No. 23-1040

IN THE

# Supreme Court of the United States





SCOTT SMITH,

*Petitioner,*

*v.*

ENTREPRENEUR MEDIA, INC.,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The United States Court of Appeals for the Ninth Circuit dismissed Petitioner's appeal holding that the questions raised in the appeal were so insubstantial as not to require further argument. The district court denied Petitioner's motion to vacate a renewal of judgment applying the federal rules of civil procedure.

The question presented, on which there appears to be no federal case on point, and the matter is one of first impression, is:

Did the United States Court of Appeals for the Ninth Circuit err in granting Respondent's Motion to Dismiss Appeal by failing to consider Petitioner's arguments that the district court erred by applying federal statute instead of State of California substantive law for vacating a renewal of judgment?

## PARTIES TO THE PROCEEDING

Petitioner Scott Smith was appellant in the United States Court of Appeals for the Ninth Circuit.

Respondent Entrepreneur Media Inc. was appellee in the United States Court of Appeals for the Ninth Circuit.

A corporate disclosure statement is not required because Petitioner Scott Smith is not a corporation. *See Sup. Ct. R. 29.6.*

## DIRECTLY RELATED PROCEEDINGS

*Entrepreneur Media, Inc. v. Scott Smith*, No. 22-55459 (9th Cir. order entered October 20, 2023).

*Entrepreneur Media, Inc. v. Scott Smith*, No. 2:98-cv-03607-PA-PLA (C.D. Cal. judgments entered on July 10, 2003 and August 13, 2003).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Smith ("Petitioner") respectfully submits this Petition for Writ of Certiorari from the dismissal of an appeal, stemming from his appeal of the United States District Court, Central District of California's April 8, 2022 order in Case No. 2:98-cv-03607-PA-PLA, denying in part and granting in part Petitioner's Motion to Vacate Renewal of Judgment, or, Alternatively, Correct the Judgment ("Motion.").

This Petition challenges not only the October 20, 2023 order on dismissal of appeal, but also the underlying April 8, 2022 order denying Petitioner's Motion to vacate the renewal of Respondent

Entrepreneur Media Inc.'s ("Respondent") 2003 judgment. *This Petition seeks to settle federal question throughout the district courts with consistency on the proper application of supplemental jurisdiction law related to judgment renewals.* Finally, there are many other grounds for reversal, as is presented in the Petition below.

## OPINIONS BELOW

The Ninth Circuit order is reproduced at App. 1a. The district court's order is reproduced at App. 2a-7a.

## JURISDICTION

The Ninth Circuit entered judgment on October 20, 2023. App. 1a. After an extension was granted on January 16, 2024, Petitioner timely filed this petition on March 18, 2024. This Court has jurisdiction under *28 U.S.C. § 1254.*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are at App. 8a–10a.

## I. THE DISTRICT COURT PROCEEDINGS.

Judgment entered in the district court matter on July 10, 2003 in favor of Respondent in the amount of $1,685,260.44. The district court entered an order granting Respondent's motion for attorneys' fees and related costs on August 13, 2003. Respondent

previously improperly renewed the judgment on February 1, 2012. Respondent submitted another improper application to renew the judgment on January 20, 2022. The district court clerk entered notice of the renewal on January 25, 2022; in an erroneous amount of $3,366,365.48 due to Respondent's use of an unlawful interest rate.

Petitioner timely filed a Motion to vacate the renewal of judgment on February 24, 2022. Respondent opposed the Motion and requested judicial notice. The district court mistakenly ruled that Petitioner contended the judgment should be vacated in its entirety "based on previous and ongoing misconduct and fraud." That was wrong; Petitioner's Motion was clearly aimed at vacating the judgment renewal nullifying judgment enforcement.

After Respondent filed its opposition to the Motion, Petitioner filed an ex parte application for enlargement of time to file reply. Petitioner requested additional time to obtain a transcript of the conference of counsel that the district court ordered after Petitioner filed his Motion, he was searching for counsel to represent or assist him, and he anticipated filing a motion to disqualify Respondent's counsel prior to the district court's consideration of his Motion.

Following the order of the district court, Petitioner filed his reply because of the risk of having his ex parte application denied, and then not having a reply considered. Petitioner also objected to Respondent's request for judicial notice. The district

court concluded that the matter was fully briefed and that Petitioner's ex parte application was moot. The district court stated that even if it were not moot, that none of the reasons Petitioner relied upon for an extension of time to file a reply warranted an additional continuance.

Considering the matter was adequately briefed for the district court to assess the merits of the Motion, the district court ruled that neither the participation of counsel, should Petitioner obtain one, nor a transcript of the conference of counsel that occurred after appellant filed his Motion to Vacate the Renewal of Judgment, would alter the district court's analysis of the pending Motion to Vacate the Renewal of Judgment. (App.2a-7a.)

Additionally, the district court noted that Petitioner previously filed a motion to disqualify plaintiff's counsel in an action pending in a State of California Superior Court. Petitioner objected to Respondent's request for judicial notice of that action. Inexplicably, the district court found that the State of California Court denied both the motion to disqualify and Petitioner's motion for reconsideration. The district court ruled that at a minimum because the grounds on which Petitioner sought to disqualify Respondent's counsel apparently existed for several years without Petitioner moving to disqualify Respondent's counsel in the Ninth Circuit action, and do not go to the merits of the 2003 judgment, the district court would not delay its consideration of the motion to vacate. Petitioner contends error; there was no motion to disqualify before the district court, the

district court considered hearsay on the judicial notice request, Petitioner moved to vacate the renewal, so respectfully Petitioner requests review here. Petitioner had always maintained that there were recent issues that merited disqualification of Respondent's counsel, but the district court misconstrued the facts. (App. 2a-7a.)

