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Court of Appeals
Division III
State of Washington
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No. 362311

COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION III

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, *et al.*

Respondents.

OPENING BRIEF OF APPELLANT

Stephen Kerr Eugster
WSBA # 2003
Attorney for Appellant

EUGSTER LAW OFFICE PSC
2418 W Pacific Avenue
Spokane, Washington 99201
(509) 624-5566
eugster@eugsterlaw.com

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INTRODUCTION AND SUMMARY

Lawyer Immunity and the Facts of the Case

A. Under the facts and the law of this case is it proper to apply lawyer immunity? No, it is not. Lawyer immunity will not be applied to what the WSBA and its lawyers have done and are continuing to do.

B. If so, to what allegations in the complaint does lawyer immunity apply? Even if the court wrongly extends lawyer immunity to the case, it will only apply to the allegations which are specifically subject to the immunity so extended. It will not extend to the damage done to the plaintiff by defendants as a result of their persistent ad hominem attacks and attitude toward plaintiff.

C. If the case can go forward with what is left and, perhaps, hypothetical facts added on, then the court will reverse the trial court decision. Yes. Plaintiffs allegations stand on their own. But additional facts, hypothetical facts will be included.

D. If there are insufficient facts and there can be no hypothetical facts added and the remainder does not support a claim, then the trial court decision would be upheld. No, it is impossible that unbiased decision-makers under the facts, and the law and applying logic without fallacy, would reverse the trial court. Plaintiff will have his day in court, and before a jury of his peers.

ASSIGNMENT OF ERROR/ ISSUES PRESENTED

Appellant assigns error to the trial court Conclusions and Order Granting Defendants' Joint Motion to Dismiss ("Order of Dismissal with Prejudice"), CP 266.

The main issue presented is whether the trial court properly exercised its discretion under CR 12(b)(6) in entering the Order of Dismissal with Prejudice. *Id.*

The sub-issues fall under the topic of "Lawyer Immunity and the Facts of This Case:"

1. Under the facts and the law is it proper to apply lawyer immunity in the case?
2. If so, to what averments in Appellant's complaint does lawyer immunity apply?
3. If the case can go forward with what is left and, perhaps, hypothetical facts added on, then the trial court decision is reversed.
4. If there are insufficient facts and there can be no hypothetical facts added, and the remainder does not support a claim, then will the trial court decision be upheld?

STATEMENT OF THE CASE

Appellant Stephen Kerr Eugster (Mr. Eugster) filed his Civil Rights (42 U.S.C. § 1983) complaint herein on February 12, 2018. CP 1. The trial court entered its Order of Dismissal with Prejudice on July 12, 2018. CP 266. Mr. Eugster filed his Notice of Appeal to the Court of Appeals, Division III on July 20, 2018. CP 271.

Defendants filed a Motion for Attorney Fees and Expenses on August 9, 2018. Suppl. CP ____.¹ The motion was denied - Order Denying Motion for Attorney Fees and Expenses on September 20, 2018. Suppl. CP _____. Notice of Cross-Review was filed on October 3, 2018. Suppl. CP _____.

ARGUMENT

I. STANDARDS OF CR 12(b)(6)

There are certain standards to appellate evaluation of a motion under CR 12(b)(6).

Whether dismissal is appropriate for failure to state a claim under CR 12(b)(6) is a question of law that an appellate court reviews de novo. *San Juan County v. No New Gas Tax*, 160

¹ Respondent's Supplemental Clerk's Papers are not due until November 30, 2018 according to the Appellant Court Case Summary.

Wash. 2d 141, 164, 157 P.3d 831 (2007). The factual inquiry on a CR 12(b)(6) motion presumes the allegations set forth in the complaint to be true and asks whether any set of facts can be conceived that would support a valid claim. *Halvorson v. Dahl*, 89 Wash. 2d 673, 674-75, 574 P.2d 1190 (1978).

"Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash. 2d 954, 962, 331 P.3d 29 (2014) (internal quotation marks omitted) (quoting *Kinney*, 159 Wash. 2d at 842). "Therefore, a complaint survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery." *Hoffer v. State*, 110 Wash. 2d 415, 420, 755 P.2d 781, 776 P.2d 963 (1988) (citing *Lawson v. State*, 107 Wash. 2d 444, 448, 730 P.2d 1308 (1986); *Bowman v. John Doe*, 104 Wash. 2d 181, 183, 704 P.2d 140 (1985)).

But "[i]f a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 215, 118 P.3d 311 (2005).

Kearney v. Kearney, 95 Wash. App. 405, 411 (1999) ("Motions

under CR 12(b)(6) "should be granted 'sparingly and with care' and only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore v. ATT Wireless Services*, 136 Wash. 2d 322, 330, 962 P.2d 104 (1998); *Cutler*, 124 Wash. 2d at 755; *Hoffer v. State*, 110 Wash. 2d 415, 421, 755 P.2d 781 (1988), affirmed on rehearing 113 Wash. 2d 148 (1989) (quoting 5, C. Wright A. Miller, FEDERAL PRACTICE § 1357, at 604 (1969)). "We must determine whether [plaintiff] can prove any set of facts, consistent with his complaint, that would entitle him to relief in superior court." *Hoffer*, 110 Wash. 2d at 421.

Findings of fact and conclusions of law are superfluous. *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 336 P.3d 632, 640 n.2 (2014) ("A motion to dismiss a complaint pursuant to CR 12(b)(6) does not call upon the trial court to determine issues of fact and we review its decision de novo. Findings of fact and conclusions of law are therefore superfluous. Implicitly, the requirement of RAP 10.3(g) applies only when a trial court's findings are appropriately entered and necessary to our review.")

In *Westberry v. Interstate Distrib*, 164 Wash. App. 196, 209,

263 P.3d 1251, 1257 (2011), the court states:

Westberry argues that the trial court erred by not entering its own findings of fact or conclusions of law. But a trial court is not required to enter findings of fact or conclusions of law when granting summary judgment under CR 56. *See, e.g., Donald v. City of Vancouver*, 43 Wash. App. 880, 883, 719 P.2d 966 (1986) (Findings of fact . . . are not necessary on summary judgment . . . and, if made, are superfluous and will not be considered by the appellate court.”). Westberry's argument fails.

“Whether immunity applies is a question of law that is reviewed under the de novo standard. *See Wynn v. Earin*, 163 Wash. 2d 361, 369, 181 P.3d 806 (2008).” *Lahrichi v. Curran*, (2011) (Unpublished No. 65144-7-I (Wash. Ct. App. Oct. 31, 2011)).²

II. LAWYER LITIGATION PRIVILEGE

Whether immunity applies is a question of law that is reviewed under the de novo standard.³

Defendants’ in their Motion to Dismiss a lawyer’s litigation privilege say:

The statements Eugster identifies as the basis for all his claims are attorney statements in legal briefing

² <https://casetext.com/case/lahrichi-v-curran?tab=keyword&jxs-wa&sort=relevance&type=case&q=%22Lahrichi%20v.%20Curran%22&p=1>.

³ *See Wynn v. Earin*, 163 Wash. 2d 361, 369, 181 P.3d 806 (2008).

submitted to the district court in *Caruso*. Such statements cannot form the basis of a subsequent, separate action because attorney statements in court filings that are “pertinent” to the lawsuit are absolutely privileged. *E.g., McNeal v. Allen*, 95 Wash. 2d 265, 267, 621 P.2d 1285 (1980).

“The fact that statements made in pleadings are absolutely privileged does not mean that an attorney may abuse the privilege with impunity.” *McNeal v. Allen*, 95 Wash. 2d 265, 267 621 P.2d 1285 (1980).

There are limitations on the concept of immunity. *Gold Seal Chinchillas, Inc. v. State*, 69 Wash. 2d 828, 420 P.2d 698 (1966) (“[They], are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.”) [Emphasis added.]

Whether immunity applies is a question of law that is reviewed under the de novo standard. *See Wynn v. Earin*, 163 Wash. 2d 361, 369, 181 P.3d 806 (2008) (reviewing witness immunity issue de novo).”)

“Generally, some compelling public policy justification must be demonstrated to justify the extraordinary breadth of an absolute privilege.” *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664

P.2d 492 (1983).

In *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wash. App. 105, 110, 796 P.2d 426 (1990) (the court said, "allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief. *McNeal*, 95 Wash. 2d at 267." "A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation.")

The court went on to say: "The absolute privilege, while broad in scope, has been applied sparingly. 'Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.' "*Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 177, 736 P.2d 249 (1987)(quoting *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664 P.2d 492 (1983)). The privilege does not extend to statements made in situations for which there are no safeguards against abuse. *Story*, 52 Wash. App. at 338-39, 760 P.2d 368. Thus, an absolute privilege is allowed only in "situations in which authorities have the power to discipline as well as strike from the record

statements which exceed the bounds of permissible conduct."

Twelker v. Shannon & Wilson, Inc., 88 Wash. 2d 473, 476, 564 P.2d 1131 (1977). In matter, the WSBA will not discipline. App. 195 and following.

Moreover, in the particular circumstances of this case, there are no safeguards to protect against an abuse of the absolute privilege. Here, there could be no protection because the trial judge was taken in by the deceptive statements of Defendants. And, because the case is still subject to being overturned because of fraud on the court. Rule 60(d)(3).

Demopolis v. Peoples Nat'l Bank, 59 Wash. App. 105, 112 (1990) ("The absolute privilege, while broad in scope, has been applied sparingly. `Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.'" *Herron v. Tribune Pub'g Co.*, 108 Wash. 2d 162, 177, 736 P.2d 249 (1987) (quoting *Bender v. Seattle*, 99 Wash. 2d 582, 600, 664 P.2d 492 (1983)).")

Demopolis v. Peoples Nat'l Bank, 59 Wash. App. 105, 112 (1990) ("We are convinced that it would not advance public service and the administration of justice to extend an absolute privilege to Hermsen's statement. An Arizona case is

instructive:

As an immunity which focuses on the status of the actor, the privilege immunizes an attorney for statements made "while performing his function as such." Restatement (Second) of Torts § 586, Comment c. We agree that "special emphasis must be laid on the requirement that it [statement] be made in furtherance of the litigation and to promote the interest of justice." *Bradley v. Hartford Accident Indemnity Co.*, 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973) (emphasis in original). Without that nexus, the defamation only serves to injure reputation.

A good article about lawyer immunity with discussion of its limits is that of T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 935 (2004).

She writes: "In contrast, a plaintiff may defeat a qualified privilege by proving that the defendant acted maliciously, thus abusing the privileged occasion." Citing *DeLong v. Yu Enters.*, 47 P.3d 8, 10 (Or. 2002) (citing *Wallulis v. Dymowski*, 918 P.2d 755 (Or. 1996)); *Demopolis v. Peoples Nat'l Bank of Wash.*, 796 P.2d 426, 431 (1990). *Id.*

Of *Demopolis*, the professor says this: "A Washington court of appeals also refused to insulate an attorney by absolute immunity against a suit based on statements regarding a witness's credibility because doing so would greatly extend the

privilege's scope since credibility is frequently an issue in litigation." *Id.*

The question of judicial immunity provides an analogous point of view. The court in *Burgess v. Towne*, 13 Wash. App. 954, 958-59 (1975), explains the limits of judicial immunity:

Although the doctrine of judicial immunity is a broad one, not all actions by judges are immune from civil suit. *In Spires v. Bottorff*, 317 F.2d 273 (7th Cir. 1963), *cert. denied*, 379 U.S. 938, 13 L. Ed. 2d 349, 85 S. Ct. 343 (1964), a judge who interfered with judicial proceedings after he had disqualified himself was held to be acting in clear absence of jurisdiction. Likewise, *Yates v. Village of Hoffman Estates*, 209 F. Supp. 757 (N.D. Ill. 1962), held that it was not a judicial function for a magistrate to direct a police officer to take into custody a person not named in a warrant, and *Wade v. Bethesda Hosp., supra*, held that a judge acted without jurisdiction in ordering a person sterilized.

The court in *Adkins v. Clark County*, 105 Wash. 2d 675, 677-78 (1986):

Judicial immunity rests on considerations of public policy. This immunity is extended to judges to protect the interests of society and not necessarily to protect the judges as individuals. *Filan v. Martin, supra*. See also *Creelman v. Svenning*, 67 Wash. 2d 882, 410 P.2d 606 (1966). Its purpose is to insure the independent administration of justice by judges who are free from fear of personal consequences. *Creelman v. Svenning, supra*. [1] In determining the scope of immunity from civil liability for "judicial acts", a distinction is drawn between acting in excess of general jurisdiction and acting in clear absence of all jurisdiction. *Burgess v. Towne*, 13 Wash. App. 954, 538 P.2d 559 (1975). To find liability, the

actions of the defendant judge must be in clear absence of all jurisdiction, not simply in excess of jurisdiction. *Burgess v. Towne*, at 958. Thus, acts by a judge or judicial officer will be protected by immunity from civil action for damages if they are intimately associated with the judicial process. *Mauro v. Kittitas Cy.*, 26 Wash. App. 538, 613 P.2d 195 (1980).

Likewise, *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir.

1974), presented the rule this way:

A seemingly impregnable fortress in American Jurisprudence is the absolute immunity of judges from civil liability for acts done by them within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. t. 1213, 18 L. Ed. 2d 288 (1967). The general rule, laid down over a century ago, is that judges are immune from suit for judicial acts within and even in excess of their jurisdiction even if those acts were done maliciously or corruptly; the only exception to this sweeping cloak of immunity exists for acts done in "the clear absence of all jurisdiction.

Here, the lawyers for the WSBA acted clearly outside of their authority. They acted to intentionally bring harm to the lawyer representing other lawyers in an effort to protect them from a discipline system which violated the lawyers' right to procedural due process of law Fifth and Fourteenth Amendments, and the lawyers' right to freedom of associations and freedom of speech and expression under the First and Fourteenth Amendments.

III. LAWYER IMMUNITY AND THE FACTS OF THE CASE

A. Under the Facts and the Law, is it Proper to Apply Lawyer Immunity in the case?

The discussion immediately above leads to the conclusion that lawyer immunity cannot be applied to the facts of this case. The common law of Washington has clear instruction that the lawyers for the WSBA cannot claim absolute immunity. Thus, the case must be reversed. If on the other hand, the court concludes that absolute immunity exists despite the foregoing discussion, then the next step will come into play.

B. If so, to What Averments in Appellant's Complaint does Lawyer Immunity Apply?

Assume for the sake of argument there is absolute immunity applicable in this case. This does not mean that all of the averments are affected by the immunity. The court will have to undertake a trial in order to decide what averments are subject to immunity and what averments are not.

C. If the Case Can go Forward With What is Left and, Perhaps, Hypothetical Facts Added on, Then the Trial Court Decision is Reversed.

The averments left over make up enough facts to support Appellants' claims, the case will move forward, and the motion to dismiss will be denied. At this juncture, it is important to understand that the Respondents and their attorneys engaged

in action, conspiratorial action, whereby attorneys fees and sanctions were sought in every case after Eugster V. Indeed, the product of the conspiracy was in addition found in the *Caruso* case.

The allegations may not be sufficient, but when additional facts and hypothetical facts are added, the case must proceed.

D. If There are Insufficient Facts and There can be no Hypothetical Facts Added, and the Remainder Does not Support a Claim, Then the Trial Court Decision is Upheld.

If the averments left over, the amendments added, and hypothetical facts added still do not sustain a claim by the Appellant, then the case would be dismissed. It is inconceivable, however, the court under the facts and applying logic without fallacy would conclude the case would be dismissed.

IV. ADDITIONAL FACTS, HYPOTHETICAL FACTS

A. Ad Hominem.

In Eugster III, No. 2:17-cv-00392 TOR, 03/23/2018, WSBA and Its Officers' Motion to Dismiss, the lawyers for the WSBA say this:

This case is the latest in a number of legal proceedings between Eugster and the authorities in charge of Washington's attorney-discipline system, the Washington State Supreme Court and the WSBA. The

prior disputes between the parties provide the context for Eugster's arguments here. This Court may take judicial notice of these prior cases. *See, e.g., MGIC Indem. Corp. v. Weisman*, 803 F.2d 500,504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings."). *Id.* at 3. [Emphasis added.] App. 1.

In this case, No. 18-2-00542-1 Defendants' Memorandum of

Authorities in Support of Joint Motion to Dismiss, say this:

Eugster was suspended from practicing law for 18 months in 2009. *In re Eugster*, 166 Wash. 2d 293, 299, 209 P.3d 435 (2009). Since then, he has filed lawsuits in federal and Washington State courts attacking the WSBA and related parties, challenging mandatory bar membership, license fees, and Washington's lawyer discipline system. Eugster's numerous prior lawsuits provide context necessary to understand his Complaint here and in particular the statements he claims defrauded the court in Caruso. This Court may take judicial notice of the public filings in these prior relevant cases. *See, e.g., Jackson v. Quality Loan Serv. Corp.*, 186 Wash. App. 838, 844-45, 347 P.3d 487 (2015) (court may take judicial notice of public documents attached to motion to dismiss if their authenticity cannot reasonably be disputed); *Rodriguez v. Loudeye Corp.*, 144 Wash. App. 709, 726, 189 P.3d 168 (2008); ER 201(b). *Id.* 2-3. [Emphasis added.]

The language above is found in each one of the so-called Eugster Cases. Eugster III, App. 1, Eugster IV, App. 17, Eugster V, App. 56, Caruso, App. 79, Eugster XIII, App. 106, Eugster XXII, App. 133, Eugster XXIII, App. 145, and Caruso (fees on appeal) App. 158.

Each time it is followed with a description of Mr. Eugster and the WSBA attorneys' view of his cases. *Id.* as to all. The statements about Eugster's character are negative; they are not true. The descriptions of Mr. Eugster's cases are also negative and significantly not true. For example, the WSBA attorneys say that Mr. Eugster's cases have been dismissed with prejudice or something of the kind. The court cannot be immune to this constant effort on the part of the Bar Association to have the court agree with them.

These actions on the part of the WSBA are intentional. And, they cannot be said to be in the furtherance of justice. The Appendix to this brief includes copies of pleadings wherein Defendants' falsely describe Mr. Eugster's cases.

B. Conspiracy to Gain Fees.

In late December 2016, early January 2017, Mr. Eugster was retained by attorneys Robert E. Caruso and Sandra L. Ferguson to represent them in action against the WSBA. The action was commenced on January 3, 2017, in District Court at Seattle, WA WD 2: 17-cv-0003-RSM. The action asserted the WSBA and WSBA Washington Discipline System violated their fundamental rights under the First, Fifth and Fourteenth

Amendments. It too was a Civil Rights action under 42 U.S.C. § 1983. The complaint included a class action claim. On February 21, 2017 Plaintiff's filed their amended complaint; the class action claim had been removed. WA WD No. 2: 17-cv-00003-RSM.

Not long after the filing, the lawyers in the case arranged a conference to talk about the amended case. The lawyers, Mr. Eugster, Paul L. Lawrence, Jessica A. Skelton, and Taki V. Flevaris were participants in a telephone call on February 23, 2017. Mr. Eugster explained the Amended Complaint. The explanation addressed the difference between the WSBA, a single member lawyer association in Eugster IV and Eugster V, and the WSBA, a multiple member legal professionals association of lawyers, limited practice officers, and limited license legal technicians as of 2017. Mr. Eugster also pointed out that exacting or strict scrutiny would be applied in testing the infringements of the fundamental rights of his Plaintiffs' First, Fifth and Fourteenth Amendments to the United States Constitution. When Mr. Eugster was finished, Paul Lawrence, the lead attorney for the WSBA, told Mr. Eugster that if he proceeded with the case, he and the other attorneys, Jessica

Skelton and Taki Flevaris, would seek fees personally from Mr. Eugster.

17. On February 23, 2017, Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson, conferred by telephone to discuss the case with the attorneys for Ms. Littlewood and the to the others.

18. During the conference call, Plaintiff explained the case, which had then been amended, to Mr. Lawrence, Ms. Skelton, and Mr. Flevaris and made it a point to emphasize that the WSBA of the case was an association of lawyers, limited practice officers, and limited license legal technicians.

19. In response, Mr. Lawrence told Plaintiff, in the presence of Ms. Skelton, and Mr. Flevaris, that if he proceeded with the action, they would seek fees [from] personally from him. [These paragraphs are from Appellant's complaint in this case.]

On behalf of his clients, Mr. Eugster filed a Motion for Summary Judgment, and to deal with the current problems, injunctions against a disciplinary action which was on-going against Mr. Caruso, and threatened against Ms. Ferguson – a Motion For Preliminary Injunction.

The WSBA lawyers responded with a Motion to Dismiss and Opposition to Plaintiffs' Motions For Summary Judgment and Preliminary Injunction. The thrust of the Motion to Dismiss directed to Mr. Eugster was experienced as painful and cruel, a false attack.

When Mr. Eugster responded, the WSBA lawyers presented him with notice they would seek Rule 11 sanctions against him.

And they did. The trial judge ruled in their favor on the motion to dismiss and in their favor gaining an order against Mr. Eugster for substantial attorney's fees in excess of \$28,000.

Clearly, Mr. Lawrence, who signed the pleadings for himself, Ms. Skelton, and Mr. Flevaris was doing what they said they would do if Mr. Eugster continued to represent his clients against the WSBA. Since then, Mr. Lawrence, Ms. Skelton, and Mr. Flevaris have sought fees and sanctions against Mr. Eugster in several other actions.

1. In the same case, Caruso and Ferguson WA WD 2.17-cv-00003-RSM, the WSBA lawyers sought and obtained a prefiling order, a sanction, from the trial judge. The order has been appealed.

2. In *Eugster v. WSBA and Judges of the Supreme Court*, WA ED No. 2.17-cv-00352-TOR, they sought attorney fees and sanctions against Mr. Eugster after Judge Thomas O. Rice decided the case. Their motion was denied. The case had already been appealed. Ninth Circuit, No. 18-35421; Mr. Eugster's Reply Brief was filed on November 12, 2018.

3. In *Eugster v. Littlewood*, Spokane County Superior Court Case No. 17-2- 04631-5, the WSBA attorneys have filed a motion for attorney fees against Mr. Eugster under Washington's frivolous action statute, RCW 4.84.185. The action is an action against the WSBA Executive Director to gain access to the email addresses of the members of the WSBA so that Mr. Eugster can communicate with his fellow members of the WSBA.

4. *Eugster v. Littlewood*, Spokane County, Case No. 18-2-00542-1 is a personal injury action against the WSBA and its lawyers. The case has been dismissed and is on appeal to the Washington Court of Appeals III. The WSBA and its attorneys sought a frivolous action judgment against Mr. Eugster, but the motion was denied.

5. *Eugster v. Court of Appeals of the State of Washington* (regarding No. 34345-6 111) Superior Court for Spokane County No. 18-2-01561-2 – motions for dismissal and sanctions are being sought by the Defendants. This action seeks to correct a decision by the Court of Appeals which made in excess of its appellate jurisdiction under Wash. Const. Art. IV, Section 30 and the state statute governing Washington Court of Appeals appellate jurisdiction, RCW 2.06.030.

6. Motions for Fees Against Eugster in appeals emanating from Caruso and Ferguson in appeal numbers No. 17-35401 and No. 17-35529. WSBA lawyers filed motions for fees in each appeal. The motions are duplicates. Fees in No. 17- 35529 claimed were \$48,459.25. The fees claimed in No. 17-35410 are \$51,585.50. The difference between the two is \$3,124.25. This amount represents increased claim "fees on fees" of \$3,124.25. The fees on fees part of the total claim, as it stands now, is \$24,255.75 of \$51,585.75. This represents 47 percent of the total amount claimed by the WSBA and its attorneys.

This will be explained further explained below:

Each motion seeks fees from Mr. Eugster personally; each addresses the conduct of Mr. Eugster; that is to say, is the person whose conduct is said to be the basis for the fees claims. Each seeks \$48,459.25 in attorney fees on appeal. See above. This amount includes approximately \$21,131.50 as attorney fees incurred in seeking the fees on the appeal. The lawyers claim they are entitled to "fees on fees." In the Supplemental motion, the lawyers add another \$3,124.25 to the fees on fees amount. Now the total is \$24,255.75, fees on fees.

Thus, the total claimed is \$48,459.25 plus \$3,124.25,

equaling \$51,585.50. Thus, of the total of \$51,585.50 claimed, only \$27,375.75 is the amount of fees sought under the motion ($\$51,585.50 - \$24,255.75 = \$27,327.75$). The fees on fees sought by the lawyers for the WSBA make up a whopping 47 percent of the total claimed ($\$24,255.75 / \$51,585.50 = 0.4702$).

C. Fees on Fees

Fees on fees are not allowed under Rule 38. *Blixseth v. Yellowstone Mountain Club, LLC*, 854 F.3d 626, 631 (9th Cir. 2017).

The award of fees and costs under Rule 38 thus must be limited to appellees' direct fees and costs for defending against the frivolous appeal, and may not include the fees and costs incurred regarding the imposition of sanctions. *See Cooter & Gell*, 496 U.S. at 406-07, 110 S.Ct. 2447; *Sunbelt*, 608 F.3d at 466-67 & n.4; *Lyddon*, 996 F.2d at 214; *Lockary*, 974 F.2d at 1178; *see also Haeger*, 813 F.3d at 1242, 1254 (affirming award of attorneys' fees and costs incurred after a misleading discovery response as a sanction under court's inherent power to compensate party for losses sustained as a result of misconduct).

Real Amount Subject to Motion

Getting back to the motion at hand. It is hard to imagine that the law of the federal courts would allow the WSBA and its lawyers to claim \$24,255.75 to collect \$27,327.75. That's what the WSBA lawyers think. One must shudder. Thankfully, the

wisdom of the court is otherwise.

This issue has been addressed and decided, fees on fees are not allowed. See above. And, any claim otherwise is frivolous. The claim is unfair and punishing. Moreover, it is mean and cruel.

Let us assume one were to allocate half of that to No. 17-35401. The amount would be \$13,66.88 ($\$51,585.50 - \$24,255.75 = \$27,327.75 / 2 = \$13,663.88$). Is that the amount the WSBA and its lawyers are entitled to? Let us take another look at what the law tells us.

But the Law Says None – Res Judicata

The panel of judges on the *Caruso* and *Ferguson* appeals have rendered two orders.

In No. 17-35529, the court said:

Appellee Washington State Bar Association's motion for attorney's fees (Docket Entry No. 27) is denied because the result of the appeal of the district court's award of sanctions under Fed. R. Civ. P. 11 was not obvious and the arguments of error were not wholly without merit. *See Grimes v. Comm 'r*, 806 F.2d 1451, 1454 (9th Cir. 1986).

In No. 17-35410 the court said:

Appellee Washington State Bar Association's motion for attorney's fees (Docket Entry No. 49) is granted. *See In re*

George, 322 F.3d 586, 591 (9th Cir. 2003). The determination of an appropriate amount of fees is referred to the Appellate Commissioner, who shall conduct whatever proceedings he deems appropriate, and who shall have authority to enter an order awarding fees. *See* 9th Cir. R. 39- 1.9. The order is subject to reconsideration by the panel. *Id.*

RES JUDICATA

"Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." (citation and internal quotation marks omitted); *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) ("Res judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits."). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003).

"Under the doctrine of res judicata, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action' even if that judgment 'may have been wrong or rested on a legal principle subsequently overruled in another case.'"

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981).

Issue Preclusion

"Res judicata encompasses the doctrines of claim preclusion and issue preclusion." *Taylor v. Sturgell*, 553 U.S. 880, 892 & n. 5, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). Issue preclusion, the doctrine more clearly applicable to this case, applies when: "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding."

Hydranautics v. Film Tee Corp., 204 F.3d 880, 885 (9th Cir.2000) (internal quotation marks omitted). *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011). Both motions address the same set of facts and in the same context. Both have the same parties on each side of the motions. A final order has been rendered in favor of Mr. Eugster. That order is res judicata in No. 17-35410. See above.

D. Fraud on the Court

WSBA and its lawyers say that in *Caruso* the 9th Circuit

affirmed there was no fraud on the court, “end of story.”

Whether there was or was not fraud on the court is still subject to question. No matter what the 9th Circuit said, Mr. Eugster still has the right to have the court, in an independent action or in the *Caruso* action, under Fed. R. Civ. P. Rule 60(b) or Rule 60(d)(3) overturn the previous decision – “set aside a judgment for fraud on the court.”

CONCLUSION

In light of the above, the court must deny Defendants’ motion to dismiss.

December 3, 2018.

Respectfully submitted,
s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro Se
WSBA #2003

EUGSTER LAW OFFICE PSC
2418 W Pacific Ave
Spokane, WA 99201-6422
509-990-9115
eugster@eugsterlaw.com

CERTIFICATION OF SERVICE

I certify that on December 3, 2018, I emailed the foregoing to counsel at their designated email addresses in the online Washington State Bar Association lawyer directory and that the JIS system will also notify Defendants by email upon filing.

December 3, 2018

s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro Se
WSBA #2003

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Honorable James J. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEPHEN KERR EUGSTER,

Plaintiff,

v.

WASHINGTON STATE BAR
ASSOCIATION, a Washington association
(WSBA); ANTHONY GIPE, President,
WSBA, in his official capacity; WILLIAM D.
HYSLOP, President-elect, WSBA, in his
official capacity; PATRICK A. PALACE,
Immediate Past President, WSBA, in his
official capacity; and PAULA LITTLEWOOD,
Executive Director, WSBA, in her official
capacity; and WASHINGTON SUPREME
COURT; BARBARA MADSEN, Chief Justice,
in her official capacity; CHARLES JOHNSON,
Associate Chief Justice, in his official capacity;
SHERYL GORDON MCCLOUD, Justice, in
her official capacity; CHARLES WIGGINS,
Justice, in his official capacity; STEVEN
GONZALEZ, Justice, in his official capacity;
MARY YU, Justice, in her official capacity;
MARY FAIRHURST, Justice in her official
capacity; SUSAN OWENS, Justice, in her
official capacity; and DEBRA STEPHENS,
Justice in her official capacity,

Defendants.

No. 2:15-cv-00375

MOTION OF DEFENDANT THE
WASHINGTON STATE BAR
ASSOCIATION AND ITS OFFICERS
TO DISMISS COMPLAINT

NOTE ON MOTION CALENDAR:
May 29, 2015

I. INTRODUCTION

This lawsuit is Plaintiff Stephen K. Eugster's ("Eugster") second attempt to attack the validity of the Washington State Bar Association ("WSBA"). Although his previous 2010 challenge to Washington's attorney discipline system was dismissed,¹ Eugster now asserts that the entirety of the WSBA system is unconstitutional because the mandatory bar membership and fees requirements violate his speech, association, and due process rights under the First and Fourteenth Amendments to the U.S. Constitution ("Constitution"). It is well settled, however, under United State Supreme Court ("Supreme Court") and United States Circuit Court for the Ninth Circuit ("Ninth Circuit") precedent, that mandatory bar membership and fees are valid ways for a state to regulate the legal profession and to improve the quality of legal services within the state.

In asserting his claims, Eugster fails to allege any cognizable violation of the First or Fourteenth Amendments. In fact, the gravamen of Eugster's claims is a challenge to the attorney discipline function of the WSBA, which courts repeatedly have upheld as a proper function of a bar association for which mandatory fees may be used. Accordingly, the WSBA and its named officers² respectfully request that Eugster's Complaint be dismissed for failure to state a claim

¹ See *Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237, at *1 (E.D. Wash. July 23, 2010) ("*Eugster II*"). Eugster also previously sued the WSBA in 2004 and 2006. See *Eugster v. Washington Supreme Court, et al.*, No. 04-cv-00158-FVS (E.D. Wash. 2004) (claiming that the Rules of Professional Conduct and the Canons of Judicial Conduct violated Eugster's constitutional rights; case dismissed pursuant to stipulation); *Eugster v. Washington State Bar Association*, No. 06-cv-00251-FVS (E.D. Wash. 2006) (claiming that the disciplinary proceedings initiated against Eugster violated his constitutional rights; case dismissed pursuant to notice of voluntary dismissal).

