CASE NO 24-205

IN THE SUPREME COURT OF THE UNITED STATES

Michael Weiss, as Executor of
Estate of Jane L. Marsh
Petitioner

vs.

Peggy Pei-Lin, Yi-Ming Su, DOES 1-10
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR JUDICIAL NOTICE and RE JOINT APPENDIX

Law Office of Michael Weiss
63 Lakefront,
Irvine, CA 92604
949-654-9919
Michael-Weiss@msn.com

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COMES NOW petitioner to motion for judicial notice under Fed. R. Evid. 201(c), (d),

Fed. R. Evid. 101(a), and/or U.S. Sup. Ct. Rule 17(2) of adjudicative facts for the purpose of granting certiorari herein if it please the court. Such facts show a fully executed and transferred title to Jane L. Marsh under a MERS reconveyance deed by her civil succession to the rights which her deceased husband Monroe F. Marsh previously had in an Irvine condo. Such facts may be judicially noticed and are found in Petitioner Complaint Exh's 1-10, and they are supported by this courts cases in connection therewith. If they are judicially noticed, under Supreme Court rule 26(8) petitioner may be relieved of any future requirement of filing a joint appendix because defendant's non-appearance or objection in this Court appears to render the same unnecessary. These documents of title were exhibited with the complaint and constitute a part of the ROA which this court can take judicial notice of to determine for itself their legal effect. Hence if it recognizes the validity and effect of the MERS reconveyance deed, the Irvine condo could not be sold 5 years later in a probate sale as belonging to Monroe F. Marsh.

Galloway v. Finley (1838) 37 U.S. 264, 298 [9 L.Ed. 1079] held that in the nature of things there must be a grantee before a grant can take effect. In other words deeds made out to persons not living are void. Because Monroe F. Marsh died without repaying the underlying secured debt and hence ceased to make it his principal residence, or continue to pay taxes on it, no reconveyance deed could be made out to him because of said default.

Louisville & N.R. Co. v. Palmes (1883) 109 U.S. 244, 253 [3 S.Ct. 193, 27 L.Ed. 922] is cited for the contention that this court can take judicial notice under Fed. R. Evid. 201(c), (d), Fed. R. Evid. 101(a), and/or U.S. Sup. Ct. Rule 17(2) of the real legal effect if any, of a document when necessary to determine if it supports a claim of infringement on petitioners U.S. constitutional rights, just as well as it can take judicial notice of a want or excess in court power.

Rice v. Sioux City Memorial Park Cemetery (1955) 349 U.S. 70, 72 [75 S.Ct. 614, 99

L.Ed. 897] held that if a government actor denies enforcement to a person of a right guaranteed under the 14th U.S. Due Process Clause it is to receive the same treatment as when it deprives the person of such right. This is what the lower federal courts did in this case as judicially noticed by their initial orders and then by their orders not to file any more papers in their courts. See District Court ECF's # 66, 75 & 81, and 9th Cir ECF's #17 & 19.

Lynch v. Household Finance Corp. (1972) 405 U.S. 538, 552 [92 S.Ct. 1113, 31 L.Ed.2d 424] held that under the United States Constitution U.S. Due Process Clause property is defined in terms of liberty rights since what due process protects are the rights of a person to that bundle of sticks that constitute the thing, but not the thing itself. This is a principal ranked as fundamental historically since Blackstone's commentaries.

Olim v. Wakinekona (1983) 461 U.S. 238, 249 [103 S.Ct. 1741, 75 L.Ed.2d 813] held that a party must have a legitimate claim of entitlement to a property or liberty interest in order to invoke the 14th U.S. Due Process Clause protection. Pursuant to judicially noticed District Court ECF #1 Complaint paragraphs 10 and 16 of her husbands trust deed Jane L. Marsh paid @ $640,000 for the MERS reconveyance deed, which was loaned to her by her son after her husbands death to acquire the Irvine condo, while her deceased husbands co-executors paid nothing to MERS nor her, nor did defendants in this case. Instead the co-executors sold the Irvine condo to defendants and kept the proceeds for themselves.

Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564 [92 S.Ct. 2701, 33 L.Ed.2d 548] likewise held that property under the United States Constitution is defined according to fundamental principles of property law as a legitimate claim of eligibility for or entitlement to it.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (1999) 527 U.S.

666, 673 [119 S.Ct. 2219, 144 L.Ed.2d 605] held that a protected property interest includes the right to exclude others.

Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 85 [108 S.Ct. 896, 99 L.Ed.2d 75] held that liens are within the definition of property for the purpose of protection under the United States U.S. Due Process Clauses.

Connecticut v. Doehr (1991) 501 U.S. 1, 11 [111 S.Ct. 2105, 115 L.Ed.2d 1] held that for purpose of the United States U.S. Due Process Clause property is defined to include liens, attachments and other rights and interest; not, just estates allowed by state law.

Mennonite Bd. of Missions v. Adams (1983) 462 U.S. 791 [103 S.Ct. 2706, 77 L.Ed.2d 180] held that the taking of a mortgagee's security interest due to insufficient notice was actionable under the 14th U.S. Due Process Clause.

Monell v. Department of Social Services of City of New York (1978) 436 U.S. 658, 687 [98 S.Ct. 2018, 56 L.Ed.2d 611] held that the 14th U.S. Due Process Clause prohibited uncompensated taking of property because of its Article 4 Section 1 Cl. 1 Interstate Privileges and Immunities Clause which protects the right to acquire defend and possess property of every kind.

U.S. v. Craft (2002) 535 U.S. 274, 283 [122 S.Ct. 1414, 152 L.Ed.2d 437] held that state law generally, but not always defines property interest, creation, vesting and divesting. For purpose of federal law it is the person's right of substantial control over the property that governs. Irrelevant to that substantial control test were the state court determinations and statutes. Substantial control is a fact issue and is to be grounded on the actual real realities of the matter; and, that is a federal question.

Property, as defined by California law, includes statutory rights per California Civil Code

655 and Civil Code 654, which in this case included the right of Jane L. Marsh under Civil Code 2941(b)(1)(B)(i) and paragraphs 10 and 16 of Monroe F. Marsh trust deed to a reconveyance deed. The following cases evidence such statutory property interest under 28 U.S.C. 1652: Federal Home Loan Bank .... v. Long Beach Federal Sav. & Loan Ass'n (S.D. Cal. 1954) 122 F.Supp. 401, 430 citing Civil Code 994, Civil Code 655 and Civil Code 654; Yuba River Power Co. v. Nevada Irr. Dist. (1929) 207 Cal. 521, 523 [279 P. 128] citing Civil Code 655, and Civil Code 654, and its McKeon case (Id. p. 524); Estate of Stanford (1899) 126 Cal. 112, 119 [58 P. 462] citing Civil Code 655 and Civil Code 654 stating that such statutes merely recite the common law; and In re Clark's Estate (1928) 94 Cal.App. 453, 119 [271 P. 542] citing Civil Code 655 and Civil Code 654.

Greenleaf's Lessee v. Birth (1832) 31 U.S. 302, 312 [8 L.Ed. 406] in the context of this case made clear that all petitioner had to do regarding property right was introduce the MERS reconveyance deed and rest its case and cite Federal and/or California law in support. The defendants in this case may be characterized as interlopers and strangers not in privity with Jane L. Marsh and intruders upon her right to possession; and, consequently they had the burden to disprove the validity of the MERS reconveyance deed; but, the district court changed that burden of proof by its own OSC re pleading implausibility after evidence had been taken and submitted per judicially noticed District Court ECF #62.