Petitioner also contends that because, as he pointed out in his briefing, Respondent has engaged in years of egregious misconduct that includes, but is not limited to, intentional violations and departure from court local rules that affected Petitioner's substantial rights; therefore, reversal was required. "a departure from local rules that affects substantial rights requires reversal." *Professional Programs Group v. Department of Commerce,* 29 F.3d 1349, 1353 (9th Cir. 1994) (internal quotation marks omitted); see *C.D. Local Rule 5.4.3.1*; *U.S. Const., amend XIV, § 1.*

Importantly, and the main issue in this Petition, in ruling on the motion, the district court relied only on *Fed. R. Civ. P. 60(b)* in its decision, failed to apply State of California substantive law, specifically, *California Code of Civil Procedure section 683.170(a)* on renewal of judgments, failed to do an *Erie Doctrine* analysis, and failed to support its reasoning for applying federal procedural law with any points and authority; stating:

> Although Federal Rule of Civil Procedure 69(a) adopts state law procedures for certain aspects of

> proceedings in execution of judgments, the Court concludes that the substantive law supplied by Federal Rule of Civil Procedure 60(b) related to relief from judgments, and not the California Code of Civil Procedure, applies to Defendant's Motion to Vacate. (App. 2a-7a.)

The district court denied Petitioner's Motion in part, and granted it in part on April 7, 2022. Petitioner contends *Fed. R. Civ. P. 69(a)* specifically applicable, yet it was not properly applied to Petitioner's Motion. Because there is egregious prejudicial error throughout, Petitioner must respectfully request review of the United States Court of Appeals for the Ninth Circuit's order on dismissal, as well as the district court's order, reversal and/or, remand with order to vacate the renewal of judgment in this matter, as well as other requests described herein to settle conflicting law throughout the federal districts with consistency (App. 1a, 2a-7a.) Petitioner contends prejudice and error here, and respectfully requests review by Writ of Certiorari.

## II. IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner sought review of the district court's orders on May 5, 2022 to the United States Court of Appeals for the Ninth Circuit. Petitioner filed his opening brief on May 5, 2023. On August 7, 2023, Respondent filed a motion to dismiss the appeal. On October 2, 2023, Petitioner filed an opposition. On October 20, 2023, the Ninth Circuit issued an order

dismissing Petitioner's appeal, holding that "the questions raised in this appeal are so insubstantial as not to require further argument," without even considering and reaching the federal questions of Petitioner's appeal. (App. 1a.)

## III. STATEMENT OF THE CASE

Respondent obtained a judgment against Appellant in 2003 based on Respondent's claims of owning exclusive trademark rights to the word "entrepreneur." The yearslong legal battle bankrupted Respondent, the judgment is uncollectible; enforcement has been minimal; yet, egregiously abusive and unethical. Respondent merely uses the court system as a hammer to harass and intimidate Petitioner. Thus, the district court should have granted Petitioner's Motion. There was ample evidence proffered.

For example, the Appellate Division of the San Francisco Superior Court and Honorable Richard B. Ulmer Jr., Presiding Judge, condemned the conduct of Respondent and its attorneys, quote, in part:

> [A]ppellant's litigation tactics and practices were "over the top."... acting in bad faith and motivated by interests other than obtaining a fair and just result, appellant used the court for sport, to bully and harass respondent.... Appellant, the judgment creditor, engaged in abusive conduct... The record demonstrates that animus... drove the litigation. Appellant's demonstration of

> animus taxed and exhausted respondent, and that was the very purpose of the exercise..... the trial court found the protracted litigation over nearly worthless assets was unconscionable...made clear its judgment that the case was overlitigated and that appellant used the case to "hammer against Mr. Smith."

Respondent improperly renewed the judgment in 2012. Respondent submitted an improper application to renew the judgment again on January 20, 2022; Petitioner was noticed on January 25, 2022. Respondent attempted to use an illegally high interest rate to pad the renewed judgment by a whopping **$1,502,772.12**, evidencing Petitioner's arguments of abuse and harassment; not to mention obvious violations of federal and State of California law, including perjury. Petitioner timely filed a Motion to vacate the judgment renewal relying mainly on State of California law. He provided a convincing basis for vacating the judgment renewal. Additionally, Petitioner's Motion was unopposed by Respondent on critical issues. Yet, the district court denied Petitioner's Motion by improperly applying only federal law; Petitioner timely filed his notice of appeal to the Ninth Circuit. This error and the underlying federal questions necessitate review to settle inconsistency throughout federal districts. Petitioner contends procedural and prejudicial error requiring reversal by the misapplication of federal stare decisis.

## IV. SUMMARY OF ARGUMENT

The district court abused its discretion under *Rule 60(b)*, the *Erie Doctrine*, and California substantive law by failing to apply the correct legal standards, and instead turning the very lenient standards of review on their head. The district court made findings that were illogical, implausible and without adequate support in the record. The district court improperly discounted numerous procedural, and due process violations by failing an *Erie Doctrine* analysis as it applies to supplemental, and possibly, pendent claims under California substantive law for renewal of judgments. Clearly, Petitioner was primarily moving the district court to vacate the judgment renewal, not merely vacate the underlying judgment, and California substantive law under *California Code of Civil Procedure section 683.170(a)* applied because there is no applicable federal law or standard. *Rule 60(b)* is inapplicable.

## V. RESPONDENT'S CONTINUED FAILURE TO COMPLY AND APPLICATION OF LOCAL RULE PREJUDICED PETITIONER EVIDENCING BIAS.

"...this regard is not a petty requirement. Improperly filing briefs in non-text searchable format ... creates unnecessary delay in the creation of orders and responsive briefs. ***Compliance is not optional.*** *AZ Holding, L.L.C. v. Frederick* (D. Ariz., Nov. 24, 2009, No. CV-08-0276-PHX-LOA) [pp. 2] (emphasis added)

Respondent has repeatedly and persistently filed documents that violate the text-searchable .pdf requirement. *C.D. Cal., Local Rule 5-4.3.1.* Respondent has done so for over a decade, including in over 100 filings. Respondent filed its January 20, 2022 application for renewal of judgment in willful violation of the district court's local rules; the document was not text-searchable, plus used an unlawful and rule-violating interest rate. And the application requires a verification under penalty of perjury. "Compliance is not optional." Respondent's conduct is meant to relentlessly harass and prejudice Petitioner and his substantial rights; having to spend an extraordinary amount of time, "to unnecessarily retype the portion of the brief to be quoted or referenced and creates unnecessary delay in the creation of orders and responsive briefs," *supra.* This is just one of the many tactics Respondent and its attorneys use to "hammer" on Petitioner to his detriment.