² This motion is filed on behalf of the WSBA and its named officers: Anthony Gipe, President; William D. Hyslop, President-elect; Patrick A. Palace, Immediate Past President; and Paula Littlewood, Executive Director.

1 upon which relief can be granted under Federal Rule of Civil Procedure (“Rule”) 12(b)(6).
2 Additionally, the WSBA, as a unified state bar association, is immune from suit under the
3 Eleventh Amendment to the Constitution. Accordingly, the WSBA also should be dismissed
4 pursuant to Rule 12(b)(1).

5 II. LITIGATION HISTORY

6 This case is the latest in a number of legal proceedings between Eugster and the
7 authorities in charge of Washington’s attorney-discipline system, the Washington State Supreme
8 Court and the WSBA. The prior disputes between the parties provide the context for Eugster’s
9 arguments here. This Court may take judicial notice of these prior cases. *See, e.g., MGIC*
10 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (“On a motion to dismiss, we may
11 take judicial notice of matters of public record outside the pleadings.”).

12 In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. *See*
13 *In re Disciplinary Proceeding Against Eugster*, 166 Wash.2d 293, 307 (2009) (“*Eugster I*”).
14 Eugster had filed “a baseless petition” in court and refused to acknowledge that his client had
15 discharged him. *Id.* at 317-18. As a result of this behavior, a hearing officer found Eugster had
16 violated numerous rules of professional conduct. *Id.* at 307. The WSBA Disciplinary Board
17 then recommended that Eugster be disbarred. *Id.* at 311. In 2009, the Washington Supreme
18 Court decided instead to suspend Eugster for 18 months. *Id.* at 327-28.

19 In the meantime, the WSBA was investigating another complaint it had received against
20 Eugster based on other conduct. *See Eugster II*, 2010 WL 2926237, at *1. This investigation
21 culminated in a letter from the WSBA to Eugster on December 21, 2009 (during his suspension)

1 warning Eugster “to more carefully analyze the law before filing lawsuits” but otherwise
2 dismissing the matter. *Id.*

3 In January 2010, Eugster filed a complaint in the United States District Court for the
4 Eastern District of Washington against the justices of the Washington Supreme Court, the
5 WSBA, and WSBA officials, alleging that Washington’s attorney discipline system was a
6 violation of his due process rights. *See id.* at *2. The district court dismissed the complaint. *Id.*
7 at *11. Specifically, the district court determined that Eugster lacked standing to assert his
8 claims because he had “failed to show the existence of a case or controversy” and “merely
9 [sought] an absolute shield from discipline in any form arising out of future violations should
10 they occur, not redress for an actual or imminent injury.” *Id.* at *8. The district court also noted
11 that “the Ninth Circuit has recognized bar associations as state agencies for the purposes of
12 Eleventh Amendment immunity” and dismissed Eugster’s claims against the WSBA for that
13 additional reason. *Id.* at *9. In an unpublished memorandum opinion, the Ninth Circuit affirmed
14 the district court’s dismissal of Eugster’s claims on standing grounds and did not reach the
15 Eleventh Amendment immunity issue. 474 Fed. App’x 624 (9th Cir. 2012).

16
17
18 On March 12, 2015, Eugster filed this lawsuit against the Washington Supreme Court, its
19 justices, the WSBA, and WSBA officials. Dkt. # 1. Rather than attack Washington’s attorney
20 discipline system directly as in his prior lawsuit, Eugster now complains that his constitutional
21 rights of association, speech, and due process are violated as a result of the mandatory WSBA
22 membership and fees required to practice law in Washington. *Id.* at 8-16. Eugster states that he
23 “does not wish to associate with the WSBA” because its “primary purpose” is attorney
24 discipline. *Id.* at 9. He also objects to the WSBA’s assessment of license fees, questioning
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1 whether such fees may be used to improve the quality of legal services in the state. *Id.* at 13, 17.
2 As set forth below, Eugster's allegations do not state a cognizable legal claim.

3 **III. STANDARD OF REVIEW**

4 A complaint must be dismissed under Rule 12(b)(6) if it "lacks a cognizable legal theory"
5 or "fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710
6 F.3d 995, 999 (9th Cir. 2013). A complaint "that offers labels and conclusions, a formulaic
7 recitation of the elements of a cause of action, or naked assertions devoid of further factual
8 enhancement will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir.
9 2014) (internal marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57
10 (2007). Instead, the complaint must allege "specific facts" establishing the plausibility of a
11 legally valid claim. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th
12 Cir. 2014). Otherwise, the complaint must be dismissed. *See* Rule 12(b)(6).

13
14
15 Additionally, where an action against an entity is barred by sovereign immunity, the
16 claims against that entity must be dismissed pursuant to Rule 12(b)(1). *See Proctor v. United*
17 *States*, 781 F.2d 752, 753 (9th Cir. 1986).

18 **IV. ARGUMENT**

19 Eugster's two claims against the WSBA and its officers lack any legal merit or factual
20 specificity and should be dismissed. Under well-settled law, the Supreme Court and Ninth
21 Circuit have determined that requiring practicing attorneys to maintain a bar membership and to
22 pay license fees serves important state interests and is consistent with the First and Fourteenth
23 Amendments. Further, the Supreme Court also has determined that a bar association may assess
24 license fees with an allowed deduction for non-chargeable activities and use mandatory fees to
25
26

1 improve the quality of legal services in the state. Finally, the Ninth Circuit has held that the
 2 WSBA, as a unified state bar association, is immune from suit under the Eleventh Amendment to
 3 the Constitution. For each of these reasons, Eugster's Complaint against the WSBA and its
 4 officers is meritless and should be dismissed.

5
 6 **A. Mandatory Membership in the WSBA and Compelled Fees Does Not Violate
 Eugster's Association Rights.**

7 Eugster's first claim for relief, that compelling membership in the WSBA and the
 8 payment of fees violates his right of nonassociation under the First and Fourteenth Amendments
 9 to the Constitution, fails as a matter of law. *See* Dkt. # 1 at 8-11. The Supreme Court and the
 10 Ninth Circuit repeatedly and consistently have held that mandatory bar membership and license
 11 fees are constitutional.
 12

13 The applicable law on mandatory bar membership and fees is well settled. The Supreme
 14 Court "has twice visited the question of bar membership." *Morrow v. State Bar of Cal.*, 188 F.3d
 15 1174, 1175 (9th Cir. 1999). In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Supreme Court
 16 "held it constitutional to compel attorneys to contribute dues to a unified bar," notwithstanding
 17 certain disagreements among the Justices on other issues. *Morrow*, 188 F.3d at 1176 (discussing
 18 *Lathrop*). The *Lathrop* Court held that mandatory bar membership and fees do not infringe on
 19 First Amendment rights because such requirements do "not compel [attorneys] to associate with
 20 anyone"—attorneys remain "free to attend or not attend [bar] meetings or vote," with the only
 21 real compulsion being "the payment of the annual dues," a requirement that serves critical
 22 governmental interests in regulating the legal profession and improving the quality of legal
 23 services in the state. *Lathrop*, 367 U.S. at 827-28, 843 (Brennan, J., lead opinion); *id.* at 849,
 24 861-64 (Harlan, J., concurring); *id.* at 865 (Whittaker, J., concurring); *see also United States v.*
 25
 26

1 *Williams*, 435 F.3d 1148, 1157 & n.9 (9th Cir. 2006) (the legal standard upon which a majority
2 of the Supreme Court agrees in lead and concurring opinions is binding precedent); *Morrow*, 188
3 F.3d at 1177 (“*Lathrop* controls our decision here.”). Three decades later, a majority of the
4 Supreme Court reaffirmed the holding in *Lathrop* that lawyers “may be required to join and pay
5 dues to the State Bar” *Keller v. State Bar of California*, 496 U.S. 1, 4 (1990).

6
7 The Supreme Court’s holdings in *Lathrop* and *Keller* also have been applied consistently
8 in the Ninth Circuit. Subsequent claims attacking mandatory state bar membership, the
9 imposition of bar fees, or the use of such fees to regulate the legal profession and improve legal
10 services, all have been rejected. *See Morrow*, 188 F.3d at 1175-77 (upholding mandatory bar
11 membership and fees); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042-43 (9th Cir. 2002)
12 (upholding bar’s public relations campaign to improve public perception of lawyers). Under this
13 authority, requiring Eugster to maintain membership in the WSBA and pay WSBA license fees
14 in order to practice law does not violate his First Amendment rights.

15
16 The Supreme Court’s recent decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), on
17 which Eugster relies, does not upset these well-established legal principles. The Supreme Court
18 has held that there is “a substantial analogy” between the relationship of a state bar and its
19 members and the relationship between a union and its members. *Keller*, 496 U.S. at 12. In
20 *Harris*, a union case, the Supreme Court held that certain “partial-public employees” could not
21 be required to pay union fees, because they were not “full-fledged state employees” and the
22 normal justifications for requiring fee payment did not apply to them. 134 S. Ct. at 2636-38.
23 The *Harris* Court left in place the framework governing full-fledged public employees, which
24 was first established in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). *See Harris*, 134 S. Ct.

1 at 2638 & n.19. The Supreme Court also expressly rejected any notion that its decision might
 2 “call into question” its longstanding decision in *Keller* that states have a “strong interest” in
 3 requiring attorneys to pay bar fees, which are used for regulating the legal profession and
 4 improving the quality of legal services. *Id.* at 2643-44. Thus, as the Supreme Court went out of
 5 its way to make clear, the “decision in [*Harris*] is wholly consistent with [the] holding in *Keller*.”
 6
 7 *Id.* at 2644.

8 Despite this clear reconciliation between *Harris* and *Keller*, Eugster’s Complaint
 9 misrepresents the Supreme Court’s opinion in *Harris*. The Complaint uses the following altered
 10 quote from *Harris* to suggest that the constitutionality of mandatory bar membership and fees
 11 remains an undecided legal issue:

12 In *Harris v. Quinn*, 573 US ___, 134 S. Ct. 2618, 2629 (2014), Justice Samuel
 13 Alito, writing for the majority, said “[T]he Court [has] never previously held that
 14 compulsory membership in and the payment of dues to an integrated bar was
 15 constitutional, and the constitutionality of such a requirement was hardly a
 foregone conclusion.”

16 Dkt. # 1 at 9 (brackets and emphasis in complaint). But the quoted opinion in *Harris* actually
 17 says “the Court had never previously” decided the issue, that is, prior to *Lathrop* and *Keller*. 134
 18 S. Ct. at 2629 & n.5 (emphasis added) (discussing *Lathrop* and *Keller*). Following *Lathrop* and
 19 *Keller*, the law on compulsory bar membership and fees is well settled and controls the
 20 adjudication of Eugster’s claims here. *See Morrow*, 188 F.3d at 1177.

21 The established law on mandatory bar membership and fees is not only clear, it is
 22 consistent with basic First Amendment principles. Mandatory bar membership does not
 23 materially limit the freedom of attorneys such as Eugster to associate and speak. Eugster
 24 remains “free to attend or not attend [bar] meetings or vote in [bar] elections as he chooses,” and
 25
 26

1 he is not forced “to associate with anyone.” *Lathrop*, 367 U.S. at 828. Likewise, Eugster is not
2 required “to express any particular ideas or make any particular utterances of any kind,” and he
3 remains able “to express [his] own views or to disagree with the positions of the Bar.” *Morrow*,
4 188 F.3d at 1176. Although Eugster is required to pay mandatory license fees, those mandatory
5 fees are more than warranted in light of the state’s strong interests in regulating the legal
6 profession and improving legal services in the state. *See, e.g., Harris*, 134 S. Ct. at 2644.

8 Eugster raises various criticisms about the WSBA and its disciplinary system, but these
9 criticisms provide no cognizable legal claim under the First or Fourteenth Amendments. *See*
10 Dkt. # 1 at 9-11. Eugster has no constitutional right to avoid mandatory bar membership and
11 dues regardless of his distaste for the disciplinary system or his other personal opinions. *See,*
12 *e.g., Morrow*, 188 F.3d at 1175. Thus, Eugster cannot revive his abstract challenge to
13 Washington’s disciplinary system under the guise of a First or Fourteenth Amendment challenge.
14 In any case, most of Eugster’s criticisms concern aspects of Washington’s disciplinary system
15 that are valid as a matter of law, such as the administrative role of the bar association and the
16 deference given to hearing officers regarding factual matters. *See Rosenthal v. Justices of the*
17 *Supreme Court of Cal.*, 910 F.2d 561, 564-65 (9th Cir. 1990) (rejecting due process challenge to
18 attorney discipline system involving bar association hearings and deference to factual findings).
19 The other criticisms Eugster raises lack factual specificity and do not identify any basis for relief
20 under the First or Fourteenth Amendments. *See* Dkt. # 1 at 9-11.

23 In sum, Eugster can be required to maintain bar membership and to pay mandatory fees
24 in order to practice law in Washington. His assertions to the contrary are baseless and, as a
25 result, the Court should dismiss the first claim in Eugster’s Complaint.

1 **B. Eugster Fails to State a Claim that the WSBA Compels the Payment of Fees**
 2 **for Non-Chargeable Activities.**

3 Similar to his first claim, Eugster's second claim alleging that the WSBA compels fees
 4 for non-chargeable activities also fails as a matter of law. *See* Dkt. # 1 at 11-17. Eugster's
 5 Complaint fails to identify any non-chargeable activity for which he has been charged. *See id.* at
 6 12-16. In fact, his only real challenge appears to be to the use of fees for "improving the quality
 7 of legal services," *see id.* at 13, which the Supreme Court has determined is a properly
 8 chargeable activity, *see Keller*, 496 U.S. at 13-14.³ Eugster also appears to assert, without
 9 authority or any factual specificity, that compelled license fees may not be used "against [his]
 10 interests." Dkt. # 1 at 15. The only use Eugster identifies in his Complaint as being against his
 11 interests, however, is the WSBA disciplinary process. *See* Dkt. #1 at 9-11. The Supreme Court
 12 repeatedly has upheld the use of mandatory license fees for attorney discipline purposes. *See*,
 13 *e.g.*, *Keller*, 496 U.S. at 16; *Lathrop*, 367 U.S. at 843. Accordingly, the Court also should
 14 dismiss Eugster's second claim in this case.
 15

16 A unified state bar association can charge mandatory fees with an allowed deduction for
 17 non-chargeable bar activities. In *Keller*, the Supreme Court held that a unified state bar
 18 association may use mandatory fees to fund activities germane to "the State's interest in
 19 regulating the legal profession and improving the quality of legal services," but cannot use such
 20 funds for "activities of an ideological nature which fall outside of those areas of activity." 496
 21 U.S. at 13-14. The *Keller* Court allowed bar associations to engage in ideological activities
 22

23
 24
 25 ³ Other portions of Eugster's Complaint appear to concede that mandatory fees may be used
 26 to improve the quality of legal services. *See, e.g.*, Dkt. # 1 at 6-7 (citing *Keller*, 496 U.S. at 13-
 14), 14-15 (same).

1 unrelated to regulating the legal profession or improving legal services if objecting members are
2 allowed to abstain from funding those particular activities. *See id.* at 9, 14, 16-17.

3 Likewise, the Ninth Circuit has recognized that a state bar complies with *Keller* if it
4 allows members to deduct the proportion of fees the bar spends on non-chargeable political
5 activities. *See Morrow*, 188 F.3d at 1175, 1177; *cf. Gardner*, 284 F.3d at 1041-43 (upholding
6 use of mandatory bar fees for public relations campaign). Complaints ignoring these well-settled
7 legal principles have been dismissed at the pleading stage. *See Morrow*, 188 F.3d at 1175;
8 *Gardner*, 284 F.3d at 1041.

9
10 As Eugster's Complaint acknowledges, the WSBA allows for the precise type of
11 deduction approved by the Supreme Court in *Keller*. *See* Dkt. # 1 at 12 & n.1 (quoting and citing
12 WSBA, *Keller Compliance Option for the Year 2015*, www.wsba.org (2015), available at
13 <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Annual-License-Renewal/Keller->
14 Deduction). The WSBA web page cited in Eugster's Complaint explains the WSBA's process
15 for determining the proportion of fees that members may deduct and notes that the WSBA "has
16 used an extremely 'conservative' test" to determine which of its activities are non-chargeable.
17 WSBA, *Keller Compliance, supra*.⁴

18
19 Eugster's Complaint fails, however, to identify any non-chargeable activity for which the
20 WSBA uses mandatory fees. Rather, the Complaint asserts only that the use of fees for the
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22 ⁴ The Court may consider this document in full because it is excerpted and cited in Eugster's
23 complaint. *See Daniels-Hall v. Nat'l Ed. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (holding that
24 document could be considered at motion to dismiss stage because the complaint "quoted [it] . . .
25 and provided the web address where [it] could be found online"); *cf. id.* at 998-99 (also
26 approving consideration of information "made publicly available [online] by government
entities" when "neither party disputes the authenticity of the web sites or the accuracy of the
information displayed therein"). For the Court's convenience, a copy of the cited WSBA web
page is attached to this motion as **Exhibit A**.

1 purpose of improving the quality of legal services in the state has “not been tested” and remains
2 subject to challenge. Dkt. # 1 at 13. But *Keller* expressly approved of the use of mandatory bar
3 fees for improving legal services. 496 U.S. at 13-14. Moreover, in *Gardner*, the Ninth Circuit
4 applied this principle in approving a state bar’s use of mandatory fees for a public relations
5 campaign. 284 F.3d at 1041, 1043. And in *Harris*, the Supreme Court expressly reaffirmed the
6 importance of each state’s interest in using bar fees to improve legal services. 134 S. Ct. at
7 2643-44.

8
9 Eugster’s failure to identify any specific use of mandatory fees that violates the
10 Constitution renders his claim impermissibly vague. *See Landers*, 771 F.3d at 641; *Twombly*,
11 550 U.S. at 555-57. Nor may Eugster shift the burden to the WSBA, as he attempts to do in his
12 Complaint, to prove “that expenditures are germane and chargeable.” Dkt. # 1 at 16; *cf. Air Line*
13 *Pilots Ass’n v. Miller*, 523 U.S. 866, 878 (1998) (noting that a member challenging a union’s use
14 of mandatory fees cannot “file a generally phrased complaint, then sit back and require the union
15 to prove the ‘germaneness’ of its expenditures without a clue as to which of its thousands of
16 expenditures the objectors oppose” (internal quotations omitted)).

17
18 Although Eugster asserts that “procedural protections” are necessary if a bar uses fees for
19 non-chargeable activities, he fails to articulate any grounds for a cognizable legal claim
20 regarding WSBA procedures. *See* Dkt. # 1 at 14. In *Keller*, the Supreme Court noted that a state
21 bar could meet its procedural obligations with “an adequate explanation of the basis for [its] fee,
22 a reasonably prompt opportunity to challenge the amount of the fee before an impartial
23 decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are
24 pending.” 496 U.S. at 16 (internal quotations omitted). Eugster does not allege that the WSBA
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1 has failed to comply with any of these requirements. To the contrary, the document Eugster cites
2 demonstrates that the WSBA is in full compliance. *See WSBA, Keller Compliance, supra*
3 (explaining fee calculation, detailing process for arbitrating challenges, and noting that a
4 reasonably challenged fee amount need not be paid until the challenge is resolved). In any case,
5 Eugster's Complaint fails to identify any particular procedure (or lack thereof) to which he
6 objects, again leaving his claim impermissibly vague. *See* Dkt. No. 1 at 14-15. An allegation
7 that the WSBA is subject to procedural requirements, without more, does not provide a sufficient
8 basis for a cognizable legal claim against the WSBA and its officers.
9

10 In sum, the WSBA can require Eugster to pay mandatory fees in order to practice law in
11 Washington and use those fees to improve the quality of legal services in the state. Eugster fails
12 to allege any basis for a cognizable legal claim that the WSBA did not fully comply with
13 applicable constitutional requirements, nor does he allege any specific facts in support of such a
14 claim. Accordingly, Eugster's second claim also should be dismissed.
15

16 **C. Eugster's Claims Against the WSBA Are Barred by the Eleventh**
17 **Amendment.**

18 Alternatively, Eugster's claims against the WSBA should be dismissed because the
19 WSBA is immune from suit. In the context of challenges to bar requirements or regulations, the
20 Ninth Circuit has recognized unified bar associations such as the WSBA as state agencies for the
21 purposes of Eleventh Amendment immunity. *See Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327
22 (9th Cir. 1985) (affirming dismissal of state bar association from case seeking to enjoin
23 enforcement of bar rule); *Ginter v. State Bar of Nev.*, 625 F.2d 829, 830 (9th Cir. 1980) ("[T]he
24 Nevada State Bar Association, as an arm of the state, is not subject to suit under the Eleventh
25 Amendment."). Indeed, this issue was previously adjudicated between Eugster and the WSBA in
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1 federal court, against Eugster. *See Eugster II*, 2010 WL 2926237, at *9 (noting that “the Ninth
2 Circuit has recognized bar associations as state agencies for the purposes of Eleventh
3 Amendment immunity” and dismissing Eugster’s claims against the WSBA for that added
4 reason), *aff’d on other grounds*, 474 Fed. App’x 624 (9th Cir. 2012). Accordingly, under well-
5 settled Ninth Circuit law, the WSBA is immune from suit and the claims against it should be
6 dismissed with prejudice.
7

8 V. CONCLUSION

9 Eugster fails to state a cognizable legal claim for relief in this case. Under established
10 Supreme Court and Ninth Circuit authority, Eugster can be required to maintain a bar
11 membership and to pay bar fees in order to practice law in Washington. Accordingly, Eugster
12 has failed to state any claim for a violation of his First or Fourteenth Amendment rights. Further,
13 the WSBA is immune from this suit. Because Eugster’s allegations are so deficient, vague, and
14 groundless, and because allowing Eugster to amend his complaint would be futile and would
15 merely result in undue delay and expense, the Court may dismiss those claims with prejudice.
16 *See, e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 990
17 (9th Cir. 2008) (affirming dismissal without leave to amend because plaintiff was unable to
18 propose any amendments that would save complaint); *cf. Bonin v. Calderon*, 59 F.3d 815, 845
19 (9th Cir. 1995) (“[A] district court does not abuse its discretion in denying [leave] to amend
20 where [plaintiff] . . . provides no satisfactory explanation for his failure to fully develop his
21 contentions originally.”). Accordingly, Eugster’s Complaint should be dismissed with prejudice.
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DATED this 7th day of May, 2015.

PACIFICA LAW GROUP, LLP

By /s/ Paul J. Lawrence

Paul J. Lawrence, WSBA #13557

Jessica A. Skelton, WSBA #36748

Taki V. Flevaris, WSBA #42555

Attorneys for Defendants WSBA; Gipe;

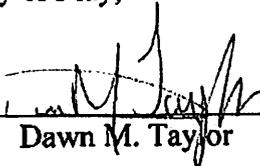
Hyslop; Palace and Littlewood

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2015, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

<p>Stephen Kerr Eugster Eugster Law Office PSC 2418 West Pacific Avenue Spokane, WA 99201-6422 Phone: 509.624.5566 Fax: 866.565.2341 Email: eugster@eugsterlaw.com</p> <p><i>Pro Se</i></p>	<p>William G. Clark Office of the Attorney General of Washington 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 Email: billc2@atg.wa.gov</p> <p><i>Attorneys for Washington Supreme Court and Justices</i></p>
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Signed at Seattle, Washington this 7th day of May, 2015.



Dawn M. Taylor

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STEPHEN KERR EUGSTER,
Plaintiff,

v.

WASHINGTON STATE BAR
ASSOCIATION, a legislatively created
Washington association (WSBA); and
PAULA LITTLEWOOD, Executive
Director, WSBA, in her official capacity;
and
DOUGLAS J. ENDE, Director of the
WSBA Office of Disciplinary Counsel, in
his official capacity; FRANCESCA
D'ANGELO, Disciplinary Counsel,
WSBA Office of Disciplinary Counsel, in
her official capacity,
Defendants.

No. 15-2-04614-9

DEFENDANTS' MEMORANDUM
OF AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Stephen Kerr Eugster ("Eugster") asks this Court to enjoin Defendant the Washington State Bar Association (the "WSBA") and its employees from administering Washington's lawyer discipline system and to award damages allegedly resulting from official actions taken within that system. This suit is but the latest in Eugster's ongoing challenge to lawyer discipline in Washington, which began after he was suspended from the practice of law in

1 2009 for filing “a baseless petition” in court and refusing to acknowledge that his client had
2 discharged him. *In re Eugster*, 166 Wn.2d 293, 317-18, 209 P.3d 435 (2009) (“*Eugster I*”).
3 Eugster’s two prior suits against the WSBA were determined to be groundless and dismissed at
4 the pleading stage. *See Eugster v. WSBA*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D.
5 Wash. July 23, 2010) (“*Eugster II*”), *aff’d*, 474 Fed. Appx. 624 (9th Cir. 2012); *Eugster v.*
6 *WSBA*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) (“*Eugster III*”),
7 *appeal filed*, No. 15-35743 (9th Cir. 2015). This lawsuit is equally groundless and also should
8 be dismissed.
9

10 Eugster’s Complaint in this case asserts that Washington’s lawyer discipline system lacks
11 adequate procedural protections and has been imposed on him as a form of retaliation. These
12 baseless claims should be dismissed for any one of five independent reasons. First, this Court is
13 not the appropriate state judicial forum to hear these claims. The Washington Supreme Court
14 has exclusive jurisdiction over the lawyer discipline system, to which Eugster’s claims all relate,
15 and that Court can and does hear claims regarding alleged deprivation of constitutional rights.
16 Second and relatedly, Eugster’s claims are not justiciable at this time, because he lacks standing
17 and because the claims are not ripe. Eugster cannot challenge Washington’s lawyer discipline
18 system in the abstract and without any allegations of specific injury. Third, the WSBA and its
19 employees are immune from any lawsuit arising out of their administration of Washington’s
20 lawyer discipline system and, thus, are immune from Eugster’s claims. Fourth, Eugster has
21 failed to state a claim upon which relief can be granted. The allegations in Eugster’s Complaint
22 only confirm that Washington’s lawyer discipline system has adequate procedural due process
23 protections and has been administered lawfully. Finally, Eugster should have brought his present
24 claims in his prior lawsuit against the WSBA that was dismissed earlier this year. The claims are
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1 now barred under the doctrine of res judicata. For each of these reasons, this Court should
2 dismiss Eugster's Complaint with prejudice.

3 II. DISCIPLINARY & LITIGATION HISTORY

4 The prior disputes between the parties provide the context for Eugster's claims in this
5 matter. This Court may take judicial notice of these prior cases for purposes of this motion to
6 dismiss. *See, e.g., Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977) (noting that on a
7 motion to dismiss a court "may take judicial notice of matters of public record").
8

9 In 2005, the WSBA charged Eugster with numerous counts of lawyer misconduct. *See*
10 *Eugster I*, 166 Wn.2d at 307. Among other issues, Eugster had filed a guardianship petition
11 without conducting an investigation, ignored his client's direction, and refused to acknowledge
12 that his client had discharged him. *Id.* at 317-18. A hearing officer found Eugster had violated
13 numerous rules of professional conduct. *Id.* at 307. The WSBA Disciplinary Board then
14 recommended that Eugster be disbarred. *Id.* at 311. In 2009, five justices of the Washington
15 Supreme Court decided to suspend Eugster for 18 months, while the remaining four justices
16 agreed with the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.
17

18 In the meantime, the WSBA was investigating another grievance it had received against
19 Eugster based on other conduct. *See Eugster II*, 2010 WL 2926237, at *1. This investigation
20 culminated in a letter from the WSBA to Eugster on December 21, 2009, warning Eugster "to
21 more carefully analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.*
22

23 In January 2010, Eugster filed a complaint in the United States District Court for the
24 Eastern District of Washington against the WSBA and its officers, alleging that Washington's
25 lawyer discipline system violated his due process rights. *See id.* at *2. The district court
26 dismissed the complaint. *Id.* at *11. Specifically, the district court determined that Eugster
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1 lacked standing to assert his claims because he had “failed to show the existence of a case or
2 controversy” and “merely [sought] an absolute shield from discipline in any form arising out of
3 future violations should they occur, not redress for an actual or imminent injury.” *Id.* at *8. The
4 court also found that the WSBA was immune from suit. *Id.* at *9. On appeal, the Ninth Circuit
5 affirmed the dismissal. 474 Fed. Appx. 624 (9th Cir. 2012).
6

7 In September 2014, another grievance was filed against Eugster, within two weeks of his
8 being retained on a matter. Compl. at 30.¹ The WSBA immediately sent an acknowledgment of
9 the grievance to Eugster. *Id.* at 30-31. In November 2014, the WSBA notified Eugster that it
10 was conducting an investigation of the grievance. *Id.* at 30. Eugster was informed that the
11 investigation had been assigned to Managing Disciplinary Counsel, who corresponded with
12 Eugster regarding the investigation. *Id.*
13

14 In March 2015, Eugster filed another lawsuit against the WSBA and its officers, in the
15 United States District Court for the Western District of Washington, this time complaining that
16 the requirement to maintain bar membership and pay license fees in order to practice law in
17 Washington violated his constitutional rights of association and speech. *Eugster III*, 2015 WL
18 5175722, at *2. In support of these claims, which were brought under 42 U.S.C. § 1983, Eugster
19 explained that he did “not wish to associate with the WSBA” because of what he believed to be
20 “significant problems” with the lawyer discipline system, including the “presumptions and
21 deference given by the [Washington Supreme] Court to [] hearing officers and . . . the
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26 ¹ The paragraph-numbering in Eugster’s Complaint is inconsistent and out of order. *See, e.g.*, Compl. at 30, 33-
27 34. To avoid confusion, all citations to the Complaint in this Memorandum are to page numbers, not paragraph
numbers.

1 Disciplinary Board,” and an overall failure to provide “due process of law . . .” App. A, ¶¶ 5,
2 39-40.²

3 In April 2015, Eugster received notice that the ongoing investigation of his conduct had
4 been assigned to an investigator, who met with Eugster to discuss the matter. Compl. at 31.
5 Eugster then received notice that the investigation had been assigned to Disciplinary Counsel.
6 *Id.* Eugster proceeded to correspond with Disciplinary Counsel, providing materials and
7 communications during the Spring and Summer of 2015. *See id.*

9 In early September 2015, the district court in *Eugster III* dismissed Eugster’s complaint.
10 2015 WL 5175722, at *1. Specifically, the court determined that Eugster had “grossly
11 misstate[d]” and “misconstrued” governing precedent, which authorized mandatory bar
12 membership and fees. *Id.* at *5. The court also determined that the WSBA was immune from
13 suit. *Id.* at *9. The court provided Eugster with an opportunity to amend his complaint in the
14 event he could identify any particular use of bar fees that he believed was unlawful. *See id.* at
15 *7-8. Eugster opted not to amend the complaint, which was thus dismissed with prejudice;
16 Eugster then appealed to the United States Court of Appeals for the Ninth Circuit. *See Eugster*
17 *III*, No. 15-35743 (9th Cir. 2015). That appeal remains pending at this time.

19 In late September 2015, Eugster received a request from Disciplinary Counsel for more
20 information, to which he responded. Compl. at 32. On November 5, 2015, Eugster was notified
21 that Disciplinary Counsel would be recommending a formal hearing on the pending grievance
22 against him. *Id.* at 33.

24 ² For the Court’s convenience, Eugster’s prior complaint from *Eugster III* is attached to this Memorandum as
25 Appendix A. The Court can take judicial notice of this document for purposes of the WSBA’s Motion without
26 converting it to a motion for summary judgment, both because the document is referenced in Eugster’s Complaint in
27 this case, *see* Compl. at 31, and because it is a matter of public record. *See Jackson v. Quality Loan Service Corp.*,
186 Wn. App. 838, 844-45, 347 P.3d 487 (2015) (holding that judicial notice of documents attached to motion to
dismiss was proper, without converting motion into one for summary judgment, because documents were referenced
in complaint and for the additional reason that they were public documents).