In Gonzales v. Ross (1887) 120 U.S. 605, 607 [7 S.Ct. 705, 30 L.Ed. 801] the judgment was based upon the failure of the plaintiff to make out their title; and, the failure to make title arose from the court’s overruling and rejecting the testimony offered by the plaintiffs re title. This court held that the lower courts evidential ruling was incorrect (Id. p. 626) for the same reasons California law would; namely, the Evidence Code 1600 presumes that the recorded

MERS reconveyance deed was executed, delivered and accepted and the effect of MERS reconveyance deed was to make a transfer of property to Jane L. Marsh. California case law provides that mere cancellation of a deed does not retransfer back title and so reconveyance is required. This court ruled that the lower court's evidential suppression involved the fundamental property principle that title forfeited was in its nature a matter of substance not a matter of evidential objection (Id. p. 6 to 9). This court held that the lower courts erred in refusing to receive evidence of plaintiff's title because defendants made no showing that it was substantively void or forfeited. This ruling was akin to this court's ruling in its Reagan case, next cited herein, that one cannot revert after evidence has been received to pleading defects. Hence the District Court ECF # 62 was implausible.

Reagan v. Farmers' Loan & Trust Co. (1894) 154 U.S. 362, 390 [14 S.Ct. 1047, 38 L.Ed. 1014] held that but one conclusion could be drawn from defendants litigation conduct, and that is that upon the taking of evidence defendant's having become satisfied that the facts as stated in the pleading and that the conclusions to be drawn from such facts, could not be overthrown by any other matters (Id. p. 401-402). Because the trial court had sufficient evidence they could not resort to a pleading defect in order to throw plaintiff out of court because that is form over substance and an unfair tactic. This Court outlawed the proposition that if a party cannot beat his opponent on the evidence he then could beat him on his pleading. This court held that that could not be done equitably as a matter of law. This court said it would be intolerable for court administering equity to seize upon a technicality for the purpose, or with the result, of entrapping a party. Liens are a matter of equity.

Hooker v. City of Los Angeles (1903) 188 U.S. 314, 319 [23 S.Ct. 395, 47 L.Ed. 487] held that California statute's were evidence to show that its City was the successor of an ancient

pueblo. In this case Civil Code 2941(b)(1)(B)(i), Civil Code 655 and 654, and well as Probate Code 600 et seq on power of appointments, and the above federal case law are evidence that Jane L. Marsh is the civil successor of Monroe F. Marsh's interest in the Irvine condo.

Oneida Indian Nation of N. Y. State v. Oneida County, New York (1974) 414 U.S. 661, 666 [94 S.Ct. 772, 39 L.Ed.2d 73] is cited for the contention that petitioner's complaint based on the U.S. Due Process Clause liberty, and California statutory right of property, coupled with its 28 U.S.C. 1331 invocation that Jane L. Marsh was deprived by defendants of her right to acquire, defend and maintain acquisition of the condo under the 14th Due Process clause was not so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy.

Felder v. Casey (1988) 487 U.S. 131, 148 [108 S.Ct. 2302, 101 L.Ed.2d 123] echoed its prior U.S. Constitution grounded decision of Burnett which explained that 42 U.S.C. 1983 actions exist independent of any other legal or administrative relief available under the federal law and are judicially enforceable in the first instance. Hence misapplication or failure of lower federal courts to exercise its Article 3 Section 2 jurisdiction to final judgment inconsistently with F.R.C.P. 1 and F.R.A.P. 2, created burdens or obstacles to the exercise of the plaintiff's right to commence and prosecute to a final judgment its 42 U.S.C. 1983 action (Id. p. 139, 141). 42 U.S.C. 1983 provides a uniquely federal remedy against incursions upon rights secured by the U.S. Constitution and laws and is accorded a sweep as broad as its language (Id. p. 139). This court in the Felder case involved a Wisconsin statute which imposed a condition on parties filing 42 U.S.C. 1983 actions to give notice of their claim and await 6 months before filing it in court. Such a condition precedent was held to be an undue burden. In this case 4 years have been consumed in the lower federal courts and nothing has been decided but pleading implausibility