Petitioner has brought this issue to the attention of Ninth Circuit, the district court, and several other State Court venues. It was the issue in two (2) of Petitioner's appeals. Unfortunately, the district court refuses to enforce its required text-searchable rule against Respondent. Even though the district court was definitely not "without power to enforce its rules." The local rules authorize sanctions for counsel's failure "to comply with these Rules." C.D. Cal. *Local R. 11-9, 83-7(a)-(c). Klemm v. Astrue,* (9th Cir. 2008) 543 F.3d 1139, 1143 fn. 3. Respondent's conduct can only be considered disrespectful and intentional violations of the California Code of

Professional Responsibility for Attorneys, meant to harass and prejudice Petitioner and affect his substantial rights in litigating against Respondent. Petitioner pointed out that electronic filing is a benefit not to be abused; as a "pro se" Petitioner even had to seek the district court's permission to electronic file his papers. Also, as a "pro se," Respondent was informed that he could have his electronic filing privileges revoked for violating Court rules. Affecting "substantial rights requires reversal." *Snyder v. HSBC Bank, USA, N.A.* (D. Ariz., July 13, 2012, No. CV-12-16-PHX-LOA) [pp. 2]; "the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Yet, the district court continues to allow Respondent to willfully violate its required local rules.

Furthermore, Local rules are "laws of the United States," *United States v. Hvass*, 355 U.S. 570, 575 (1958), and a district court's failure to comply with a local rule may be grounds for reversal if prejudice results. *In re Matter of Telemart Enters.*, 524 F.2d 761, 766 (9th Cir. 1975). *U.S. v. Hernandez*, 251 F.3d 1247 (9th Cir. 2001).

Petitioner must also point out that the district court's local rule, *C.D. Cal., L.R. 5-4.1.1,* which inexplicably burdens "pro se" litigants with the requirement of having to seek leave of court to apply for permission to electronically file documents, and risk having the privilege revoked, ***evidences inherently biased rules and practices, and unequal treatment of all "pro se" litigants***, as is

shockingly obvious in this matter. *U.S. Const., amend. XIV, § 1.*

## REASONS FOR GRANTING THE PETITION

"Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Payne v. Tennessee* (1991) 501 U.S. 808, 827.

Thus, the Ninth Circuit's decision, as well as the district court's, would unconstitutionally disenfranchise millions of litigants throughout its districts, and likely embolden, and be used as a template, by unethical and abusive debt collection agencies, to disenfranchise millions of litigants nationwide into a "Modern-Day Debtor's Prison" when defending against unlawful judgment renewals and debt collection tactics. Which is already happening to Petitioner.

## VI. THE ISSUES PRESENTED IN THIS PETITION ARE OF EXCEPTIONAL IMPORTANCE AND URGENTLY REQUIRE THIS COURT'S PROMPT RESOLUTION.

The Ninth Circuit erred by summarily dismissing Petitioner's appeal. The Ninth Circuit usurped Congressional authority and misinterpreted and misapplied federal law and stare decisis including, but not limited to, the *Erie Doctrine, Rules Enabling (28 U.S.C. § 2802)* and *Rules of Decision (28 U.S.C. § 1652) Acts, 14th Amendment, U.S.*

*Constitution*, and questions of which Appellant contends implicate *Article I, § I, Article III, § II, U.S. Constitution* and applicable state substantive law as applied to renewing judgments. (App. 1a, 2a-7a.)

## A. RULE 60(b) and RULE 69(a)(1)

*Fed. R. Civ. P. 60(b)* provides in pertinent part:

> GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and ***just terms***, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed

> or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief. [Emphasis added].

Petitioner contends order, or proceeding applicable to Respondent's improper judgment renewal application; thus, Petitioner's Motion was misconstrued by the district court. Petitioner emphasizes "misconduct by an opposing party." The district court relied on *Lyon v. Agusta S.P.A* (9th Cir. 2001) 252 F.3d 1078, 1088. That case is distinguished. *Lyon* had nothing to do with judgment renewal; it dealt with a wrongful death action and plaintiff's motion to vacate its prior judgment under *Fed. R. Civ. P. 60(b)(6)* so that they could amend their complaint to assert the exception involving knowing misrepresentations to the FAA. *Lyon v. Agusta S.P.A, supra*, 252 F.3d 1088.

The district court also erroneously relied on another distinguished matter, *Lemoge v. U.S.* (9th Cir. 2009) 587 F.3d 1188, 1196, as to "reasonable time" in its erred ruling on what is clearly Petitioner's Motion to vacate the "renewal" of the judgment in this action. *Lemoge* also had nothing to do with renewal of judgments, rather, the dismissal of a personal injury action. ***In fact, there appears to be no federal case on point, and the matter is one of first impression.***

The district court noted in its ruling *Fed. R. Civ. P. 69(a)(1)*, but should have relied on that statute

in its analysis to grant Petitioner relief; but, without any real substantive explanation or analysis as to why it did not, and why it instead chose to solely rely on *Fed. R. Civ. P. 60(b)*, constitutes error and an abuse of discretion.

Clearly, "(*"Rule 69(a)*") "governs execution proceedings in federal courts." *Hilao v. Estate of Marcos*, 95 F.3d 848, 851 (9th Cir. 1996). *Rule 69(a)* provides in part that the procedure to execute a judgment "shall be in accordance with the practice and procedure of the ***state*** in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable." *Id. Paul Revere v. U.S.* (9th Cir. 2007) 500 F.3d 957, 960 [emphasis added]. And renewal of a judgment is enforcement; *Rule 60(b)* is inapplicable.

