative facts." *Ziolkowski v. Johnson, Rodenburg & Lauinger, PLLP*, 2013 WL 1291615, at *7 (D. Mont. Mar. 27, 2013) (quoting *Brilz*, 285 P.3d at 502).

Both *McCann* 10 and this action arise out of a common nucleus of operative facts. McCann's alleges here, as she did in McCann 10, that the Defendants have engaged in illegal, oppressive and fraudulent conduct with respect to the family corporations. McCann has alleged mismanagement of corporate records and mail fraud in both cases. McCann seeks the same relief here as she did in *McCann* 10.

McCann seeks a forced dissolution of the family corporations. (Doc. 1 at 40-42). The third element of *res judicata* is therefore satisfied.

To the extent McCann's Complaint in this case alleges federal civil rights claims and federal RICO claims she did not raise in *McCann* 10, the third element of *res judicata* is nevertheless met because those claims also arise from the same common nucleus of operative facts, and McCann could have asserted the claims in *McCann* 10. State courts possess concurrent jurisdiction over federal civil rights claims and federal RICO claims. See *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Tafflin v. Levitt*, 493 U.S. 455, 460 (1990).

d. Capacities of the Parties are the Same

The fourth element requires that the capacities of the parties be the same in the first and second actions. This element is also satisfied. McCann has sued the Defendants in her individual capacity as a shareholder of the family corporations, just as she did in *McCann* 10. McCann has asserted claims against the Defendants in both their individual and official capacities, just as she did in *McCann* 10.

e. Final Judgment on the Merits

The fifth element of *res judicata* requires that the first action conclude with a final judgment on the merits. The fifth element is also satisfied here. The state district court entered a final judgment on the merits in *McCann* 10, and the

Montana Supreme Court affirmed the judgment. See *McCann v. McCann*, 425 P.3d at 694. McCann's claims against Sheila, Paul, Jr., and William McCann, and attorneys Parker and Rogers are barred by the doctrine of *res judicata*.

D. Claims Against Cotter, Moog, Taleff and Axelberg

McCann has asserted claims for monetary relief against Defendants Cotter, Moog, Taleff and Axelberg based upon their participation in the disciplinary proceedings that resulted in her disbarment as a lawyer. McCann has sued Cotter, Moog, Taleff and Axelberg in both their official and individual capacities.

a. Official-Capacity Claims for monetary relief

An official-capacity suit for money damages represents "another way of pleading an action against the entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The ODC and the Commission on Practice operate as agencies of the State of Montana. See *Rothstein v. Montana State Supreme Court*, 638 F. Supp. 1311, 1312 (D. Mont. 1986). The claims for monetary damages against Cotter, Moog, Taleff and Axelberg, in their official capacities, are therefore claims against the State of Montana. *Shaw v. State of Cal. Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 604 (9th Cir. 1986).

The Eleventh Amendment bars a plaintiff from suing a state in federal court for monetary damages. *Hirsh v. Justices of the Supreme Court of California*, 67

F.3d 708, 715 (9th Cir. 1995). The Eleventh Amendment's immunity extends to official-capacity claims against agents of a state. *Id.* The official-capacity claims against Cotter, Moog, Taleff and Axelberg for monetary damages are barred by the Eleventh Amendment.

b. Individual-Capacity Claims for monetary relief

An individual-capacity suit for money damages "seek[s] to impose personal liability upon a government official for actions he takes under color of state law." *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 966 (9th Cir. 2010). Moog and Cotter acted as prosecutorial counsel in all of McCann's disciplinary proceedings. Axelberg and Taleff served as Chairpersons of the Commission on Practice that recommended McCann's disbarment. All of the claims against Moog, Cotter, Axelberg and Taleff are based on acts the Defendants undertook in the performance of their official duties in disciplinary proceedings.

Administrative law judges and attorneys who prosecute lawyers in disciplinary proceedings are entitled to quasi-judicial immunity from individual-capacity claims brought against them based upon their actions in disciplinary proceedings. *Hirsh*, 67 F.3d at 715; *Clark v. State of Washington*, 366 F.2d 678, 681 (9th Cir. 1966); *Wu v. State Bar of California*, 953 F. Supp. 315, 319-20 (C.D. Cal. 1997). Moog, Cotter, Axelberg and Taleff are entitled to immunity. The

individual-capacity claims against Cotter, Moog, Taleff and Axelberg for monetary damages should be dismissed.

E. Claims Against Judge Manley

McCann has asserted claims for monetary relief against Judge Manley. Judge Manley presided over Paul Sr.'s probate proceeding as well as Ann Marie's guardianship and conservatorship proceedings. Judge Manley argues that he is immune from liability.