and even then without leave to amend. 28 U.S.C. 2071 and 2072 likewise prohibit federal claim processing rules which when applied have the practical effect of operating as condition precedents or subsequent's, or other unconstitutional effect or practical result. This courts fundamental practical effect principle distinguishes substance over the form; and, defines its real and true character and nature when otherwise clothed in innocuous garb. The lower federal courts were apprised by petitioner that every order of this court creating and amending the rules ordered that they be not applicable if the result be a miscarriage of justice. At the pleading stage 1983 actions are regulated by Article 3 Section 2 substantial question doctrine, today called standing in case or controversy; but, not by usurpation nor misapplication of claim processing rules. Petitioner by prosecuting this 42 U.S.C. 1983 action acts as a private attorney general and by protecting its rights to acquire, defend and maintain property within the Ninth Circuit's bailiwick, protects all others similarly situated persons.

Mitchum v. Foster (1972) 407 U.S. 225, 240 [92 S.Ct. 2151, 32 L.Ed.2d 705] held that Congress intended to protect each and every U.S. constitutional right, privilege or immunity against state action which impairs or denies them to the people when it enacted the Civil Rights act of 1871 and the amendment thereto which is 42 U.S.C. 1983. This court cited statements from Representative Lowe, Shellabarger and Hoar for the Congress's intent and concluded that 42 U.S.C. 1983 and the 14th amendment created an exception to the principle of comity and federalism and equity (Id. p. 243).

In U.S. v. Price (1966) 383 U.S. 787, 789 [86 S.Ct. 1152, 16 L.Ed.2d 267] the indictment specifically alleged that all of the defendants were acting under color of the laws of Mississippi and so this Court held that the fault lay not in the indictment, but in the district court's view that the statute required that each offender be an official of the State (Id. p. 795). Same may be

judicially noticed for the district court Judge Consuello Marshall in this case per District Court ECF #66. This Court in its appendix provided the following remarks of Sen. Pool and sponsoring the Enforcement Act of 1870: "there are various ways in which a state may deny constitutional rights... it may practically deny the right" (Id. p. 810). Footnote 7 of the opinion cited its Burton case which distinguished joint participant activity from activity so purely private as to fall outside the 14th amendment. Footnote 6 of this Court's opinion cited its Williams 2 case wherein the accused was denied the right to be tried by a legally constituted court; and, in our case that is what the Ninth Circuit clerk did when assigning the summary disposition panel to the appeal in the Ninth Circuit. In re Abdu (1918) 247 U.S. 27, 30 [38 S.Ct. 447, 62 L.Ed. 966] is cited for the proposition that petitioner's reference to the clerk and staff attorney in his petition for certiorari should be seen as really directed to the 9th circuit court itself because its judicially noticed (Petn for Cert Appx F) general orders directed their actions thereunder. Wilson v. Schnettler (1961) 365 U.S. 381, 387 [81 S.Ct. 632, 5 L.Ed.2d 620] and Rea v. U.S. (1956) 350 U.S. 214, 217 [76 S.Ct. 292, 100 L.Ed. 233] both held that the power of the federal courts, including this court, extends to policing the requirements of the Federal rules prescribed by this court in making certain that they are observed.

Camreta v. Greene (2011) 563 U.S. 692, 708-709 [131 S.Ct. 2020, 179 L.Ed.2d 1118] echoed this Court's rule 10 virtual unflagging duty to exercise its jurisdiction to clarify constitutional rights without undue delay. Petitioner acts as a private attorney general in vindicating constitutional rights of itself to a timely, fair, meaningful, regular and appropriate hearing in addition to those of the public nationwide when insisting on neutrality and fidelity to national rules because local rules had compromised the timely orderly, decorous, and rational tradition that courts rely upon to ensure the integrity of their own judgments.