1 Four days later, on November 9, 2015, Eugster filed this lawsuit against the WSBA.
2 Eugster's Complaint alleges three claims for violation of procedural due process (Counts 2-4),
3 two of which allege that various general aspects of the disciplinary system do not comport with
4 due process requirements (Counts 2 and 3) and one of which alleges that the WSBA is retaliating
5 against him for filing *Eugster III* (Count 4). Compl. at 22-33. Eugster also alleges a claim for
6 declaratory judgment based on the alleged due process violations (Count 1). *Id.* at 22. Finally,
7 Eugster alleges three additional claims based on his allegations that the WSBA is retaliating
8 against him for filing *Eugster III*: a claim that his First Amendment and petition rights have
9 been violated (Count 5), a claim for intentional infliction of emotional distress (Count 6), and a
10 claim that the WSBA is negligently using the disciplinary system to cause him injury and
11 distress (Count 7). *Id.* at 33-34. The WSBA now moves to dismiss the Complaint for lack of
12 jurisdiction and failure to state a claim.
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15 III. STANDARD OF REVIEW

16 A complaint must be dismissed under CR 12(b) if the court lacks jurisdiction "over the
17 subject matter" or "over the person," or if the complaint fails "to state a claim upon which relief
18 can be granted." CR 12(b)(1), (2), (6). A complaint should be dismissed for failure to state a
19 claim if, presuming "that the plaintiff's factual allegations are true," the plaintiff "can prove no
20 set of facts that would justify recovery." *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820,
21 830, 355 P.3d 1100 (2015).
22

23 IV. ARGUMENT

24 A. Eugster must raise his claims within his disciplinary proceedings.

25 First, the Complaint should be dismissed because Eugster's objections to any disciplinary
26 proceedings brought against him must be presented within those proceedings, not as a
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1 preemptive collateral attack in this Court. The Washington Supreme Court has recognized that
2 any claims concerning the operation and administration of the lawyer discipline system must be
3 raised within the disciplinary system and to the Washington Supreme Court – not the superior
4 courts – because the Washington Supreme Court has exclusive jurisdiction over such claims.
5 *State ex rel. Schwab v. WSBA*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972) (noting that matters of
6 lawyer discipline “exist under the aegis of one authority, the Supreme Court” (emphasis added)).
7 The Washington Supreme Court directly oversees the “rules,” “procedures,” “investigation[s],”
8 “prosecutions,” and “hearing of all cases involving discipline, disbarment, suspension, or
9 reinstatement” of lawyers. *Id.*; see also *In re Sherman*, 58 Wn.2d 1, 8, 363 P.2d 390 (1961)
10 (noting that lawyer discipline proceedings are “special proceeding[s] . . . incident to the inherent
11 power of the [Washington Supreme Court] to control its officers” and that “[d]ecisions in
12 disciplinary matters are not precedents of any other class of cases”). In conducting these special
13 proceedings, the Washington Supreme Court is merely “assisted” by the WSBA acting as its
14 “agent.” *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980). Accordingly,
15 disciplinary proceedings before the Washington Supreme Court are “not in the nature of an
16 appellate review, as that term is generally understood.” *Sherman*, 58 Wn.2d at 8.
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19 The Washington Supreme Court repeatedly has emphasized the limited jurisdiction of
20 superior courts in reviewing issues related to disciplinary proceedings. See *In re Sanai*, 177
21 Wn.2d 743, 767-68, 302 P.3d 864 (2013) (reasoning that superior court’s authority in relation to
22 lawyer discipline system is limited to powers expressly delegated in court rules); *Hahn*, 95
23 Wn.2d at 34 (noting “the Superior Court lacks authority to conduct disciplinary proceedings” and
24 “as to matters which do not affect [the] proceedings [otherwise before a superior court], the
25 disciplinary power rests exclusively in [the Washington Supreme Court]”); see also *In re*
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1 *Bannister*, 86 Wn.2d 176, 177, 186-88, 543 P.2d 237 (1975) (finding “petition for investigation
2 of [lawyer] misconduct” to Washington Supreme Court was appropriate only after concluding
3 petitioners had already taken “all steps reasonably available to them . . . pursuant to the rules”).
4 There are no rules allowing a lawyer to challenge his disciplinary proceedings by way of
5 complaint filed in superior court.
6

7 Thus, Eugster is obligated to raise his challenges to the lawyer discipline system and to
8 the WSBA’s conduct within his disciplinary proceedings, but he has failed to do so. The
9 Washington Supreme Court’s Rules for the Enforcement of Lawyer Conduct broadly allow for
10 objections to be raised and motions to be brought during such proceedings. *See, e.g.*, ELC
11 10.1(a), (c), 10.8, 10.16. The WSBA and Washington Supreme Court thus regularly consider
12 constitutional and other challenges, like the claims in Eugster’s Complaint, within such
13 proceedings. *See, e.g., In re Blanchard*, 158 Wn.2d 317, 330-31, 144 P.3d 286 (2006)
14 (adjudication of due process claim); *In re Scannell*, 169 Wn.2d 723, 736-37 & n.8, 239 P.3d 332
15 (2010) (adjudication of retaliation claim). Thus, the claims raised here must be brought as part
16 of Eugster’s defense to any disciplinary action, not in this case.
17

18 In sum, the lawyer discipline system offers ample and appropriate opportunity for
19 Eugster to assert his claims. Eugster cannot use this Court to bypass and undercut that system.
20 His Complaint should be dismissed for this reason alone.
21

22 **B. Eugster’s claims are not justiciable.**

23 As the United States Court of Appeals for the Ninth Circuit previously recognized in a
24 similar case filed by Eugster, Eugster lacks standing to bring a general challenge to the lawyer
25 disciplinary system and any specific claims that he might have arising out of his discipline are
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1 not ripe for adjudication. See *Eugster II*, 474 Fed. Appx. at 625. For these additional reasons,
2 Eugster claims here should be dismissed.

3 To fulfill standing requirements, a plaintiff must allege “an immediate, concrete, and
4 specific injury to him or herself,” rather than a generalized claim of harm. *Trepanier v. City of*
5 *Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992) (“If the injury is merely conjectural or
6 hypothetical, there can be no standing.”). Here, like in the Ninth Circuit, Eugster asserts
7 generalized claims based on the structure of the disciplinary system (which claims are baseless as
8 discussed below). See Compl. at 22-30 (Counts 1-3). Eugster fails to allege a specific injury to
9 him sufficient to satisfy standing requirements and his claims should be dismissed on that basis.

10
11 Moreover, Eugster’s Complaint should be dismissed because his claims are not ripe. In
12 order to assert a claim over which this Court has jurisdiction, Eugster must allege:

13
14 (1) ... an actual, present and existing dispute, or the mature seeds of one, as
15 distinguished from a possible, dormant, hypothetical, speculative, or moot
16 disagreement, (2) between parties having genuine and opposing interests, (3)
17 which involves interests that must be direct and substantial, rather than potential,
18 theoretical, abstract or academic, and (4) a judicial determination of which will be
19 final and conclusive.

20 *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (internal quotations
21 omitted). As part of this inquiry, the ripeness doctrine requires a case to be “developed
22 sufficiently” for a court to adjudicate. *Asarco Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 759, 43
23 P.3d 471 (2002) (internal quotations omitted). Thus, where a claim is merely speculative and
24 hypothetical, it is not ripe. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d
25 137 (1973).

26 Eugster here only complains about the lawyer discipline process in the abstract, without
27 alleging any particular deprivation of due process that he has suffered or is likely to suffer.

Eugster objects, for example, that “[t]here are vast differences among hearing officers” within

1 the discipline system, but his disciplinary proceeding has not been assigned to a hearing officer.
2 Compl. at 26. Eugster also complains about the rules and systemic framework of the lawyer
3 discipline system. Compl. at 22-30. Eugster fails to allege a specific injury to him sufficient to
4 satisfy standing and ripeness requirements and, as a result, those claims should be dismissed.
5

6 **C. The WSBA is immune from this lawsuit.**

7 Eugster's claims also fail because the WSBA and its employees are immune from
8 liability for those claims. Eugster is barred from suing the WSBA and its employees based on
9 their operation and administration of Washington's lawyer discipline system on behalf of the
10 Washington Supreme Court.

11 Under Washington law, the WSBA and its employees have quasi-judicial immunity in
12 their administration of the lawyer discipline system. *See* GR 12.3 (providing that the WSBA and
13 its officers, employees, and others, when "acting on behalf of the Supreme Court under . . . the
14 [ELCs] . . . enjoy quasi-judicial immunity if the Supreme Court would have immunity in
15 performing the same functions"). Quasi-judicial immunity "protects those who perform judicial-
16 like functions" from suit and is an "absolute" form of immunity. *Kelley v. Pierce County*, 179
17 Wn. App. 566, 573, 319 P.3d 74 (2014). This absolute immunity "prevents recovery even for
18 malicious or corrupt actions" to ensure that judicial functions can be performed "without fear of
19 personal lawsuits." *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009).

20 Application of such immunity depends on whether the defendant's challenged conduct was part
21 of the performance of a judicial function. *See Kelley*, 179 Wn. App. at 576-77.

22 Eugster's Complaint is based entirely on the judicial function of the WSBA and its
23 employees, undertaken in the course of administering the lawyer discipline system on behalf of
24 the Washington Supreme Court. *See* Compl. at 22-34. Eugster does not allege that the WSBA
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1 or its employees took any action that does not qualify as the performance of a judicial function.
2 To the contrary, Eugster complains about the initiation and administration of lawyer disciplinary
3 proceedings, which are classic judicial functions. *See, e.g., In re Sherman*, 58 Wn.2d 1, 8, 363
4 P.2d 390 (1961) (noting that lawyer discipline proceedings are “special proceeding[s] . . .
5 incident to the inherent power of the [Washington Supreme Court] to control its officers”).
6 Thus, the WSBA and its employees enjoy quasi-judicial immunity from suit in this case.
7

8 Additionally, sovereign immunity also protects the WSBA and its officials from suit.
9 The sovereign immunity doctrine “prohibits suits against unconsenting states in state court.”
10 *Harrell v. Wash. State ex rel. Dep’t of Soc. Health Servs.*, 170 Wn. App. 386, 405, 285 P.3d 159
11 (2012). The doctrine extends to lawsuits “against state agencies or instrumentalities,” because
12 “such suits are, in effect, suits against the state regardless of whether it is named a party to the
13 action.” *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986); *Rains v. State*, 100 Wn.2d
14 660, 666-67, 674 P.2d 165 (1983). Likewise, lawsuits “against state officials in their official
15 capacities” are also “treated as suits against the state” for sovereign immunity purposes. *Harrell*,
16 170 Wn. App. at 405. As discussed above, the WSBA is a state instrumentality in this context,
17 administering Washington’s lawyer discipline system under the supervision and oversight of the
18 Supreme Court. As such, the WSBA and its officials – whom Eugster has sued here in their
19 official capacities – are doubly immune from Eugster’s claims.³
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22 Finally, the WSBA and its officials also are immune from liability for damages in this
23 case. Under federal law, the WSBA and its officials do not qualify as “persons” who can be held
24 liable for damages under 42 U.S.C. § 1983. *See Buechler v. Wenatchee Valley College*, 174 Wn.
25

26 ³ The issue of sovereign immunity already has been decided against Eugster and in favor of the WSBA on
27 multiple occasions in federal court. *See Eugster II*, 2010 WL 2926237, at *9 (citing *Hirsh v. Justices of the Supreme
Court of the State of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995)); *Eugster III*, 2015 WL 5175722, at *9 (citing cases).
The result should be no different in state court.

1 App. 141, 155, 298 P.3d 110 (2013) (“A state agency or individual acting in his or her official
2 capacity is not a ‘person’ for purposes of § 1983.”). Under Washington law, there is no “cause
3 of action for damages based upon constitutional violations” *Blinka v. WSBA*, 109 Wn. App.
4 575, 590-91; 36 P.3d 1094 (2001). Accordingly, there is no basis to impose liability for damages
5 on the WSBA and its officials.
6

7 In sum, the WSBA and its employees are immune from Eugster’s claims in this lawsuit
8 and the Complaint should be dismissed for this additional reason.

9 **D. Eugster has failed to state a claim upon which relief can be granted.**

10 Even if Eugster raised any claims that were properly before this Court, Eugster’s
11 Complaint also should be dismissed because it fails to state any valid claim for relief. Eugster’s
12 general allegations about Washington’s lawyer discipline system only confirm that the system’s
13 procedural protections are constitutionally adequate. The allegations in the Complaint also
14 confirm that the WSBA’s investigation of the grievance against Eugster has been conducted
15 fairly and properly. Moreover, the Complaint entirely fails to address key elements of Eugster’s
16 retaliation-based claims. Eugster’s claims are thus meritless and should be dismissed.
17

18 *1. Eugster’s due process claims should be dismissed.*

19 Eugster’s first set of claims allege that the lawyer discipline system violates his
20 procedural due process rights. *See* Compl. at 22-33 (Counts 1-4). But as reflected in Eugster’s
21 Complaint, Washington’s lawyer discipline system includes numerous robust procedural
22 protections. These include a formal grievance process, formal hearings and appellate review,
23 and ultimate review and oversight by the Washington Supreme Court. *See* Compl. at 8-9, 16.
24 Within this process, lawyers are given notice and afforded the opportunity to respond, to develop
25 facts, to raise arguments, objections, and motions, to be represented by counsel, and to obtain the
26
27

1 Supreme Court's review. *See, e.g.*, ELC 10.1(a), 10.5, 10.8, 10.11, 10.12, 10.13, 11.9, 11.14,
2 12.1, 12.3, 12.6; *see also* Compl. at 8-15. These robust procedures satisfy due process
3 requirements as a matter of law. *See, e.g., Blanchard*, 158 Wn.2d at 330-31 ("An attorney has a
4 due process right to be notified of clear and specific charges and to be afforded an opportunity to
5 anticipate, prepare, and present a defense. . . . Mr. Blanchard's due process rights were not
6 violated.").

8 Eugster presents various criticisms regarding specific aspects of the system, but these
9 criticisms are baseless, contrary to governing precedent, and do not reflect any violation of due
10 process. Eugster first complains that the standard of proof in disciplinary proceedings "should
11 be at least 'clear and convincing evidence'" Compl. at 28. But the ELCs do require proof
12 of misconduct "by a clear preponderance of the evidence," ELC 10.14, which is equivalent to the
13 "clear and convincing" standard Eugster demands, *see, e.g., Costanzo v. Magnano*, 99 Wash.
14 679, 679-80, 170 P. 337 (1918); *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d
15 1241 (2006). Regardless, Eugster cites no authority for the proposition that such a standard is
16 constitutionally required.

18 Additionally, Eugster makes various generalized accusations of bias and incompetence
19 against the hearing officers who preside over formal lawyer disciplinary hearings. *See* Compl. at
20 26-27. But the Supreme Court always retains the "ultimate responsibility" for determining
21 discipline, and that Court individually reviews underlying proceedings for bias or legal error as
22 appropriate. *See, e.g., In re Lynch*, 114 Wn.2d 598, 608-09, 789 P.2d 752 (1990) (dismissing
23 objection that Disciplinary Board was biased in part because its "recommendations are only
24 advisory"); *see Blanchard*, 158 Wn.2d at 331 ("Mr. Blanchard has not been prejudiced . . .
25 because he was able to appeal the decision to this court, and we are reviewing his case pursuant
26

1 to our plenary authority.”). There is no allegation of bias or incompetence regarding the
2 Washington Supreme Court. For the same reason, Eugster’s myriad complaints about the
3 overlapping roles of WSBA employees and alleged conflicts of interest are equally meritless.
4 *See Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) (“So long
5 as the judges hearing the [lawyer] misconduct charges are not biased . . . there is no legitimate
6 cause for concern over the composition and partiality of the [initial disciplinary committee].”).
7

8 Finally, Eugster alleges that lawyers are denied a “fair hearing” because the Washington
9 Supreme Court “will defer to others in the system” when determining appropriate sanctions.
10 Compl. at 29-30. To the contrary, the Supreme Court repeatedly has clarified that it exercises
11 independent judgment in each case. *See, e.g., Blanchard*, 158 Wn.2d at 330 (“[W]hile we do not
12 lightly depart from the Board’s recommendation, we are not bound by it.” (internal marks
13 omitted)). Indeed, in Eugster’s own case, the Supreme Court deviated from a unanimous
14 recommendation of disbarment to instead impose a suspension of 18 months. *Eugster I*, 166
15 Wn.2d at 299. It now strains credulity for Eugster to argue that the Supreme Court blindly defers
16 to other actors within the system.
17

18 Accordingly, Eugster has failed to state a claim for violation of procedural due process
19 and his Counts 1-4 should be dismissed.
20

21 *2. Eugster’s retaliation-based claims should be dismissed.*

22 Eugster’s second set of claims are based on allegations of unlawful retaliation, by
23 violating his due process and first amendment rights, by intentionally inflicting emotional
24 distress on him, and by negligently using the disciplinary system as a means to cause him injury.
25 *See* Compl. at 30-34 (Counts 4-7). In particular, Eugster alleges that the WSBA’s investigation
26 of the recent grievance against him was commenced and conducted in retaliation for his filing
27

1 *Eugster* III. Compl. at 32-34. But the allegations in the Complaint themselves contradict this
2 baseless assertion. The Complaint also fails to address key elements of these retaliation-based
3 claims. For both of these reasons, the Court should dismiss *Eugster*'s claims.

4 The allegations in *Eugster*'s Complaint are inconsistent with and fatally undermine his
5 claim of retaliation. His claim is based on an alleged "belie[f] that the [WSBA's] investigation
6 [was] launched . . . in retaliation" for his filing *Eugster* III. Compl. at 32. But at the same time,
7 the Complaint alleges that the WSBA notified *Eugster* that its "investigation" had begun in
8 November 2014, *id.* at 30 (quoting letter), while *Eugster* III was not filed until March 2015, *id.* at
9 31. *Eugster* "has therefore pleaded himself out of court," because he has conceded that the
10 WSBA already was formally investigating his conduct well before he filed his lawsuit. *Dunlap*
11 *v. Sundberg*, 55 Wash. 609, 614, 104 P. 830 (1909) (holding that factual concession in complaint
12 demonstrated failure to state a claim).

13 *Eugster*'s Complaint also fails to address a necessary element of any claim based on
14 retaliation, further warranting dismissal. *See Berge*, 88 Wn.2d at 762-64 (noting complaint
15 "must contain either direct allegations of every material point necessary to sustain a recovery" or
16 "allegations from which an inference fairly may be drawn that evidence on these material points
17 will be introduced" (internal quotations omitted)); *Trujillo*, 183 Wn.2d at 839-41 & n.14
18 (dismissing claims for profiteering and intentional infliction of emotional distress that lacked any
19 allegations regarding key elements). To show retaliation, *Eugster* would need to demonstrate
20 that his lawsuit not only substantially motivated the WSBA's investigation, but also that the
21 same investigation would not have been conducted otherwise. *See, e.g., Dewey v. Tacoma Sch.*
22 *Dist. No. 10*, 95 Wn. App. 18, 24, 974 P.2d 847 (1999) (noting that retaliation claim requires that
23 public actor "would not have made the same [] decision" otherwise). *Eugster*'s Complaint
24
25
26
27

1 nowhere suggests that the WSBA's investigation, which was in response to a specific grievance
2 filed against Eugster, would not have been conducted otherwise. Lacking any allegations
3 regarding this critical element of retaliation, Eugster's Complaint necessarily fails. *See Trujillo*,
4 183 Wn.2d at 839-41 & n.14.

5
6 Eugster's Complaint also fails because it lacks additional key elements for the claims of
7 intentional infliction of emotional distress and negligence. With respect to intentional infliction
8 of emotional distress, the Complaint fails to allege "severe" emotional distress or the type of
9 "extreme and outrageous" conduct necessary for liability to attach. *Contreras v. Crown*
10 *Zellerbach Corp.*, 88 Wn.2d 735, 739, 565 P.2d 1173 (1977). Likewise, nowhere does the
11 Complaint allege any of the required elements of a negligence claim against the WSBA. *See*,
12 *e.g., Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (negligence claim requires
13 allegations of (1) duty, (2) breach, (3) resulting injury, and (4) proximate cause, including cause
14 in fact and legal causation). Instead, the Complaint broadly asserts, without explanation, that the
15 WSBA is retaliating against Eugster through the disciplinary system. This vague and
16 unsupported allegation is insufficient to avoid dismissal. *See Trujillo*, 183 Wn.2d at 839-41 &
17 n.14.

18
19 **E. Eugster's claims are barred by res judicata.**

20
21 Finally, Eugster's Complaint also should be dismissed because he was obligated to raise
22 his claims in his most recent lawsuit against the WSBA, *Eugster III*. Because Eugster failed to
23 do so, his claims are now barred. Under the doctrine of res judicata, filing two separate lawsuits
24 based on the same subject matter, sometimes called "claim splitting," is "precluded in
25 Washington." *Ensley v. Pitcher*, 152 Wn. App. 891, 898-99, 222 P.3d 99 (2009) (internal
26 quotations omitted). This "puts an end to strife, produces certainty as to individual rights, and
27

1 gives dignity and respect to judicial proceedings.” *Id.* at 899 (internal quotations omitted).

2 Eugster’s claims in this lawsuit are all substantively related to the claims he brought against the
3 WSBA and its officers earlier this year in *Eugster III*, and because his current claims should have
4 been asserted in that prior lawsuit, Eugster is precluded from raising those claims here.
5

6 The “threshold requirement of res judicata is a valid and final judgment on the merits in a
7 prior suit.” *Id.* For this purpose, “[d]ismissal of an action ‘with prejudice’ is a final judgment on
8 the merits of a controversy.” *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175
9 Wn. App. 222, 228 n.11, 308 P.3d 681 (2013). In *Eugster III*, the court dismissed Eugster’s
10 complaint against the WSBA and its officers with prejudice. Thus, the threshold requirement of
11 a final judgment is met.

12 When there is a prior final judgment on the merits, res judicata precludes a matter from
13 being “relitigated, or even litigated for the first time, if it could have been raised, and in the
14 exercise of reasonable diligence should have been raised, in the prior proceeding.” *Kelly-Hansen*
15 *v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). There is “no simple all-inclusive
16 test” for determining whether specific claims should have been asserted in a prior proceeding.
17 *Id.* at 330. “Instead, it is necessary to consider a variety of factors,” including, for example,
18 “whether the present and prior proceedings arise out of the same facts,” and whether “there were
19 valid reasons” not to assert the claims earlier. *Id.* A claim “should have been raised and decided
20 earlier if,” for example, “it is merely an alternate theory of recovery, or an alternate remedy.” *Id.*
21

22 Eugster’s claims in this lawsuit should have been brought, if at all, in *Eugster III*. In that
23 prior lawsuit, Eugster challenged mandatory membership in the WSBA, in part based on his
24 objections to the lawyer discipline system – the very same objections he raises here. *Compare*
25 *Compl.* at 22-30, *with App. A*, ¶¶ 39-40. Eugster also now objects to the WSBA’s ongoing
26
27

1 grievance investigation, alleging it is a form of retaliation against him for filing *Eugster III*. But
2 months after *Eugster III* was filed and long after the WSBA's investigation had continued to
3 develop, Eugster was specifically afforded an opportunity to amend his complaint in that case.
4 *See* 2015 WL 5175722, at *7-8. Rather than amend his complaint to assert his claim of
5 retaliation in the very proceedings in question, Eugster abandoned the lawsuit, leaving the
6 complaint to be dismissed with prejudice. Under the circumstances, the present claims "could
7 have been raised, and in the exercise of reasonable diligence should have been raised, in the prior
8 proceeding." *Kelly-Hansen*, 87 Wn. App. at 329.

10 In sum, because Eugster's claims in this lawsuit arise out of the same facts as his prior
11 lawsuit, because he has no valid reason for failing to assert those claims in the prior suit, and
12 because his claims are simply alternative theories and remedies in his continuing assault against
13 Washington's lawyer discipline system, Eugster's claims are barred under the doctrine of res
14 *judicata*.

16 **F. Eugster's Complaint should be dismissed with prejudice.**

17 For each of the reasons discussed above, Eugster's Complaint should be dismissed with
18 prejudice. The decision whether to dismiss "with prejudice and without leave to amend" is
19 discretionary. *Green v. Holm*, 28 Wn. App. 135, 140, 622 P.2d 869 (1981). Dismissal with
20 prejudice is appropriate when "amendment would be futile," including when the plaintiff cannot
21 "identify any additional facts that might support [his] claims." *Rodriguez v. Loudeye Corp.*, 144
22 Wn. App. 709, 730, 189 P.3d 168 (2008).

24 Here, dismissal is warranted based in part on the Supreme Court's exclusive jurisdiction
25 over all matters related to Eugster's disciplinary proceedings, lack of justiciability, the immunity
26 of the defendants and *res judicata* – grounds that cannot be remedied by amendment and which
27

1 warrant dismissal with prejudice. *See, e.g., Ent v. Wash. State Crim. Justice Training Comm'n,*
2 174 Wn. App. 615, 618, 301 P.3d 468 (2013) (affirming dismissal with prejudice based on
3 immunity); *Ensley*, 152 Wn. App. at 894 (remanding for dismissal with prejudice based on res
4 judicata). In addition, because the allegations in the Complaint regarding due process and
5 retaliation are so facially deficient on the merits, dismissal with prejudice also is warranted
6 because of Eugster's failure to state a claim. *See, e.g., Green*, 28 Wn. App. at 140 (affirming
7 dismissal with prejudice for failure to state a claim).
8

9 **V. CONCLUSION**

10 This Court should reject Eugster's attempt to bypass and undercut the lawyer discipline
11 system through incessant civil litigation against the WSBA. Because Eugster's claims have been
12 asserted in the wrong forum, prematurely, against defendants who are immune, without
13 substantial basis, and in a duplicative lawsuit, the Complaint should be dismissed with prejudice.
14

15 DATED this 22nd day of January, 2016.

16 PACIFICA LAW GROUP LLP

17 By 

18 Paul J. Lawrence, WSBA #13557
19 Jessica A. Skelton, WSBA #36748
20 Taki V. Flevaris, WSBA #42555

21 Attorneys for Defendants
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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 22nd day of January, 2016 I caused to be served a true copy of the foregoing document upon:

Stephen Kerr Eugster
Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, WA 99201-6422
Phone: 509.624.5566
Fax: 866.565.2341
Email: eugster@eugsterlaw.com

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email service agreement
- via electronic court filing
- via hand delivery

Pro Se Plaintiff

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2016.



Sydney Henderson

Appendix A

1 Stephen Kerr Eugster
2 eugster@eugsterlaw.com
3 Eugster Law Office PSC
4 2418 West Pacific Avenue
5 Spokane, Washington 99201-6422
6 Telephone: +1.509.624.5566
7 Facsimile: +1.866.565.2341
8 Attorney for Plaintiff

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

20 STEPHEN KERR EUGSTER,)
21)
22 Plaintiff,)
23 vs.)
24)
25 WASHINGTON STATE BAR)
26 ASSOCIATION, a Washington association)
27 (WSBA); ANTHONY GIPE, President,)
28 WSBA, in his official capacity; WILLIAM D.)
29 HYSLOP, President-elect, WSBA, in his)
30 official capacity; PATRICK A. PALACE,)
31 Immediate Past President, WSBA, in his)
32 official capacity; and PAULA)
33 LITTLEWOOD, Executive Director, WSBA,)
34 in her official capacity;)
35 and)

No.

COMPLAINT FOR
DECLARATORY RELIEF

1 WASHINGTON SUPREME COURT;)
2 BARBARA MADSEN, Chief Justice, in her)
3 official capacity; CHARLES JOHNSON,)
4 Associate Chief Justice, in his official)
5 capacity; SHERYL GORDON MCCLOUD,)
6 Justice, in her official capacity; CHARLES)
7 WIGGINS, Justice, in his official capacity;)
8 STEVEN GONZÁLEZ, Justice, in his official)
9 capacity; MARY YU, Justice, in her official)
10 capacity; MARY FAIRHURST, Justice, in)
11 her official capacity; SUSAN OWENS,)
12 Justice, in her official capacity; and DEBRA)
13 STEPHENS, Justice, in her official capacity,)
14 Defendants.)
_____)

15
16 Stephen Kerr Eugster, Plaintiff, alleges as follows:

17 **NATURE OF THE CLAIMS**

18 1. This civil rights action seeks injunctive and declaratory relief to redress and prevent
19 the deprivation of Plaintiff’s rights against compelled association and compelled speech
20 protected by the First and Fourteenth Amendments to the United States Constitution by
21 practices and policies of Defendants acting under color of state law.

22 2. Specifically, those rights have been violated by Plaintiff’s compelled membership in
23 the Washington State Bar Association (“WSBA”), which is a prerequisite to the ability to
24 practice law in the state of Washington. Specifically, those rights have been violated by
25 Defendants because the imposition of mandatory dues as a condition of membership to the
26 WSBA violates Plaintiff’s right not to associate with the WSBA and Plaintiff’s right of freedom

1 of speech.

2 3. Specifically, those rights have been violated by Plaintiff's compelled support of
3 activities of WSBA, which are not germane to the purposes of the WSBA.

4 JURISDICTION AND VENUE

5 4. Plaintiff brings this civil rights lawsuit pursuant to the First and Fourteenth
6 Amendments to the United States Constitution. Because this action arises under the
7 Constitution and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. §
8 1331.

9 5. This is also an action under the Civil Rights Act of 1871, specifically 42 U.S.C. § 1983,
10 to redress the deprivation, under color of state law, of rights, privileges, and immunities secured
11 to Plaintiff by the Constitution of the United States, particularly the First and Fourteenth
12 Amendments thereto. The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. §
13 1343(a)(3), (4).

14 6. This is also a case of actual controversy because Plaintiff seeks a declaration of his
15 rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this
16 Court may declare the rights of Plaintiff and grant further necessary and proper relief, including
17 injunctive relief, pursuant to Fed. R. Civ. P. 65.

18 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial
19 district where Defendants reside, and "in which a substantial part of the events or omissions

1 giving rise to the claim occurred.” 28 U.S.C. §§ 1391(b), 124(d)(1).

2 **PARTIES**

3 8. Plaintiff Stephen K. Eugster, is a citizen of the United States and a resident of the state
4 of Washington. Plaintiff is also a duly licensed attorney under the laws of Washington and, as
5 required by RCW 2.48.170, is a member of the WSBA, which is a mandatory prerequisite to the
6 ability to practice law in the State of Washington.

7 9. Plaintiff made his attorney’s oath and was sworn in to the bar of Washington Supreme
8 Court by Associate Justice William O. Douglas at the United States Supreme Court in
9 Washington, D.C., January of 1970.

10 10. As an active member of the WSBA, Plaintiff has paid required mandatory dues to the
11 WSBA since he was admitted to practice law in 1970.

12 11. Defendant WSBA is an association created by the Washington State Bar Act, RCW
13 Ch. 2.48.

14 12. Defendant WSBA is headquartered in Seattle, Washington, and conducts its business
15 and operations throughout the State of Washington.

16 13. Defendant WSBA is a “mandatory” or “integrated” bar association as described in
17 *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). That is, all attorneys must join the WSBA
18 and pay mandatory bar dues as a condition of practicing law in the state of Washington.

19 14. Defendant WSBA is currently enforcing the unconstitutional practices and policies

1 complained of in this action.

2 15. Defendant, Anthony Gipe, is a resident of the state of Washington and is President of
3 the WSBA.

4 16. Defendant Gipe is currently implementing and enforcing the unconstitutional
5 practices and policies complained of in this action. Defendant Gipe is sued in his official capacity.

6 17. Defendant William D. Hyslop, is the President-elect, WSBA;

7 18. Defendant William D. Hyslop is currently implementing and enforcing the
8 unconstitutional practices and policies complained of in this action. Defendant Hyslop is sued in
9 his official capacity is sued in his official capacity.

10 19. Defendant Patrick A. Palace, is the Immediate Past President, WSBA;

11 20. Defendant Palace is currently implementing and enforcing the unconstitutional
12 practices and policies complained of in this action. Defendant Palace is sued in his official
13 capacity.

14 21. Defendant Paula Littlewood, is the Executive Director, WSBA.

15 22. Defendant Littlewood is currently implementing and enforcing the unconstitutional
16 practices and policies complained of in this action. Defendant Littlewood is sued in her official
17 capacity.