Judges enjoy absolute immunity from damage liability for judicial acts performed within the jurisdiction of their court. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). A judge is stripped of this immunity only when: 1) the judge acts in the clear absence of all jurisdiction; or 2) the judge performs an act that is not judicial in nature. *Id.*

To determine whether a given action is judicial in nature, courts focus on: 1) whether the act is a normal judicial function; 2) whether the act occurred in the courtroom; 3) whether the controversy centered around a case that was pending before the judge; and 4) whether the act at issue arose directly out of a confrontation with the judge in his official capacity. *Id.*

Here, it is clear that Judge Manley was vested with jurisdiction to preside over Paul Sr.'s probate, and Ann Marie's guardianship and conservatorship

proceedings. See Mont. Code Ann. §§ 3-5-302(b), 72-5-405. All of the acts by Judge Manley, of which McCann complains, were judicial in nature. Judge Manley was performing normal judicial functions when he appointed Ann Marie's guardian and co-conservators, quashed McCann's subpoenas, and sanctioned McCann for her professional misconduct. Judge Manley is therefore immune from liability. McCann's claims against Judge Manley should be dismissed.

F. Claims Against Wold-McCauley

McCann has asserted claims for monetary relief against Wold-McCauley. Wold-McCauley was Judge Manley's judicial assistant. Wold-McCauley argues that she is immune from liability.

Court personnel enjoy quasi-judicial immunity for acts that are "integral to the judicial process." See e.g., *Mullis v. U.S. Bankruptcy Court, Dist. of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987) (clerk of court vested with quasi-judicial immunity); *Sindram v. Suda*, 986 F.2d 1459, 1460-61 (D.C. Cir. 1993) (quasi-judicial immunity applies to acts of auxiliary court personnel that are part of their judicial function); *Kincaid v. Vail*, 969 F.2d 594, 600-01 (7th Cir. 1992).

Here, McCann has failed to identify a single act that Wold-McCauley allegedly undertook that was not integral to the judicial process. McCann alleges that Wold-McCauley is liable as a co-conspirator merely because she is Judge

Manley's assistant. Wold-McCauley is entitled to immunity. McCann's claims against Wold-McCauley should be dismissed.

G. Claims Against Emerson

McCann has asserted claims for monetary relief against Emerson. Emerson was Ann Marie's court-appointed guardian. McCann alleges that Emerson is liable because she allowed Ann Marie to travel to California on January 6, 2015, knowing that the state court had scheduled a hearing relating to Ann Marie's guardianship for January 7, 2015. (Doc. 1 at 18-20). Emerson argues that McCann's claims fail because she is immune from liability, and the claims are also barred by the doctrine of collateral estoppel.

Court-appointed guardians perform quasi-judicial functions. See *e.g.*, *Smith v. DSHS*, 2010 WL 4483531, at *2 (W.D. Wash. Sept. 28, 2010); *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994). Court-appointed guardians enjoy immunity for their quasi-judicial functions. See *Dahl v. Charles F. Dahl, M.D., P.C.*, 744 F.3d 623, 630 (10th Cir. 2014); *Dornheim v. Sholes*, 430 F.3d 919, 925 (8th Cir. 2005); *Hughes v. Long*, 242 F.3d 121, 127 (3rd Cir. 2001). Emerson was acting pursuant to court order and was functioning as an arm of the court when she allowed Ann Marie to travel to California. Emerson is immune from liability.

Montana's collateral estoppel doctrine, also known as issue preclusion,

operates to bar a party from re-litigating issues that were raised or could have been raised in a prior action. *Baltrusch v. Baltrusch*, 130 P.3d 1267, 1274 (Mont. 2006). Montana's collateral estoppel doctrine applies if the following four elements are satisfied:

1. The issue raised in the present action must have been decided in a prior action;

2. A final judgment on the merits must have been issued in the prior action;

3. The party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior action; and

4. The party against whom collateral estoppel is asserted must have been afforded a full and fair opportunity to litigate the issue in the prior action.

Baltrusch, 130 P.3d at 1274.

All four of the collateral estoppel elements are satisfied here. Emerson's decision to allow Ann Marie to travel to California was fully litigated in the state court guardianship proceedings. The state district court determined that Ann Marie's presence at the hearing was not required. McCann was afforded a full opportunity to challenge the ruling of the district court. McCann participated in the state court guardianship proceedings both personally and as counsel for her brother Timothy. McCann appealed the rulings of the district. The appeal was

unsuccessful. The Montana Supreme Court affirmed the rulings of the state district court. See *In re Guardianship of A.M.M.*, 380 P.3d at 737-743. The claims against Emerson are barred by the doctrine of collateral estoppel.

H. Claims Against Amanda James

McCann has asserted claims for monetary relief against James. James was hired by Emerson to be Ann Marie's care giver. James traveled with Ann Marie to California on January 6, 2015, in her capacity as Ann Marie's care giver. McCann alleges that James, like Emerson, is liable because she allowed Ann Marie to travel to California knowing that the state court had scheduled a hearing relating to Ann Marie's guardianship for January 7, 2015. (Doc. 1 at 18-19).

The claims against James are barred by the doctrine of collateral estoppel for the same reasons stated above with respect to Emerson.

I. Claims Against Wold

McCann has asserted claims for monetary relief against Wold. Wold was one of Ann Marie's court-appointed conservators. McCann alleges that Wold is liable based on his conduct as co-conservator. Wold argues that he is immune from liability.