Nguyen v. U.S. (2003) 539 U.S. 69, 74 [123 S.Ct. 2130, 156 L.Ed.2d 64] applied this Court's rule 10 due to the Ninth Circuit's improper designation of a panel member. It also affirmed its prior decisions holding that the issue of prejudice to the party was irrelevant since it involves a power issue (Id. p. 79 and 81). This is just one of the many decisions of this Court holding the Ninth Circuit's mode and manner of conducting business to be invalid.

Thomson v. Wooster (1885) 114 U.S. 104, 114 [5 S.Ct. 788, 29 L.Ed. 105] held that it was traditional for a pleading to be explained to the court so that it may see that a default judgment was proper to issue. If the pleading was uncertain or indefinite proofs were taken once again to assure that any judgment be a proper one (Id. p. 111). F.R.C.P. 55(b)(2) limited the District Court to conduct hearings when "necessary to enter or enforce a judgment." Nothing in F.R.C.P. 55 authorized the court after hearing evidence to disregard that evidence and issue an OSC regarding pleading implausibility. The 1937 Advisory Committee Notes say the default rule represents former equity rule 12, 16, 17, 29 and 31 all relating to equity pro confesso situations. If Article 3 Section 2 standing in case or controversy existed, it obligated the district court to exercise its jurisdiction and proceed to final judgment under 42 U.S.C. 1983.

Winters v. U. S. (1908) 207 U.S. 564, 575 [28 S.Ct. 207, 52 L.Ed. 340] and Steel Co. v. Citizens for a Better Environment (1998) 523 U.S. 83 [118 S.Ct. 1003, 140 L.Ed.2d 210] both hold that if Article 3 Section 2 standing facts exist, then the failure to properly state a plausible claim has no effect because of the presumption that supportive facts exist when the ultimate facts regarding standing in case or controversy are alleged.

Gomez v. Toledo (1980) 446 U.S. 635, 640 [100 S.Ct. 1920, 64 L.Ed.2d 572] held that by the plain terms of 42 U.S.C. 1983 two, and only two allegations are required in order to state a cause of action under that statute. First that some person had deprived her of a federal right.

2nd, that such person acted under color of state law.

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit (1993) 507 U.S. 163, 168 [113 S.Ct. 1160, 122 L.Ed.2d 517] held that in a defendant's F.R.C.P. 12(b)(6) motion the district court could not apply a heightened pleading standard because F.R.C.P. 8(a)(2) did not. F.R.C.P. 8(a) requires a short and plain statement of the jurisdictional grounds, a short and plain statement of the claim showing entitlement to relief and, a demand for the relief sought which may include alternative or different types. F.R.C.P. 8(e) says pleadings must be construed so as to do justice. The District Court's requirement that petitioner "somehow" show a close nexus was thus heightened standard above and beyond this courts cases regarding same, as well as being void for vagueness.

Soldal v. Cook County, Ill. (1992) 506 U.S. 56, 71 [113 S.Ct. 538, 121 L.Ed.2d 450] held that certain wrongs affect more than a single right; and, can implicate more than one of the constitutional commands, limitations, or privileges. Where multiple violations are alleged this court does not identify which one is dominant; but, rather it examines each constitutional provision in turn. This means examination of the facts pled because it is the facts which give jurisdiction not the theory (Id. p. 72). The facts alleged that

"defendant acting under color of state law dispossessed the Soldals of their home. Those facts alleged sufficed to constitute a seizure within the meaning of the 4th amendment."

A seizure of property occurs when there is some meaningful interference with the individual's possessory interest (Id. p. 61). The Ninth Circuit in this case affirmed the district court mootness decision, which arguably left the case in the pleading stage.

Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co. (1924) 263 U.S. 629, 635 [44 S.Ct. 220, 68 L.Ed. 480] was presented with a rule of court which had the

unconstitutional effect of depriving litigants of the right to prosecute their claims to judgment unless they complied with an order of the trial court (Id. p. 634). This court ruled that the right of a U.S. citizen to sue in a court having fundamental jurisdiction includes the right to prosecute his claim to judgment. In this case the lower federal court relied on no rule in the F.R.C.P. when issuing its OSC regarding dismissal. The OSC required petitioner to show plausibility of its pleading or suffer dismissal with no right to amend provided. The district court had no power under the F.R.C.P. 12(h) nor inherent judicial power to do that instead of making a final judgment, or reserving to petitioner the right to a final judgment thereon.

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp. (U.S.N.C. 1983) 460 U.S. 1, 9 [103 S.Ct. 927, 74 L.Ed.2d 765] is cited to show that in this case the lower federal courts effectively put petitioner out of court by their refusals to exercise jurisdiction to a valid final judgment. The well pleaded complaint rule applies only to statutory actions not actions directly under the United States Constitution.

Rita v. U.S. (2007) 551 U.S. 338, 358 [127 S.Ct. 2456, 168 L.Ed.2d 203] held the presumption that judicial duty was regularly performed in the district court was because the record made clear that the District Court listened to each argument, considered the supporting evidence, was aware of and understood Rita's previous work in the immigration service in detecting the crime, had concluded his lengthy 25 year military service and had received 35 metal awards. In our case the district court cited not one fact from the ROA. This court then applied the "appellate court presumption" that because the district court made a thorough testing as contemplated by the applicable procedure, recognizing the importance of notice and meaningful opportunity to be heard at the time of the trial decision (Id. p. 351), that it would be reasonable for this court to rely on same. In this case it may be judicially noticed from the

District Court docket sheets that the district court never gave due notice of anything as required by F.R.C.P. 5(b). The district court judge and stopped counsel short in argument while he was presenting his default judgment prove up as the reporter's transcript in the ROA before before the 9th Circuit showed. This Court (Id. p. 357) by stating that the circumstances may make clear that the district court exercised its power shows that the exercise of not only judicial power but of jurisdiction becomes a question of fact when the ROA facts negate those presumptions as to both trial and appellate courts. In this case a judicially noticed Ninth Circuit Memo opinion as well as its order denying a petition for rehearing cited not one fact from the ROA; and, the reasonable inference drawn from same and its reliance on nothing but Ninth Circuit precedent instead of U.S. Supreme Court constitutionally grounded decisions where the facts were virtually the same, was that it evaded its unflagging obligation to exercise jurisdiction in a manner consistently with national F.R.A.P. 38 standards and otherwise consistent under the 5th amendment Due Process Clause. The same may be said of the district court.

Arbaugh v. Y&H Corp. (2006) 546 U.S. 500, 506 [126 S.Ct. 1235, 163 L.Ed.2d 1097] noted that F.R.C.P. 12(b)(1) gave power to the District courts on their own to determine if a pleading is defective as jurisdictional facts at any time. However no such sua sponte power to dismiss for failure to state a claim was given (Id. p. 510-511). In this case it may be judicially noticed that the District Court OSC regarding pleasing pleading implausibility was issued after the District Court had taken evidence in default judgment prove up hearings. The District Court's OSC hence was not only untimely but unauthorized.

Klapprott v. U.S. (1949) 335 U.S. 601, 611 [69 S.Ct. 384, 93 L.Ed. 266] held that neither the F.R.C.P., the F.R.A.P nor the F.R.E. could infringe on a party's Due Process clause right to full and fair trials or default judgments. This court held that in default proceedings, like trials,

fair hearings are required in accord with elemental concepts of justice. That requires that default hearings be full and fair, held at a meaningful time place and manner, and be regular as to the nature and stage of the case. It may be judicially noticed that in the F.R.C.P. there only about 12 rules authorizing the District Court to act on its own motion; and, none of them go to pleading implausibility at the default evidential prove up stage.