18 23. Defendant Washington State Supreme Court is the Supreme Court of the State of
19 Washington created as such by Wash. Const. Art. IV, § 1.

1 quality of legal services. *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990); *Kingstad*, 622
2 F.3d at 712–13; *see also Knox*, 132 S. Ct. at 2295–96; *Abood v. Detroit Board of Education*, 431 U.S.
3 209, 235 (1977).

4 29. Any activities that are not “germane” to the bar association’s purposes of regulating
5 the legal profession and improving the quality of legal services, including political and ideological
6 activities, are “non-chargeable activities.” *Keller*, 496 U.S. at 14; *see also Kingstad*, 622 F.3d at
7 718–19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302–03 (1st Cir. 2000).

8 **FACTUAL ALLEGATIONS**

9 30. The WSBA is a mandatory bar. WSBA, RCW Ch. 2.48. As such, it is unlawful for a
10 person to practice law in the State of Washington unless such person is a member of the WSBA.
11 RCW 2.48.170. The WSBA thus acts under color of state law to collect mandatory dues from
12 WSBA members. *Id.*

13 31. Defendant Washington State Supreme Court regards Defendant WSBA as its agent.
14 The Supreme Court has determined that “the bar association . . . is an association that “is sui
15 generis, many of whose important functions are directly related to and in aid of the judicial
16 branch of government. [citation omitted].” *Graham v. State Bar Association*, 86 Wn.2d 624, 632,
17 548 P.2d 310 (1976). “The power to accomplish the integration of the bar, its supervision and
18 regulation is found first in this court, not the legislature.” *Id.*

19 32. Defendant Washington State Supreme Court under General Rule (GR) 12.2 has

1 delegated to the Washington State Bar Association the authority and responsibility to administer
2 certain boards and committees established by court rule or order. This delegation of authority
3 includes providing and managing staff, overseeing the boards and committees to monitor their
4 compliance with the rules and orders that authorize and regulate them, paying expenses
5 reasonably and necessarily incurred pursuant to a budget approved by the Board of Governors,
6 performing other functions and taking other actions as provided in court rule or order or
7 delegated by the Supreme Court, or taking other actions as are necessary and proper to enable the
8 board or committee to carry out its duties or functions.

9 33. Defendant Washington State Supreme Court under General Rule (GR) 12.1 has
10 designated the purposes of the WSBA and the limitations on purposes of the WSBA.

11 **FIRST CLAIM FOR RELIEF**

12 **The Right of Non-association**

13
14 34. Plaintiff realleges and incorporates by reference each and every allegation set forth
15 above.

16 35. Plaintiff is compelled to be a member of the WSBA and to pay the dues levied by the
17 WSBA in order to practice law in the state of Washington and to appear in the courts of the state
18 of Washington.

19 36. Such compulsions constitute compelled speech and association in violation of
20 Plaintiff's rights under the First and Fourteenth Amendments.

1 37. The issue of whether mandatory membership in an integrated bar association violates
2 a lawyer’s First and Fourteenth Amendments rights has yet to be determined. In *Harris v. Quinn*,
3 573 US ___, 134 S. Ct. 2618, 2629 (2014), Justice Samuel Alito, writing for the majority, said
4 “[T]he Court [has] never previously held that compulsory membership in and the payment of
5 dues to an integrated bar was constitutional, and the constitutionality of such a requirement was
6 hardly a foregone conclusion.” (Emphasis added.) The case of *Lathrop v. Donohue*, 367 U.S. 820
7 (1961) (a plurality decision) did not reach the question whether mandatory membership in an
8 integrated bar association was a violation of an attorney’s First and Fourteenth Amendments
9 rights.

10 38. Mandatory association is permissible under the First and Fourteenth Amendments
11 only if it serves a compelling state interest that cannot be achieved through means significantly
12 less restrictive of associational freedoms. *Knox v. Service Employees International Union*, at 10, 132
13 S.Ct. 2277 (2012), citing *Roberts v. United States Jaycees*, 468 U. S. 609, 623 (1984) (“Freedom
14 of association therefore plainly presupposes a freedom not to associate.”)

15 39. Plaintiff does not wish to associate with the WSBA because its primary purpose is the
16 WSBA Washington Lawyer Discipline System (Discipline System or System). The WSBA’s
17 major attention, its major use of bar membership resources – more than 48% – is to the WSBA
18 Washington Lawyer Discipline System.

19 40. There are significant problems with the System, some of which are described as

1 follows:

2 a. It is questionable that an association which exists to assist its members in their
3 efforts to practice law has as its primary function the object of member discipline, suspension and
4 disbarment. This, to Plaintiff, is an obvious conflict of interest on the part of the WSBA and the
5 Supreme Court.

6 b. Plaintiff also contends that WSBA Washington Lawyer Discipline System
7 does not comply with substantive due process of law guaranteed to members of the WSBA
8 because the system is controlled entirely by the WSBA – from discipline counsel prosecutors to
9 the hearing officers and discipline board members.

10 c. The Washington Supreme Court has the final say on matters of suspension
11 and disbarment, however, given the presumptions and deference given by the Court to System
12 hearing officers and the members of the Disciplinary Board, it is highly unlikely that a lawyer
13 suspended or disbarred by the System will have his case overturned.

14 d. Plaintiff does not want to associate with the WSBA and the Court regarding
15 the present System because it devotes nearly all of its disciplinary efforts on single or very small
16 firm lawyers. This is decidedly unfair.

17 e. Plaintiff does not want to be a member of the WSBA because it has combined
18 the prosecutorial and judicial function under the authority of the WSBA.

19 f. There is no way a lawyer can have the Washington Lawyer Discipline System

1 reviewed by a federal court. The likelihood that a petition for writ of certiorari being granted is
2 almost zero. And, there is no real opportunity to have a United States District Court review the
3 System due the impacts of the Younger Abstention Doctrine (*Younger v. Harris*, 401 U.S. 37
4 (1971)), and the Rooker Feldman Doctrine (*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and
5 *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

6 41. The attorney regulatory function could be performed by entities which do not require
7 a lawyer's mandatory membership. Resources for such functions could be imposed by order of
8 the Supreme Court.

9 42. Accordingly, Defendants currently maintain and actively enforce a set of laws,
10 customs, practices, and policies under color of state law that deprive Plaintiff of rights, privileges
11 and/or immunities secured by the First and Fourteenth Amendments, and, therefore,
12 Defendants are liable to Plaintiff under 42 U.S.C. § 1983.

13 43. Plaintiff has no adequate legal remedy by which to prevent or minimize the
14 continuing irreparable harm to his constitutional rights.

15 44. Plaintiff is therefore entitled to declaratory and permanent injunctive relief. 28
16 U.S.C. §§ 2201, 2202.

17 **SECOND CLAIM FOR RELIEF**
18 **Compelled Dues for Non-Chargeable Activities**
19 **First and Fourteenth Amendments**
20

21 45. Plaintiff realleges and incorporates by reference each and every allegation set forth

1 above.

2 46. Plaintiff asserts that his dues may only be used for chargeable activities, that is,
3 activities must (1) be "germane" to the purposes of the institution; (2) be justified by a vital policy
4 of the government which cannot be fulfilled other than by forced membership; and (3) not
5 significantly add to the burdening of free speech that is inherent government compelled speech
6 and association.

7 47. Defendants may contend that Plaintiff cannot bring this claim because the matter is
8 resolved by the "WSBA Keller Deduction."

9 48. The Keller Deduction is described as follows:

10 In a U.S. Supreme Court case, *Keller v. State Bar of California*, the Court ruled
11 that a bar association may not use mandatory member fees to support political or
12 ideological activities that are not reasonably related to the regulation of the legal
13 profession or improving the quality of legal services. The bar is required to
14 identify that portion of mandatory license fees that go to such "nonchargeable"
15 activities and establish a system whereby objecting members may either deduct
16 that portion of their fees or receive a refund. This year (2015), objecting members
17 may deduct up to \$4.40 if paying \$325; \$2.20 if paying \$162.50; \$2.71 if paying
18 \$200; \$1.10 if paying \$81.25; or \$0.68 if paying \$50.¹

19
20 49. The Keller Deduction applies only to "fees to support political or ideological
21 activities that are not reasonably related to the regulation of the legal profession or improving the
22 quality of legal services." It does not apply to other non-chargeable activities. The Keller

¹ WSBA Website <http://www.wsba.org/Licensing-and-Lawyer-Conduct/-Annual-License-Renewal/Keller-Deduction>.

1 Deduction was limited to “those activities having political or ideological coloration which are not
2 reasonably related to the advancement” [of the] “the regulation of the legal profession.” *Keller*,
3 496 U.S. at 16. Justice Samuel Alito, writing for the majority in said this about the impact of
4 *Harris v. Quinn* on the holding in *Keller*:

5 In *Keller*, we considered the constitutionality of a rule applicable to all members
6 of an “integrated” bar, i.e., “an association of attorneys in which membership and
7 dues are required as a condition of practicing law.” 496 U. S., at 5. We held that
8 members of this bar could not be required to pay the portion of bar dues used for
9 political or ideological purposes but that they could be required to pay the portion
10 of the dues used for activities connected with proposing ethical codes and
11 disciplining bar members. *Id.*, at 14.

12 *Harris V. Quinn*, 134 U.S. ___ at ___ 134 S.Ct. 2618, at 2644 ___ (2014).

13 50. *Keller* used *Abood* to reach the foregoing rule. *Abood* cannot be used in this case
14 because it is necessary to determine exactly what falls into the category of non-chargeable
15 activities.

16 51. Furthermore, even if *Abood* is used, the non-chargeable activities can be only for
17 those activities which, as Justice Samuel Alito said are the “ activities connected with proposing
18 ethical codes and disciplining bar members.”

19 52. Dues relating to “improving the quality of legal services” have not been tested or
20 described at the present time.

21 53. As to these, *Abood* should not apply. In *Harris* the court examined and criticized the
22 use of *Abood*. One of the strongest criticisms was this:

1 *Abood* does not seem to have anticipated the magnitude of the practical
2 administrative problems that would result in attempting to classify public-sector
3 union expenditures as either "chargeable" (in *Abood's* terms, expenditures for
4 "collective-bargaining, contract administration, and grievance-adjustment
5 purposes," *id.*, at 232) or nonchargeable (i.e., expenditures for political or
6 ideological purposes, *Id.*, at 236). In the years since *Abood*, the Court has struggled
7 repeatedly with this issue. *See Ellis v. Railway Clerks*, 466 U. S. 435 (1984);
8 *Teachers v. Hudson*, 475 U. S. 292 (1986); *Lehnert v. Ferris Faculty Assn.*, 500 U. S.
9 507 (1991); *Locke v. Karass*, 555 U. S. 207 (2009). In *Lehnert*, the Court held that
10 "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2)
11 be justified by the government's vital policy interest in labor peace and avoiding
12 'free riders'; and (3) not significantly add to the burdening of free speech that is
13 inherent in the allowance of an agency or union shop." 500 U. S., at 519. But as
14 noted in JUSTICE SCALIA's dissent in that case, "each one of the three 'prongs'
15 of the test involves a substantial judgment call (What is 'germane'? What is
16 'justified'? What is a 'significant' additional burden)." *Id.*, at 551 (opinion
17 concurring in judgment in part and dissenting in part).

18
19 *Harris V. Quinn*, 134 U.S. ___ at ___ 134 S.Ct. 2618, at 2632 - 2633 (2014).

20
21 54. The First Amendment protects not only the freedom to associate, but the freedom
22 not to associate; and it protects not only the freedom of speech, but the freedom to avoid
23 subsidizing group speech with which an individual disagrees. *Knox v. Service Employees Intern.*
24 *Union*, 132 U.S. ____, 132 S. Ct. 2277, 2288-89 (2012); *Kingstad v. State Bar of Wisconsin*, 622
25 F.3d 708, 712- 13 (7th Cir. 2010).

26 55. Unless specific procedural protections are in place, an individual's rights against
27 compelled speech and compelled association are violated when a mandatory bar uses mandatory
28 member dues for purposes not germane to regulating the legal profession or improving the

1 quality of legal services. *Keller*, 496 U.S. at 13-14; *Kingstad*, 622 F.3d at 712-13; *see also Knox*, 132
2 S. Ct. at 2295-96; *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977).

3 56. The failure to provide such procedural protections in the first instance violates bar
4 members' Fourteenth Amendment right to procedural due process. *Hudson v. Chicago Teachers*
5 *Union Local No. 1*, 743 F.2d 1187, 1192-93 (7th Cir. 1984) *aff'd sub nom. Chicago Teachers Union,*
6 *Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

7 57. Any activities that are not "germane" to the bar association's dual purposes of
8 regulating the legal profession and improving the quality of legal services, including political and
9 ideological activities, are "non-chargeable activities." *Keller*, 496 U.S. at 14; *see also Kingstad*,
10 622 F.3d at 718-19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302-03 (1st
11 4:12-cv-03214-RGK Doc # 1 Filed: 10/10/12 Page 6 of 22 - Page ID # 6 Cir. 2000);

12 58. In the past, *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977) has been
13 used to determine what a non-consenting member should be rebated by the WSBA for political or
14 ideological speech.

15 59. *Abood* does not apply in this case as to the determination of what are the non-
16 chargeable activities of the WSBA which use dues compelled by WSBA against Plaintiff's
17 interests.

18 60. When mandatory member dues are used for non-chargeable activities, the bar
19 association is required to establish procedures that satisfy three requirements: (a) proper notice

1 to members, including an adequate explanation of the calculations of all non-chargeable activities;
2 (b) a reasonably prompt decision by an impartial decision maker once a member makes an
3 objection to the manner in which his or her mandatory member dues are being spent; and (c) an
4 escrow for the amounts reasonably in dispute while such challenges are pending. *Keller*, 496 U.S.
5 at 14; *Hudson*, 475 U.S. at 306-08.

6 61. Defendants bear the burden of proving that expenditures are germane and chargeable.
7 *Hudson*, 475 U.S. at 306; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)
8 (emphasizing that, "as always, the union bears the burden of proving the proportion of chargeable
9 expenses to total expenses").

10 62. Chargeable activities must (1) be "germane" to purposes of the WSBA; (2) be
11 justified by the government's vital policy interest in regulating attorneys; and (3) not significantly
12 add to the burdening of free speech. *In re Petition for Rule to Create Vol. State Bar Assn.*, 286 Neb.
13 1018, 1032 - 1033, 841 N.W.2d 167 (2013).

14 63. Accordingly, Defendants currently maintain and actively enforce a set of laws,
15 customs, practices, and policies under color of state law that deprive Plaintiff of rights, privileges
16 and/or immunities secured by the First and Fourteenth Amendments, and, therefore,
17 Defendants are liable to Plaintiff under 42 U.S.C. § 1983.

18 64. Plaintiff has no adequate legal remedy by which to prevent or minimize the
19 continuing irreparable harm to his constitutional rights.

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Respectfully submitted,

EUGSTER LAW OFFICE PSC

s/ Stephen K. Eugster

Stephen Kerr Eugster, WSBA # 2003
2418 West Pacific Avenue
Spokane, Washington 99201-6422

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Paul J. Lawrence, WSBA #13557
Jessica A. Skelton, WSBA #36748
Taki V. Flevaris, WSBA #42555
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: (206) 245.1700
Facsimile: (206) 245.1750
Attorneys for Defendants

Honorable Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN KERR EUGSTER,

Plaintiff,

v.

PAULA LITTLEWOOD, Executive
Director, Washington State Bar
Association (WSBA), in her official
capacity; DOUGLAS J. ENDE,
Director of the WSBA Office of
Disciplinary Counsel, in his official
capacity; FRANCESCA D'ANGELO,
Disciplinary Counsel, WSBA Office of
Disciplinary Counsel, in her official
capacity,

Defendants.

No. 2:15-cv-00352-TOR

DEFENDANTS'
MOTION TO DISMISS

6/28/2016
Without Oral Argument

DEFENDANTS'
MOTION TO DISMISS
Case No. 2:15-cv-00352-TOR

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

I. INTRODUCTION

1
2 Ever since Plaintiff Stephen Kerr Eugster (“Eugster”) was disciplined for
3 attorney misconduct in 2009, he has brought one collateral attack after another
4 against the Washington State Bar Association (“WSBA”) and its officials,
5 challenging the lawyer discipline system that the WSBA administers on behalf
6 of the Washington Supreme Court. This is Eugster’s fourth such lawsuit, and
7 his second before this Court. Each of his prior lawsuits lacked merit and was
8 dismissed, and this case is no different.

9 In this case, Eugster brings meritless claims that Washington’s lawyer
10 discipline system violates procedural due process requirements and infringes on
11 his First Amendment right of association. *See* ECF No. 8 at 2-3, 27-35.
12 Eugster’s due process claim should be dismissed because (1) his procedural
13 objections are all hypothetical and vague, and thus unripe; (2) he has failed to
14 identify any violation of due process; and (3) he could have asserted his claim in
15 an earlier lawsuit, and thus, it is barred by the doctrine of res judicata. *See infra*,
16 at 7-15. Eugster’s First Amendment claim also should be dismissed, because (1)
17 he already asserted the same claim in an earlier lawsuit, which was dismissed
18 with prejudice; and (2) as a matter of law, requiring bar membership to practice
19 law does not infringe on First Amendment freedoms. *See infra*, at 15-17.
20

1 Additionally, this Court should dismiss the entire complaint under the
2 *Younger* abstention doctrine, to avoid interfering with the pending bar
3 proceedings against Eugster. *See infra*, at 17-20. Eugster should present his
4 objections within those proceedings rather than in this collateral attack.

5 For each of these reasons, this Court should dismiss Eugster's claims.
6 Moreover, this Court should dismiss with prejudice because Eugster's claims
7 cannot be rescued by yet another amendment to his Complaint.

8 **II. DISCIPLINARY & LITIGATION HISTORY**

9 This case is the latest in a number of proceedings between Eugster and the
10 WSBA. The prior disputes provide context for Eugster's arguments here. This
11 Court may take judicial notice of these prior cases. *See MGIC Indem. Corp. v.*
12 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may
13 take judicial notice of matters of public record outside the pleadings.").

14 In 2005, the WSBA charged Eugster with numerous counts of attorney
15 misconduct. *See In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d
16 293, 307 (2009) ("*Eugster I*"). Among other issues, Eugster had filed a
17 "baseless" petition, ignored his client's direction, and refused to acknowledge
18 that his client had discharged him. *Id.* at 317-18. A hearing officer found
19 Eugster had violated numerous rules of professional conduct. *Id.* at 307. The
20 WSBA Disciplinary Board then recommended that Eugster be disbarred. *Id.* at

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1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 311. In 2009, five justices of the Washington Supreme Court decided instead to
2 suspend Eugster for 18 months, while the remaining four justices agreed with
3 the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.

4 In the meantime, the WSBA was investigating another complaint it had
5 received against Eugster based on other conduct. *See Eugster v. Wash. State*
6 *Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237, at *1 (E.D. Wash. July
7 23, 2010) ("*Eugster II*"). This investigation culminated in a letter from the
8 WSBA to Eugster in December of 2009 warning Eugster "to more carefully
9 analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.*

10 In January 2010, Eugster filed a complaint in this Court against the
11 WSBA and its officials, alleging that Washington's attorney discipline system
12 violated his due process rights. *See id.* at *2. This Court dismissed the case. *Id.*
13 at *11. Specifically, this Court determined that Eugster lacked standing to assert
14 his claims and that his claims were "unripe" because he did "not present
15 concrete legal issues...but rather, abstractions." *Id.* at *8 (internal quotations
16 omitted). The Ninth Circuit affirmed. 474 Fed. App'x 624 (9th Cir. 2012).

17 In September 2014, another grievance was filed against Eugster, within
18 two weeks of his being retained on a matter. ECF No. 8 at 23. The WSBA
19 immediately sent an acknowledgement of the grievance to Eugster. *See id.* In
20 November 2014, the WSBA notified Eugster that it was conducting an

1 investigation of the grievance. *See id.* at 24. Eugster was informed that the
2 investigation had been assigned to Managing Disciplinary Counsel, who began
3 corresponding with Eugster regarding the investigation. *See id.*

4 On March 12, 2015, Eugster filed another lawsuit in federal court against
5 the WSBA and its officials, this time in the Western District of Washington. *See*
6 *Eugster v. WSBA*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3,
7 2015) (“*Eugster III*”). In that lawsuit, Eugster complained that his constitutional
8 rights of association, speech, and due process were violated by the requirement
9 for membership in the state bar and payment of license fees in order to practice
10 law. *Id.* at 8-16. In support of these claims, Eugster explained that he did “not
11 wish to associate with the WSBA” because of what he believed to be
12 “significant problems” with the lawyer discipline system, including a failure to
13 provide “due process of law....” App. 1 (*Eugster III Compl.*) at 9-10.¹

14 In September 2015, the district court in *Eugster III* dismissed Eugster’s
15 complaint. 2015 WL 5175722, at *1. Specifically, the court determined Eugster

17 ¹ For the Court’s convenience, relevant court filings are attached as appendices.
18 The Court may take judicial notice of these filings because they are referenced
19 in Eugster’s complaint and are matters of public record. *See Daniels-Hall v.*
20 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010); *MGIC*, 803 F.2d at 504.

1 had “grossly misstate[d]” and “misconstrued” governing precedent, which
2 authorized mandatory bar membership and fees. *Id.* at *5. Eugster appealed to
3 the Ninth Circuit, and that appeal remains pending. *See Eugster III*, No. 15-
4 35743 (9th Cir. 2015).

5 In the meantime, the bar disciplinary process moved forward and the
6 latest grievance against Eugster continued to be investigated. In April 2015,
7 Eugster received notice that the ongoing investigation had been assigned to an
8 investigator, who met with Eugster to discuss the matter. ECF No. 8 at 25.
9 Eugster then received notice the investigation had been assigned to Disciplinary
10 Counsel, with whom Eugster corresponded. *See id.* In late September 2015,
11 Eugster received a request for more information, to which he responded. *See id.*
12 On November 5, 2015, Eugster was notified that Disciplinary Counsel would be
13 recommending a formal hearing on the pending grievance against him. *See id.*
14 at 26. A formal hearing has since been ordered. *See id.* at 26-27.

15 On November 9, 2015—four days after Eugster received notice of the
16 hearing recommendation—Eugster filed another lawsuit against the WSBA and
17 its officials, this time in Spokane County Superior Court. *Eugster v. WSBA*, No.
18 15204514-9 (Spok. Cnty. Super. Ct. 2015) (“*Eugster IV*”). Eugster’s complaint
19 was largely identical to his complaint here, sounding in due process, but also
20 including damages claims. *See App. 2 (Eugster IV Compl.)*, at 26-45. On April

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1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 1, 2016, the superior court dismissed the complaint with prejudice, concluding
2 that the Washington Supreme Court has exclusive jurisdiction over lawyer
3 discipline in Washington, that Eugster already had been afforded an opportunity
4 to raise his objections within his prior disciplinary proceedings, and that the
5 WSBA's officials were immune from Eugster's damages claims. *See* App. 3
6 (*Eugster IV* order), at 2-4. Eugster appealed that decision to Division III of the
7 Washington Court of Appeals, and that appeal remains pending.

8 Finally, on December 22, 2015, Eugster filed the present lawsuit against
9 the WSBA's officials. *See* ECF No. 1. Eugster's "Amended and Restated"
10 complaint alleges two claims for relief. *See* ECF No. 8 at 2-3, 27-34. Eugster's
11 primary claim, which is his "focus" throughout the complaint, is that
12 Washington's lawyer discipline system "violates Procedural Due Process." *Id.*
13 at 32. Eugster also alleges that the discipline system violates his First
14 Amendment rights, and in particular his "Associational Freedoms." *Id.* at 3, 31.
15 Defendants now move to dismiss the Amended and Restated Complaint under
16 Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6).

17 III. STANDARD OF REVIEW

18 A complaint must be dismissed under Rule 12(b)(1) if the claims asserted
19 are not ripe for adjudication. *See, e.g., Chandler v. State Farm Mut. Auto. Ins.*

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SUITE 2000
SEATTLE, WASHINGTON 98101-3404
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FACSIMILE: (206) 245 17500

1 Co., 598 F.3d 1115, 1121-22 (9th Cir. 2010). The burden is on the plaintiff to
2 demonstrate ripeness. *See id.*

3 A complaint must be dismissed under Rule 12(b)(6) if it “lacks a
4 cognizable legal theory” or “fails to allege sufficient facts to support a
5 cognizable legal theory.” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir.
6 2013). A complaint “that offers labels and conclusions, a formulaic recitation of
7 the elements of a cause of action, or naked assertions devoid of further factual
8 enhancement will not suffice.” *Landers v. Quality Commc’ns, Inc.*, 771 F.3d
9 638, 641 (9th Cir. 2014) (internal marks omitted). Instead, the complaint must
10 allege “specific facts” establishing the plausibility of a valid claim. *Eclectic
11 Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th Cir. 2014).

12 IV. ARGUMENT

13 A. Eugster’s Due Process Claim Should Be Dismissed.

14 Eugster’s procedural due process claim is unripe, legally deficient on the
15 merits, and barred under the doctrine of res judicata. Each of these reasons is
16 independently sufficient to warrant dismissal of Eugster’s due process claim.

17 1. Eugster’s due process claim is not ripe.

18 Eugster’s due process claim should be dismissed because it is not ripe for
19 adjudication. The ripeness doctrine requires a claimant to present “concrete
20 legal issues” rather than mere “abstractions.” *Mont. Env’t’l Info. Ctr. v. Stone-*

1 *Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted).

2 Further, a claimant must allege injury that “is sufficiently direct and immediate”
3 to warrant judicial review. *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978)
4 (internal quotations omitted). These requirements “sharpen[] the presentation of
5 issues upon which the court so largely depends for illumination of difficult
6 constitutional questions.” *Id.* at 738 (internal quotations omitted).

7 Here, Eugster complains about the lawyer discipline system only in the
8 abstract, without alleging any particular deprivation of due process that he has
9 suffered or is likely to suffer. *See* ECF No. 8 at 31-34. He describes various
10 components of the discipline system, but without stating how those components
11 have been or will be used to violate his due process rights. *See* ECF No. 8 at 6-
12 23. He also insists he “will be injured,” but he never explains how. *Id.* at 34.
13 As a result, Eugster has failed to present “concrete legal issues” or any “direct
14 and immediate” injury and his claim is unripe. *See Pence*, 586 F.2d at 737-38.

15 Eugster’s vague allegations are especially deficient in the context of a
16 procedural due process challenge. None of Eugster’s objections arise from the
17 application of the discipline system to him—instead, they are objections to the
18 system in theory. But as the Ninth Circuit has observed, “the very nature of due
19 process negates any concept of inflexible procedures universally applicable to
20 every imaginable situation.” *Pence*, 586 F.2d at 737 (internal quotations

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1 omitted). In other words, it is generally impossible to evaluate the sufficiency of
2 procedures in a vacuum, without application to a particular case and without
3 consideration of context and details. As the Ninth Circuit made clear in *Pence*, a
4 procedural due process challenge “requires factual development, and should not
5 be decided in the abstract.” *Id.* at 736-37 (dismissing as unripe a challenge to
6 regulations that had “not yet been applied to [the] plaintiffs”).

7 Here, all of Eugster’s objections to the discipline system are abstract and
8 premature. Eugster complains about “vast differences among hearing officers”
9 and alleges “[n]ot all hearing officers understand the trial process and the rules
10 of evidence.” *Id.* at 21. Given that a hearing officer has not yet been assigned to
11 Eugster’s case, however, these complaints are entirely speculative. *See Hirsh v.*
12 *Justices of Supreme Ct.*, 67 F.3d 708, 714 (9th Cir. 1995) (noting bar officers are
13 “entitled to a presumption of honesty and integrity”). Moreover, the system
14 provides due process protections relating to the assignment of hearing officers.
15 *See, e.g.,* Wash. R. Enf’t of Lawyer Conduct (“ELC”) 10.2(b) (providing
16 procedures for disqualification of hearing officers).

17 Eugster also complains about the deference the Washington Supreme
18 Court allegedly affords to the WSBA Disciplinary Board. *See* ECF No. 8 at 23.
19 But again, without allegations of an actual instance of improper deference in
20 Eugster’s case, this issue cannot be evaluated or adjudicated. Regardless, as

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FACSIMILE: (206) 245 17500

1 Eugster’s own prior case demonstrates, the Washington Supreme Court does
2 depart from hearing officer and/or Disciplinary Board recommendations. *See*
3 *Eugster I*, 166 Wn.2d at 299 (deviating from unanimous Board recommendation
4 of disbarment to impose 18-month suspension); *see also, e.g., In re Blanchard*,
5 158 Wn.2d 317, 330 (2006) (“[W]hile we do not lightly depart from the Board’s
6 recommendation, we are not bound by it.” (internal marks omitted)).²

7 In sum, Eugster’s objections to the discipline system are too vague and
8 abstract to be adjudicated. This Court should once again dismiss Eugster’s due
9 process challenge because it is not ripe. *See Eugster II*, 2010 WL 2926237, at
10 *8 (rejecting prior challenge as too abstract), *aff’d*, 474 Fed. App’x at 625.

11 2. Eugster has failed to identify a violation of due process.

12 Even if Eugster could bring an abstract challenge to the lawyer discipline
13 system (which he cannot), his due process claim also fails because he does not
14 identify a single procedural deficiency within that system, much less a
15 deficiency of constitutional magnitude. Eugster ignores governing precedent on

16
17 ² Eugster also overlooks that the Ninth Circuit has upheld such a framework of
18 deference in a prior case. *Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910
19 F.2d 561, 564 (9th Cir. 1990) (upholding system in which state supreme court
20 gave “great weight” to board’s findings but was “not bound by them”).

1 this issue and raises various objections that have no legal significance. His
2 complaint is thus devoid of any “specific facts” establishing a genuine due
3 process violation. *Eclectic Props.*, 751 F.3d at 999.

4 In the context of lawyer discipline, the Ninth Circuit has recognized that
5 due process consists primarily of “notice and an opportunity to be heard.”
6 *Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir.
7 1990). Under Washington’s system, lawyers are afforded these protections. *See*
8 ELC 4.1, 5.7, 10.3. Thus, Washington’s system comports with minimum due
9 process requirements.

10 In fact, the Ninth Circuit already has reviewed a lawyer discipline system
11 identical to Washington’s in all relevant respects, and held that such a system is
12 more than adequate. In *Rosenthal*, the court concluded that California’s bar
13 system provides disciplined lawyers “with more than constitutionally sufficient
14 procedural due process.” 910 F.2d at 565. The court reached this conclusion
15 because disciplined lawyers were afforded (1) the right to a hearing, (2) the
16 ability “to call witnesses and cross-examine,” (3) the burden being on the state
17 “to establish culpability by convincing proof,” and (4) ultimate, independent
18 review by the state’s supreme court. *See id.* at 564-65. Washington’s system
19 provides each of these protections. *See* ELC Title 10 (hearings); ELC 10.1,
20 10.11, 10.12, 10.13 (ability to call and cross-examine witnesses); ELC 10.14(b)

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Case No. 2:15-cv-00352-TOR

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 (burden on state to prove misconduct “by a clear preponderance”); ELC Title 12
2 (supreme court review). As with the system considered in *Rosenthal*,
3 Washington’s discipline system provides more than adequate process.

4 Eugster ignores the governing precedent on this issue and instead alleges
5 an assortment of standalone objections to Washington’s system. *See* ECF No. 8
6 at 19-23, 32-34. None of Eugster’s objections rises to the level of a
7 constitutional violation. For example, Eugster objects to the Washington
8 Supreme Court’s delegation of authority to the WSBA to administer the
9 discipline system. *See id.* at 33. But the Washington Supreme Court maintains
10 exclusive authority over the system, establishes the rules that govern the WSBA,
11 and retains ultimate decision-making power in each case. *See, e.g., Hahn v.*
12 *Boeing Co.*, 95 Wn.2d 28, 34 (1980); ELC Title 2. The Supreme Court is
13 merely “assisted” by the WSBA acting as its “agent.” *Hahn*, 95 Wn.2d at 34.
14 Eugster does not articulate how such a framework violates due process.