Court-appointed conservators enjoy quasi-judicial immunity for actions performed at the direction of the court. See *Mosher v. Saalfeld*, 589 F.2d 438, 442

(9th Cir. 1978). Wold is entitled to immunity. The claims against Wold should be dismissed.

J. Claims for Injunctive Relief

McCann has asserted three claims for injunctive relief: McCann seeks an order directing the Commission on Practice to reinstate her license to practice law; McCann seeks an order terminating the guardianship and conservatorship appointments made by the state court; and McCann seeks an order dissolving the family corporations. (Doc. 1 at 40-42). Defendants argue that McCann's claims for equitable relief are barred by the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine originated from two Supreme Court opinions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The *Rooker-Feldman* doctrine holds that a United States District court possesses no jurisdiction to review final judgments of a state court. *Feldman*, 460 U.S. at 482. The *Rooker-Feldman* doctrine applies if the following four criteria are satisfied:

1. The plaintiff must have lost in the underlying state court proceeding;

2. A final judgment must have been rendered in state court proceeding before the federal lawsuit was filed;

3. The plaintiff must complain that the state court judgment has caused her to suffer injuries; and

4. The plaintiff's complaint must invite the federal court to review and reject the final judgment of the state court.

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005).

All four of *Rooker-Feldman* criteria are satisfied here. The first element is satisfied because McCann lost in the state court guardianship proceedings. *In re Guardianship of A.M.M.*. 356 P.3d at 481; *In re Guardianship of A.M.M.*. 380 P.3d at 738-746. McCann lost in the state disbarment proceeding, and McCann lost in the state court lawsuit referred to as *McCann* 10 in which she sought a forced dissolution of the family corporations. See *In the Matter of Genet McCann, Attorney at Law*, No. P.R. 16-0635, Or. (Mont. 6, 2018); *McCann v. McCann*, 425 P.3d 682, 686 (Mont. 2018).

The second element is satisfied because final judgments were entered in all of these state court proceedings before McCann filed her Complaint in this case.

The third element is satisfied because McCann alleges that she has suffered injuries as a result of the adverse decisions she received in the state court proceedings. McCann alleges that she has suffered "$5,370,000.00" in loss of business and net-worth. (Doc. 1 at 41).

Finally, the fourth element is satisfied because the equitable relief that McCann requests would require this Court to reject the final decisions of the

Montana Supreme Court with respect to the state court guardianship proceedings, the state court disbarment proceeding, and the state court lawsuit referred to as *McCann* 10.

McCann's claims for injunctive relief are barred by the *Rooker-Feldman* doctrine.

MOTIONS REQUESTING THAT McCANN BE DECLARED A VEXATIOUS LITIGANT

All of the Defendants have moved for an order declaring McCann a vexatious litigant. McCann opposes the motions.

Every citizen possesses a right of access to the courts that is protected under the First Amendment to the United States Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Litigants are not permitted, however, to abuse the judicial system by filing numerous actions that are either frivolous, or reflect a pattern of harassment. *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990). "Flagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *Id.*

The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent authority to stop abusive litigation by vexatious litigants by entering

"pre-filing orders" that restrict the litigant's ability to file further lawsuits. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). When entering a pre-filing order, the district court must:

1. Give the litigant notice and an opportunity to be heard;

2. Compile an adequate record for appellate review;

3. Make substantive findings about the frivolous or harassing nature of the litigant's litigation history; and

4. Tailor the order in a way that fits "the specific vice encountered."

Ringgold-Lockhart v. County of Los Angeles, 761 F.3d 1057, 1062 (9th Cir. 2014).

The latter two requirements are substantive requirements. They focus on whether the litigant is vexatious, and whether a pre-filing order is warranted. *Id.* The Ninth Circuit has identified five factors courts are to consider when making these determinations. These five factors include:

1. The litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits;

2. The litigant's motive in pursuing the present lawsuit;

3. Whether the litigant is represented by counsel;

4. Whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and

5. Whether sanctions other than a pre-filing order would be adequate to protect the court and other parties.

Ringgold-Lockhart, 761 F.3d at 1062.

1. Notice and Opportunity to Oppose a Pre-Filing Order

Due process requires that a district court give a litigant notice and an opportunity to be heard before it issues an order restricting a litigant's access to the courts. *Ringgold-Lockhart*, 761 F.3d at 1062. An opportunity to be heard is satisfied if the litigant is provided an opportunity to file a brief. *Molski*, 500 F.3d at 1058.

Here, the Court has provided McCann with the required notice and an opportunity to be heard. The Court issued an Order on January 29, 2019, advising McCann of its intent to consider whether she was vexatious litigant based upon her pattern of litigation conduct. (Doc. 53). The Court informed McCann that it would conduct a hearing on the issue on March 12, 2019. *Id.* The Court gave McCann an opportunity to submit a brief. McCann availed herself of that opportunity. McCann filed a brief in opposition to Defendant's motions on December 12, 2018. (Doc. 36). The Court conducted a hearing on March 12, 2019. (Doc. 62). McCann presented oral argument at the hearing.