"California law, which applies to these proceedings under *Fed. R. Civ. P. 69(a)*, has established procedures for renewal of judgment in... ("The federal court applies state law...") *Med. Provider Fin. Corp. v. San Diego Ctr. for Women's Health & Primary Care Med. Grp., Inc.* (S.D. Cal., May 2, 2017, Case No.: 07-mc-00413) [pp. 4-5]; see *Meadows v. The Dom. Rep.* (N.D. Cal., Mar. 11, 2024, 80-cv-4626) [pp. 1].

The district court recognized and mentions *Rule 69(a)* in its ruling, citing *In re Levander*, 180 F.3d 1114, 1121 (9th Cir. 1999); but the district court deviated and instead erroneously relied on *Fed. R. Civ. P. 60(b)* without proper explanation and

authority. The district court also ruled that if it had applied State of California law, it still would have ruled against Petitioner. However, as unanalyzed there was no authority relied on or explanation on how this would have been achieved. Given Petitioner's arguments below, the district court still needed to conduct an *Erie* analysis on whether or not State of California substantive law would apply and be guiding, but failed to do so. The district court's sole use of *Fed. R. Civ. P. 60(b)* is misplaced and error, constituting the grounds for this appeal and a reversal. (App.1a.)

### 1. Respondent's Renewal of Judgment.

Respondent filed its second defective application for renewal of judgment on January 20, 2022. Notice was given to Petitioner on January 25, 2022.

### 2. The District Court Failed to Apply The Correct Federal Rules.

Because the district court failed to make the specific factual findings needed to properly apply the law, it requires reversal of the district court's order and judgments resulting from it. *Matkovich v. Costco Wholesale Corp.* (9th Cir., Apr. 11, 2019, No. 17-56440) [pp. 3]; *Fed. R. Civ. P. 52.* The district court's ruling and analysis is devoid of an *Erie* Analysis, factual findings regarding Petitioner's ex parte application to continue briefing and his desires to file a motion to disqualify Respondent's counsel. The district court ruled on a motion to disqualify counsel

without a proper notice and motion. The district court also improperly considered hearsay for a request for judicial notice. *Fed. Rules of Evid., Rule 801(c); U.S. Const., amend., XIV, § 1.*

### 3. Background of Rule 60. It's Inapplicability.

First promulgated in 1937, Rule 60 of the Federal Rules of Civil Procedure authorizes relief from final judgments for a wide variety of reasons. **Rule 60(a)** authorizes district courts to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

For example, district courts can grant Rule 60(a) relief when they accidentally swap two digits awarding damages on the verdict form or make a math error. *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787, 795-96 (2d Cir. 1986); 11 Charles Allen Wright et al., *Federal Practice and Procedure* § 2854 & n.12 (3d ed. updated Apr. 2021) (Wright & Miller). The district court may correct such mistakes "on its own, with or with-out notice," or the parties can file a motion. *Fed. R. Civ. P. 60(a).* The court can provide relief "whenever" the mistake is found, although leave from the court of appeals is required if an appeal is pending. *Id.*

**Rule 60(b)**, in turn, lets a party "seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Parties must file

a motion, which courts will grant "on just terms" for the following reasons:

**Rule 60(b)(1)** covers "mistake, inadvertence, surprise, or excusable neglect." For example, if parties no-show because their lawyer misunderstood what day the judge said the trial would begin, that "mistake or excusable neglect" warrants relief. *Ellingsworth v. Chrysler*, 665 F.2d 180, 184 & n.3 (7th Cir. 1981).

**60(b)(2)** authorizes relief for "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under *Rule 59(b).*" For example, where a prison warden originally prevailed against a failure-to-train claim, *Rule 60(b)(2)* provided relief when new evidence of inadequate training emerged months after judgment. *Luna v. Bell*, 887 F.3d 290, 292-93 (6th Cir. 2018).

**60(b)(3)** authorizes relief in cases of "fraud . . . , misrepresentation, or misconduct by an opposing party," for instance when a plaintiff testified at trial that he was wrongfully terminated based on his back injury, but the injury was fictitious. *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 364 (5th Cir. 2018).

**60(b)(4)** permits relief if "the judgment is void," for instance because the court lacked personal jurisdiction. *Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1163 (7th Cir. 2015).

**60(b)(5)** provides for relief if "the judgment has been satisfied, released, or discharged," if the judgment "is based on an earlier judgment that has been reversed or vacated," or if "applying [the judgment] prospectively is no longer equitable." Thus, if parties reach separate set-elements, courts may apply Rule 60(b)(5) to reduce the total damages awarded because the judgment is partially "satisfied." *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 (11th Cir. 2008). This provision like-wise justifies relief if, for instance, a court enters a consent decree restructuring a prison system and "changed factual conditions" or "unforeseen obstacles" render the terms impracticable. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992).

**60(b)(6)** is a catch-all provision, authorizing relief for "any other reason that justifies relief." But *Rule 60(b)(6)* demands an additional step: the movant must also show "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

**Timing**. *Rule 60(b)* sets different deadlines for different motions. Movants have a non-extendable one-year deadline to file motions under *60(b)(1)* for "mistake, inadvertence, surprise, or excusable neglect," motions under *60(b)(2)* for newly discovered evidence, and motions under 60(b)(3) identifying fraud. *Fed. R. Civ. P. 6(b)(2), 60(c)(1).* By contrast, movants can file all other *Rule 60(b)* motions "within a reasonable time." *Fed. R. Civ. P. 60(c)(1).*

**Other bases for relief.** Rule 60 "abolished" various common-law and equitable forms for seeking relief from final judgments, *i.e.*, "bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela." *Fed. R. Civ. P. 60(e).* There was no need to preserve these separate writs, because *Rule 60(b)* incorporated all of the grounds these writs covered. *Fed. R. Civ. P. 60(b)* advisory committee's note to 1946 amendment. Conversely, Rule 60 does not affect courts' authority to grant certain other forms of relief, such as "an independent action to relieve a party from a judgment" to prevent grave injustice. *Fed. R. Civ. P. 60(d)(1)*; *United States v. Beggerly*, 524 U.S. 38, 47 (1998).

Given Rule 60's background, it is not hard to see that the district court erred and abused its discretion in solely relying on Rule 60 in denying relief. Yet, there was room to grant Petitioner relief using Rule 60, even as to timing. *Fed. R. Civ. P. 60(c)(1).* (App. 2a-7a.)