Bank of Nova Scotia v. U.S. (1988) 487 U.S. 250, 255 [108 S.Ct. 2369, 101 L.Ed.2d 228] held that the F.R.C.P., F.R.A.P., and F.R.E. trump inherent judicial power because they are the supreme law of the land.

Gonzalez v. Thaler (2012) 565 U.S. 134, 141 [132 S.Ct. 641, 181 L.Ed.2d 619] echoed the rules that (1) a claim processing rule does not go to a court's subject matter jurisdiction (2) when a statute contains a mandatory and jurisdictional fact, then the court may sua sponte consider it and (3) the Congress must clearly state that the limitation prescribed shall count as jurisdictional. In this case nothing in 42 U.S.C. 1983 nor 28 U.S.C. 1331 contains such a subject matter limitation. State action and property deprivation go to the merits of 1983 and not to subject matter jurisdiction.

Bond v. U.S. (2011) 564 U.S. 211, 218-219 [131 S.Ct. 2355, 180 L.Ed.2d 269] echoed the distinction between pleadings and jurisdiction recognized by its Steel Co. case. In this case it may be judicially noticed that in its ECF's # 75 and 81 that the district court conceded jurisdiction of the subject and the parties. It may be judicially noticed that in its ECF's #17 and 19 that the 9th Circuit likewise refused to permit an amendment of implausible pleadings under 28 U.S.C. 1653 and that was error due to abuse of discretion. The Ninth Circuit also abused its discretion in not issuing a writ to its staff attorney and clerk not to assign panels for summary disposition. Under 28 U.S.C. 1631 it should have transferred the appeal to a panel chosen by the

court itself but did not even do that after petitioner complained in its petition for rehearing.

Lewis v. Casey (1996) 518 U.S. 343, 361 [116 S.Ct. 2174, 135 L.Ed.2d 606] said that the same concerns that this court expressed in its Bounds case was the same in its Turner case; and, so the 2 were in pari materia. However this court held that the sole reason for vacating the district order was its refusal to provide respondents with more than just an "opportunity for rebuttal" (Id. p. 663). In this case that was all the District Court gave petitioner in its OSC. This court noted that the parties went beyond the pleading stage. Elemental 5th Amendment Due Process Clause regular hearing principle distinguishes the parties burdens at the pleading, summary judgment, and trial stages. This case involves an evidential stage and petitioner asks this court may want to provide guidance as to what is required by the district court at such default prove up evidential stage because the F.R.C.P. does not contain intelligible guidelines about that. Even before the default prove up hearing petitioner gave res gestae evidence about its pleading. It may be judicially noticed from its ECF #66, that the District Court order said petitioner was "given an opportunity to respond" to the OSC. Traditionally and historically and under F.R.C.P. 7(b)(1) as well, a request for a court order must be made by motion of a party see Louisville & N.R. Co. v. Schmidt (1900) 177 U.S. 230, 235, 237, 238 [20 S.Ct. 620, 44 L.Ed. 747] and Henderson ex rel. Henderson v. Shinseki (2011) 562 U.S. 428, 434 [131 S.Ct. 1197, 179 L.Ed.2d 159]. Courts usually do not raise arguments on their own; but, must do so when it comes time to jurisdiction. It may be judicially noticed that there is no case out of this Court ever approving a sua sponte District Court OSC regarding dismissal for implausibility without leave to amend when Article 3 Section 2 standing in case or controversy prescriptions were met. Such authority would be inconsistent with the unflagging duty of all federal courts to exercise their jurisdiction absent abstention grounds. F.R.C.P. 41 authorizes dismissal for failure to comply

with any order of the court; but, when U.S. Constitutional free speech, petition and access to judicial review, are at issue the U.S. constitutional standards that this Court prescribed for such matters must be the test.

LAW OFFICE MICHAEL WEISS

By: Michael Weiss

Michael Weiss, Attorney for Estate of

Jane L. Marsh