2. Adequate Record for Review

The court must make an adequate record for review on appeal. The court must identify the prior litigation that leads the court to conclude that a pre-filing order is warranted. *Molski*, 500 F.3d at 1059; De *Long*, 912 F.2d at 1147.

Here, McCann's history of litigation includes ten vexatious, harassing, and duplicative proceedings filed in both state court and federal court. These prior legal proceedings are referred to as *McCann* 1 through *McCann* 10.

3. Substantive Findings about the Frivolous or Harassing Nature of Plaintiff's Litigation

The heart of the vexatious litigant analysis requires "substantive findings as to the frivolous or harassing nature of the litigant's actions." *Molski*, 500 F.3d at 1059. The court may consider a variety of factors when determining whether a litigant's actions are frivolous or harassing. The court may consider the number and content of the litigant's filings. *Id.* The court may consider whether the litigant's filing are patently without merit, and whether the litigant's filings allege facts that are grossly exaggerated or totally false. *Molski*, 500 F.3d at 1059, 1061. The court may also consider whether the litigant's filings qualify as manipulative or coercive litigation tactics. *Id.* at 1060.

McCann's litigation history includes both frivolous and duplicative litigation. McCann's litigation history includes three appeals related to Ann Marie's guardianship and conservatorship proceedings, four frivolous attempts to challenge her disbarment in federal court, and two lawsuits against the Montana Supreme Court.

The Montana Supreme Court has declared McCann a vexatious litigant. See *McCann v. McCann*, 425 P. 3d at 692-94. The Montana Commission on Practice has entered extensive findings regarding McCann's record of harassing litigation. The Commission has stated that McCann:

> is truly the poster child of not just a vexatious litigant, but a vexatious lawyer, unwilling or unable to see the outrageous nature of her conduct, both in the district court and in these disciplinary proceedings. Ms. McCann had numerous opportunities to correct or at least mitigate her conduct. In each instance, she took the approach of escalating the dispute by engaging in unprofessional name-calling, accusatory statements of bias, and relying on a hodgepodge of groundless claims and unsupportable theories that failed to articulate a coherent legal position.

McCann, 425 P. 3d at 693.

Here, McCann seeks to litigate issues that have been or could have been resolved in *McCann* 10. McCann's litigation conduct here has caused needless expense to the parties in this case and has posed an unnecessary burden on the

Court. McCann's allegations of a criminal enterprise that involves a sitting Montana district court judge, quasi-judicial officials, and well-respected lawyers is patently frivolous and harassing. Her repeated unsuccessful legal challenges in state and federal court demonstrate her intent to harass both opposing litigants and the courts. The fact that McCann is trained in the law, makes her litigation conduct even more un-excusable. McCann is well aware that it is improper for lawyers to repeatedly assert claims that are unsupported in fact and in law.

4. Adequacy of Sanctions Other than a Pre-Filing Order

The Court has determined that a pre-filing order is the only sanction that will protect the Court and the parties from further vexatious, harassing and duplicative lawsuits by McCann. McCann's track record in state court shows that she will continue to file frivolous and harassing lawsuits until an order is entered that restricts her ability to file further lawsuits.

CONCLUSION

The deficiencies in McCann's Complaint cannot be cured by amendment. An order dismissing all of McCann's claims with prejudice is appropriate.

Accordingly, IT IS HEREBY RECOMMENDED:

1. Defendants' Motions to Dismiss (Docs. 2, 10, 15, 31, 33, 40, 43) should be GRANTED.

2. All of McCann's claims should be DISMISSED with prejudice.

3. Defendants' Motions to Declare McCann a vexatious litigant (Docs. 2-1, 15-1, 31-1, 33-1, 43-1) should be GRANTED.

4. The District Court should enter a pre-filing order limiting McCann's litigation activities in this Court as follows:

a. McCann should be 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 should be 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.

5. The District Court should inform the Clerk that if McCann attempts to file any further lawsuits with this Court, the Clerk should lodge McCann's pleadings in a miscellaneous civil case entitled *In re Genet McCann* until the District Court determines whether the action should be allowed to proceed.

NOTICE OF RIGHT TO OBJECT TO FINDINGS AND RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

The parties may serve and file written objections to the Findings and Recommendations within 14 days of their entry, as indicated on the Notice of Electronic Filing. 28 U.S.C. § 636(b)(1). A district court judge will make a de

novo determination regarding any portion of the Findings and Recommendations to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district court judge.

DATED this 24th day of April, 2019.

John Johnston
United States Magistrate Judge

ER 2

FINAL JUDGMENT

(Dkt. 77)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

GENET McCANN,

Plaintiff,

vs.

WARD TALEFF, et al.,

Defendants.

CV 18-115-GF-BMM-JTJ

ORDER

BACKGROUND

Plaintiff Genet McCann ("McCann") alleges that three of her siblings conspired to exert unlawful control over cash that belongs to family-owned corporations. This underlying dispute has led to extensive litigation in Montana state courts. McCann's efforts in the Montana state court litigation have resulted in judgments against her. The Montana Supreme Court has disbarred McCann as a lawyer, declared McCann a vexatious litigant, and prohibited McCann from filing any further lawsuits in state court without prior approval.