## B. THE DISTRICT COURT ERRED WHEN IT APPLIED FEDERAL LAW INSTEAD OF CALIFORNIA SUBSTANTIVE LAW.

### 1. The District Court's Finding Was Not Supported By The Record.

Petitioner contends the district court's finding was not supported by the record. *Stormans v. Selecky* (9th Cir. 2009) 586 F.3d 1109, 1136. Simply put, the district court just did not comprehend

Petitioner's "Motion."

**2. The District Court Failed to Analyze Petitioner's Motion to Vacate Under the Erie Doctrine. The Erie Doctrine Applies Even Though This Matter is Not a Diversity Action. Supplemental Jurisdiction Applies.**

Under the *Erie* doctrine, a federal court exercising supplemental jurisdiction applies state substantive law and federal procedural law. *Erie R.R. Co v. Tompkins*, 304 U.S. 64 (1938); *see Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (holding that *Erie* extends to cases heard under supplemental jurisdiction; *Tri-Dam v. Yick* (E.D. Cal., July 28, 2016, No. 1:11-CV-01301 AWI-SMS) [pp. 8]; 28 U.S.C. § 1367.

It is well established that "[u]nder the *Erie* doctrine [*Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, *supra*], federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.,*518 U.S. 415, 427, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659 (1996); *In re Larry's Apartment, L.L.C.* (9th Cir. 2001) 249 F.3d 832, 837. The district court merely stated:

> Although Federal Rule of Civil Procedure 69(a) adopts state law procedures for certain aspects of proceedings in execution of judgments, the Court concludes that the substantive

> law supplied by Federal Rule of Civil Procedure 60(b) related to relief from judgments and not the California Code of Civil Procedure, applies to Defendant's Motion to Vacate.

"A successful motion under section 683.170 vacates only the renewal of the judgment thereby precluding its extended enforceability under section 683.120." *Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 203-04. This is the point Petitioner makes on this Petition for Writ of Certiorari in establishing the Ninth Circuit's and district court's errors by total reliance on federal law. *There is no applicable federal law on judgment renewal procedure.* Judgment set aside, yes, not otherwise. Petitioner moved the district court to vacate the *renewal* of the judgment to preclude its extended enforceability; not merely to *vacate* the original underlying judgment pursuant to *Fed. R. Civ. P. 60(b).* Even if somehow inferred in part a relief from judgment, or order, the district court should have applied the correct legal standard for Petitioner's relief in vacating the renewal when he provided the forum state law to the district court.

*There is no federal law that allows a judgment debtor to obtain this type of relief.* This is why *Rule 69* is exclusively applicable. Petitioner's moving papers stated, "...including but not limited to..." Petitioner was not merely moving to vacate the 2003 judgment in this case; but rather, the renewal. The district court should have construed this, constituting error. The district court erred by not

applying the specific State of California law on vacating the renewal of judgments.

### 3. The District Court Failed to Correctly Apply the Rules Enabling Act to Petitioner's Motion. The U.S. Constitution is Implicated.

Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law. See *Hanna* v. *Plumer*, 380 U.S. 460, 469-474 (1965); *Burlington Northern R. Co.* v. *Woods*, 480 U.S. 1, 4-5 (1987). Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies. *Gasperini v. Center for Humanities, Inc.*, supra, 518 U.S. 428 fn. 7. Here, renewal of judgments as the important state interest.

Finding no federal rule on point, a court of appeals held that a State law is "substantive" within the meaning of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, supra; *Shady Grove Orthopedic v. Allstate Ins. Co.* (2010) 559 U.S. 393, 398.

***Such are the circumstances here; there is no federal rule on point regarding applications and vacating the judgment renewal.*** Enforcement of judgments; yes. The district court somehow relied

on *Rule 60(b)*; without adequate explanation. Therefore, *California Code of Civil Procedure section 683.170(a)* should correctly apply. The district court erred in not recognizing this important federal question. Writ of Certiorari should be granted.

## C. THE LOWER COURTS ERRED.

### 1. State Substantive Law Was Applicable to Petitioner's Motion.

When faced with a state law that may be classified as either substantive or procedural, the court must determine whether "there is an applicable federal rule of civil procedure." *Id.* If there is an applicable federal rule, "and if that rule is valid under the Rules Enabling Act, 28 U.S.C. § 2072, that rule should be applied." (*Zamani v. Carnes* (9th Cir. 2007) 491 F.3d 990, 995).

The applicable federal rule was *Rule 69(a),* which provides, in pertinent part:

> The *procedure on execution,* in proceedings *supplementary to and in aid of a judgment,* and in *proceedings on and in aid of execution shall* be in accordance with the practice and procedure of the *state* in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

*Zamani v. Carnes*, supra, 491 F.3d 996. [Emphasis added]

("classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor"); *Lundgren v. McDaniel,* 814 F.2d 600, 605-06 (11th Cir. 1987) (observing that "[t]he distinction between substance and procedure has proved highly elusive"). In fact, placing a state rule within the substance-procedure continuum is generally unhelpful in determining whether Erie commands its application in federal court. *See, e.g., Hanna,* 380 U.S. at 471, 85 S.Ct. at 1144 (quoting *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945)) ("The line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'"); *Edelson v. Soricelli,* 610 F.2d 131, 133 (3d Cir. 1979) (stating that classification of state rule as substantive or procedural "provides no effective guidance" in applying the *Erie* doctrine; *Computer Economics, Inc. v. Gartner Group, Inc.* (S.D. Cal. 1999) 50 F. Supp. 2d 980, 986).

This issue is not highly elusive, but rather, highly transparent. *Rule 60(b)* is not valid under the Rules Enabling Act. ***There is no federal statute for vacating a renewal of judgment in the forum State of California***, and importantly, as applied throughout all the federal districts. Additionally, Respondent, and the district court, both rely on the California Code of Civil Procedure for Respondent's renewal of judgments. Motions to vacate renewals of

judgments must also be considered under the same laws.

