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Pro Se

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY JOHNSON, an individual,
Plaintiff,
v.
DAVID KINNEY, an individual;
RICHARD TURNER, an individual;
MANUEL ALTAMIRANO, an individual;
DAVID HUFFMAN, an individual; and
DAVID SMILJKOVICH, an individual;
PAUL TYRELL, an individual;
SEAN SULLIVAN, an individual;
MARTY READY, an individual;
DAVID AVENI, an individual;
MICHAEL MCCLOSKEY, an individual;
STORIX INC., a California corporation;
JUDGE MARILYN HUFF, an individual;
JUDGE RANDA TRAPP, an individual;
JUDGE KEVIN ENRIGHT, an individual;
JUDGE KATHERINE BACAL, an individual,
Defendants.

Case No. 3:20-cv-1354-TWR-MSB

PLAINTIFF'S SUR-REPLY TO MOTIONS TO DISMISS FIRST AMENDED COMPLAINT BY DEFENDANT JUDGES KATHERINE BACAL, KEVIN ENRIGHT, RANDA TRAPP, AND MARILYN HUFF

Hearing Date: February 24, 2020
Time: 1:30 p.m.
Courtroom: 3A (Schwartz)
Judge: Hon. Todd W. Robinson

[*Telephonic Appearance Requested*]

Complaint Filed: July 16, 2020
Trial Date: Not Set

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I. INTRODUCTION

Plaintiff Anthony Johnson ("Johnson") respectfully submits this Sur-Reply to the state judges' reply ("SJR") to the motion to dismiss the First Amended Complaint ("FAC") brought by the defendant Judges Randa Trapp, Katherine Bacal, and Kevin Enright ("State Judges") and the federal judge's reply ("FJR") by defendant Judge Marilyn Huff.

The judicial defendants asserted misleading arguments and authority in their replies, and Johnson requested oral arguments to address the issues. In its November 30, 2020 order vacating the hearing originally set for December 2, the Court granted Johnson leave to file this Sur-Reply. (ECF No. 39.) Since the reply brief by Judge Huff makes the same arguments as those of the State Judges, but are limited to issues relevant to federal judges, this Sur-Reply follows the form of the State Judges' reply.

II. ARGUMENT

A. This Action is Not Barred by the *Rooker-Feldman* Doctrine

The State Judges cite *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) in saying, "Under the *Rooker-Feldman* doctrine, an unsuccessful state court litigant cannot file suit in federal court to establish that the state court judgment violated the litigant's federal rights." (SJR at p. 1.) Nowhere does *Exxon* make such a conclusion, but instead states that the doctrine only applies when the plaintiff is "inviting district court review and rejection of those judgments." *Ibid*. (underline added.) "In *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, the parties turned to a federal district court for relief. Alleging that the adverse state-court judgment was rendered in contravention of the Constitution, they asked the federal court to declare it 'null and void.'." *Ibid*. (underline added.) The Complaint does not seek to impair any State Court rulings.

The State Judges' citation to *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) similarly defeats their argument. "Far from bringing a general constitutional challenge that is not 'inextricably intertwined' with the state court

decision, *Bianchi* essentially asked the federal court to review the 'state court's denial in a judicial proceeding,' [citation], and to afford him the same individual remedy he was denied in state court." *Ibid.* (underline added.) The State Judges thereby assert that "Johnson fails to appreciate that, although his claims seemingly do not constitute direct appeals, they are barred because they are inextricably intertwined with the state court rulings." (SJR. at p. 2, citing *Ignacio v. Judges of U.S. Ct. of Appeals for Ninth Circuit*, 453 F.3d 1160, 1165 (9th Cir. 2006).) *Ignacio* is equally unhelpful because "The only plausible interpretation of his complaint is that he wishes for the dismissed cases — all having to do with what he perceives as problems with his domestic dispute — to be reinstated." *Ibid*. Johnson's claims are not "*inextricably* intertwined" with the state court decisions unless the decisions themselves are inter-dependent.

The State Judges are simply trying to confuse this Court as to the purpose of *Rooker-Feldman* by omitting that, for the doctrine to apply *in any instance*, the party must be seeking to reverse a state court decision. They are correct that "Johnson's claims for declaratory and injunctive relief ultimately relate to and implicate the decisions made in the underlying state court cases." (SJR. at p. 2.) But the Court's *evaluation* of Johnson's allegations do not amount to a "review the underlying state court cases", nor does it require that the Court "find that they were wrongly decided." *Id*. Simply put, an "appellate review" is a request to reverse or vacate a state court decision, and Johnson has not done so here.

Finally, the Judges assert that "Johnson contends that an exception to the *Rooker-Feldman* doctrine exists because the state court lacked jurisdiction over him pursuant to *In re Moreno*, 479 B.R. 553 (Bankr. E.D. Cal. 2012)." (SJR. at p. 3.) The exception is irrelevant since *Rooker-Feldman* doesn't apply to Johnson's claims, but it *is* relevant to Johnson's allegation of bias in that the judges knew they lacked personal jurisdiction but refused to acknowledge that Johnson lived out-of-state in order to allow the other defendants to continue an unlawful state case against him.