McCann filed the present lawsuit as an effort to continue to litigate the family dispute in federal court. The named Defendants include the following parties: the state district court judge who presided over the guardianship and

conservatorship proceeding for McCann's mother; the state district judge's judicial assistant; the lawyers appointed by the Montana state court to serve as guardian and conservator for McCann's mother; the lawyers who participated in the Montana state disciplinary proceedings that resulted in McCann's disbarment as a lawyer; and the lawyers who opposed McCann's efforts in Montana state court to dissolve the family-owned corporations.

The Court today addresses Defendants' motion to dismiss and Defendants' motion that seeks an order declaring McCann a vexatious litigant in this Court. Magistrate Judge John Johnston conducted a hearing on these two motions on March 12, 2019. Judge Johnston issued Findings and Recommendations on April 24, 2019. Judge Johnston determined that McCann's Complaint could not be cured by an amendment. Judge Johnston recommended that all of McCann's claims be dismissed with prejudice. Judge Johnston further recommended that McCann be declared a vexatious litigant in federal court. McCann timely filed her objections to Judge Johnston's Findings and Recommendations on June 5, 2019. (Doc. 71.)

DISCUSSION

McCann sets forth the following six objections: McCann argues that (1) Judge Johnston violated McCann's First and Fifth Amendment rights to meaningful access and opportunity to be heard on her claims in federal court; (2)

Judge Johnston abused his discretion in taking judicial notice of the factual recitals in the 10 orders from Montana state courts; (3) Judge Johnston erred in law in not giving notice per Rule 12(b) and the opportunity to respond regarding judicial notice of the 10 orders from Montana state courts; (4) Judge Johnston violated McCann's First and Fifth Amendment rights to access the federal court by denying McCann a meaningful opportunity to be heard at the hearing; (5) Judge Johnston abused his discretion by concluding that amendment of McCann's complaint would be futile; and (6) Judge Johnston erred in recommending that McCann be declared a vexatious litigant.

The Court reviews de novo Findings and Recommendations to which a party timely objected. 28 U.S.C. § 636(b)(1). The Court reviews for clear error the portions of the Findings and Recommendations to which a party did not specifically object. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Where a party's objections constitute perfunctory responses argued in an attempt to engage the district court in a re-argument of the same arguments set forth in the original response, however, the Court will review for clear error the applicable portions of the Findings and Recommendations. *Rosling v. Kirkegard*, 2014 WL 693315 *3 (D. Mont. Feb. 21, 2014) (internal citations omitted).

A. Judicial Notice

Judge Johnston did not err in taking judicial notice of the underlying Montana state court cases. Defendants assert that the doctrines of res judicata and the *Rooker-Feldman* doctrine apply. Those doctrines required Judge Johnston to look at prior proceedings in the Montana state courts to determine whether McCann's claims must be precluded. Judge Johnston did not err in taking judicial notice of McCann's Montana state court cases to determine whether res judicata and the *Rooker-Feldman* doctrines applied to McCann's claims.

B. Motions to Dismiss

Defendants moved to dismiss all of McCann's claims under Rule 12(b)(1) and Rule 12(b)(6). Fed. R. Civ. P. 12(b)(1) authorizes a court to dismiss claims over which it lacks subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A plausible claim exists when "the plaintiff pleads factual content that allows the court to draw reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

1. Claims Against Sheila McCann, Paul McCann, Jr., William McCann, Mark Parker, and Guy Rogers.

McCann asserts claims for monetary relief against her siblings Sheila, Paul Jr. and William, and attorneys Parker and Rogers. Defendants assert that the doctrine of res judicata bars all of McCann's claims. The doctrine of res judicata bars a party from re-litigating claims that could have been brought in a prior action. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

The doctrine of res judicata deters "plaintiffs from splitting a single cause of action into more than one lawsuit." *Asarco LLC v. Atlantic Richfield Co.*, 369 P.3d 1019, 1023 (Mont. 2016). Montana law sets forth five elements that must be met under the doctrine of res judicata: (1) the parties or their privies must be the same in the first and second actions; (2) the subject matter of the actions must be the same; (3) the issues must be the same in both actions, or they must be issues that could have been raised in the first action, and they must relate to the same subject matter; (4) the capacities of the parties in both actions must be the same in reference to the subject matter and the issues raised in the actions; and (5) the first action must have ended with a final judgment on the merits. *Brilz v. Metropolitan General Ins. Co.*, 285 P.3d 494, 501 (Mont. 2012).

Judge Johnston correctly determined that Defendants met each element of res judicata. Judge Johnston first reasoned that each Defendant in this lawsuit represent either parties in *McCann 10* or are privies with persons or entities in

McCann 10. Judge Johnston next determined that both cases involve the same subject matter as both cases arise from the same McCann family dispute.

Third, Judge Johnston concluded that both *McCann 10* and this action arise out of "a common nucleus of operative facts." *See Ziolkowski v. Johnson Rodenburg & Lauinger*, PLLP, 2013 WL 1291615, at *7 (D. Mont. Mar. 27, 2013). As in *McCann 10*, McCann seeks a forced dissolution of the family corporations. Res judicata further bars McCann's alleged RICO claims that she did not raise in *McCann 10* because they arise from the same common nucleus of operative facts. McCann could have brought these claims in *McCann 10*.