### 2. The District Court Failed An Erie Analysis.

Applying the doctrine of *Erie* requires a two-step analysis. First, the court must determine whether the state rule conflicts with an applicable Federal Rule of Civil Procedure. If so, principles of federal supremacy require the court to apply the Federal Rule rather than state law. *Hanna, supra*, 380 U.S. at 471, 85 S.Ct. at 1143-44. Otherwise, the court must analyze whether failure to apply the state law would either significantly affect the outcome of the litigation or encourage litigants to file their actions in federal court. *Id.* at 468, 85 S.Ct. at 1142. *Computer Economics, Inc. v. Gartner Group, Inc., supra*, 50 F. Supp. 2d 986.

***As stated, there is no federal rule that governs vacating the renewal of judgments.*** *Rule 60(b),* relief from judgments, does not conflict with California State substantive law that would apply, to wit, *California Code of Civil Procedure section 683.170(a).* This is an action against judgment enforcement, not relief from the underlying judgment. The district court failed a proper analysis, and its ruling will encourage litigants to file their actions in federal court instead of state court. (App. 2a-7a.)

## D. POTENTIAL CONFLICT WITH THE FEDERAL RULES OF CIVIL PROCEDURE [RULES ENABLING ACT ANALYSIS].

A critical question the court must address is whether one or more of the Federal Rules of Civil Procedure controls the issue before the court. *Hanna, supra*, 380 U.S. at 471, 85 S.Ct. at 1143-44. "The initial step is to determine whether, when fairly construed, the scope of [a Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of state law." *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5, 107 S.Ct. 967, 969, 94 L.Ed.2d 1 (1987) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 n. 9, 100 S.Ct. 1978, 1984-85 n. 9, 64 L.Ed.2d 659 (1980). *Rule 60(b)* is not sufficiently broad as to leave no room for California State law. *Rule 69(b)* is obviously guiding and applicable to judgment renewals. "Shall" means mandatory application.

*Rule 60(b)* is totally inapplicable. *Rule 60(b)* applies to relief from the underlying judgment and within certain time limits. Whereas an application for renewal of a judgment takes place years after the entry of judgment.

When determining the scope of the Federal Rules, the Rules must be given their plain meaning, consistent with their purpose, affording some sensitivity to the policies the state law serves to advance. *Gasperini,* 518 U.S. at 427 n. 7, 116 S.Ct. at

2219 n. 7 ("[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies"); *Stewart Org.*, 487 U.S. at 37-38, 108 S.Ct. at 2247-48 (Scalia, J., dissenting) ("in deciding whether a federal statute or [r]ule . . . encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits"); *Walker*, 446 U.S. at 750 n. 9, 100 S.Ct. at 1985 n. 9 ("This is not to suggest that the Federal Rules . . . are to be narrowly construed in order to avoid a 'direct collision' with state law. The . . . Rules should be given their plain meaning.").

If a Federal Rule controls the issue before the court, the Rule will be applied so long as it is constitutional and consistent with the Rules Enabling Act's caveat that the rule "not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b); *Hanna, supra*, 380 U.S. at 471, 85 S.Ct. at 1144; *Sibbach v. Wilson Co.*, 312 U.S. 1, 14, 655, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941) (validity of Federal Rule under Rules Enabling Act turns on whether Rule "really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

*Rule 69* should not be displaced. It is clearly guiding on renewal of judgments.

## E. TRADITIONAL ERIE ANALYSIS [RULES OF DECISION ACT]

Once a court determines that the state law does not conflict with a Federal Rule of Civil Procedure, it must determine whether the principles underlying the *Erie* doctrine require enforcement of the state rule in federal court. First, federal courts sitting in diversity must enforce state rules that are clearly substantive, "intended to be bound up with the definition of the rights and obligations of the parties." *Byrd v. Blue Ridge Rural Electrical Coop., Inc.*, 356 U.S. 525, 536, 78 S.Ct. 893, 900, 2 L.Ed.2d 953 (1958).

State rules that define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are so obviously substantive that their application in diversity actions is required. *See Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 109-11, 65 S.Ct. 1464, 1470-71, 89 L.Ed. 2079 (1945) (federal court must apply state law specifying length of applicable statute of limitations); *Ragan v. Merchants Transfer Warehouse Co., Inc.,* 337 U.S. 530, 532, 69 S.Ct. 1233, 1234, 93 L.Ed. 1520 (1949) (federal court must apply state law on tolling of statute of limitations); *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 446-47, 79 S.Ct. 921, 927, 3 L.Ed.2d 935 (1959) (federal court must apply state law presumptions and burdens of proof); *Coplay Cement Co., Inc. v. Willis Paul Group,* 983 F.2d 1435, 1438 (7th Cir. 1993) (federal court must apply state rules concerning contract interpretation, including the parole evidence rule and the Statute of Frauds);

*Woods v. Interstate Realty Co.*, 337 U.S. 535, 538, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949) (federal court must apply state statute precluding corporations not qualified to do business in state from filing suit); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56, 69 S.Ct. 1221, 1230, 93 L.Ed. 1528 (1949) (federal court must apply state statute requiring plaintiff to post bond in stockholder's derivative action: although bond requirement had procedural component, state statute was substantive because it "creates a new liability where none existed before." Emphasis added).