15 Additionally, Eugster objects that the WSBA suffers from an
16 impermissible “conflict of interest,” both because of its mission to promote “the
17 interests of member lawyers” and because of potentially overlapping roles of bar
18 officials. ECF No. 8 at 20, 33. But Eugster does not articulate why the
19 WSBA’s interest in advancing the legal profession renders its role in the
20 discipline system a due process violation. Nor does he explain why the

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1 allegedly overlapping roles of WSBA officials violate due process. Regardless,
2 the Ninth Circuit previously has rejected such objections. *See Hirsh*, 67 F.3d at
3 714 (rejecting suggestion that “the State Bar” having “both investigative and
4 adjudicative functions” creates an “unacceptable risk of bias”); *Standing Comm.*
5 *on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) (“So long as the
6 judges hearing the [lawyer] misconduct charges are not biased...there is no
7 legitimate cause for concern over the composition and partiality of the [initial
8 disciplinary committee].”).

9 Eugster further complains that the standard of proof in disciplinary
10 proceedings “should be at least ‘clear and convincing evidence’” ECF No. 8
11 at 22. But the ELCs do require proof of misconduct “by a clear preponderance
12 of the evidence,” ELC 10.14(b), which is equivalent to the “clear and
13 convincing” standard Eugster demands, *see, e.g., Costanzo v. Magnano*, 99
14 Wash. 679, 679-80 (1918); *Mansour v. King County*, 131 Wn. App. 255, 266
15 (2006). Regardless, Eugster does not claim that such a standard is
16 constitutionally required. In fact, the Ninth Circuit rejected a similar complaint
17 in *Rosenthal* and emphasized that the “presumption of innocence...does not
18 apply in a lawyer disbarment proceeding.” 910 F.2d at 564.

19 Eugster makes various additional objections, each of which is vague,
20 unexplained, and unsupported. *See* ECF No. 8 at 19 (objecting to discretion of

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1 disciplinary officials to “investigate any alleged or apparent misconduct by a
2 lawyer” (quoting ELC 5.3)); *id.* at 22 (discussing role of “expert testimony” in
3 proceedings); *id.* (asserting, without explanation, that the “Rules of Professional
4 Conduct” in “many instances” do not “define what is permitted and not
5 permitted”). These objections are all deficient as a matter of law. Eugster has
6 thus failed to identify any plausible due process violation.

7 3. Eugster’s abstract due process claim could have been raised earlier
8 and is now barred by the doctrine of res judicata.

9 Eugster’s due process claim also should be dismissed because the claim
10 should have been alleged in prior litigation and is now barred by the doctrine of
11 res judicata. The doctrine of res judicata “bars litigation in a subsequent action
12 of any claims that were raised or could have been raised in the prior action.”
13 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).
14 The doctrine applies whenever there is a prior “final judgment” between the
15 same or related parties and “the two suits arise out of the same transactional
16 nucleus of facts.” *Id.* at 713-14 (internal quotes omitted). Here, there are two
17 relevant prior judgments, either one of which precludes Eugster’s claim.

18 First, Eugster should have asserted his due process claim in *Eugster III*,
19 his federal lawsuit from last year challenging mandatory bar membership, which
20 was dismissed with prejudice. Such a dismissal qualifies as a final judgment for

1 res judicata purposes. *See, e.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th
2 Cir. 2002). That prior lawsuit arose out of the same nucleus of facts, namely,
3 Eugster’s involvement with and abstract objections to Washington’s lawyer
4 discipline system. *See, e.g., App. 1 at 9-11.* Eugster alleged a deprivation of
5 due process at the time—he simply chose not to assert a separate due process
6 claim, as he has done here. *See id.* at 10.

7 Second, Eugster should have raised the same objections even earlier, in
8 *Eugster I*, his prior disciplinary proceedings. As the court in *Eugster IV*
9 observed, Washington’s discipline system provides an adequate forum for
10 adjudicating any given due process objections. *See App. 3 at 3; see also, e.g.,*
11 *Blanchard*, 158 Wn.2d at 330-31. Accordingly, Eugster already “had the
12 opportunity to raise his constitutional concerns with the Washington Supreme
13 Court in his prior discipline case.” *App. 3 at 3.* Eugster should not be allowed
14 to continue engaging in serial litigation against the WSBA and its officials.
15 Under the doctrine of res judicata, his due process claim must be dismissed.

16 **B. Eugster’s First Amendment Claim Also Should Be Dismissed.**

17 Eugster’s second claim in this case alleges a violation of his First
18 Amendment rights. *See ECF No. 8 at 3, 27-31.* This claim also is barred by the
19 doctrine of res judicata and legally deficient on the merits. Each of these
20 reasons is independently sufficient to warrant dismissal of Eugster’s claim.

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1 1. Eugster’s First Amendment claim already has been adjudicated.

2 Eugster’s First Amendment claim should be dismissed because it already
3 was adjudicated in prior litigation and is now barred by the doctrine of res
4 judicata. As explained above, the doctrine of res judicata applies whenever
5 there is a prior “final judgment” between the same or related parties and “the
6 two suits arise out of the same transactional nucleus of facts.” *Owens*, 244 F.3d
7 at 713-14 (internal quotations omitted).

8 In this case, Eugster is asserting a First Amendment claim that already
9 was asserted and dismissed with prejudice in *Eugster III*. See 2015 WL
10 5175722, at *2, 8, 9. Specifically, Eugster already claimed that “mandatory
11 WSBA membership violates his First and Fourteenth Amendment freedoms by
12 compelling association....” *Id.* at *2. Eugster now reasserts the same claim—in
13 fact, the relevant language in Eugster’s Amended and Restated Complaint was
14 taken verbatim from Eugster’s appellate brief in *Eugster III*. Compare App. 4
15 (*Eugster III* brief) at 17-18, 20-25, with ECF No. 8 at 27-31 (complaint). This
16 claim already was dismissed and is now barred by the doctrine of res judicata.

17 2. Eugster’s First Amendment claim is legally meritless.

18 Eugster’s First Amendment claim also should be dismissed because it
19 lacks merit as a matter of constitutional law. As the court in *Eugster III*
20 observed, “the Supreme Court and Ninth Circuit have held...several times, and

1 in no uncertain terms” that mandatory bar membership does not infringe on First
2 Amendment rights. 2015 WL 5175722, at *5 (citing *Lathrop v. Donohue*, 367
3 U.S. 820 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Morrow v. State*
4 *Bar of Cal.*, 188 F.3d 1174 (9th Cir. 1999)). As in *Eugster III*, these precedents
5 “bind this court” and require dismissal of Eugster’s claim. *Id.*

6 **C. This Court Should Abstain to Avoid Interfering with the Ongoing**
7 **Disciplinary Proceedings Against Eugster.**

8 This Court also should dismiss Eugster’s entire complaint under the
9 *Younger* abstention doctrine, to avoid interference with the ongoing bar
10 proceedings against Eugster. Under the *Younger* doctrine, abstention is required
11 “to avoid interference in a state-court civil action” when there are “ongoing state
12 proceedings” that “implicate important state interests” and the federal plaintiff’s
13 claims may be litigated “in the state proceedings.” *M&A Gabae v. Comm’y*
14 *Redev’t Agency*, 419 F.3d 1036, 1039 (9th Cir. 2005). The U.S. Supreme Court
15 previously has determined that lawyer disciplinary proceedings qualify as
16 proceedings that implicate important state interests. *See, e.g., Middlesex Cnty.*
17 *Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 434-35 (1982).
18 Additionally, due process objections may be litigated within such disciplinary
19 proceedings. *See, e.g., ELC 10.1, 10.8.*
20

1 Here, the pending disciplinary proceedings against Eugster are ongoing
2 and merit abstention for two reasons. First, the disciplinary investigation of
3 Eugster is governed by detailed Washington rules and constitutes a formal and
4 substantive part of the disciplinary process. *See* ELC Title 5; *cf. Alsager v. Bd.*
5 *of Osteopathic Medicine and Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash.
6 2013) (“The Board’s investigation of Plaintiff’s conduct constitutes a state
7 initiated ‘ongoing proceeding’ for the purpose of *Younger* abstention.” (citing
8 cases)); *In re Scannell*, 169 Wn.2d 723, 740 (2010) (holding that lawsuit filed
9 during initial bar investigation “was not preexisting” and did not warrant
10 disqualification of hearing officers named as defendants in lawsuit).

11 Second, a formal hearing already has been ordered and is thus inevitable.
12 *See* ECF No. 8 at 26-27. Under Washington’s rules, once “a matter is ordered to
13 hearing,” as here, a formal complaint must be filed as a matter of course. ELC
14 10.3(a)(1). This case thus presents a substantial risk of precisely the type of
15 interference that the *Younger* doctrine is intended to prevent. To avoid such
16 interference, this Court should abstain from litigating Eugster’s collateral attack
17 on the Washington disciplinary process.

18 This case stands in contrast to the circumstances in which the Ninth
19 Circuit has allowed bar discipline challenges to proceed in federal court. In
20 *Canatella v. State of California*, 304 F.3d 843 (9th Cir. 2002), for example, the

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FACSIMILE: (206) 245 17500

1 court allowed a lawyer's challenge to go forward because "no affirmative action
2 had been taken by the State Bar" and the only relevant state rule provided that
3 bar proceedings commenced with "the filing of an initial pleading," which had
4 not yet occurred. 304 F.3d at 850-51. Although Washington has a similar rule
5 regarding the formal commencement of disciplinary proceedings, *see* ELC
6 10.3(b), this case is very different than *Canatella*.

7 Here, the WSBA has taken a number of affirmative steps within the
8 discipline system, *see* ECF No. 8 at 23-27, whereas in *Canatella* there was no
9 ongoing disciplinary investigation, 304 F.3d at 851 (noting that the "only
10 procedural step that had occurred" was "Canatella's act of self-reporting"). In
11 this case, an investigative report and recommendation already has been
12 completed regarding the grievance against Eugster, *see* ELC 5.7(c); an order for
13 a public hearing already has been issued to him, *see* ECF No. 8 at 26-27 & App.
14 B; and a formal complaint is forthcoming, *see* ELC 10.3(a)(1). Moreover, the
15 Washington Supreme Court has ruled, in a case where a lawyer subject to
16 disciplinary investigations sought to disqualify bar officials by filing a separate
17 lawsuit against them, that the disciplinary investigations were "pending ELC
18 proceedings" that preexisted his lawsuit. *Scannell*, 169 Wn.2d at 740. In sum,
19
20

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1 the potential for interference with the ongoing state proceedings against Eugster
2 is both apparent and substantial. Thus, this Court should dismiss his claims.³

3 **D. Eugster's Complaint Should Be Dismissed with Prejudice.**

4 This Court should dismiss Eugster's claims with prejudice. Eugster
5 already has amended his complaint once and his allegations are so speculative
6 and deficient, as well as barred by legal doctrines such as *res judicata* and
7 *Younger*, that they do not warrant an opportunity for further amendment. *See,*
8 *e.g., In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d
9 981, 990 (9th Cir. 2008) (affirming dismissal without leave to amend because
10 plaintiff was unable to propose any amendments that would save complaint).

11 **V. CONCLUSION**

12 Eugster fails to state a cognizable legal claim for relief in this case. His
13 claims are unripe, legally insufficient, barred under the *res judicata* doctrine, and
14 should be dismissed under the *Younger* abstention doctrine. For each of these
15 reasons, the Court should dismiss this case with prejudice.

16
17 ³ Although the holding of *Canatella* is inapplicable here, Defendants believe the
18 Ninth Circuit's decision in *Canatella* is inconsistent with Supreme Court
19 precedent, allows for too much interference with state disciplinary proceedings,
20 and ultimately should be overruled.

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 DATED this 9th day of May, 2016.

2 PACIFICA LAW GROUP LLP

3 By s/ Paul J. Lawrence

4 Paul J. Lawrence, WSBA #13557

5 Jessica A. Skelton, WSBA #36748

6 Taki V. Flevaris, WSBA #42555

7 Attorneys for Defendants

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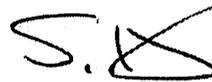
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1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2016, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

Stephen Kerr Eugster
Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, WA 99201-6422
Phone: 509.624.5566
Fax: 866.565.2341
Email: eugster@eugsterlaw.com

Dated this 9th day of May, 2016.



Sydney Henderson

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
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Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L.
FERGUSON,

Plaintiffs,

v.

WASHINGTON STATE BAR
ASSOCIATION 1933, a legislatively created
Washington association, State Bar Act (WSBA
1933); WASHINGTON STATE BAR
ASSOCIATION after September 30, 2016
(WSBBA 2017); PAULA LITTLEWOOD,
Executive Director, WSBA 1933 and WSBA
2017, in her official capacity; ROBIN LYNN
HAYNES is the President of the WSBA 1933
and WSBA 2017, in her official capacity;
DOUGLAS J. ENDE, Director of the WSBA
1933 and WSBA 2017 Office of Disciplinary
Counsel, in his official capacity; WSBA
1933/WSBA 2017 BOARD OF
GOVERNORS, namely: BRADFORD E.
FURLONG-President-elect (2016-2017), *et al.*,

Defendants.

No. 2:17-cv-00003 RSM

DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' CLAIMS AND
OPPOSITION TO PLAINTIFFS'
MOTIONS FOR SUMMARY
JUDGMENT AND PRELIMINARY
INJUNCTION

NOTE ON MOTION CALENDAR:
APRIL 21, 2017

DEFS.' MOTION TO DISMISS AND OPPOSITION TO
MOTIONS FOR SUMMARY JUDGMENT AND
PRELIMINARY INJUNCTION

Case No. 2:17-cv-00003 RSM
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I. INTRODUCTION

In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior *pro se* lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.¹ This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.² These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims.

Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA. Contrary to these assertions, Washington law expressly authorizes the WSBA to adopt rules relating to the practice of law in the state, including rules relating to bar membership and limited-license practices. The WSBA remains the same organization Eugster repeatedly has sued over the past two years. Accordingly, cutting through the irrelevant rhetoric, the First Amended Complaint raises only three core claims: first, that requiring bar membership and payment of license fees to practice

¹ In addition to this lawsuit, Eugster also recently filed yet another lawsuit against the WSBA and its officials in Thurston County Superior Court. *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017).

² See *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *2, 5-8 (W.D. Wash. Sept. 3, 2015) (dismissing objections to mandatory bar membership and fees and rejecting misreading of case law).

1 law in Washington violates plaintiffs’ constitutional rights of speech and association; second,
2 that the WSBA lacks authority to discipline lawyers as a result of the bylaws amendments
3 regarding membership in the WSBA; and third, that the WSBA’s discipline system fails to
4 provide adequate procedures to satisfy constitutional due process requirements. These claims are
5 meritless and should be dismissed, for five independent reasons.

6
7 First, Plaintiffs’ claims fail as a matter of law because (a) compulsory bar membership
8 and fees have been repeatedly upheld as constitutional requirements to practice law; (b) the
9 bylaws amendments do not eliminate the WSBA’s authority to administer the Washington
10 Supreme Court’s lawyer discipline system, and (c) the numerous protections provided under the
11 discipline system have been recognized as sufficient to satisfy due process. Second, any of
12 Plaintiffs’ claims related to lawyer discipline are barred under the *Younger* doctrine, given that
13 each Plaintiff is subject to ongoing state discipline proceedings. Plaintiffs’ objections must be
14 brought within those proceedings, not in a collateral attack in federal court. Third, Plaintiffs’
15 discipline-related claims are barred under the res judicata doctrine, because those claims already
16 should have been brought, if at all, in Plaintiffs’ prior disciplinary proceedings. Fourth,
17 Plaintiffs’ due process claim is generic, nebulous, and thus unripe. Fifth and finally, the WSBA
18 is immune from suit.
19

20 Accordingly, Plaintiffs’ claims should be dismissed with prejudice. For the same
21 reasons, Plaintiffs’ request for a preliminary injunction and summary judgment should be denied.
22

23 **II. BACKGROUND AND PROCEDURAL HISTORY**

24 **A. Prior Lawsuits Involving Eugster**

25 This case is the latest in a number of proceedings involving both Eugster and the WSBA.
26 The prior disputes provide context for Plaintiffs’ arguments and issues presented in this case.

1 This Court may take judicial notice of the public filings in these prior relevant cases. *See MGIC*
 2 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (“On a motion to dismiss, we may
 3 take judicial notice of matters of public record outside the pleadings.”). The Court also may
 4 consider the decisions made in each case as persuasive authority.

5 ***In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) (“*Eugster I*”):**

6 In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. *Id.* at 307.
 7 Among other issues, Eugster had filed a “baseless” petition, ignored his client’s direction, and
 8 refused to acknowledge that his client had discharged him. *Id.* at 317-18. A hearing officer
 9 found Eugster had violated numerous rules of professional conduct. *Id.* at 307. The WSBA
 10 Disciplinary Board then recommended that Eugster be disbarred. *Id.* at 311. In 2009, five
 11 justices of the Washington Supreme Court decided instead to suspend Eugster for 18 months,
 12 while the remaining four justices agreed with the Disciplinary Board’s conclusion that he should
 13 be disbarred. *Id.* at 327-28.

14 ***Eugster v. Wash. State Bar Ass’n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D.**

15 **Wash. July 23, 2010) (“*Eugster II*”):** In the meantime, the WSBA was investigating another
 16 complaint it had received against Eugster based on other conduct. *Id.* at *1. This investigation
 17 culminated in a letter from the WSBA to Eugster in December of 2009 warning Eugster “to more
 18 carefully analyze the law before filing lawsuits” but otherwise dismissing the matter. *Id.* In
 19 January 2010, Eugster filed a complaint in the United States District Court for the Eastern
 20 District of Washington against the WSBA and its officials, alleging that Washington’s attorney
 21 discipline system violated his due process rights. *Id.* at *2. The district court dismissed the case.
 22 *Id.* at *11. Specifically, the court determined that Eugster lacked standing to assert his claims
 23 because he was not seeking “redress for an actual or imminent injury.” *Id.* at *8 (internal
 24
 25
 26
 27

1 quotations omitted). The district court also noted that “the Ninth Circuit has recognized bar
2 associations as state agencies for purposes of Eleventh Amendment immunity” and dismissed
3 Eugster’s claims against the WSBA for that additional reason. *Id.* at *9. In an unpublished
4 memorandum opinion, the Ninth Circuit affirmed on standing grounds and did not reach the
5 immunity issue. 474 Fed. App’x 624 (9th Cir. 2012).
6

7 ***Eugster v. Wash. State Bar Ass’n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash.**
8 **Sept. 3, 2015) (“*Eugster III*”)**: In September 2014, another grievance was filed against Eugster.
9 *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June
10 29, 2016) (“*Eugster V*”) (discussing disciplinary history). The WSBA notified Eugster that it
11 was conducting an investigation of the grievance. *See id.* Eugster eventually was informed that
12 the investigation had been assigned to Managing Disciplinary Counsel. *See id.* On March 12,
13 2015, Eugster filed another lawsuit against the WSBA and its officials, before this Court. *See*
14 *Eugster III*. In *Eugster III*, Eugster complained that his constitutional rights of association and
15 speech were violated by the requirements of state bar membership and payment of license fees in
16 order to practice law. 2015 WL 5175722, at *2. In September 2015, this Court dismissed the
17 complaint. *Id.* at *1. Specifically, this Court determined Eugster had “grossly misstate[d]” and
18 “misconstrued” governing precedent, which authorizes mandatory bar membership and fees. *Id.*
19 at *5. This Court also observed that the WSBA is immune from suit in federal court as an
20 “investigative arm” of the State of Washington. *Id.* at *9.
21
22

23 Eugster appealed to the Ninth Circuit. Today, on March 21, 2017, the Ninth Circuit
24 affirmed in an unpublished memorandum opinion, upholding “compulsory membership in the
25 WSBA” and rejecting Eugster’s lawsuit because “an attorney’s mandatory membership with a
26 state bar association is constitutional.” *Eugster III*, No. 15-35743, Dkt. # 18-1 (9th Cir. Mar. 21,
27

1 2017). The Ninth Circuit also noted that “[c]ontrary to Eugster’s contention,” it could not
 2 “overrule binding authority” *Id.* For the Court’s convenience, a copy of the memorandum
 3 opinion is attached to this brief as Exhibit A.

4 ***Eugster v. Wash. State Bar Ass’n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015)**

5 (“*Eugster IV*”): While *Eugster III* was progressing in this Court, the bar disciplinary process
 6 moved forward and the latest grievance against Eugster continued to be investigated. On
 7 November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a
 8 formal hearing on the pending grievance against him. On November 9, 2015—four days after
 9 Eugster received notice of the hearing recommendation—Eugster filed another lawsuit against
 10 the WSBA and its officials, this time in Spokane County Superior Court. Eugster’s complaint
 11 alleged that the lawyer discipline system violates his procedural due process rights. *See Eugster*
 12 *V*, 2016 WL 3632711, at *2 (discussing *Eugster IV*). The complaint also sought damages. *See*
 13 *id.* The superior court in *Eugster IV* ultimately dismissed the complaint with prejudice,
 14 concluding that the Washington Supreme Court has exclusive jurisdiction over lawyer discipline
 15 in Washington, that Eugster already had been afforded an opportunity to raise his objections
 16 within his prior disciplinary proceedings, and that the WSBA’s officials were immune from
 17 Eugster’s damages claims. *See id.* Eugster appealed to Division III of the Washington Court of
 18 Appeals, and that appeal remains pending. *See Eugster IV*, No. 34345-6-III (Wash. Ct. App.).

19 ***Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June**

20 **29, 2016)** (“*Eugster V*”): On December 22, 2015, soon after Eugster filed his lawsuit in
 21 Spokane County Superior Court (*Eugster IV*), Eugster filed yet another lawsuit against the
 22 WSBA’s officials, this one another federal suit in the Eastern District of Washington. *Id.*

23 Eugster’s complaint sounded in due process, with allegations largely identical to those made in

1 *Eugster IV. Id.* at *5. On June 29, 2016, the district court dismissed the complaint with
 2 prejudice, determining that Eugster’s claims were barred under the res judicata doctrine. *Id.* at
 3 *4-6. Eugster appealed the decision to the Ninth Circuit Court of Appeals, and that appeal
 4 remains pending. *See Eugster V*, No. 16-35542 (9th Cir.).

5 ***Eugster v. Wash. State Bar Ass’n*, No. 2:16-cv-01765 (W.D. Wash.) (“*Eugster VI*”):**

6 On November 15, 2016, Eugster filed yet another lawsuit in this Court. *Id.* As in the present
 7 case, the complaint objected to compulsory bar membership and fees, asserted that the recent
 8 amendments to the WSBA’s bylaws resulted in a new organization without disciplinary
 9 authority, and alleged that Washington’s discipline system failed to meet procedural due process
 10 requirements. *See id.*, Dkt. # 1. Eugster filed a voluntary dismissal of the case on January 4,
 11 2017—one day after he filed the present lawsuit on behalf of Plaintiffs. *See id.*, Dkt. # 3.

12 **B. The Current Lawsuit**

13 The current lawsuit was filed on January 3, 2017. *See* Dkt. # 1. Initially, the case was
 14 filed as a putative class action on behalf of all WSBA members, naming Plaintiffs Robert E.
 15 Caruso (“Caruso”) and Sandra L. Ferguson (“Ferguson”) as class representatives. *See id.* at 11.
 16 On February 21, Plaintiffs filed a First Amended Complaint, which asserts individual claims on
 17 behalf of Plaintiffs Caruso and Ferguson, abandoning all class claims. *See* Dkt. # 4. Caruso and
 18 Ferguson are practicing lawyers and active members of the WSBA. *See id.* at 5.

19 The First Amended Complaint raises three claims: First, it asserts that requiring bar
 20 membership and payment of license fees in order to practice law violates Plaintiffs’
 21 constitutional rights of association and speech. *See* Dkt. # 4 at 32-34. Second, it asserts that as a
 22 result of recent amendments to the WSBA’s bylaws, the WSBA is a new organization that no
 23 longer has authority to discipline lawyers in Washington. *See id.* at 34-35. Third, it asserts that

1 Washington's lawyer discipline system violates procedural due process requirements. *See id.* at
 2 35-36. The Amended Complaint also alleges claims for declaratory relief and failure to meet
 3 "constitutional scrutiny," which are derivative arguments that are subsumed under the three
 4 claims identified above. *See id.* at 31-32, 36-38.

5
 6 **C. Prior and Current Disciplinary Matters Against Plaintiffs**

7 Each Plaintiff in this case has previously been subject to disciplinary action for
 8 professional misconduct and is also currently subject to an ongoing disciplinary matter. The
 9 Court may take judicial notice of state bar records from disciplinary matters. *See White v.*
 10 *Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (noting that "state bar records reflecting disciplinary
 11 proceedings" were "appropriate for judicial notice"); *Jackson v. Med. Bd. of Cal.*, 424 Fed.
 12 App'x 670, 670 (9th Cir. 2011) (granting "request to take judicial notice of . . . State Bar
 13 Association records"). Copies of relevant bar documents are attached to this motion as Exhibits
 14 for the Court's convenience.

15
 16 Plaintiff Caruso previously received an admonition in 2015 for ordering a supervised
 17 junior lawyer to withdraw immediately from a case without ensuring proper notice or steps to
 18 protect his client's interests. *See Ex. B.* More recently, Caruso had a grievance filed against
 19 him. *See Ex. C.* Upon review after an investigation by the Office of Disciplinary Counsel, a
 20 Review Committee has ordered a public hearing on the alleged misconduct. *See id.*

21
 22 Plaintiff Ferguson previously was suspended from the practice of law for appearing ex
 23 parte without notice to opposing counsel, failing to disclose all relevant facts at an ex parte
 24 hearing, and obtaining relief through misrepresentation and deceit. *In re Ferguson*, 170 Wn.2d
 25 916, 921 (2011). More recently, Ferguson had a grievance filed against her that is currently
 26 under investigation by the Office of Disciplinary Counsel. Dkt. # 15 at 4; Dkt. # 11 at 1.

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1 **D. Procedural History**

2 The Court has set a briefing schedule for dispositive motions in this case pursuant to a
3 stipulation between the parties. See Dkt. # 14 at 3. On March 1, 2017, Plaintiffs filed their
4 Motion for Summary Judgment. See Dkt. # 8. On March 3, 2017, Plaintiffs inexplicably also
5 filed a Motion for Preliminary Injunction, making largely the same arguments in support of
6 Plaintiffs’ claims in this case. See Dkt. # 15. The motion for a preliminary injunction also
7 requests that the Court “stay the discipline endeavors of [the WSBA] until the issues in this case
8 can be decided.” *Id.* at 3. The WSBA now requests that the Court deny Plaintiffs’ motions and
9 dismiss their claims with prejudice, as set forth below.
10

11 **III. STATEMENT OF ISSUES**

12 1. Whether requiring bar membership and payment of license fees in order to
13 practice law is constitutional.

14 2. Whether the WSBA remains authorized to administer the Washington Supreme
15 Court’s lawyer discipline system notwithstanding recent amendments to its bylaws designating
16 certain classes of limited-license practitioners as members.
17

18 3. Whether Washington’s lawyer discipline system—which provides notice, the
19 right to a hearing, the ability to call and cross-examine witnesses, a “clear preponderance”
20 evidentiary burden on the WSBA, and procedures for independent review by the Washington
21 Supreme Court—meets constitutional due process requirements.
22

23 4. Whether the *Younger* abstention doctrine bars Plaintiffs from asserting their
24 discipline-related claims in federal court rather than within the discipline proceedings that are
25 currently underway to resolve pending charges against them.
26

V. ARGUMENT

A. Plaintiffs’ Claims Regarding Mandatory Bar Membership, License Fees, and Lawyer Discipline Fail as a Matter of Law.

Plaintiffs’ Amended Complaint should be dismissed because it fails to state a valid claim for entitlement to relief. Plaintiffs object to requirements that have been repeatedly upheld as constitutional, make unsupported and convoluted allegations about the WSBA’s organizational status without any basis in law, and complain about a system that offers robust procedural protections that are more than sufficient to satisfy due process requirements. In sum, none of Plaintiffs’ three claims has any merit.

1. Requiring bar membership and license fees to practice law is constitutional.

Plaintiffs’ first claim is that requiring bar membership and license fees to practice law violates their constitutional rights of association and speech. Plaintiffs acknowledge that this claim has nothing to do with the WSBA’s recent bylaws amendments. See Dkt. # 4 at 32 (“Plaintiff[s] cannot be compelled to be [] members of WSBA 1933 or WSBA 2017.”). Instead, Plaintiffs more broadly question whether Washington can “impose a mandatory fee on lawyers” to “subsidize efforts” intended to “improve the quality of legal services.” Id. at 17.

Plaintiffs’ question already has been answered by several prior courts. As this Court explained in *Eugster III*, “[n]otwithstanding Mr. Eugster’s mischaracterization of case law, several binding decisions” establish that such requirements are indeed constitutional. 2015 WL 5175722, at *5 (citing *Lathrop v. Donohue*, 367 U.S. 820, 827-28, 832-33 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990); *O’Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); and *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999)); see also Ex. A. Although Plaintiffs call into question

1 the Supreme Court's longstanding decision in *Lathrop*, see Dkt. # 8 at 16-17, they fail to explain
2 their reasons for doing so and ignore the numerous subsequent cases that place this issue beyond
3 any doubt. In *Keller*, for example, the Supreme Court reaffirmed that lawyers "may be required
4 to join and pay dues to the State Bar," noting that this form of mandatory association and
5 payment is "justified by the State's interest in regulating the legal profession and improving the
6 quality of legal services." 496 U.S. at 4, 13.
7

8 The established law on mandatory bar membership and fees is not only clear, it is also
9 consistent with basic First Amendment principles. Mandatory bar membership does not
10 materially limit the freedom of attorneys such as Plaintiffs to associate and speak. Plaintiffs
11 remain "free to attend or not attend [bar] meetings or vote in [bar] elections," and they are not
12 forced "to associate with anyone." *Lathrop*, 367 U.S. at 828. Likewise, Plaintiffs are not
13 required "to express any particular ideas or make any particular utterances of any kind," and they
14 remain able "to express their own views or to disagree with the positions of the Bar." *Morrow*,
15 188 F.3d at 1176. Although Plaintiffs are required to pay mandatory license fees, those
16 mandatory fees are warranted by the state's strong interest in regulating the practice of law and
17 improving legal services in the state.
18

19 Ignoring this binding precedent, Plaintiffs repeatedly cite to *Knox v. Serv. Emp'ees Int'l*
20 *Union*, 132 S. Ct. 2277 (2012) and *In re Petition for a Rule Change to Create a Voluntary State*
21 *Bar of Nebraska*, 286 Neb. 1018 (2013) ("*In re Petition for Rule Change*"). See Dkt. # 4 at 37-
22 38; Dkt. # 8 at 19-20; Dkt. # 15 at 16. Both cases are distinguishable and irrelevant. *Knox*
23 discussed the evolving standards governing "compulsory subsidies for private speech" in the
24 context of commercial enterprises and unions—rather than compelled payment of licensing fees
25 to a mandatory bar association. 132 S. Ct. at 2289; see also *Rosenthal v. Justices of the Supreme*
26

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1 *Ct. of Cal.*, 910 F.2d 561, 566 (9th Cir. 1990) (noting that the “substantial analogy” between
 2 unions and bar associations “does not establish that [a] bar association *is* a labor union” and
 3 “substantial differences remain” (quoting *Keller*)). More recently, the Supreme Court
 4 specifically confirmed that mandatory bars are distinguishable from the union context, serve
 5 strong state interests, and still withstand constitutional scrutiny. *Harris v. Quinn*, 134 S. Ct.
 6 2618, 2644 (2014).

7
 8 Likewise, *In re Petition for Rule Change* involved the Nebraska Supreme Court opting to
 9 limit the use of mandatory bar fees to regulation purposes, rather than improvement of the legal
 10 profession. Plaintiffs fail to acknowledge, however, that the Nebraska Supreme Court’s decision
 11 was made as a policy decision in response to a petition for a rule change, not a change
 12 necessitated for constitutional reasons. *See* 286 Neb. at 1018-19, 1034. Accordingly, Plaintiffs’
 13 Second and Third Claims for Relief, which challenge mandatory bar membership and fees, lack
 14 merit and should be dismissed as a matter of law.
 15

16 2. The WSBA remains the same association authorized to administer the
 17 Washington Supreme Court’s lawyer discipline system.