Fourth, McCann alleges claims against the Defendants in both their individual and official capacities in this case and in *McCann 10*. McCann asserts these claims in her capacity as a shareholder of the family corporations in this case and in *McCann 10*. The capacities of the parties prove identical between the current action and *McCann 10*.

And lastly, Defendants satisfy the final element of res judicata because *McCann 10* concluded with a final judgment on the merits entered by the Montana District Court. The Montana Supreme Court affirmed the judgment. *McCann v. McCann*, 425 P.3d at 694. Judge Johnston correctly determined that the doctrine of

res judicata bars McCann's claims against Sheila, Paul, Jr., and William McCann, and attorneys Parker and Rogers.

2. Claims Against Cotter, Moog, Taleff and Axelberg

McCann asserts claims for monetary relief against Defendants Cotter, Moog, Taleff and Axelberg. McCann bases these claims upon the proceedings that resulted in her disbarment as a lawyer. McCann alleges misconduct against Cotter, Moog, Taleff and Axelberg in both their official and individual capacities.

a. Official-Capacity Claims

Defendants Cotter and Moog work for the Office of Disciplinary Counsel ("ODC"). Defendants Taleff and Axelberg serve on the Commission on Practice. The ODC and the Commission on Practice operate as agencies of the State of Montana. *See Rothstein v. Montana State Supreme Court*, 638 F. Supp. 1311, 1312 (D. Mont. 1986). McCann's claims against Cotter, Moog, Taleff and Axelberg, in their official capacities, constitute claims against the State of Montana. *Shaw v. State of Cal. Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 604 (9th Cir. 1986).

The Eleventh Amendment bars a plaintiff from suing a state in federal court for monetary damages. *Hirsh v. Justices of the Supreme Court of California*, 67

F.3d 708, 715 (9th Cir. 1995). This bar extends to official capacity claims against agents of a state. *Id.* Judge Johnston correctly determined that The Eleventh Amendment bars McCann's official-capacity claims against Defendants Cotter, Moog, Taleff and Axelberg.

b. Individual-Capacity Claims

Individual-capacity claims for monetary damages "seek to impose personal liability upon a government official for actions he takes under color of state law." *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 966 (9th Cir. 2010). The claims against Cotter, Moog, Taleff and Axelberg arise from acts that they undertook in the performance of their disciplinary proceeding duties. Cotter and Moog served as prosecutorial counsel for ODC. Taleff and Axelberg served as Chairpersons of the Commission on Practice that recommended McCann's disbarment.

Administrative law judges and attorneys who serve in disciplinary proceedings possess quasi-judicial immunity from individual capacity claims based on their actions in disciplinary proceedings. *Hirsh*, 67 F.3d at 715; *Clark v. State of Washington*, 366 F.2d 678, 681 (9th Cir. 1966). Cotter, Moog, Taleff and Axelberg retain quasi-judicial immunity from McCann's individual capacity claims based on

their actions in the disciplinary proceedings against McCann. *Hirsh*, 67 F.3d at 715.

1. Claims Against Judge Manley and Wold-McCauley

McCann asserts claims for monetary relief against Montana state court Judge Manley, and Wold-McCauley – Judge Manley's Judicial assistant. Judges possess absolute immunity from damage liability for judicial acts performed within the jurisdiction of their court. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). An action may strip a judge of judicial immunity in limited circumstances: (1) when the judge acts in the clear absence of all jurisdiction; or (2) the judge performs an act that is not judicial in nature. *Id.*

Judge Manley retained jurisdiction to preside over Paul McCann Sr.'s probate, and Ann Marie McCann's guardianship and conservatorship proceedings. Judge Manley's actions, of which McCann complains, prove judicial in nature. Judge Johnston correctly determined that Judge Manley retains judicial immunity from liability for his judicial acts performed within the jurisdiction of his court. *Ashelman*, 793 F.2d at 1075.

McCann's claims against Wold-McCauley prove similarly barred. Court personnel enjoy quasi-judicial immunity for acts "integral to the judicial process."

See Mullis v. U.S. Bankruptcy Court, Dist. Of Nevada, 828 F.2d 1385, 1390 (9th Cir. 1987). McCann fails to identify any act by Wold-McCauley that does not stand "integral to the judicial process." Judge Johnston correctly determined that Wold-McCauley possesses quasi-judicial immunity. *Mullis*, 828 F.2d at 1390.

2. Claims Against Casey Emerson

McCann asserts claims for monetary relief against Casey Emerson – Ann Marie McCann's court-appointed guardian. McCann alleges liability against Emerson involvement in allowing Ann Marie to travel to California on January 6, 2015. McCann alleges that Emerson allowed Ann Marie to travel to California on that date even though Emerson knew that the Montana state court had scheduled a hearing related to Ann Marie's guardianship for January 7, 2015.