When a state rule is not "clearly substantive," *Erie* requires the court to analyze the probable effect non-application of the rule will have on the behavior of litigants or the outcome of the case. Specifically, the state rule should apply when the failure to do so would significantly affect the outcome of the litigation, encourage forum shopping, or result in "inequitable administration of the laws." *Gasperini,* 518 U.S. at 428, 116 S.Ct. at 2220 (quoting *Hanna, supra,* 380 U.S. at 468, 85 S.Ct. at 1142). The court must determine whether failure to apply the state rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

*See Hanna, supra,* 380 U.S. at 468 n. 9, 85 S.Ct.

at 1142 n. 9; *see also Gasperini,*518 U.S. at 431, 116 S.Ct. at 2221. Under this analysis, courts may apply ostensibly procedural rules when their non-application would create an incentive for plaintiffs to file actions in federal court. *See, e.g., Woods v. Holy Cross Hospital,*591 F.2d 1164, 1168 (5th Cir. 1979) (federal court must apply state statute requiring malpractice plaintiffs to submit claims to screening panel because statute serves state's substantive policies and failure to apply it would encourage forum shopping); *Stoner v. Presbyterian University Hospital,*609 F.2d 109, 110 (3d Cir. 1979) (federal court must apply state statute requiring plaintiffs to first submit claims to non-binding arbitration: although statute was more procedural than substantive, failure to apply it would relieve diversity litigants of legal burdens imposed on litigants in state court); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.,*981 F. Supp. 334, 346-47 (D.N.J. 1997) (federal court must apply state statute requiring malpractice plaintiffs to furnish defendant with affidavit from a licensed professional attesting to the merit of plaintiffs' claims within 60 days after filing of answer); *State of Wisconsin Investment Bd. v. Plantation Square Assoc., Ltd.,*761 F. Supp. 1569, 1579-80 (S.D.Fla. 1991) (federal court must apply state statute preventing plaintiff from conducting discovery of defendant's net worth until claim for punitive damages survives motion to dismiss).

Finally, the court must determine if the state's interest in uniform enforcement of its laws is outweighed by any "countervailing federal interests." *Gasperini,* 518 U.S. at 432, 116 S.Ct. at 2222; *Byrd,*

356 U.S. 525, 537, 78 S.Ct. 893, 901, 2 L.Ed.2d 953 (1958). In *Byrd,* the Supreme Court held that the strong federal interest in the function of the jury — an interest embodied in the Seventh Amendment — required a federal court to submit disputed factual questions to a jury, even in light of a contrary state practice. *Id.* at 537-38, 78 S.Ct. at 900-01. Although the Court acknowledged that submitting factual questions to a jury could affect the outcome of cases, the state's interest was outweighed by the federal interest in maintaining trial by jury, an "essential characteristic" of the federal courts. *Id. Computer Economics, Inc. v. Gartner Group, Inc., supra,* 50 F. Supp. 2d 980, 990-91).

Here, there is no question the district court failed the required analysis and should have applied California State substantive law applicable to vacating judgment renewals; and the Ninth Circuit should have realized all the federal questions involved. The Ninth Circuit and the district court erred. Given these courts' rulings, judgment debtor relief under California State substantive law is impossible. Review is warranted.

## F. CALIFORNIA STATE SUBSTANTIVE LAW WAS APPLICABLE TO PETITIONER'S MOTION; CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 683.170(a) AND NOT RULE 60(b)

Section 683.170 provides in its entirety:

(a) The renewal of a judgment pursuant

> to this article may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered pursuant to this article is incorrect, and shall be vacated if the application for renewal was filed within five years from the time the judgment was previously renewed under this article. [¶]
>
> (b) Not later than 30 days after service of the notice of renewal pursuant to Section 683.160, the judgment debtor may apply by noticed motion under this section for an order of the court vacating the renewal of the judgment. The notice of motion shall be served on the judgment creditor. Service shall be made personally or by mail. [¶]
>
> (c) Upon the hearing of the motion, the renewal may be ordered vacated upon any ground provided in subdivision (a), and another and different renewal may be entered, including, but not limited to, the renewal of the judgment in a different amount if the decision of the court is that the judgment creditor is entitled to renewal in a different amount.

*Fidelity Creditor Service, Inc. v. Browne, supra,* 89 Cal.App.4th 195, 199 fn. 2.

A successful motion under section 683.170 does not affect the validity of the default or the default judgment. *Green v. Zissis* (1992) 5 Cal.App.4th 1219, 1222.

The statutory renewal procedure was intended to save time and money while remaining fair to the judgment debtor by affording him or her the opportunity to assert *any defense* that could have been asserted in an independent action. (Cf. *Tom Thumb Glove Co. v. Kwang-Wei Han*, 78 Cal.App.3d 1, 7 (1978); *Silbrico Corp. v. Raanan* (1985) 170 Cal.App.3d 202, 206, fn. 3.) Accordingly, the Legislature directed that a trial court may vacate renewal of a judgment "on *any ground* that would be a defense to an action on the judgment. . . ." (§ 683.170, subd. (a); *In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058, emphasis added.)

California State substantive law *Code of Civil Procedure § 683.170(a)* applied to the instant action related to Petitioner's "Motion"; given the above arguments. Petitioner's contention was the judgment was procured by fraud and was void ab initio; a basis for relief, on any ground, primarily under California State law as well as federal statute. Clearly, Petitioner did not only want to set aside the 2003 Judgment in this matter, rather, vacate the Judgment renewal on his *unopposed* fraud and void ab initio arguments. Indeed, the majority of Petitioner's motion was unopposed, *infra*. The Ninth Circuit and the district court erred and Petitioner requests reversal of the October 2023 and April 8, 2022 orders. This Court should clarify this important federal

question throughout the federal district courts for consistency. (App. 1a., 2a-7a.)

## VII. JUDGMENT VOID AB INITIO AND FRAUD.

"Rule 60 provides the only avenue of relief from final civil judgments other than by appeal or independent action." *Lubben v. Selective Serv. Sys. Local Bd.*, 453 F.2d 645, 648 (1st Cir. 1972).

Under *Rule 60(b)(4),* a court may grant relief from a final judgment upon a showing that "the judgment is void." "A void judgment is a legal nullity." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010); see also *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984).

However, in the interest of finality, the concept of void judgments is narrowly construed. *Jones*, 741 F.2d at 248; *Lubben*, 453 F.2d at 649; *Hoffman v. Pulido* (E.D. Cal., Mar. 15, 2018, No. 1:18-CV-0209 AWI SKO (PC)) [pp. 7-8], see *Rule 60(d).*

Petitioner argued extensively and submitted undisputed evidence of fraud on the part of Respondent only recently discovered. Although narrowly construed, the issue went unopposed and the ruling should have been in Petitioner's favor. Petitioner's motion established that Respondent's "Mark" was obtained and maintained by fraud, and therefore, the underlying judgment in this matter is arguably void ab initio pursuant to *Rule 60.* Petitioner requests reversal.