18 Plaintiffs’ second claim is that the WSBA “came to an end” due to certain bylaws
 19 amendments, and that as a result, the WSBA is no longer authorized to administer the
 20 Washington Supreme Court’s lawyer discipline system. Dkt. # 4 at 9. At issue are amendments
 21 the WSBA made to bylaws provisions relating to bar “membership” to include limited-license
 22 practitioners whom the WSBA already regulated (namely “Limited Practice Officers,” or
 23 “LPOs,” and “Limited License Legal Technicians,” or “LLLTs”). *See, e.g.*, Dkt. # 15 at 5-6, 11.
 24 Plaintiffs’ assertions that these bylaws amendments terminated the WSBA’s existence, created a
 25
 26
 27

1 new entity, and nullified the WSBA’s authority to administer lawyer discipline in Washington
2 are meritless and should be rejected.

3 Without citation to authority, Plaintiffs assert that the bylaws amendments somehow
4 remove the WSBA from the purview of the State Bar Act, chapter 2.48 RCW. *See, e.g.*, Dkt. # 8
5 at 10. To the contrary, the State Bar Act establishes the WSBA as an “agency of the state,”
6 RCW 2.48.010, and gives the WSBA Board of Governors the power to adopt rules governing bar
7 membership and discipline:
8

9 The said board of governors shall [] have power, in its discretion, from time to
10 time to adopt rules, subject to the approval of the supreme court, fixing the
11 qualifications, requirements and procedure for admission to the practice of law; . .
12 . to appoint boards or committees to examine applicants for admission; and, to
13 investigate, prosecute and hear all causes involving discipline, disbarment,
suspension or reinstatement, and make recommendations thereon to the supreme
court; and, with such approval, to prescribe rules establishing the procedure for
the investigation and hearing of such matters

14 RCW 2.48.060. Pursuant to and consistent with the State Bar Act and other Washington law, the
15 WSBA regularly amends its bylaws regarding any number of matters relevant to the practice of
16 law in Washington, including bar membership and limited-license practices. *See also* RCW
17 2.48.050 (noting WSBA board has discretion to adopt rules “from time to time” concerning
18 “membership” and “all other matters” affecting “the organization and functioning of the state
19 bar”); WSBA Bylaws at 72-73 (providing that the Bylaws may be amended by the Board of
20 Governors at a regular meeting).³ Such amendments do not render the WSBA a new
21 organization or entity. *See* RCW 2.48.050; WSBA Bylaws at 72-73; *cf.* Fletcher Cyclopeda of
22 the Law of Corps. §§ 6, 4176 (2016) (noting a corporate entity’s existence “presumptively
23
24

25 _____
26 ³ Available at
<http://www.wsba.org/~media/Files/About%20WSBA/Governance/WSBA%20Bylaws/Current%20Bylaws.ashx>
(last visited Mar. 17, 2017).

1 continues . . . irrespective of . . . its component members” and “a person who becomes . . . a
2 member . . . does so with . . . implied assent that its bylaws may be amended”).

3 As Plaintiffs point out, the State Bar Act also states that “all persons who are admitted to
4 practice in accordance with the provisions of RCW 2.48.010 through 2.48.180 . . . shall become
5 by that fact active members of the state bar.” RCW 2.48.021. But Plaintiffs never specify how
6 this requirement has been violated. Plaintiffs also ignore that the statutes referenced within and
7 incorporated into RCW 2.48.021—including RCW 2.48.050 and .060—empower the WSBA
8 Board of Governors to set rules for membership and for admission to practice law, and do not
9 preclude the WSBA from establishing membership for limited-license practitioners.
10

11 Furthermore, the recent bylaws amendments are consistent with Washington General
12 Rule 12.1, the Washington Supreme Court’s statement of the purposes and authorized activities
13 of the WSBA. Nothing in the amendments changes the WSBA into something beyond what the
14 Washington Supreme Court has authorized, in its inherent authority over the practice of law.
15 *See, e.g., State ex rel. Schwab v. Wash. State Bar Ass’n*, 80 Wn.2d 266, 269, 493 P.2d 1237
16 (1972) (“In short, membership in the state bar association and authorization to continue in the
17 practice of law coexist under the aegis of one authority, the Supreme Court.”); *Hahn v. Boeing*
18 *Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980) (noting Washington Supreme Court is “assisted” by
19 the WSBA acting as its “agent”).
20

21 Moreover, limited-license practitioners are nothing new. As an example, for decades
22 certain “qualified law students” have been licensed to practice in limited circumstances. *State v.*
23 *Cook*, 84 Wn.2d 342, 346, 525 P.2d 761 (1974) (discussing Washington Admission and Practice
24 Rule (APR) 9 (adopted effective June 4, 1970)). LPOs have been licensed by the Washington
25 Supreme Court since 1983 and regulated by the WSBA since 2002. *See* APR 12 (adopted
26

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1 effective January 21, 1983 and amended July 1, 2002). The rule creating LLLTs and delegating
 2 regulation to the WSBA was adopted in 2012, well before the recent bylaws amendments. *See*
 3 APR 28 (adopted effective September 1, 2012). Indeed, Plaintiffs' counsel already specifically
 4 complained about the LPO and LLLT Boards in one of his prior lawsuits. *See Eugster III*, 2015
 5 WL 5175722, at *7. Thus, prior to the recent bylaws amendments, LPOs and LLLTs were
 6 already licensed by the Washington Supreme Court and regulated by the WSBA, but were not
 7 defined as members of the bar under the WSBA Bylaws; now they are. These bylaws
 8 amendments do not in any way alter the existence of the WSBA or its authority to administer the
 9 Washington Supreme Court's lawyer discipline system.

11 In sum, the WSBA remains the "agent" of the Washington Supreme Court tasked with
 12 administering its lawyer discipline system. *Hahn*, 95 Wn.2d at 34; *see also* Wash. Rules for
 13 Enf't of Lawyer Conduct ("ELC") 1.3(a). Accordingly, Plaintiffs' Fourth Claim for Relief,
 14 which asserts that the WSBA lacks the authority to administer the lawyer discipline system, fails
 15 as a matter of law and should be dismissed with prejudice.

17 3. Washington's lawyer discipline system provides protections that satisfy
 18 procedural due process requirements.

19 Plaintiffs' third claim is that the Washington Supreme Court's lawyer discipline system
 20 fails to provide adequate procedures to satisfy due process requirements. Plaintiffs make vague
 21 allegations that the structure and operation of the lawyer discipline system as a whole is not
 22 "fair." *See* Dkt. # 4 at 15-31; Dkt. # 8 at 22; Dkt. # 15 at 18-20. Again, Plaintiffs ignore
 23 governing precedent regarding the operation of lawyer discipline systems.

24 In the context of lawyer discipline, the Ninth Circuit has recognized that due process
 25 consists primarily of "notice and an opportunity to be heard." *Rosenthal v. Justices of the*
 26

1 *Supreme Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990). Under Washington's system, lawyers
 2 are afforded these protections. *See* ELC 4.1, 5.7, 10.3. Thus, Washington's system comports
 3 with minimum due process requirements.

4 In fact, the Ninth Circuit already has reviewed a lawyer discipline system identical to
 5 Washington's in all relevant respects, and held that such a system is more than adequate. In
 6 *Rosenthal*, the court concluded that California's bar system provides disciplined lawyers "with
 7 more than constitutionally sufficient procedural due process." 910 F.2d at 565. The court
 8 reached this conclusion because disciplined lawyers were afforded (1) the right to a hearing, (2)
 9 the ability "to call witnesses and cross-examine," (3) the burden being on the state "to establish
 10 culpability by convincing proof," and (4) ultimate, independent review by the state's supreme
 11 court. *See id.* at 564-65. Washington's system provides each of these protections. *See* ELC
 12 Title 10 (hearings); ELC 10.1, 10.11, 10.12, 10.13 (ability to call and cross-examine witnesses);
 13 ELC 10.14(b) (burden on state to prove misconduct "by a clear preponderance"); ELC Title 12
 14 (supreme court review). As with the system considered in *Rosenthal*, Washington's discipline
 15 system provides more than adequate process.

16 Plaintiffs complain mostly about impartiality, but this objection is especially groundless.
 17 *See* Dkt. # 15 at 17-20. Plaintiffs overlook that independent review by the Washington Supreme
 18 Court ensures the requisite neutrality. *See Rosenthal*, 910 F.2d at 564-65; *Standing Comm. on*
 19 *Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) ("So long as the judges hearing the
 20 [lawyer] misconduct charges are not biased . . . there is no legitimate cause for concern over the
 21 composition and partiality of the [initial disciplinary committee]."). Further, the Ninth Circuit
 22 has "specifically rejected" the notion that a state supreme court has "an inherent conflict of
 23 interest" in reviewing "state bar disciplinary proceedings." *Canatella v. California*, 404 F.3d
 24
 25
 26
 27

1 1106, 1112 (9th Cir. 2005). The Ninth Circuit has also rejected the notion that a bar association
 2 having “both investigative and adjudicative functions” creates an “unacceptable risk of bias.”
 3 *Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708, 714 (9th Cir. 1995). In other words,
 4 Plaintiffs would need to allege and present “actual evidence” of bias specific to a given
 5 adjudicator to overcome the “presumption of honesty and integrity in those serving as
 6 adjudicators.” *Canatella*, 404 F.3d at 1112 (internal quotes omitted); *see also Stivers v. Pierce*,
 7 71 F.3d 732, 741 (9th Cir. 1995). Plaintiffs have not done so, and their claim is thus meritless.

9 Washington’s lawyer discipline system unquestionably comports with due process
 10 requirements. Accordingly, Plaintiffs’ Fifth Claim for Relief should be dismissed with
 11 prejudice. Moreover, because Plaintiffs’ First and Sixth Claims for Relief rely entirely on their
 12 other failed claims, those claims also fail as a matter of law and should be dismissed with
 13 prejudice.

14
 15 **B. Plaintiffs’ Discipline-Related Claims Are Barred Under the *Younger* Doctrine and
 16 Must Be Raised Within Their Disciplinary Proceedings.**

17 Plaintiffs’ Fourth and Fifth Claims for Relief, which concern the lawyer discipline
 18 system, also should be dismissed under the *Younger* abstention doctrine, because Plaintiffs are
 19 prohibited from using these proceedings as a way of interfering with ongoing state bar
 20 disciplinary actions. Under the *Younger* doctrine, abstention is required “to avoid interference in
 21 a state-court civil action” when there are “ongoing state proceedings” that “implicate important
 22 state interests” and the federal plaintiff’s claims may be litigated “in the state proceedings.”
 23 *M&A Gabae v. Comm’y Redev’t Agency*, 419 F.3d 1036, 1039 (9th Cir. 2005). The U.S.
 24 Supreme Court previously has determined that lawyer disciplinary proceedings qualify as
 25 proceedings that implicate important state interests. *See, e.g., Middlesex Cnty. Ethics Comm. v.*
 26

1 *Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982). Additionally, constitutional and other
2 objections may be litigated within such disciplinary proceedings. *See, e.g.*, ELC 10.1, 10.8.

3 Here, pending disciplinary matters against each Plaintiff are ongoing and merit
4 abstention. A formal hearing already has been ordered against Caruso. *See* Ex. C. Under
5 Washington's rules, once "a matter is ordered to hearing," as here, a formal complaint must be
6 filed as a matter of course. ELC 10.3(a)(1). Likewise, the ongoing investigation of Ferguson is
7 governed by detailed Washington rules and also constitutes a substantive part of the disciplinary
8 process. *See* ELC Title 5; *cf. Alsager v. Bd. of Osteopathic Medicine and Surgery*, 945 F. Supp.
9 2d 1190, 1195 (W.D. Wash. 2013) ("The Board's investigation of Plaintiff's conduct constitutes
10 a state initiated 'ongoing proceeding' for the purpose of *Younger* abstention." (citing cases)); *In*
11 *re Scannell*, 169 Wn.2d 723, 740 (2010) (holding that lawsuit filed during initial bar
12 investigation "was not preexisting" and did not warrant disqualification of hearing officers
13 named as defendants in lawsuit).

14
15
16 In light of the formal disciplinary proceedings ongoing against both Plaintiffs, this case
17 presents a substantial risk of precisely the type of interference that the *Younger* doctrine is
18 intended to prevent. Indeed, Plaintiffs have specifically asked this Court to "stay the discipline
19 endeavors" against them. Dkt. # 15 at 3. To avoid any such interference, this Court should
20 abstain from litigating Plaintiffs' collateral attack on the Washington disciplinary process.

21
22 This case stands in contrast to the circumstances in which the Ninth Circuit has allowed
23 bar discipline challenges to proceed in federal court. In *Canatella v. State of California*, 304
24 F.3d 843 (9th Cir. 2002), for example, the court allowed a lawyer's challenge to proceed because
25 "no affirmative action had been taken by the State Bar" and the only relevant state rule provided
26 that bar proceedings commenced with "the filing of an initial pleading," which had not occurred.

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1 304 F.3d at 850-51. Washington has a similar rule regarding the formal commencement of a
 2 disciplinary proceeding, *see* ELC 10.3(b), but this case is very different than *Canatella*.

3 Here, the WSBA has taken a number of affirmative steps within the discipline system,
 4 *see* Ex. C; Dkt. # 15 at 4; Dkt. # 11 at 1, whereas in *Canatella* there was no ongoing disciplinary
 5 investigation, 304 F.3d at 851 (noting that the “only procedural step that had occurred” was
 6 “Canatella’s act of self-reporting”).⁴ In this case, an investigative report and recommendation
 7 already has been completed regarding the grievance against Caruso, *see* ELC 5.7(c); an order for
 8 a public hearing already has been issued, *see* Ex. C; and a formal complaint is forthcoming, *see*
 9 ELC 10.3(a)(1). Likewise, a grievance against Ferguson already has been processed and an
 10 investigation is underway. Dkt. # 15 at 4; Dkt. # 11 at 1. Moreover, the Washington Supreme
 11 Court has ruled, in a case where a lawyer under investigation sought to disqualify bar officials by
 12 filing a separate lawsuit against them, that the disciplinary investigations were “pending ELC
 13 proceedings” that preexisted his lawsuit. *Scannell*, 169 Wn.2d at 740. In sum, the potential for
 14 interference with ongoing state proceedings against Plaintiffs is both clear and substantial. Thus,
 15 this Court should dismiss Plaintiffs’ Fourth and Fifth Claims for Relief regarding the WSBA’s
 16 disciplinary authority and procedural due process.

17 **C. Plaintiffs’ Discipline-Related Claims Also Should Have Been Raised in Their Prior**
 18 **Disciplinary Proceedings and Are Thus Barred Under the Res Judicata Doctrine.**

19 Plaintiffs’ Fourth and Fifth Claims for Relief also should be dismissed under the doctrine
 20 of res judicata; their discipline-related claims should have been raised, if at all, in their prior
 21 disciplinary proceedings. Res judicata is intended to “avoid[] repetitive litigation, conserv[e]
 22
 23
 24

25 _____
 26 ⁴ Although the holding of *Canatella* is inapplicable here, Defendants believe the Ninth Circuit’s decision in
 27 *Canatella* is inconsistent with Supreme Court precedent, allows for too much interference with state disciplinary
 proceedings, and ultimately should be overruled.

1 judicial resources, and prevent[] the moral force of court judgments from being undermined.”
2 *Int’l Union of Operating Eng’rs-Emp’rs Constr. Indus. Pension v. Karr*, 994 F.2d 1426, 1430
3 (9th Cir. 1993) (internal quotations omitted). Federal courts give state court judgments the same
4 preclusive effect as they would receive in the courts of the originating state. *See, e.g., Migra v.*
5 *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).
6

7 Under Washington law, res judicata bars a matter from being “relitigated, or even
8 litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence
9 should have been raised, in [a] prior proceeding.” *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App.
10 320, 329, 941 P.2d 1108 (1997). There is “no simple all-inclusive test” for determining whether
11 specific claims should have been asserted in a prior proceeding. *Id.* at 330. “Instead, it is
12 necessary to consider a variety of factors,” including, for example, whether “there were valid
13 reasons” not to assert the claims earlier. *Id.* at 331.
14

15 Here, Plaintiffs should have raised their objections related to the discipline system in their
16 prior discipline proceedings. Caruso was disciplined in 2015 and Ferguson in 2011. As noted
17 above, limited-license practitioners had already begun to be licensed and regulated by the WSBA
18 at the time. Further, the discipline system generally had the same structure and provided lawyers
19 with the same procedural protections that it does now. Plaintiffs could have raised their
20 objections in those proceedings, and should now be precluded from wasting scarce judicial
21 resources on their belated arguments. Accordingly, this Court also should dismiss Plaintiffs’
22 Fourth and Fifth Claims for Relief regarding the WSBA’s disciplinary authority and procedural
23 due process on res judicata grounds.
24
25
26
27

1 **D. Plaintiffs' Due Process Objections Are Unripe.**

2 Plaintiffs' Fifth Claim for Relief, their due process claim, also should be dismissed
3 because it is not ripe for adjudication. The ripeness doctrine requires a claimant to present
4 "concrete legal issues" rather than mere "abstractions." *Mont. Env't'l Info. Ctr. v. Stone-*
5 *Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted). Further, a claimant
6 must allege injury that "is sufficiently direct and immediate" to warrant judicial review. *Pence v.*
7 *Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (internal quotations omitted). These requirements
8 "sharpen[] the presentation of issues upon which the court so largely depends for illumination of
9 difficult constitutional questions." *Id.* at 738 (internal quotations omitted).
10

11 Here, Plaintiffs complain about the lawyer discipline system only in the abstract, without
12 alleging any particular deprivation of due process that they have suffered or are likely to suffer.
13 *See* Dkt. # 4 at 15-31. They describe various components of the discipline system, but without
14 stating how those components have been or will be used to violate their due process rights. *See*
15 *id.* As a result, Plaintiffs have failed to present concrete legal issues or any "direct and
16 immediate" injury and their claim is unripe. *See Pence*, 586 F.2d at 737-38.
17

18 Plaintiffs' vague allegations are especially deficient in the context of a procedural due
19 process challenge. None of their objections arise from the application of the discipline system to
20 them—instead, they are objections to the system in theory. But as the Ninth Circuit has
21 observed, "the very nature of due process negates any concept of inflexible procedures
22 universally applicable to every imaginable situation." *Pence*, 586 F.2d at 737 (internal
23 quotations omitted). In other words, it is generally impossible to evaluate the sufficiency of
24 procedures in a vacuum, without application to a particular case and without consideration of
25 context and details. As the Ninth Circuit made clear in *Pence*, a procedural due process
26

1 challenge “requires factual development, and should not be decided in the abstract.” *Id.* at 736-
 2 37 (dismissing as unripe a challenge to regulations that had “not yet been applied to [the]
 3 plaintiffs”).

4 Here, all of Plaintiffs’ objections to the discipline system are abstract and premature.
 5 They complain about “vast differences among hearing officers” and allege that “[n]ot all hearing
 6 officers understand the trial process and the rules of evidence.” Dkt. # 4 at 28. Given that a
 7 hearing officer has not yet been assigned to either of their cases, however, these complaints are
 8 entirely speculative. *See Hirsh*, 67 F.3d at 714 (noting bar officers are “entitled to a presumption
 9 of honesty and integrity”). Moreover, the system provides due process protections relating to the
 10 assignment of hearing officers. *See, e.g.*, ELC 10.2(b) (providing procedures for disqualification
 11 of hearing officers).

12 Plaintiffs also complain about the deference the Washington Supreme Court allegedly
 13 affords to the WSBA Disciplinary Board. *See* Dkt. # 4 at 30. But again, without allegations of
 14 an actual instance of improper deference in either of their cases, this issue cannot be evaluated or
 15 adjudicated. As *Eugster I* demonstrates, the Washington Supreme Court departs from hearing
 16 officer and/or Disciplinary Board recommendations when it sees fit to do so. *See Eugster I*, 166
 17 Wn.2d at 299 (deviating from unanimous Board recommendation of disbarment to impose 18-
 18 month suspension); *see also, e.g., In re Blanchard*, 158 Wn.2d 317, 330 (2006) (“[W]hile we do
 19 not lightly depart from the Board’s recommendation, we are not bound by it.” (internal marks
 20 omitted)).⁵

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 26 ⁵ Plaintiffs also ignore that the Ninth Circuit upheld such a framework of deference in *Rosenthal*. *See* 910 F.2d
 at 564 (upholding system in which state supreme court gave “great weight” to board’s findings but was “not bound
 by them”).

1 In sum, Plaintiffs' objections to the discipline system are too vague and abstract to be
 2 adjudicated. This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not ripe, as
 3 in previous related cases. *See Eugster II*, 2010 WL 2926237, at *8 (rejecting prior challenge as
 4 too abstract), *aff'd*, 474 Fed. App'x at 625.

5 **E. The WSBA Is Immune from Suit.**

6 Finally, the WSBA should be dismissed from this case because it is immune from suit. In
 7 the context of challenges to bar requirements or regulation, the Ninth Circuit has recognized
 8 unified bar associations such as the WSBA are state agencies for the purposes of Eleventh
 9 Amendment immunity. *See Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985)
 10 (affirming dismissal of state bar association from case seeking to enjoin enforcement of bar rule);
 11 *Ginter v. State Bar of Nev.*, 625 F.2d 829, 830 (9th Cir. 1980) (“[T]he Nevada State Bar
 12 Association, as an arm of the state, is not subject to suit under the Eleventh Amendment.”).
 13 Indeed, this issue has been previously adjudicated multiple times between Plaintiffs' counsel and
 14 the WSBA in federal court, against Plaintiffs' counsel. *See Eugster II*, 2010 WL 2926237, at *9
 15 (noting that “the Ninth Circuit has recognized bar associations as state agencies for the purposes
 16 of Eleventh Amendment immunity” and dismissing claims against the WSBA for that added
 17 reason), *aff'd on other grounds*, 474 Fed. App'x 624 (9th Cir. 2012); *Eugster III*, 2015 WL
 18 5175722, at *9 (“[A]s a federal court in this state has already apprised Mr. Eugster, the WSBA is
 19 a state agency immunized from suit by the Eleventh Amendment.”). In sum, under well-settled
 20 Ninth Circuit law, the WSBA is immune from suit and the claims against it should be dismissed.

21 **F. The Amended Complaint Should Be Dismissed with Prejudice.**

22 This Court should dismiss Plaintiffs' claims with prejudice. Plaintiffs already have
 23 amended their complaint once and their allegations are so deficient and speculative, as well as

1 barred by the *Younger*, res judicata, and immunity doctrines, that they do not warrant an
 2 opportunity for further amendment. *See, e.g., In re Dynamic Random Access Memory (DRAM)*
 3 *Antitrust Litig.*, 546 F.3d 981, 990 (9th Cir. 2008) (affirming dismissal without leave to amend
 4 because plaintiff was unable to propose any amendments that would save complaint).

5 **G. Plaintiffs Have Failed to Make the Showings Necessary for Summary Judgment or a**
 6 **Preliminary Injunction.**

7 By asserting flawed claims subject to dismissal, Plaintiffs have also failed to demonstrate
 8 entitlement to summary judgment or a preliminary injunction. As explained above, Plaintiffs'
 9 Amended Complaint lacks any legal merit and should be dismissed with prejudice. Accordingly,
 10 Plaintiffs are not entitled to judgment "as a matter of law" on summary judgment. Fed. R. Civ.
 11 Pro. 56(a). Nor have Plaintiffs demonstrated a likelihood of success "on the merits" as required
 12 for a preliminary injunction. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2009). Moreover,
 13 Plaintiffs fail to specify any potential irreparable harm that would result if a preliminary
 14 injunction is not issued. *See* Dkt. # 15 at 20. Indeed, as Plaintiffs' disciplinary history
 15 demonstrates, irreparable harm is far more likely to result if Plaintiffs are no longer subject to
 16 regulatory oversight in the practice of law. For the same reason, the balance of equities and
 17 public interest tip sharply in favor of denying Plaintiffs' unsupported requests.

18 **VI. CONCLUSION**

19 This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend
 20 Washington's bar system, including the Washington Supreme Court's disciplinary system.
 21 Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with
 22 counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice.
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1 DATED this 21st day of March, 2017.
2

3 PACIFICA LAW GROUP LLP

4 By s/ Paul J. Lawrence

5 Paul J. Lawrence, WSBA #13557

6 Jessica A. Skelton, WSBA #36748

7 Taki V. Flevaris, WSBA #42555

8 Attorneys for Defendants
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DEFS.' MOTION TO DISMISS AND OPPOSITION TO
MOTIONS FOR SUMMARY JUDGMENT AND
PRELIMINARY INJUNCTION - 25

Case No. 2:17-cv-00003 RSM
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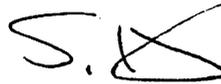
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2017, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to the following:

Stephen Kerr Eugster
Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, WA 99201-6422
Phone: 509.624.5566
Fax: 866.565.2341
eugster@eugsterlaw.com

Plaintiff

DATED this 21st day of March, 2017.



Sydney Henderson

Honorable Thomas O. Rice

Jessica A. Skelton
Taki V. Flevaris
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: (206) 245.1700
Facsimile: (206) 245.1750
Jessica.Skelton@pacificalawgroup.com
Taki.Flevaris@pacificalawgroup.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STEPHEN KERR EUGSTER,

Plaintiff,

v.

PAULA C. LITTLEWOOD, Executive
Director of the WASHINGTON STATE BAR
ASSOCIATION in her official capacity, et al.,

Defendants.

No. 2:17-cv-00392 TOR

DEFENDANTS' JOINT
MOTION TO DISMISS
AMENDED COMPLAINT

05/11/2018
Without Oral Argument

DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT
Case No. 2:17-cv-00392-TOR

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

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DEFENDANTS' MOTION TO DISMISS
 AMENDED COMPLAINT - iv
 Case No. 2:17-cv-00392-TOR

PACIFICA LAW GROUP LLP
 1191 SECOND AVENUE
 SUITE 2000
 SEATTLE, WASHINGTON 98101-3404
 TELEPHONE: (206) 245.1700
 FACSIMILE: (206) 245.17500

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I. INTRODUCTION

Ever since being disciplined for professional misconduct, Plaintiff Stephen K. Eugster (“Eugster”) repeatedly has sued officials of the Washington State Bar Association (“WSBA”) and the Justices of the Washington Supreme Court (“Justices”), asserting the same claims over and over without success. Federal and state courts across Washington have determined that Eugster’s challenges to the constitutionality of mandatory bar membership and license fees, the way those fees are spent, and Washington’s lawyer discipline procedures are meritless.

As with Eugster’s prior suits, this case is frivolous and should be dismissed. Most importantly, the res judicata doctrine bars Eugster’s claims because he already has or could have litigated them in his prior cases. Eugster attempts to distinguish this case based on recent amendments to the WSBA’s bylaws, but a prior court already has rejected that distinction as meritless and irrelevant. He also now asserts that the Washington Supreme Court and WSBA constitute a monopoly, but he provides no reasoning or authority in support of this theory, which is contrary to law, irrelevant to his repetitive claims, and does not alter the preclusive effect of the prior judgments against him.

In addition, the collateral estoppel doctrine bars Eugster’s claims because prior courts have already recognized numerous grounds for dismissing them—

1 including failure to state a claim, res judicata, standing, and ripeness. Eugster's
2 claims also fail on their merits and his due process claim is not justiciable. For
3 each and all of these reasons, this lawsuit should be dismissed with prejudice.

4 II. LITIGATION AND PROCEDURAL HISTORY

5 A. Eugster Repeatedly Has Sued the WSBA and the Justices.

6 This lawsuit is one of many Eugster has pursued against WSBA officials,
7 including Defendant Paula Littlewood as Executive Director, and the Justices. The
8 prior cases provide context and persuasive authority for the issues presented here.
9 This Court may take judicial notice of these cases. *See MGIC Indem. Corp. v.*
10 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (court can “take judicial notice of
11 matters of public record”); *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007)
12 (taking notice of party’s “five prior cases” in state and federal courts).

13 ***Eugster I:*** In 2005, the WSBA charged Eugster with misconduct. *See In re*
14 *Disciplinary Proceeding Against Eugster*, 166 Wash.2d 293, 298 (2009) (“*Eugster*
15 *I*”). After review by a hearing officer and the WSBA Disciplinary Board
16 culminating in a recommendation of disbarment, Eugster appealed to the
17 Washington Supreme Court, which suspended him for 18 months. *Id.* at 327-28.

18 ***Eugster II:*** In January of 2010, Eugster sued the WSBA, its officers, and the
19 Justices, alleging that Washington's lawyer discipline system violates due process.
20 *Eugster v. Wash. State Bar Ass’n*, No. CV 09-357, 2010 WL 2926237, at *1-2

1 (E.D. Wash. July 23, 2010) (“*Eugster II*”). This Court dismissed the case on
2 standing and ripeness grounds, and the Ninth Circuit affirmed on both grounds. *Id.*
3 at *11, *aff’d*, 474 F. App’x 624, 625 (9th Cir. 2012).

4 ***Eugster III***: In March 2015, Eugster filed another suit in federal court
5 against the WSBA, its officials, and the Justices. *Eugster v. Wash. State Bar*
6 *Ass’n*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015)
7 (“*Eugster III*”). Eugster claimed that bar membership and license fees, and the
8 way fees are spent, violate his constitutional rights of speech and association. *Id.*
9 at *2. The district court concluded Eugster had “grossly misstate[d]” and
10 “misconstrued” governing precedent, which establishes that mandatory bar
11 membership and fees are constitutional. *Id.* at *5-7 (citing cases). The district
12 court also concluded Eugster’s “mere mention” of WSBA activities and “bare
13 assertion” that license fees were being misspent were “legally conclusory and thus
14 insufficient” to state a claim. *Id.* at *7. Eugster appealed and the Ninth Circuit
15 affirmed. *Eugster III*, 684 F. App’x 618, 619 (9th Cir. 2017).

16 ***Eugster IV***: In November 2015, Eugster filed another lawsuit against the
17 WSBA and its officials in state court. *Eugster v. Wash. State Bar Ass’n*, 198
18 Wash. App. 758, 767 (2017) (“*Eugster IV*”). Yet again, Eugster claimed that the
19 lawyer discipline system violates procedural due process requirements. *Id.* at 770.
20 The superior court dismissed with prejudice, and Division III of the Washington

1 Court of Appeals affirmed, holding res judicata barred Eugster’s challenge because
2 he should have raised it, if at all, in his prior discipline proceeding in *Eugster I*. *Id.*
3 at 794. Eugster petitioned the Washington Supreme Court for review, which was
4 denied. *See Eugster IV*, 189 Wash.2d 1018 (2017).

5 ***Eugster V***: In December 2015, one month after filing *Eugster IV*, Eugster
6 filed a twin complaint in this Court. *Eugster v. Littlewood*, No. 2:15-CV-0352-
7 TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) (“*Eugster V*”). Eugster
8 again claimed that the lawyer discipline system “violates procedural due process.”
9 *Id.* at *1. This Court dismissed with prejudice, holding Eugster’s claim was barred
10 by res judicata. *Id.* at *4-6. Eugster’s appeal of that decision to the Ninth Circuit
11 remains pending. *See Eugster V*, No. 16-35542 (9th Cir.).