Court-appointed guardians perform quasi-judicial functions. *See e.g., Smith v. DSHS*, 2010 WL 4483531, at *2 (W.D. Wash. Sept. 28, 2010). Court-appointed guardians possess immunity for their quasi-judicial functions. *Id.* Emerson retained judicial immunity when she acted as Ann Marie's guardian pursuant to a court order. Emerson functioned as an arm of the court when she allowed Ann Marie to travel to California.

The doctrine of collateral estoppel further bars McCann's claims regarding Emerson's decision to allow Ann Marie to travel to California. Collateral estoppel bars a party from re-litigating issues that a plaintiff raised or could have raised in a prior action. *Baltrusch v. Baltrusch*, 130 P.3d 1267, 1274 (Mont. 2006). The parties fully litigated in the Montana state court guardianship proceedings Emerson's decision to allow Ann Marie to travel to California. The Montana state district court determined that the hearing did not require Ann Marie's presence. McCann possessed a full opportunity to challenge the ruling of the Montana state district court. The doctrine of collateral estoppel bars the claims against Emerson. *Baltrusch*, 130 P.3d at 1274.

3. Claims Against Amanda James

McCann asserts claims for monetary relief against Amanda James. Emerson, Ann Marie's court-appointed guardian, hired James as Ann Marie's care giver. McCann alleges liability against James for traveling to California on January 6, 2015, with Ann Marie as her care giver. The doctrine of collateral estoppel bars claims against James for the same reasons regarding Emerson. *Baltrusch*, 130 P.3d at 1274.

4. Claims Against Doug Wold

McCann asserts claims for monetary relief against Wold. McCann alleges liability against Wold based on his conduct as a co-conservator. Court-appointed conservators possess quasi-judicial immunity for actions performed at the direction of the court. *Mosher v. Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978). Wold possesses immunity as a court-appointed co-conservator. *Mosher*, 589 F.2d at 442.

5. Claims for Injunctive Relief

McCann asserts the following three claims for injunctive relief: (1) an order directing the Commission on Practice to reinstate her license to practice law; (2) an order terminating the guardianship and conservatorship appointments made by the Montana state court; and (3) an order dissolving the family corporations. Defendants counter that the *Rooker-Feldman* doctrine bars McCann's claims for injunctive relief.

The *Rooker-Feldman* doctrine provides that federal district courts possess no jurisdiction to review final judgments of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The *Rooker-Feldman* doctrine requires that the following four elements be satisfied: (1) the plaintiff must have lost in the underlying state court proceeding; (2) a final judgment must have been

rendered in the state court proceeding before the federal lawsuit was filed; (3) the plaintiff must complaint that the state court judgment has caused her to suffer injuries; and (4) the plaintiff's complaint must invite the federal court to review and reject the final judgment of the state court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Judge Johnston correctly determined that Defendants satisfy all four of the *Rooker-Feldman* criteria. McCann lost in the Montana state court guardianship proceedings. *See In re Guardianship of A.M.M.* 356 P.3d at 481; *In re Guardianship of A.M.M.* 380 P.3d at 738-746. McCann further lost in the Montana state disbarment proceeding and the lawsuit referred to as *McCann 10*. Second, the Montana state courts entered final judgments in all Montana state court proceedings before McCann filed her Complaint in the instant case. McCann next alleges that she suffered injuries as a result of the adverse decisions that she received in the Montana state court proceedings. Finally, the court would be forced to reject the final decisions of the Montana Supreme Court in order to grant McCann the equitable relief that she seeks. Judge Johnston correctly concluded that Defendants satisfied each element of the *Rooker-Feldman* doctrine. *Exxon Mobil Corp.*, 544 U.S. at 284. The *Rooker-Feldman* doctrine bars McCann's claims for injunctive relief.

A. Motion Requesting that McCann be Declared a Vexatious Litigant

Defendants move for an order declaring McCann a vexatious litigant. Every citizen possesses a right to access the courts under the First Amendment to the United States Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Litigants may not abuse the judicial system, however, by filing numerous actions that prove frivolous or reflect a pattern of harassment. *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990).

District courts possess the authority to stop abusive litigation by vexatious litigants by entering "pre-filing orders" that restrict the litigant's ability to file further lawsuits. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). The district court must take the following steps to enter a pre-filing order: (1) give the litigant notice and opportunity to be heard; (2) compile an adequate record for appellate review; (3) make substantive findings about the frivolous or harassing nature of the litigant's litigation history; and (4) tailor the order in a way that fits "the specific vice encountered." *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014).

Judge Johnston correctly evaluated the four pre-filing order factors. Judge Johnston provided McCann with the required notice and opportunity to be heard.

Judge Johnston advised McCann of his intent to consider whether she constituted a vexatious litigant on January 29, 2019. (Doc. 53.) Judge Johnston informed McCann that it would conduct a hearing on March 12, 2019. McCann filed a brief and presented oral argument at the hearing. (Docs. 36, 62.) Judge Johnston correctly determined that Defendants satisfied the first factor. *Ringgold-Lockhart*, 761 F.3d at 1062.