## VIII. APPLICATION OF THE ERRONEOUS FEDERAL INTEREST RATE REQUIRES A REVERSAL. PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW.

28 U.S.C. § 1961 and *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990) govern the calculation of post-judgment interest. (*Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activities*, 518 F.3d 1013, 1017 (9th Cir. 2008)). "Appellate courts may reverse and remand a district court's judgment without concluding that the judgment was "erroneous or unsupported by the evidence."' *Padgett v. Loventhal* (N.D. Cal., May 13, 2020, No. 5:04-cv-03946-EJD) [pp. 3].

Respondent applied to the district court with an erroneous interest rate to unlawfully pad the renewed judgment by a whopping **$1,502,772.12**, and requesting a total renewed judgment in the amount of $3,366,365.48. However, Petitioner caught Respondent in its illegal scheme, and he timely objected. Respondent's counsel also submitted their application under "penalty of perjury," constituting misconduct. However, the district court's April 8, 2022 order is silent on the correct procedure and interest rate to be applied.

Petitioner was deprived of due process of law for having a judgment renewed against him with an erroneous interest rate. The district court's April 7 and 8, 2022 orders are totally devoid of a correct interest rate calculation. "It has long been the rule

that an award of post-judgment interest is procedural in nature and thereby dictated by federal law." *In re Cardelucci*, 285 F.3d 1231, 1235 (9th Cir. 2002) (citing *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965), *Freeland Lending, LLC v. RCJS Props., LLC* (W.D. Wash., Sep. 4, 2018, No. C17-5383 RBL) [pp. 6]. Petitioner requests reversal. *U.S. Constitution, Amendment XIV.*

## IX. RESPONDENT WAIVED JUDGMENT VOID AB INITIO AND FRAUD ARGUMENTS.

In general, arguments not raised before the trial court are waived on appeal. *See In re Magnacom Wireless, LLC,* 503 F.3d 984, 996 (9th Cir. 2007); *In re Eliapo,* 468 F.3d 592, 603 (9th Cir. 2006); *In re Burnett,* 435 F.3d 971, 975-76 (9th Cir. 2006); *In re Am. W. Airlines, Inc.,* 217 F.3d 1161, 1165 (9th Cir. 2000). "[N]o bright line rule exists to determine whether a matter has been properly raised below. A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it. This principle accords to the [trial] court the opportunity to reconsider its rulings and correct its errors." *WhittakerCorp. v. Execuair Corp.,* 953 F.2d 510, 515 (9th Cir. 1992); *see also In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir. 2010); *In re E.R. Fegert, Inc.,* 887 F.2d 955, 957 (9th Cir. 1989).

Respondent never opposed the issues with Petitioner's contentions and evidence regarding critical issues such as Respondent's fraudulent

obtaining of its "Mark," and therefore Respondent waived the issues. The district court should have found for Petitioner on the issue of fraud and judgment void ab initio and granted his "Motion." Additionally, and worth mentioning, the district court deemed Petitioner's Motion as untimely under *Rule 60(b).* Petitioner did raise the issues of fraud, and, arguably on the Court. "Rule 60(d) has no time limit" *Fuller v. Johnson* (W.D. Wash. 2015) 107 F. Supp. 3d 1161, 1167. Thus, even if only applying Rule 60(b), arguably, the district court still erred on the time limit reasoning. (App. 2a-7a.)

There is nothing in the record indicating Petitioner could have brought a *Rule 60(b)* motion earlier. The district court could have well construed Appellant's Motion as one under *Rule 60(d)(3)*; but failed to do so, constituting further error. "A party is not bound by the label used in the party's papers." *Zone Sports Ctr. Inc. v. Red Head, Inc.* (N.D. Cal., May 22, 2013, No. 11-cv-00634-JST) [pp. 9].

## X. THE DISTRICT COURT ERRED WHEN TAKING JUDICIAL NOTICE.

The State Court Ruling is properly subject to judicial notice as it concerns litigation between the same parties with a *direct relation* to matters at issue here. *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (noting judicial notice of proceedings in other courts is proper "if those proceedings have a *direct relation* to matters at issue." Emphasis added). The Court does not take judicial notice of reasonably disputed facts in judicially noticed documents. *Lee v.*

*City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001): *Abe v. AFCH, Inc.* (C.D. Cal., June 1, 2021, No. 2:20-CV-08193-ODW (PVCx)) [pp. 1]. "the court may take judicial notice of the fact that a document was recorded, it may not take judicial notice of factual matters stated therein." *Kinman v. Wells Fargo Bank, N.A.* (E.D. Cal., Feb. 8, 2013, No. 2:12-cv-02853-MCE-DAD) [pp. 2].

Certainly, the district court could take judicial notice of the litigant's California State court proceeding, and as it related to Petitioner's motion to disqualify Respondent's counsel. It is arguable, however, that the State court proceedings had no *direct relation* to this matter, and, as it relates to a motion to disqualify or in any other manner. Additionally, it was reasonably disputed that Petitioner could not have successfully moved to disqualify Respondent's counsel in this action. Any ruling containing hearsay evidence related to this matter was improper as a basis for denying Petitioner's application to continue for more time. The district court improperly denied Petitioner his opportunity to be heard on disqualifying Respondent's counsel. Petitioner objected. It was also important for Petitioner to seek counsel, and disqualify Respondent's counsel if merited. The district court's conclusions were unreasonable. Petitioner requests review of the district court improperly taking judicial notice.

## XI. CONCLUSION.

Sole application of *Rule 60(b)* abridged Petitioner's clearly substantive rights as to vacating the at issue renewal of judgment. State substantive law should have been applied. *Rule 60(d)* was ignored and/or misapplied. For the foregoing reasons, the petition for Writ of Certiorari should be granted and the decision of the Ninth Circuit, and the United States District Court, Central District of California, summarily reversed; for consistency of law in all districts.

Respectfully submitted,

By:_____
SCOTT SMITH, *Petitioner*

March 15, 2024