The Judges have not cited any case (nor can they) in which *Rooker-Feldman* applies absent a demand that the federal court reverse or vacate a state court decision. Interestingly, in this case where Johnson alleges a conspiracy to deprive him his civil rights, the State Judges, the Management Defendants, and the Wilson/Elser attorneys all defend using the same *Rooker-Feldman* doctrine that any reasonable judge or attorney would quickly discard as irrelevant when a plaintiff makes no attempt to reverse a state judgment.

B. The Judicial Defendants Do Not Have Absolute Immunity Against Johnson's Claims of Declaratory or Injunctive Relief

1. Johnson is not seeking damages from the Judicial Defendants.

Johnson's demand for damages does not apply to the judicial defendants, but only to the other defendants who conspired with them to deprive Johnson his civil rights. The State Judges (SJR at p. 3) and Judge Huff (FJR at p. 2) reference *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986), which is misleading because it addressed "whether a judge and prosecutor are immune from damages in a civil rights action" (*Id*. at 1074), finding that they are "absolutely immune from damage liability for acts performed in their official capacities." *Id*. at 1075. Both replies similarly cite *In re Castillo*, 297 F.3d 940, 952 (9th Cir. 2002) in saying that "Judicial immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." But, *Castillo* was a case against a bankruptcy trustee who enjoyed quasi-judicial immunity, and found such immunity applied to damage claims. All the cases cited are inapplicable because Johnson is not seeking damages from any judges.

The defendants all assert that Johnson's complaint cannot be amended to cure any deficiency. Even though Johnson concedes that he failed to separate the judicial defendants when seeking "general and special damages against defendants, jointly or severally" (FAC ¶ 91), the Complaint can easily be amended to change "defendants" to "non-judicial defendants". However, such an amendment is unnecessary since all

parties understand that Johnson doesn't seek damages from any judges, and Johnson understands that absolute immunity applies to damage claims.

2. The Judicial Defendants are not immune from equitable relief.

All cases cited by the judges in their replies involve a plaintiff demanding damages, even if also demanding declaratory and injunctive relief. The State Judges cite the Federal Courts Improvement Act of 1996 as superseding *Pulliam v. Allen*, 466 U.S. 522 (1984), but it only bars equitable relief when paired with damages. They support their position by citing a district court order, *Alvarez Acuna v. Fireside Thrift Co*., No. CV-05-3876-PHX-JAT, 2006 WL 1312528, which states, "To the extent that the relief sought by the Plaintiff's claims require this Court to reconsider or overrule the prior final decisions of the Superior Court, the Plaintiff's claims are dismissed for lack of subject matter jurisdiction." Johnson is not asking this Court to reconsider or overrule the prior State Court decisions. They cite other district court orders and unpublished cases involving equitable relief from past judgments, but they admit when citing the persuasive rulings from other circuit courts that "some courts have held that the amendment to § 1983 does not bar declaratory relief against judges." However, they misconstrue *Justice Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019) in asserting that Johnson is "'seeking … a declaration of past liability against a judge instead of 'future rights'[.]"

The state judges further state that "Johnson must show he has 'in inadequate remedy at law and a serious risk of irreparable harm." (SJR at p. 5.) Again, they cite two district court cases for this proposition, but neither are applicable to *prospective* relief. As to the State Judges, there is no adequate remedy at law because, in the likely event that Johnson succeeds in his state appeal[1] and claims or issues are remanded for further proceedings, even a peremptory challenge on remand may only

[1] The California Court of Appeals heard oral arguments on December 18, 2020 (case numbers D075308 and D077096), which may be decided before this motion is heard.

result in reassigning the case to another of the State Judges. The facts of the Complaint demonstrate, based on extraordinary bias against Johnson in the prior proceedings, a significant risk of irreparable harm if any judicial defendants are allowed to continue deciding Johnson's cases.

Judge Huff asserts that "Johnson does not contend that appeal is somehow out of his reach." (FJR at p. 4.) Judge Huff cannot contend that an appeal is within Johnson's reach because she refused Johnson's request for an interlocutory appeal of her order denying his motion to stay, dismissed three of his claims with prejudice based on a judgment pending appeal in state court, denied Johnson's request for partial appeal of the dismissal, and then stayed the remaining claims pending the same appeal without explanation as to how the appeal had any bearing on the claims. Judge Huff's actions were taken to intentionally aid the defendants in delaying the action against them for a year while preventing any appeal of her decisions. If Johnson's state appeal is successful, her persistent bias suggests she will similarly ignore the statutes requiring her to vacate her prior dismissal of Johnson's claims. And she will continue depriving Johnson due process and prolonging the litigation in order to prevent Johnson from appealing her decisions.