The Court set forth an adequate record for review on appeal by identifying the prior litigation that warranted the pre-filing order. *See Molski*, 500 F.3d at 1059. McCann's history of litigation includes ten proceedings filed in both Montana state court and federal court. These proceedings, known as *McCann 1* through *McCann 10*, constitute vexatious, harassing, and duplicative proceedings. *Molski*, 500 F.3d at 1057. Judge Johnston correctly determined that Defendants satisfied the second element. *Ringgold-Lockhart*, 761 F.3d at 1062.

The main factor to be considered in the vexatious litigant analysis requires "substantive findings as to the frivolous or harassing nature of the litigant's actions." *Molski*, 500 F.3d at 1059. Judge Johnston reasoned that McCann's litigation history includes both frivolous and duplicative litigation. Judge Johnston determined that the litigation history includes three appeals related to Ann Marie's guardianship and conservatorship proceedings, four frivolous attempts to challenge

her disbarment in federal court, and two lawsuits against the Montana Supreme Court. Judge Johnston correctly determined that McCann seeks to litigate issues that the parties have resolved, or could have resolved, in *McCann 10*. McCann's litigation conduct has caused needless expense to the parties, and unnecessary burden on the Court. Judge Johnston correctly concluded that McCann's allegations of a criminal enterprise that involves a sitting Montana district court judge, quasi-judicial officials, and well-respected lawyers proves patently frivolous and harassing. McCann's challenges did not succeed in state or federal court. McCann possesses training in the law. McCann should understand that the repeated assertion of unsupported claims in fact prove unjustifiable. McCann's conduct demonstrates clear frivolous litigation and harassment. *Ringgold-Lockhart*, 761 F.3d at 1062.

Judge Johnston correctly determined under the fourth factor that a pre-filing order constitutes the only sanction that will protect the Court and the parties from further vexatious, harassing, and duplicative lawsuits from McCann. McCann's conduct in state court demonstrates that she will continue to file frivolous and harassing lawsuits until the Court enters an order that restricts her ability to file further lawsuits. *Molski*, 500 F.3d at 1059. The Court agrees with Judge Johnston's

conclusion under the fourth factor that a pre-filing order proves proper. *Ringgold-Lockhart*, 761 F.3d at 1062.

CONCLUSION AND ORDER

The deficiencies in McCann's Complaint cannot be cured by amendment. An order dismissing all of McCann's claims with prejudice proves appropriate.

ACCORDINGLY, IT IS ORDERED:

1. Defendants' Motions to Dismiss (Docs. 2, 10, 15, 31, 33, 40, 43) are GRANTED.

2. All of McCann's claims are DISMISSED with prejudice.

3. Defendants' Motions to declare McCann a vexatious litigant (Docs. 2-1, 15-1, 33-1, 43-1) are GRANTED.

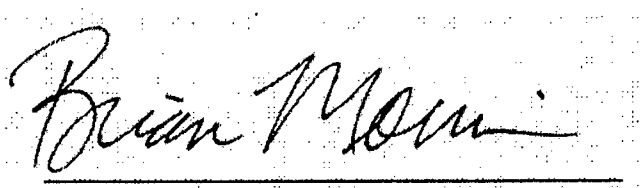
4. A pre-filing order shall be entered limiting McCann's litigation activities in this Court as follows:

   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.

5. 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 Court determines whether the action should be allowed to proceed.

DATED this 23rd day of July, 2019.



Brian Morris
United States District Court Judge

ER 3

POST-JUDGMENT ORDER

(Dkt. 84)

ER 3

POST-JUDGMENT ORDER

(Dkt. 84)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

GENET MCCANN

Plaintiff,

vs.

WARD TALEFF, ET AL.,

Defendants.

CV 18-115-GF-BMM

ORDER

This Court previously dismissed with prejudice all of Plaintiff Genet McCann's (McCann) claims. (Doc. 77 at 17.) McCann timely filed a notice of appeal of that decision on August 26, 2019. (Doc. 81.) McCann also filed two separate motions in this Court under Federal Rules of Civil Procedure 60(b)(4) and 15 to set aside the previous dismissal and grant her leave to file a first amended complaint. (Doc. 79 and Doc. 82.)

"The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012) (holding that under *Griggs* the appellate court has jurisdiction over appeals from a

district court order); *BNSF Ry. Co. v. Feit*, No. 10-cv-54, No. 11-cv-01, 2014 WL 12769807, at *1 (D. Mont. Apr. 2, 2014) (same). McCann's Notice of Appeal divests this court of jurisdiction over her Rule 60 motion because the motion involves the same issues now on appeal.

ORDER

Accordingly, **IT IS ORDERED** that McCann's Rule 60 Motion to Set Aside Judgment and Request Leave to Amend (Doc. 79) and McCann's Rule 60 Motion to Set Aside Judgment and Request Leave to Amend (Doc. 82) are **DENIED**, subject to renewal following the Ninth Circuit Court of Appeals' decision on the pending appeal.

DATED this 28th day of August 2019.

Brian Morris
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

GENET MCCANN

Plaintiff,

vs.

WARD TALEFF, ET AL.,

Defendants.

CV 18-115-GF-BMM

ORDER

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