12 ***Eugster VI***: In November 2016, Eugster filed another lawsuit against the
13 WSBA and its officials in the Western District. *Eugster v. Wash. State Bar Ass’n*,
14 No. 2:16-cv-01765 (W.D. Wash.) (“*Eugster VI*”). As before, Eugster asserted
15 claims that compulsory bar membership and fees are unconstitutional and that the
16 lawyer discipline system violates due process. *See id.* He also argued that recent
17 WSBA bylaw amendments, formally designating limited license practitioners as
18 members, created a “new” WSBA lacking regulatory authority. *Id.* Eugster
19 voluntarily dismissed the case on January 4, 2017. *Id.*

1 **Caruso:** One day after dismissing *Eugster VI*, Eugster filed a nearly
2 identical suit on behalf of two other previously disciplined attorneys. *Caruso v.*
3 *Wash. State Bar Ass'n*, No. C17-003 RSM, 2017 WL 1957077 at *1 (W.D. Wash.
4 May 11, 2017). Eugster filed the case initially as a putative class action on behalf
5 of all WSBA members, but abandoned the class claims soon after. *Id.* The district
6 court dismissed the case with prejudice for failure to state a claim, holding that (1)
7 substantial authority establishes compelled bar membership and license fees are
8 constitutional; (2) the WSBA remains the same entity and retains its regulatory
9 authority notwithstanding the recent bylaw amendments; and (3) the lawyer
10 discipline system provides due process. *Id.* at *2-4. The court sanctioned Eugster
11 for filing a “legally and factually baseless” lawsuit and ordered payment of the
12 WSBA’s fees. 2017 WL 2256782, at *4 (W.D. Wash. May 23, 2017). Both orders
13 are on appeal. *See Caruso*, Nos. 17-35410, 17-35529 (9th Cir.).

14 **B. Eugster Pursues the Same Claims in the Current Lawsuit.**

15 On November 25, 2017, Eugster filed the present suit, initially against the
16 WSBA and its Executive Director. *See* Dkt. No. 1. In the original complaint,
17 Eugster again argued that bar membership and license fees violate his
18 constitutional rights of association and speech; that the WSBA bylaw amendments
19 related to membership stripped the WSBA of its regulatory authority; and that the
20 lawyer discipline system fails to satisfy due process. Dkt. No. 1 at 9-10. The

1 WSBA filed a Motion to Dismiss, arguing res judicata, collateral estoppel, and
2 failure to state a claim. Dkt. No. 8 at 1-2.

3 Eugster then filed an Amended Complaint. Dkt. No. 9. In it, Eugster again
4 claims that bar membership and license fees violate his constitutional rights and
5 that the discipline system fails to satisfy due process. *Id.* at 18-19. He also
6 reasserts his challenge from *Eugster III* against the use of fees. *Id.* at 20. In
7 support of his claims, Eugster now argues that the Washington Supreme Court and
8 WSBA constitute a monopoly over the practice of law. *Id.* at 7, 8, 10, 15-18.
9 Eugster has removed the WSBA but added the Justices as defendants. *Id.* at 1;
10 Dkt. No. 23 at 3.

11 III. STANDARDS OF REVIEW

12 A motion to dismiss on the basis of res judicata or collateral estoppel may be
13 brought under Rule 12(b)(6). *See, e.g., Holcombe v. Hosmer*, 477 F.3d 1094, 1097
14 (9th Cir. 2007). Likewise, a complaint must be dismissed under Rule 12(b)(6) if it
15 lacks a cognizable legal theory or fails to allege sufficient facts in support. *Zixiang*
16 *Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). Mere “labels and conclusions, a
17 formulaic recitation of the elements of a cause of action, or naked assertions
18 devoid of further factual enhancement will not suffice.” *Landers v. Quality*
19 *Commc’ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (internal marks omitted). A
20 complaint also must be dismissed under Rule 12(b)(1) if the plaintiff fails to

1 demonstrate standing or ripeness for adjudication. *Chandler v. State Farm Mut.*
2 *Auto. Ins. Co.*, 598 F.3d 1115, 1121-23 (9th Cir. 2010).

3 IV. ARGUMENT

4 A. Res Judicata Bars Eugster's Claims Because They Were or Could 5 Have Been Adjudicated in Each of His Prior Lawsuits.

6 All of the claims Eugster asserts here already have been or could have been
7 adjudicated in each of his prior suits and are thus barred by the doctrine of res
8 judicata. The purpose of res judicata, also called claim preclusion, is to “avoid[]
9 repetitive litigation, conserv[e] judicial resources, and prevent[] the moral force of
10 court judgments from being undermined.” *Int’l Union of Operating Eng’rs-
11 Emp’rs Constr. Indus. Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993)
12 (internal quotes omitted). In determining whether res judicata bars a claim, federal
13 courts apply the law of the jurisdiction in which each prior judgment was rendered.
14 *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984). Ninth
15 Circuit law and Washington law are substantially aligned regarding application of
16 the doctrine. *See Kuhlman v. Thomas*, 78 Wash. App. 115, 120 n.3 (1995) (noting
17 overlap). In particular, a final judgment on the merits bars a later action between
18 the same parties, or those in privity with them, over claims that were or could have
19 been raised in the prior action. *W. Radio Servs. Co., Inc. v. Glickman*, 123 F.3d
20 1189, 1192 (9th Cir. 1997); *Kelly-Hansen v. Kelly-Hansen*, 87 Wash. App. 320,
329 (1997).

DEFENDANTS’ JOINT MOTION TO
DISMISS AMENDED COMPLAINT - 7
Case No. 2:17-cv-00392-TOR

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

1 Here, each claim Eugster raises already was or could have been raised in his
2 past cases, and is thus barred. He attempts to distinguish this case as one of “first
3 impression,” but his alleged distinctions are meritless and irrelevant. The res
4 judicata doctrine thus bars Eugster’s claims in this case.

5 1. Eugster Has Already Challenged Bar Membership and License Fees.

6 Eugster claims that the requirement to maintain bar membership and pay
7 license fees to practice law violates his constitutional rights of association and
8 speech. Dkt. No. 9 at 18-19. Eugster already raised this claim in *Eugster III*.
9 2015 WL 5175722 at *1. His arguments were rejected on the merits. *See Eugster*
10 *III*, 684 F. App’x at 619. Because he already litigated this claim unsuccessfully,
11 Eugster is unquestionably barred from re-litigating it here. *W. Radio*, 123 F.3d at
12 1192. Eugster also could have raised this claim in any of his other suits, including
13 when he challenged the lawyer discipline system in *Eugster IV* and *V*. 198 Wash.
14 App. at 770; 2016 WL 3632711, at *1. Eugster did not, and is barred from raising
15 it here for this additional reason. *See Kelly-Hansen*, 87 Wash. App. at 330; *W.*
16 *Radio*, 123 F.3d at 1192.

17 2. Eugster Has Already Challenged the Use of License Fees.

18 Eugster also claims the WSBA improperly spends his fees for “purposes not
19 germane to the practice of law,” in violation of his constitutional rights of
20 association and speech. Dkt. No. 9 at 20. Eugster already raised this claim in

1 *Eugster III*. See 2015 WL 5175722, at *2-3. His arguments were rejected because
2 they lacked specificity and he failed to identify any improper spending. See
3 *Eugster III*, 684 F. App'x at 619. Eugster also could have raised this claim again
4 in any of his other suits, but did not. On either basis, this claim is barred. See *W.*
5 *Radio*, 123 F.3d at 1192; *Kelly-Hansen*, 87 Wash. App. at 330.

6 3. Eugster Has Already Challenged the Discipline System Procedures.

7 Eugster also vaguely asserts that the lawyer discipline system has “affected”
8 his constitutional due process rights. Dkt. No. 9 at 7, 19. Eugster repeatedly has
9 raised unsuccessful challenges to the lawyer discipline system and this claim is
10 also barred.

11 Initially, Eugster already had the opportunity to raise this challenge during
12 his prior disciplinary proceeding. See *Eugster I*, 166 Wash.2d at 298; see also
13 *Eugster IV*, 198 Wash. App. at 785 (noting that constitutional challenges may be
14 raised during bar disciplinary proceedings). Eugster failed to do so, and is thus
15 barred from arguing the claim here. See *id.*; *Kelly-Hansen*, 87 Wash. App. at 330.

16 Eugster also raised the same claim in multiple subsequent suits that were
17 dismissed with prejudice, including on the basis of res judicata. See *Eugster IV*,
18 198 Wash. App. at 767, 785-90, 794 (holding Eugster should have raised claim in
19 *Eugster I*); *Eugster V*, 2016 WL 3632711 at *1, 5-6 (holding *Eugster IV* barred the
20 claim); *Eugster II*, 474 F. App'x at 625 (holding Eugster lacked standing and the

1 claim was unripe). Such dismissals preclude re-litigation. *See Berschauer Phillips*
2 *Const. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wash. App. 222, 232 (2013) (noting
3 dismissal “with prejudice” is a final judgment on merits for res judicata purposes);
4 *Int’l Union*, 994 F.2d at 1429 (same).

5 4. Eugster’s Asserted Distinctions Are Irrelevant and Meritless.

6 Eugster makes two unavailing attempts to distinguish this case from his prior
7 cases. First, he asserts this is a case of “first impression” because of WSBA bylaw
8 amendments designating limited license practitioners as members. Dkt. No. 9 at 2.
9 Second, he attempts to distinguish his claims by asserting a new theory that the
10 Washington Supreme Court and WSBA constitute a monopoly. *See* Dkt. No. 9 at
11 15-18. Neither alleged distinction affects the outcome here.

12 As to the bylaw amendments, this is not an issue of first impression: Eugster
13 already raised the same argument in *Caruso* and it was rejected as frivolous. *See*
14 2017 WL 1957077 at *3. The argument remains frivolous here.

15 Decidedly, Eugster never explains how the designation of limited-license
16 practitioners as WSBA members makes any difference to his claims. *See* Dkt. No.
17 9. Nor could he. Mandatory bar membership and license fees still serve strong
18 state interests and impose minimal burdens on speech and association regardless of
19 whether limited-license practitioners are designated bar members. *See* Section
20 IV(C)(1), *infra*. The WSBA’s expenditures are also legitimate either way. *See*

1 Section IV(C)(2), *infra*. And Washington's bar discipline procedures still provide
2 notice, an opportunity to be heard, and impartial adjudication. *See* Section
3 IV(C)(3), *infra*. Accordingly, res judicata still applies here. *See, e.g., Davidson v.*
4 *Kitsap Cty.*, 86 Wash. App. 673, 682 (1997) (holding res judicata barred review
5 where asserted change in circumstances was irrelevant).

6 Further, as Eugster acknowledges, the Washington Supreme Court and
7 WSBA have authorized and regulated limited-license practitioners since at least
8 1983. *See* Dkt. No. 9 at 8. Indeed, Eugster already unsuccessfully challenged
9 spending for such regulation in *Eugster III*. *See* 2015 WL 5175722 at *7. Thus,
10 the issue of limited-license practice is not new, it has been or should have been
11 litigated in each of Eugster's prior suits, and it does not affect the outcome here.

12 Eugster's monopoly theory fares no better. As Eugster himself observes, the
13 authority of the Washington Supreme Court and WSBA over the practice of law is
14 not new. *See* Dkt. No. 9 at 9 (acknowledging this form of bar regulation and
15 oversight was established in 1933). As such, Eugster could have raised this theory
16 before and is barred from doing so now. *See Franklin v. Murphy*, 745 F.2d 1221,
17 1230 (9th Cir. 1984) (res judicata barred claim because new legal theory could
18 have been raised previously); *Costantini v. Trans World Airlines*, 681 F.2d 1199,
19 1201 (9th Cir. 1982) (res judicata applies to a new legal theory where the
20 underlying cause of action is the same); *Kelly-Hansen*, 87 Wash. App. at 330.

DEFENDANTS' JOINT MOTION TO
DISMISS AMENDED COMPLAINT - 11
Case No. 2:17-cv-00392-TOR

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

1 Moreover, Eugster never explains how Washington’s bar system constitutes
2 a monopoly, nor could he, given that regulation and monopolization are distinct
3 concepts. The Supreme Court merely oversees the practice of law in this state
4 rather than practicing law itself, with the WSBA acting as its “agent.” *Hahn v.*
5 *Boeing Co.*, 95 Wash.2d 28, 34 (1980).

6 Even if Eugster could begin to explain his theory, it would still fail under the
7 state immunity doctrine. *See Mothershed v. Justices of Supreme Court*, 410 F.3d
8 602, 609-10 (9th Cir. 2005) (holding state supreme court and bar association did
9 not constitute unlawful monopoly under federal or state law). As in *Mothershed*,
10 Eugster is challenging aspects of Washington’s bar system that are subject to state
11 governmental control and supervision, which are immunized from antitrust
12 restrictions. *See id.*; Dkt. No. 9 at 17-18; Wash. Gen. R. (“GR”) 12.2; RCW
13 19.86.920 (Washington antitrust law construed in accordance with federal law).

14 Eugster also fails to explain why his monopoly theory would make any
15 difference to his claims. *See* Dkt. No. 9. It would not. Whether the Supreme
16 Court and WSBA have complied with antitrust laws is distinct from any alleged
17 violations of the First Amendment or due process requirements, which are the only
18 claims Eugster has pleaded. *See* Dkt. No. 9 at 13-22. In sum, res judicata
19 precludes Eugster from re-litigating his claims in this serial lawsuit.

1 **B. Eugster Is Barred Under the Collateral Estoppel Doctrine from**
2 **Challenging the Numerous Grounds for Dismissing His Claims.**

3 In addition to res judicata, collateral estoppel bars Eugster’s claims because
4 the applicable grounds for dismissal of those claims have already been decided
5 against Eugster, repeatedly. The collateral estoppel doctrine, also called issue
6 preclusion, protects litigants from the burden of “relitigating an identical issue”
7 and “promot[es] judicial economy” by “preventing needless litigation.” *Wabakken*
8 *v. California Dep’t of Corr. & Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015)
9 (internal quotations omitted). As with res judicata, a federal court will apply the
10 law of the jurisdiction that issued the prior judgment. *Migra*, 465 U.S. at 81.
11 Ninth Circuit law and Washington law on collateral estoppel are again aligned.
12 *Gausvik v. Perez*, 396 F. Supp. 2d 1173, 1175 (E.D. Wash. 2005) (noting there is
13 “no material distinction”). In particular, the doctrine applies when an issue was
14 decided in a prior action, that action ended in a final judgment on the merits, and
15 the party against whom the issue is asserted was a party to that first action or in
16 privity with one. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir.
17 2000); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135
18 Wash.2d 255, 263 (1998).

19 Numerous courts have already determined that Eugster’s claims against
20 Washington’s bar system are subject to dismissal, on multiple grounds. Prior

1 courts have rejected Eugster’s legal theories as failing to state a valid claim for
2 relief. *See Eugster III*, 684 F. App’x at 619 (holding that mandatory bar
3 membership and license fees are constitutional requirements to practice law, and
4 that Eugster’s broad assertion that the WSBA improperly spends fees fails);
5 *Caruso*, 2017 WL 1957077 at *3-4 (holding mandatory bar membership and fees
6 are constitutional and lawyer discipline system satisfies due process standards).¹

7 Prior courts have also rejected Eugster’s due process claim under *res*
8 *judicata*, standing, and ripeness doctrines. *Eugster IV*, 198 Wash. App. at 785-90,
9 794 (*res judicata*); *Eugster II*, 474 F. App’x at 625 (standing and ripeness).

10 Prior courts have also informed Eugster that the designation of limited-
11 license practitioners as members did not alter the WSBA’s authority to regulate the
12 practice of law and that spending to regulate those members is appropriate.

13
14 ¹ In *Caruso*, the court rejected the theories Eugster argued for his clients as
15 frivolous. Under the circumstances, those rulings should apply to him here as
16 plaintiff. *See United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir.
17 1980) (noting “[c]ourts are no longer bound by rigid definitions of parties or their
18 privies” and that determining privity is flexible and directed by policy);
19 *Weinberger v. Tucker*, 510 F.3d 486, 493 (4th Cir. 2007) (noting attorney-client
20 relationship in prior litigation can establish privity for preclusion purposes).

1 *Caruso*, 2017 WL 1957077 at *3 (holding WSBA regularly amends its bylaws and
2 the membership amendment did not alter WSBA’s authority); *Eugster III*, 2015
3 WL 5175722 at *7 (holding spending for limited-license boards appropriate
4 because geared toward “improving the quality of legal services”).

5 These prior decisions are determinative in this case, notwithstanding
6 *Eugster’s* new monopoly theory. Arguing a new legal theory in support of the
7 same ultimate claim or issue is insufficient to avoid collateral estoppel. *See, e.g.,*
8 *Paulo v. Holder*, 669 F.3d 911, 918 (9th Cir. 2011) (“If a party could avoid issue
9 preclusion by finding some argument it failed to raise in the previous litigation, the
10 bar on successive litigation would be seriously undermined.”). Moreover, *Eugster*
11 has not explained the relevance of his new theory to his claims in this case or to
12 any of the prior decisions against him. And as explained above, the theory has no
13 legal merit in any event. In sum, *Eugster’s* claims remain subject to dismissal for
14 the same reasons prior courts have recognized.

15 **C. Eugster’s Claims Fail on the Merits.**

16 Finally, even if this Court reaches the merits of *Eugster’s* claims, it should
17 dismiss for the same reasons recognized by prior courts. Specifically, *Eugster* fails
18 to state a valid claim and his due process claim is not justiciable.

1 1. Mandatory Membership and License Fees Are Constitutional.

2 Eugster’s first claim challenging mandatory bar membership and fees fails to
3 present a valid basis for relief. Ample authority establishes that these requirements
4 are constitutional, specifically to regulate and improve the practice of law. *See*
5 *Eugster III*, 2015 WL 5175722 at *2; *Caruso*, 2017 WL 1957077 at *3; *see also*,
6 *e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2643-44 (2014); *Keller v. State Bar of Cal.*,
7 496 U.S. 1, 4 (1990); *Lathrop v. Donohue*, 367 U.S. 820, 827-28 (1961).

8 As these and other courts have repeatedly recognized, mandatory bar
9 membership and license fees not only serve “strong” state interests, *Harris*, 134 S.
10 Ct. at 2644, they also impose only minimal burdens on speech and association.
11 Like any other WSBA member, Eugster remains “free to attend or not attend [bar]
12 meetings or vote in [bar] elections,” and he is not forced “to associate with
13 anyone.” *Lathrop*, 367 U.S. at 828. Likewise, he is not required “to express any
14 particular ideas or make any particular utterances of any kind,” and remains able
15 “to express [his] own views or to disagree with the positions of the Bar.” *Morrow*
16 *v. State Bar of Cal.*, 188 F.3d 1174, 1176 (9th Cir. 1999). Thus, Eugster cannot
17 demonstrate a violation of his First Amendment rights, and this claim should be
18 dismissed as prior courts have done.

1 2. WSBA Spending of License Fees Is Appropriate and Constitutional.

2 As to Eugster’s second claim, his vague assertion that the WSBA collects his
3 license fees “for political, ideological, and other non-chargeable activities” in
4 violation of his constitutional rights also fails as a matter of law. Dkt. No. 9 at 20.
5 Eugster fails to specify any non-chargeable activity funded by fees in violation of
6 the Constitution. *See* Dkt. No. 9 at 20-21. Thus, as before, Eugster does not allege
7 a basis for a cognizable legal claim regarding the WSBA’s use of fees. *See*
8 *Eugster III*, 684 F. App’x at 619 (holding “Eugster failed to allege facts sufficient
9 to show an improper use of” his license fees).

10 Further, the WSBA has established a meticulous process to avoid any such
11 violation. *See* WSBA, *Keller Deduction Overview, Calculation and Arbitration*
12 (noting “extremely ‘conservative’ test” is used to determine which activities are
13 non-chargeable).² As the district court observed in *Eugster III*, this deduction
14 system “provides robust procedural safeguards to ensure compliance with *Keller*,
15 many of them responding directly to Supreme Court precedent.” 2015 WL
16 5175722, at *7. Eugster’s unsupported assertion to the contrary should be
17 dismissed for failure to state a claim.

18
19 ² Available at [https://www.wsba.org/docs/default-source/licensing/keller-](https://www.wsba.org/docs/default-source/licensing/keller-deduction-overview.pdf?sfvrsn=9f3538f1_4)
20 [deduction-overview.pdf?sfvrsn=9f3538f1_4](https://www.wsba.org/docs/default-source/licensing/keller-deduction-overview.pdf?sfvrsn=9f3538f1_4) (last visited Mar. 13, 2018).

1 3. The Lawyer Discipline System Affords Due Process.

2 With respect to Eugster’s third claim, abundant authority establishes that
3 Washington’s lawyer discipline system satisfies due process requirements. In the
4 context of lawyer discipline, the Ninth Circuit has recognized that due process
5 consists primarily of “notice and an opportunity to be heard.” *Rosenthal v. Justices*
6 *of the Supreme Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990). Further, the Ninth
7 Circuit has held that “more than constitutionally sufficient procedural due process”
8 exists where disciplined attorneys are afforded (1) the right to a hearing, (2) the
9 ability “to call witnesses and cross-examine,” (3) the burden being placed on the
10 state “to establish culpability by convincing proof,” and (4) ultimate, independent
11 review by the state’s supreme court. *See id.* at 564-65. Under Washington’s
12 system, lawyers are afforded these very protections. *See Wash. R. Enf’t of Lyr.*
13 *Conduct 4.1, 5.7, 10.1, 10.3, 10.11, 10.12, 10.13, 10.14 (b), 12.* As with the
14 system considered in *Rosenthal*, Washington’s discipline system provides more
15 than adequate due process.

16 4. Eugster’s Due Process Claim Is Not Justiciable.

17 Eugster’s due process claim should also be dismissed for lack of standing
18 and because it is unripe. To have standing to seek injunctive relief, Eugster must
19 show imminent harm. *Chandler*, 598 F.3d at 1122; *Eugster II*, 474 F. App’x at
20 625 (affirming Eugster lacked standing because he did not point to any imminent

1 injury for which he sought relief). Here, Eugster asserts that he will be
2 “irreparably harmed,” but without explanation or support. Dkt. No. 9 at 14.
3 Eugster’s due process claim thus fails because he has no standing to pursue it.

4 Likewise, a due process claim is not ripe if a claimant alleges an injury that
5 is speculative, abstract, and undeveloped. *See Pence v. Andrus*, 586 F.2d 733, 737-
6 38 (9th Cir. 1978); *Eugster II*, 2010 WL 2926237 at *8 (concluding Eugster’s
7 claims were unripe because they relied on “abstractions” and speculation). Here,
8 as in prior cases, Eugster’s due process claim is entirely abstract and vague. *See*
9 Dkt. No. 9 at 7 (relying on bare assertion that discipline system violates “the
10 Constitutional Scrutiny Test”). As such, Eugster’s due process claim is unripe and
11 fails for that added reason.

12 **D. Eugster’s Claims Should Be Dismissed With Prejudice.**

13 This Court should dismiss Eugster’s claims with prejudice. He has already
14 amended his complaint once, in response to a motion to dismiss, but could not
15 salvage any of his claims, which remain barred on multiple grounds. As such,
16 leave for further amendment should not be granted. *See, e.g., In re Dynamic*
17 *Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 990 (9th Cir.
18 2008) (affirming dismissal without leave to amend because plaintiff was unable to
19 propose any amendments that would save complaint).

V. CONCLUSION

Despite repeated prior dismissals of his claims and a sanction for frivolity, Eugster continues to advance unavailing challenges to the state bar system. He should be precluded from seeking another round of review of the same meritless claims, and from asserting a new, equally meritless monopoly theory. The doctrines of res judicata and collateral estoppel exist to preclude precisely this type of repetitive litigation. The WSBA respectfully requests that Eugster's requests for relief be denied and that this suit be dismissed with prejudice.

DATED this 22nd day of March, 2018.

PACIFICA LAW GROUP LLP

ROBERT W. FERGUSON
Attorney General

By /s/ Jessica A. Skelton
Jessica A. Skelton, WSBA #36748
Taki V. Flevaris, WSBA #42555

/s/ Alicia O. Young
Alicia O. Young, WSBA #35553
Assistant Attorney General

Attorneys for Defendant Littlewood

Attorneys for Defendants Justices of
the Washington State Supreme Court

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 22nd day of March, 2018, I caused to be
3 electronically filed the foregoing with the Clerk of the Court using the CM/ECF
4 System, which in turn automatically generated a Notice of Electronic Filing (NEF)
5 to all parties in the case who are registered users of the CM/ECF system. The NEF
6 for the foregoing specifically identifies recipients of electronic notice.

7 Stephen Kerr Eugster
8 EUSTER LAW OFFICE PSC
9 2418 West Pacific Avenue
10 Spokane, WA 99201
11 eugster@eugsterlaw.com

12 DATED this 22nd day of March, 2018.

13 s/ Taki V. Flevaris
14 Taki V. Flevaris

1 Hearing Date: June 22, 1:30pm
2 Presiding: Honorable John O. Cooney
3 Place: Department 9
4 Address: Spokane County Court House
5 1116 W. Broadway Avenue
6 Spokane, WA 99260
7

8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR THE COUNTY OF SPOKANE

10 EUGSTER, STEPHEN KERR,

11 Plaintiff,

12 v.

13 WASHINGTON STATE BAR
14 ASSOCIATION *et al.*,

15 Defendants.
16

No. 18-02-00542-1

DEFENDANTS' MEMORANDUM
OF AUTHORITIES IN SUPPORT OF
JOINT MOTION TO DISMISS

17
18 **I. INTRODUCTION**

19 This lawsuit is the latest in a series of lawsuits that Plaintiff Stephen Kerr Eugster
20 ("Eugster") has filed in federal and state courts against Washington's bar system. Since 2015
21 alone, Eugster has filed over ten lawsuits against Defendant the Washington State Bar
22 Association ("WSBA") and related parties, repeatedly asserting claims that have been foreclosed
23 by prior judgments and ignoring judicial admonitions to cease his improper conduct.

24 One of those cases was *Caruso v. Wash. State Bar Ass'n*, No. C17-003 RSM, 2017 WL
25 1957077 (W.D. Wash. May 11, 2017), in which Eugster was the attorney for two other
26 previously disciplined lawyers. The *Caruso* complaint reasserted challenges to the Washington
27

DEFENDANTS' MEMORANDUM IN SUPPORT OF JOINT
MOTION TO DISMISS - 1

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

1 bar system that Eugster had already raised *pro se* without success. Finding that the lawsuit was
2 “legally and factually baseless,” the *Caruso* court dismissed the complaint with prejudice and
3 awarded the WSBA nearly \$30,000 in attorneys’ fees and costs against Eugster as a sanction for
4 his frivolous claims. The Ninth Circuit recently affirmed both the dismissal and the sanction.
5

6 Eugster now attempts to undermine these prior final judgments by suing not only the
7 WSBA, but also its lawyers, based on the legal briefing that was filed in *Caruso*. The Complaint
8 asserts several causes of action that all stem from the central allegation that the WSBA’s Motion
9 to Dismiss (“Motion”) in *Caruso* contained defamatory statements that defrauded the court.

10 Eugster’s claims are meritless and should be dismissed with prejudice, for multiple reasons.

11 First, the statements Eugster complains of are entitled to absolute immunity as attorney
12 statements in court filings. Second, collateral estoppel bars Eugster’s claims because the Ninth
13 Circuit already rejected his core assertion of fraud as meritless and unsupported. Third, Eugster
14 fails to state a valid claim for relief because the statements at issue were not fraudulent, as a
15 matter of law. Finally, the WSBA is immune from suit under 42 U.S.C. § 1983. For these
16 reasons, Eugster’s claims are fatally deficient and could not be remedied by amendment.
17

18 Defendants therefore request that the Court dismiss Eugster’s Complaint with prejudice.
19

20 II. BACKGROUND AND PROCEDURAL HISTORY

21 Eugster was suspended from practicing law for 18 months in 2009. *In re Eugster*, 166
22 Wn.2d 293, 299, 209 P.3d 435 (2009). Since then, he has filed lawsuits in federal and
23 Washington State courts attacking the WSBA and related parties, challenging mandatory bar
24 membership, license fees, and Washington’s lawyer discipline system. Eugster’s numerous prior
25 lawsuits provide context necessary to understand his Complaint here and in particular the
26 statements he claims defrauded the court in *Caruso*. This Court may take judicial notice of the
27

1 public filings in these prior relevant cases. *See, e.g., Jackson v. Quality Loan Serv. Corp.*, 186
2 Wn. App. 838, 844-45, 347 P.3d 487 (2015) (court may take judicial notice of public documents
3 attached to motion to dismiss if their authenticity cannot reasonably be disputed); *Rodriguez v.*
4 *Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008); ER 201(b).

5
6 **A. Eugster files numerous repetitive complaints challenging Washington’s bar system.**

7 In 2009, soon after being suspended, Eugster filed suit in federal court against the WSBA
8 and the Justices of the Washington Supreme Court, arguing that Washington’s lawyer discipline
9 violated his due process rights. *See Eugster v. Wash. State Bar Ass’n*, No. CV 09-357-SMM,
10 2010 WL 2926237 (E.D. Wash. July 23, 2010) (“*Eugster II*”). The district court dismissed the
11 case for lack of standing or ripeness, and because the WSBA is immune from suit in federal
12 court under the Eleventh Amendment. *Id.* at *11. The Ninth Circuit affirmed on standing and
13 ripeness grounds. *Eugster v. Wash. State Bar Ass’n*, 474 Fed. App’x. 624 (9th Cir. 2012).

14
15 In September of 2014, a new bar grievance was filed against Eugster. *See Eugster v.*
16 *Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016)
17 (“*Eugster V*”) (detailing procedural history). Soon after, he filed suit again in federal court
18 challenging the state bar membership system and arguing that the requirements to pay license
19 fees and maintain bar membership violated his constitutional rights. *Eugster v. Wash. State Bar*
20 *Ass’n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015), *aff’d*, 684 Fed. App’x
21 618, 619 (9th Cir. 2017), *cert. denied*, 137 S. Ct. 2315 (2017) (“*Eugster III*”). That complaint
22 was dismissed with prejudice. *Id.* at *1. The Court noted that Eugster had “grossly misstate[d]”
23 and “misconstrued” governing precedent and that the WSBA was immune from suit. *Id.* at *5, 9.

24
25 Shortly afterward, in late 2015, Eugster filed twin complaints in this Court and in federal
26 court, again claiming that Washington’s lawyer discipline system violates due process
27

1 requirements. The cases were dismissed with prejudice on res judicata grounds. *Eugster v.*
2 *Wash. State Bar Ass'n*, 198 Wn. App. 758, 785 (2017), *pet. denied*, 189 Wn.2d 1018 (2017)
3 (“*Eugster IV*”); *Eugster V*, 2016 WL 3632711, at *2.

4 In late 2016, Eugster filed another suit in federal court challenging mandatory
5 membership, fees, and discipline procedures. *Eugster v. Wash. State Bar Ass'n*, No. 2:16-cv-
6 01765 (W.D. Wash.) (“*Eugster VI*”). Eugster voluntarily dismissed the case. *See App.* at 26-27.

7
8 **B. The district court dismisses *Caruso* with prejudice and sanctions Eugster for
9 bringing frivolous claims.**

10 One day after voluntarily dismissing *Eugster VI*, Eugster filed similar claims on behalf of
11 two other previously disciplined lawyers. *Caruso*, 2017 WL 1957077 (W.D. Wash. May 11,
12 2017). Eugster filed the case initially as a putative class action on behalf of all WSBA members,
13 but then, after the WSBA responded, he abandoned the class claims in an amended complaint.
14 *Id.* at *1.

15 The *Caruso* complaint claimed that mandatory bar membership and license fees are
16 unconstitutional; that recent bylaw amendments designating limited-license practitioners as
17 members stripped the WSBA of its regulatory authority; and that Washington’s lawyer discipline
18 system does not meet due process requirements. *Id.* The district court dismissed the complaint
19 with prejudice for failure to state a claim, holding that (i) substantial authority holds that
20 compelled bar membership and license fees are constitutional, (ii) the WSBA remains the same
21 entity and has retained its regulatory authority notwithstanding its recent bylaw amendments, and
22 (iii) the lawyer discipline system meets due process requirements. *Id.* at *2-4.

23
24 In light of Eugster’s escalating behavior, the WSBA sought, for the first time, attorneys’
25 fees and costs to deter further meritless suits. *Caruso v. Wash. State Bar Ass'n*, No. C17-003
26 RSM, 2017 WL 2256782, at *4 (W.D. Wash. May 23, 2017). In his response to that motion,
27

1 Eugster contended that the WSBA had submitted false statements to the district court. App. at
2 80-81. The district court found that the lawsuit was “legally and factually baseless,” sanctioned
3 Eugster, and ordered him to pay \$28,385 to the WSBA for legal expenses incurred in defending
4 against the suit. *Caruso*, 2017 WL 2256782, at *4 (W.D. Wash. May 23, 2017).