Judge Huff cites further cases that predate those in Johnson's opposition providing that equitable relief is available against judges. She cites cases that generally refer to judicial immunity, but most quote underlying cases involving damage claims. Her primary reliance on *Moore v. Brewster* (Moore), 96 F.3d 1240, 1243-44 (9th Cir. 1996) is misleading because too involves damages against a federal judge. Also, as Judge Huff points out, *Moore* relied in part on *Mullis v. U.S. Bankr. Court for Dist. of Nevada* (Mullis), 828 F.2d 1385, 1394 (9th Cir. 1987). But *Mullis* concludes that "To allow an action for declaratory and injunctive relief against federal officials who would be entitled to judicial immunity from damages merely engenders unnecessary confusion and a multiplicity of litigation." That proposition doesn't apply in this case. If Johnson obtains the *prospective* declaratory

and injunctive relief he seeks, then his successful appeal of the state judgment will avoid the need to appeal Judge Huff's decisions in the federal case, since it would require an impartial judge to decide Johnson's motion to vacate Judge Huff's order dismissing his claims under Rule 60(b)(5).

Judge Huff further argues that federal judges are immune from injunctive relief by citing two unpublished cases. The first, *Dettamanti v. Staffel*, 793 F. App'x. 583 (9th Cir., February 10, 2020), also relied on *Moore*, but it was a § 1983 action against state judges. The second, *Stafne v. Zilly*, 820 F. App'x. 594, 595 (9th Cir., September 3, 2020), relied on *Mullis* in denying injunctive relief because "the collateral attacks of the kind Stafne seeks here cannot be allowed 'without seriously undercutting the orderly process of law.'" Johnson doesn't seek to undercut an orderly process of law – he seeks to restore it. And there would be no prejudice or multiplicity of actions created by awarding Johnson the equitable relief he seeks.

Lastly, the judges are wrong that Johnson seeks "purely retrospective" relief. (SJR at p 9.) The declaration of persistent past violations of his civil rights is necessary to obtain relief from *prospective* future violations and nothing more. Johnson's current state appeal does not request or provide the future relief he seeks, and a declaration of past bias in the underlying actions will ensure their recusal if the claims or issues are remanded or reassigned to their courts.

3. Johnson has alleged sufficient facts supporting a conspiracy.

The judges continue to assert that Johnson is "rely[ing] merely on allegations that a state judge issued erroneous orders to support a conspiracy claim under § 1983." (SJR at p. 6, citing *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); underline added.) Johnson did not "surmise[] that a conspiracy must exist because, in his opinion, the decisions were erroneous." (SRB at p. 8; underline added.) Judge Huff joined in saying that "Johnson's complaint alleging errors in Judge Huff's rulings in Johnson's two federal cases." (FJR at p. 4; underline added.) None of the

defendants' briefs point to a single allegation in the Complaint where Johnson stated their rulings are wrong.

The facts demonstrate that the judges exhibited extraordinary bias against Johnson, especially when he was acting *pro se*. Johnson provided "material facts that show an agreement among the alleged conspirators to deprive the party of his or her civil rights." *Margolis v. Ryan*, *supra*, 140 F.3d at 853. And, the Complaint includes "enough factual matter (taken as true) to suggest than an agreement was made." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Johnson's allegations demonstrate (without alleging actual legal error) a conspiracy to deprive him due process and how the non-judicial defendants benefited from such acts to Johnson's detriment.

The State Judges again cite *Ashelman v. Pope*, supra, 793 F.2d at 1075, in saying that "judicial immunity applies 'however erroneous the act may have been, and however injurious it may have proved to the plaintiff.'" (SRB at p. 7.) Judge Huff similarly cites *Moore v. Brewster*, *supra*, 96 F.3d at 1244, which in turn cites *Ashelman* at 1078 in saying that a conspiracy doesn't "pierce the immunity extended to judges." (FRB at p. 8.) Again, *Moore* involved damage claims and *Ashelman* pertains to damages against state judges.

In any event, the judge's arguments are irrelevant to *their* defense since it serves only to relieve the non-judicial from liability for their participation in the conspiracy.

4. Johnson need not allege that the state courts lacked subject matter jurisdiction.

The State Judges attempt to create confusion by asserting that they must lack subject matter jurisdiction for Johnson's claims to proceed. The claim that "[t]he only two instances in which immunity is overcome is where the judge 'acts in the "clear absence of all jurisdiction," [citation], or performs an act that is not "judicial" in nature. [Citation.]'" (SRB at p. 7, citing *Ashelman*, 793 F.2d at 1075.) They

misapprehend this statement, which provides immunity from damages when a judge is acting in their official capacity. In other words, if they have no subject matter jurisdiction, then they are acting independently and not in a judicial role, and therefore immunity is unavailable. This in no way suggests that, as long as a judge has subject matter jurisdiction, they are absolutely immune from claims of declaratory or injunctive relief.

III. CONCLUSION

The Court should deny the motions to dismiss the State Judges and Judge Huff on the ground that Johnson properly seeks prospective declaratory and injunctive relief. Even if the judges are dismissed, the claims should proceed against the other defendants involved in the conspiracy to deprive Johnson his civil rights. If the Court finds the Complaint insufficient for any reason, Johnson should be granted leave to amend the complaint.

DATED: December 21, 2020

Respectfully submitted,

By: _____

ANTHONY JOHNSON, In Pro Per