5
6 Eugster appealed the dismissal of the complaint and the sanction. On appeal, Eugster
7 argued that the WSBA had defrauded the district court by defaming him in its briefing. App. at
8 113-27, 163-81. The Ninth Circuit affirmed both decisions without oral argument, specifically
9 rejecting Eugster’s allegations of fraud as being “without merit” and “unsupported by the record”
10 below. *Eugster v. Wash. State Bar Ass’n 1993*, 716 Fed. App’x 645, 646 (9th Cir. 2018); *Caruso*
11 *v. Wash. State Bar Ass’n 1993*, 716 Fed. App’x 650, 651 (9th Cir. 2018).

12 **C. Eugster files additional lawsuits against the WSBA.**

13
14 In the midst of the *Caruso* litigation, Eugster filed another lawsuit that again challenged
15 WSBA license fees. *Eugster v. Supreme Court of Wash.*, No. 17-2-00228-34 (Thurston Cnty.
16 Super. Ct. 2017) (“*Eugster VII*”). After Defendants moved to dismiss, Eugster voluntarily
17 dismissed the case. App. at 208-11.

18 Then, in late 2017, Eugster filed another lawsuit against the WSBA, asserting, once
19 again, constitutional claims challenging bar membership, license fees, and discipline procedures.
20 See *Eugster v. Littlewood*, No. 2:17-cv-00392-TOR, 2018 WL 2187054 (E.D. Wash. May 11,
21 2018) (“*Eugster VIII*”). The district court recently dismissed Eugster’s complaint with prejudice
22 based on the res judicata doctrine and for failure to state a claim. *See id.*

23
24 Amidst these ongoing actions, and facing a sanction of nearly \$30,000, Eugster also filed
25 the current Complaint, which names as defendants not only the WSBA and its executive director,
26 but also the lawyers who represented the WSBA in *Caruso*. Compl. at 1. The Complaint asserts
27

1 five causes of action: defamation, false light invasion of privacy, intentional abuse of process by
2 false statements, civil conspiracy, and civil rights damages under 42 U.S.C. § 1983. *See* Compl.
3 at 5-9. The purported basis for each cause of action is the same: the statements that the WSBA
4 made in its prior briefing in *Caruso*, such as those describing Eugster’s claims as “meritless” and
5 characterizing his numerous suits against the WSBA as a “long line of frivolous attempts . . . to
6 upend Washington’s bar system.” Compl. at 6. Eugster alleges these statements were fraudulent
7 and defamatory, abused the judicial process, resulted from an unlawful conspiracy, and violated
8 his civil rights. *See id.* at 5-9.

10 III. STANDARD OF REVIEW

11 A complaint must be dismissed under CR 12(b) when the complaint fails “to state a claim
12 upon which relief can be granted.” CR 12(b)(6). Even assuming that “the plaintiff’s factual
13 allegations are true,” a complaint should be dismissed for failure to state a claim if the plaintiff
14 “can prove no set of facts that would justify recovery.” *Trujillo v. Nw. Trustee Servs., Inc.*, 183
15 Wn.2d 820, 830, 355 P.3d 1100 (2015). Dismissal is also appropriate under CR 12(b)(6) based
16 on collateral estoppel, *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008), and when
17 a party is immune from suit, *Hoffer v. State*, 110 Wn.2d 415, 440, 755 P.2d 781 (1988), *on*
18 *reconsideration in part*, 113 Wn.2d 148, 776 P.2d 963 (1989).

20 IV. ARGUMENT

21 A. The statements forming the basis of Eugster’s claims are absolutely privileged.

22 The statements Eugster identifies as the basis for all his claims are attorney statements in
23 legal briefing submitted to the district court in *Caruso*. Such statements cannot form the basis of
24 a subsequent, separate action because attorney statements in court filings that are “pertinent” to
25 the lawsuit are absolutely privileged. *E.g., McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285
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1 (1980) (noting such statements “are absolutely privileged and cannot form the basis for a damage
2 action”). This privilege “is based upon a public policy” of giving attorneys “the utmost freedom
3 in their efforts to secure justice for their clients.” *Id.* This privilege “avoids all liability.” *Id.*

4 For a statement to be pertinent, it need only have “some relation to the judicial
5 proceedings” in which it was used and “any bearing upon the subject matter of the litigation.”
6 *Johnston v. Schlarb*, 7 Wn.2d 528, 540, 110 P.2d 190 (1941) (emphasis omitted). The statement
7 need not even be legally relevant, and all doubts are resolved in favor of the speaker. *Id.* at 538-
8 39. Here, the statements at issue were pertinent to the *Caruso* litigation, and Eugster makes no
9 allegation to the contrary. At the time *Caruso* was filed, Eugster had already initiated several
10 duplicative suits against the WSBA that had been dismissed with prejudice at the pleadings
11 stage. *See supra*, Section II(A). Because Eugster was arguing the same claims again in *Caruso*,
12 the WSBA detailed his history of repetitive lawsuits, characterized his conduct as meritless and
13 frivolous, and described how the *Caruso* lawsuit reasserted claims and arguments, many
14 verbatim, that he had previously raised without success. These were fair and accurate
15 representations that had a strong relation—and certainly at least “some relation”—to the
16 litigation. *Johnston*, 7 Wn.2d at 540. They are therefore entitled to absolute immunity from any
17 claims for liability, and the proper remedy is dismissal of the action in its entirety, including each
18 and every one of Eugster’s five claims. *See McNeal*, 95 Wn.2d at 267.

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21 **B. Eugster’s claims are barred under the collateral estoppel doctrine.**

22 Eugster’s claims are also barred under the doctrine of collateral estoppel. Again, all of
23 his claims stem from the central allegation that the WSBA’s Motion in *Caruso* contained
24 defamatory statements about Eugster that defrauded the court. *See Compl.* at 5-9. Collateral
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1 estoppel bars these claims because Eugster raised this same underlying issue in both appeals in
2 *Caruso*, and the Ninth Circuit expressly considered and rejected Eugster’s contention.

3 The collateral estoppel doctrine protects litigants from the burden of “relitigating an
4 identical issue” and “promot[es] judicial economy” by “preventing needless litigation.” *State*
5 *Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 721-22, 346 P.3d 771 (2015). In
6 Washington courts, the law of the jurisdiction that issued the prior judgment governs preclusion
7 analysis—in this case, the law of the Ninth Circuit. *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App.
8 720, 724-25, 864 P.2d 417 (1993). Under Ninth Circuit law, collateral estoppel applies when an
9 identical issue was decided in a prior action, that action ended in a final judgment on the merits,
10 and the party against whom collateral estoppel is asserted was a party to that earlier action or in
11 privity with one. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

12 Here, the Ninth Circuit has twice rejected Eugster’s argument that the WSBA’s briefing
13 in *Caruso* was fraudulent and defamatory. In his opening brief on the merits in *Caruso*, Eugster
14 argued that “the lawyers for the WSBA have been successful in getting the Court to act favorably
15 toward the WSBA and dismiss the case against it on the basis of their defamations and other
16 fraudulent conduct.” App. at 124-25. Similarly, in his opening brief on the sanction award
17 against him, Eugster listed as the first issue on appeal “[w]hether the WSBA and its lawyers
18 perpetrated a fraud on the court and defamed Pro se Eugster.” App. at 153. In support of this
19 argument, Eugster quoted the same statements he quotes in his complaint in this case, which he
20 asserted were “a great fraud on the court and defamation of Pro se Eugster” App. at 168-69.

21 In both appeals, the Ninth Circuit expressly rejected Eugster’s contentions of fraud and
22 defamation. *See Caruso*, 716 Fed. App’x. 650, 651 (9th Cir. 2018) (“We reject as without merit
23 *Caruso*’s contentions of fraud upon the district court.”); *Eugster*, 716 Fed. App’x. 645, 646 (9th

1 Cir. 2018) (“We reject as without merit and unsupported by the record Eugster’s contentions that
2 he is entitled to sanctions, that defendants committed fraud on the court, and that the district
3 court was required to recuse or disqualify itself.”). Thus, the Ninth Circuit already decided in
4 two final judgments that the briefing in *Caruso* was not fraudulent and defamatory. Eugster is
5 therefore precluded from raising the issue here, and his Complaint should be dismissed because
6 all five of his claims rely on his assertions of fraudulent and defamatory statements.
7

8 **C. Eugster’s claims also should be dismissed for failure to state a claim.**

9 Eugster’s Complaint also should be dismissed for failure to state a valid claim for relief.
10 Each of Eugster’s claims here requires proof of false statements as a necessary element. For
11 defamation or false light invasion of privacy, a false statement is required. *See, e.g., Emeson v.*
12 *Dep’t of Corr.*, 194 Wn. App. 617, 640, 376 P.3d 430 (2016). Similarly, Eugster’s claim for
13 abuse of process is based on his contention that the WSBA “lied” and “failed to tell the whole
14 truth” Compl. at 7-8. Finally, Eugster’s claims for conspiracy and under 42 U.S.C. § 1983
15 are derivative claims, based on his claim that the WSBA conspired to defame him with false
16 statements and in doing so violated his civil rights. Compl. at 8-9.
17

18 As a matter of law, Eugster cannot establish that the statements at issue were false.
19 Eugster complains that the WSBA characterized his conduct as “meritless” and “frivolous.”
20 Compl. at 6. But these were fair and reasonable characterizations given Eugster’s long history of
21 unsuccessful suits against the WSBA, which characterizations were confirmed by the district
22 court and the Ninth Circuit. *See Caruso*, 2017 WL 2256782, at *3-4; *supra*, Section II. Eugster
23 also objects to the notion that he “enlisted” the two named plaintiffs for the *Caruso* lawsuit.
24 Compl. at 6. But again, this was a fair and reasonable description, given that the lawsuit asserted
25 the same claims and arguments (many verbatim) that Eugster had already raised on his own
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1 behalf, and that the lawsuit was initially filed as a class action. *Compare, e.g.*, App. at 19 *with*
2 68-69; *supra*, Section IV(B). Eugster also asserts that the arguments he raised in *Caruso* were
3 not “the same” as in his prior suits. Compl. at 6. But as multiple courts have determined,
4 Eugster’s claimed distinction—that the WSBA amended its bylaws to include limited-license
5 practitioners as members and thus transformed into a new entity—is without merit and irrelevant
6 to the substance of his claims. *See Caruso*, 2017 WL 1957077, at *2-3; *Eugster VIII*, 2018 WL
7 2187054, at *4-5. In sum, the WSBA’s characterizations of Eugster’s conduct were fair and
8 reasonable and, as a matter of law, were not false.
9

10 **D. The WSBA and Littlewood are entitled to immunity.**

11 Eugster’s claim for civil rights damages under 42 U.S.C. § 1983 should be dismissed for
12 the additional reason that the WSBA and Littlewood, who is being sued in her official capacity,
13 are immune from suit. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct.
14 2304 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’
15 under § 1983.”); *Beuchler v. Wenatchee Valley College*, 174 Wn. App. 141, 155, 298 P.3d 110
16 (2013) (“A state agency or individual acting in his or her official capacity is not a ‘person’ for
17 purposes of § 1983.”).
18

19 **E. Eugster’s complaint should be dismissed with prejudice.**

20 Courts typically exercise their discretion to dismiss claims with prejudice when
21 “amendment would be futile,” including when the plaintiff cannot “identify any additional facts
22 that might support [his] claims.” *Rodriguez*, 144 Wn. App. at 730. Dismissal with prejudice is
23 appropriate here because the attorney statements at issue are absolutely privileged, Eugster’s
24 claims are collaterally estopped, the claims are deficient on the merits as a matter of law, and
25 multiple Defendants are immune. Eugster cannot remedy these deficiencies through amendment,
26
27

1 and dismissal with prejudice is warranted. *See, e.g., Gem Trading Co., Inc. v. Cudahy Corp.*, 92
2 Wn.2d 956, 959, 603 P.2d 828 (1979); *Ent. v. Wash. State Crim. Justice Training Comm'n*, 174
3 Wn. App. 615, 618, 301 P.3d 468 (2013); *Green v. Holm*, 28 Wn. App. 135, 140 (1981).

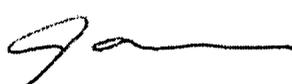
4
5 **V. CONCLUSION**

6 Eugster's Complaint seeks to undermine judgments from a prior federal case by attacking
7 the legal briefing in that case as defamatory. Eugster's claims in this case fail as a matter of law
8 because the attorney statements at issue are absolutely privileged; collateral estoppel bars
9 relitigation of the fundamental issue Eugster raises; Eugster has failed to state a valid claim for
10 relief; and the WSBA and Littlewood are immune. For each and all of these reasons, the
11 Complaint should be dismissed with prejudice.

12 DATED this 25th day of May, 2018.

13 PACIFICA LAW GROUP LLP

14 EVANS, CRAVEN & LACKIE, P.S.

15
16 
17 By _____
18 Jessica A. Skelton, WSBA #36748
19 Taki V. Flevaris, WSBA #42555
20 Pacifica Law Group LLP
1191 2nd Ave, Ste. 2000
Seattle, WA 98101

15 
16 WSBA # 36748 – Approved by telephone.
17 By _____
18 Christopher J. Kerley, WSBA #36748
19 Evans, Craven, & Lackie, P.S.
20 818 W. Riverside, Suite 250
Spokane, WA 99201

21 Attorneys for Defendants Washington State
22 Bar Association and Paula Littlewood

21 Attorneys for Defendants Pacifica Law Group
22 LLP, Paul Lawrence, Jessica Skelton, and Taki
23 Flevaris

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STEPHEN KERR EUGSTER,

Plaintiff,

v.

COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION THREE
(Regarding No. 34345-6 III);

WASHINGTON STATE BAR
ASSOCIATION, a legislatively created
Washington Association (WSBA); and
PAULA LITTLEWOOD, Executive
Director, WSBA in her official capacity;
DOUGLAS J. ENDE, Director of the
WSBA Office of Disciplinary Counsel, in
his official capacity; and FRANCESCA
D'ANGELO, Disciplinary Counsel,
WSBA Office of Disciplinary Counsel, in
her official capacity;

GEORGE B. FEARING; ROBERT
LAWERENCE-BERREY; and,
REBECCA L. PENNELL,

Defendants.

No. 18-2-01561-2

DEFENDANTS WASHINGTON
STATE BAR ASSOCIATION AND
ITS OFFICIALS' MEMORANDUM
OF AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AND FOR
SANCTIONS

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I. INTRODUCTION

This lawsuit is an improper collateral attack against a Washington Court of Appeals decision in a prior case between Plaintiff Stephen Kerr Eugster (“Eugster”) and Defendants the Washington State Bar Association and its officials (collectively, the “WSBA”). In that prior suit, the Court of Appeals affirmed dismissal of Eugster’s complaint, holding that res judicata barred his claims against Washington’s lawyer discipline process, which he should have raised, if at all, during the prior disciplinary proceedings against him. Eugster moved for reconsideration in the Court of Appeals, which was denied, and petitioned the Washington Supreme Court for discretionary review, which was also denied. Unhappy with the outcome, Eugster then filed a “Complaint on Remand” before this Court under the same cause number, asking this Court to reconsider the Court of Appeals decision and requesting damages against the three Court of Appeals judges who affirmed dismissal of his complaint. This Court summarily rejected Eugster’s filing because the case had already been dismissed with prejudice and the case had been closed. Undeterred, Eugster then filed this separate suit against the Court of Appeals, its judges, and the WSBA, again asking this Court to invalidate the prior appellate decision.

This suit is a blatant collateral attack that should be dismissed with prejudice, for multiple reasons. First, this Court lacks jurisdiction to reconsider or invalidate a Court of Appeals decision. Second, collateral estoppel bars Eugster’s claim because he already litigated—and the Court of Appeals already rejected—the same argument he raises here. Third, Eugster fails to state a claim for relief because the Court of Appeals was authorized to affirm dismissal on any ground supported by the record, including res judicata. For each and all of these reasons, Eugster’s Complaint is fatally deficient, cannot be remedied by amendment, and is entirely frivolous. Accordingly, the WSBA respectfully requests that the Court dismiss Eugster’s

1 Complaint with prejudice and, under Civil Rule (“CR”) 11 and RCW 4.84.185, order Eugster to
2 pay the WSBA’s attorney fees and expenses incurred in defending against this meritless lawsuit.

3 **II. BACKGROUND AND PROCEDURAL HISTORY**

4 **A. Eugster sued the WSBA and his complaint was dismissed with prejudice.**

5
6 In November 2015, among numerous other suits Eugster has filed against the WSBA in
7 recent years, Eugster filed suit in Spokane County Superior Court in a case referred to as
8 “Eugster VI.” *Eugster v. Washington State Bar Ass’n*, 198 Wn. App. 758, 763-72, 397 P.3d 131
9 (2017) (detailing relevant litigation history). In *Eugster VI*, Eugster claimed that Washington’s
10 lawyer discipline system violated his due process rights. *Id.* at 768-69.

11 In response, the WSBA moved to dismiss on multiple grounds, including that the
12 Washington Supreme Court had exclusive jurisdiction over matters of bar discipline and that res
13 judicata barred Eugster’s claims because he should have raised them, if at all, in the prior
14 disciplinary proceedings against him, *see In re Eugster*, 166 Wn.2d 293, 209 P.3d 495 (2009)
15 (“*Eugster I*”), or in another one of his suits against the WSBA, *see Eugster v. Washington State*
16 *Bar Ass’n*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015), *aff’d*, 684 Fed.
17 App’x 618 (9th Cir. 2017) (“*Eugster V*”). *See Eugster VI*, 198 Wn. App. at 763, 784.
18

19 The superior court granted the WSBA’s motion and dismissed Eugster’s complaint with
20 prejudice for lack of subject matter jurisdiction. *Id.* at 770-71. The superior court also
21 concluded that Eugster “had the opportunity to raise his constitutional concerns with the
22 Washington Supreme Court in his prior discipline case.” App. at 42.¹
23

24
25 ¹ The WSBA has included relevant public filings from Eugster’s prior cases in the Appendix to this
26 memorandum. This Court may take judicial notice of these documents for purposes of this Motion to Dismiss. *See,*
27 *e.g., Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844-45, 347 P.3d 487 (2015) (court may take judicial
notice of public documents attached to motion to dismiss if their authenticity cannot reasonably be disputed);
Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008); Rule of Evidence 201(b).

1 **B. The Court of Appeals affirmed dismissal and denied Eugster’s Motion for**
2 **Reconsideration.**

3 Eugster appealed the case to Division III of the Washington Court of Appeals, which
4 affirmed the dismissal of Eugster’s complaint with prejudice. The court first addressed whether
5 the superior court had subject matter jurisdiction. *Id.* at 773. The appellate court held that,
6 contrary to the superior court’s reasoning, jurisdiction attached because Eugster had asserted his
7 claims under federal law, specifically 42 U.S.C. § 1983, and state courts of general jurisdiction
8 maintain authority over such claims. *Id.* at 783-84. Having concluded that jurisdiction attached,
9 the court turned to whether the superior court’s dismissal of Eugster’s claims was the correct
10 result under the law. The Court of Appeals held that the decision was correct because res
11 judicata barred the claims, given that Eugster could have asserted them in *Eugster I.* *Id.* at 784.
12 Because the Court of Appeals affirmed dismissal based on res judicata, it did not address the
13 additional bases for dismissal that the WSBA had argued. *Id.* at 794.

14
15 In response, Eugster filed a Motion for Reconsideration under Rule of Appellate
16 Procedure 12.4. App. at 87. As with the Complaint here, the Motion argued that the Court of
17 Appeals could not affirm on the ground of res judicata because “[o]nce the Court ruled that the
18 Trial Court had subject matter jurisdiction; [*sic*] its appellate jurisdiction was over.” App. at 90.
19 The Court of Appeals summarily denied the Motion. App. at 103-04.

20
21 Eugster then filed a Petition for Discretionary Review with the Washington Supreme
22 Court, presenting the same argument about appellate jurisdiction that he advanced in his Motion
23 for Reconsideration. App. at 116. The Washington Supreme Court denied review. App. at 126.
24 The Court of Appeals decision therefore became the decision terminating review, and the
25 mandate issued on November 8, 2017. App. at 127.
26
27

1 **C. Eugster collaterally attacked the decision of the Court of Appeals in a “Complaint**
2 **on Remand” filed with this Court, which was summarily rejected.**

3 Ignoring the resolution of his appeal, Eugster then filed a “Complaint on Remand” with
4 this Court, purporting to join as defendants the Court of Appeals and the individual judges who
5 decided the appeal. App. at 128. As in his Motion for Reconsideration and Petition for
6 Discretionary Review, Eugster argued that the “jurisdiction of the [Court of Appeals] came to an
7 end” once it had concluded that jurisdiction attached, and that the court’s affirmance based on res
8 judicata was therefore invalid. App. at 130. In a one-page letter ruling, this Court summarily
9 rejected Eugster’s filing because the case had already been “dismissed with prejudice” and
10 affirmed on appeal, and the case was thus “closed.” App. at 137.

11 **D. Eugster filed this lawsuit, in a second attempt to collaterally attack the outcome of**
12 **his appeal in *Eugster VI*.**

13 Unsatisfied with the multiple decisions of this Court, the Court of Appeals, and the
14 Supreme Court in his prior case, Eugster filed this lawsuit in yet another attempt to undo the
15 result of *Eugster VI*. In his complaint, Eugster requests that this Court declare that the Court of
16 Appeals did not have jurisdiction to affirm on the basis of res judicata in *Eugster VI*, effectively
17 overturning that ruling. Compl. at ¶ 23. Eugster’s argument is the same one that he advanced in
18 his Motion for Reconsideration, Petition for Discretionary Review, and Complaint on Remand in
19 *Eugster VI*—all of which were rejected. Compare Compl. at ¶ 23, with App. 90, 116, 130.

20 After receiving the Complaint, the WSBA notified Eugster of its intent to seek attorney
21 fees under CR 11 and RCW 4.84.185 if he did not withdraw the lawsuit. Decl. of Taki Flevaris
22 (“Flevaris Decl.”), Ex. A at 4. The WSBA explained that Eugster’s Complaint violated CR 11
23 and RCW 4.84.185 for several reasons, including that the trial court lacks authority to review a
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1 Court of Appeals decision, collateral estoppel bars the suit, and the Complaint fails to state a
2 claim for relief. *Id.* Eugster refused to withdraw the complaint. *Id.* at 1, 3.

3 III. STANDARDS FOR DISMISSAL

4 A complaint must be dismissed under CR 12(b)(1) when the court lacks jurisdiction over
5 the subject matter. A court also must dismiss a complaint under CR 12(b)(6) when the complaint
6 fails “to state a claim upon which relief can be granted.” CR 12(b)(6). Even assuming that “the
7 plaintiff’s factual allegations are true,” a complaint should be dismissed for failure to state a
8 claim if the plaintiff “can prove no set of facts that would justify recovery.” *Trujillo v. Nw.*
9 *Trustee Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Such dismissal is appropriate
10 when the trial court lacks authority to review the claim asserted, *see, e.g., Yurtis v. Phipps*, 143
11 Wn. App. 680, 689, 181 P.3d 849 (2008), when collateral estoppel bars the claim, *id.*, or when
12 the complaint fails to present a viable legal theory for relief, *Trujillo*, 183 Wn.2d at 830.
13
14

15 IV. ARGUMENT

16 A. This Court lacks jurisdiction to reconsider a prior Court of Appeals decision.

17 The primary reason that Eugster’s Complaint should be dismissed is that this Court lacks
18 jurisdiction to review the Court of Appeals decision from *Eugster VI*. Under Washington law
19 and the Rules of Appellate Procedure, a “trial court has no authority to review a ruling of the
20 Court of Appeals.” *Yurtis*, 143 Wn. App. at 690 (“After the mandate has issued, the trial court
21 may [] hear and decide postjudgment motions otherwise authorized by statute or court rule *so*
22 *long as those motions do not challenge issues already decided by the appellate court.*” (quoting
23 RAP 12.2, emphasis added in *Yurtis*)); *see also State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919,
24 929, 959 P.2d 1130 (1998) (“A superior court cannot override a higher court’s determination of
25 an appealed, decided issue.”); *Cochrane v. Van De Vanter*, 13 Wash. 323, 326, 43 P. 42 (1895)
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1 (holding superior court had “no jurisdiction” over collateral challenge to prior appellate
2 decision). Here, Eugster is asking this Court to reconsider and overturn a prior Court of Appeals
3 decision, in clear violation of case law and RAP 12.2.

4 *Yurtis* is particularly instructive. There, the superior court dismissed the plaintiff’s
5 lawsuit with prejudice, and that decision was affirmed on appeal. *Yurtis*, 143 Wn. App. at 684-
6 86. The plaintiff then filed a new complaint in superior court, which alleged that the prior
7 appellate decision incorrectly decided a key issue. *Id.* at 687. The superior court dismissed the
8 new complaint and the Court of Appeals affirmed, holding that the superior court had “no
9 authority” to review a Court of Appeals decision. *Id.* at 690.

10 Here, the superior court dismissed Eugster’s prior complaint and the Court of Appeals
11 affirmed. App. at 40; *Eugster VI*, 198 Wn. App. at 794. Eugster is not allowed to pursue a new
12 lawsuit asking this Court to reconsider that appellate decision. If such collateral attacks “were
13 tolerated, nothing would be gained by an appeal.” *Cochrane*, 13 Wash. at 326. Eugster’s
14 Complaint should be dismissed with prejudice on this ground alone.

15
16
17 **B. Collateral estoppel also bars Eugster’s Complaint.**

18 Even if this Court had jurisdiction, which it does not, Eugster’s Complaint is also
19 separately barred under the doctrine of collateral estoppel. The collateral estoppel doctrine “bars
20 relitigation of any issue that was actually litigated in a prior lawsuit.” *In re Dependency of H.S.*,
21 188 Wn. App. 654, 660, 356 P.3d 202 (2015) (internal quotations omitted). Collateral estoppel
22 applies when an identical issue was decided in a prior action, that action ended in final judgment
23 on the merits, the party against whom collateral estoppel is asserted was a party to that earlier
24 action, and applying collateral estoppel will not work an injustice on that party. *See id.*

1 Here, Eugster’s contention is that in *Eugster VI*, the Court of Appeals lacked jurisdiction
2 to affirm dismissal on the basis of res judicata. Collateral estoppel bars Eugster from relitigating
3 this issue, however, because he already argued it in his Motion for Reconsideration in *Eugster*
4 VI, and the Court of Appeals rejected the argument. In particular, Eugster’s motion specifically
5 argued that “[o]nce the Court ruled that the Trial Court had subject matter jurisdiction; [*sic*] its
6 appellate jurisdiction was over.” App. at 90. The Court of Appeals summarily denied Eugster’s
7 motion. App. at 103-04.

9 Eugster now raises the exact same argument in this serial lawsuit: “After doing so (after
10 deciding the issue before the court – whether the [superior] court had jurisdiction), appellate
11 jurisdiction of the court came to an end.” Compl. at ¶ 23. Again, the Court of Appeals already
12 rejected this argument, and Eugster is therefore precluded from raising it here. *See, e.g., H.S.*,
13 188 Wn. App. at 661. The Complaint should be dismissed for this additional reason.

15 **C. Eugster’s Complaint also fails to state a valid claim for relief.**

16 Eugster’s Complaint also should be dismissed for failure to state a valid claim for relief.
17 Again, Eugster’s sole claim is that the Court of Appeals could not affirm dismissal once it
18 decided that the superior court had jurisdiction over the complaint. It is axiomatic, however, that
19 a reviewing court may “affirm on any basis the record supports.” *Hawkins v. Empres Healthcare*
20 *Mgmt., LLC*, 193 Wn. App. 84, 102, 371 P.3d 84 (2016). That remains true even if the trial
21 court’s reasoning was incorrect. *See Int’l B’hd. of Pulp v. Delaney*, 73 Wn.2d 956, 971-72, 442
22 P.2d 250 (1968); *see also* RAP 12.2 (“The appellate court may reverse, affirm, or modify the
23 decision being reviewed and take any other action as the merits of the case and the interest of
24 justice may require.”). Washington courts have repeatedly invoked and reaffirmed this
25 fundamental principle of appellate review. *See, e.g., Yurtis*, 143 Wn. App. at 690 (“[A]n
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1 appellate court may sustain the trial court’s judgment upon *any theory* that is established by the
2 pleadings and supported by the record.” (emphasis added)); *Bavand v. OneWest Bank*, 196 Wn.
3 App. 813, 825, 385 P.3d 233 (2016) (same); *Ladenburg v. Campbell*, 56 Wn. App. 701, 703, 784
4 P.2d 1306 (1990) (same).

5
6 Here, the Court of Appeals held that while the superior court did in fact have jurisdiction,
7 the complaint was nevertheless barred by res judicata, and dismissal with prejudice was thus the
8 correct result under the law. *Eugster VI*, 198 Wn. App. at 763. This was a proper basis to affirm
9 because the WSBA expressly briefed it as an independent ground for dismissal and the record
10 supported it. The WSBA specifically argued that res judicata barred Eugster’s claims both in its
11 motion for dismissal before the superior court, App. at 16-18, and in its brief before the Court of
12 Appeals, App. at 75-77. Moreover, the facts supporting dismissal on this basis were and are
13 matters of public record subject to judicial notice for this purpose. *See Eugster VI*, 198 Wn.
14 App. at 763-67, 784 (citing and discussing prior litigation); *see also supra*, n.1 (citing cases
15 regarding judicial notice in support of dismissal); *Hawkins*, 193 Wn. App. at 88, 102 (affirming
16 dismissal on alternative ground). Accordingly, res judicata was properly before the Court of
17 Appeals as a basis for dismissal, having been “established by the pleadings and supported by the
18 record.” *Yurtis*, 143 Wn. App. at 690. Eugster can state no valid claim for relief, and his
19 Complaint should be dismissed for this added reason.

20
21
22 **D. Eugster’s Complaint should be dismissed with prejudice.**

23 Courts typically exercise their discretion to dismiss claims with prejudice when
24 “amendment would be futile,” including when the plaintiff cannot “identify any additional facts
25 that might support [his] claims.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d
26 168 (2008). Dismissal with prejudice is appropriate here because this Court lacks authority to
27

1 reconsider a Court of Appeals decision, collateral estoppel bars Eugster's claim, and the claim is
2 facially deficient as a matter of law. As shown above, Eugster cannot remedy these deficiencies
3 through amendment. This Court should dismiss this matter with prejudice.

4 **E. Eugster's Complaint is frivolous and the WSBA should be awarded its attorney fees.**

5 The WSBA should be awarded its attorney fees and expenses under both CR 11 and
6 RCW 4.84.185. The "primary purpose" of CR 11 "is to deter litigation abuses." *Biggs v. Vail*,
7 124 Wn.2d 193, 198, 876 P.2d 448 (1994). Under CR 11, "sanctions are appropriate if [a
8 plaintiff]'s complaint lacks a factual or legal basis" and the plaintiff "failed to conduct a
9 reasonable inquiry into the factual and legal basis of the claim." *Harrington v. Pailthorp*, 67
10 Wn. App. 901, 912, 841 P.2d 1258 (1992); *see also State ex rel. Quick-Ruben v. Verharen*, 136
11 Wn.2d 888, 897-99, 903-05, 969 P.2d 64 (1998) (holding fee award was warranted where "no
12 authority" supported plaintiff's position, which was "untenable" under the law). If CR 11 is
13 violated, and the party seeking sanctions provided "notice of the possibility of sanctions" to the
14 offending party, *Biggs*, 124 Wn.2d at 198, then the court may sanction the violator, including
15 ordering the person to pay "the amount of the reasonable expenses incurred . . . including a
16 reasonable attorney fee," CR 11(a)(4).

17 Here, Eugster should be sanctioned under CR 11 because he advanced a groundless claim
18 without a reasonable inquiry and disregarded notice of the WSBA's intent to seek a fee award on
19 that basis. As established above, this lawsuit is a blatant collateral attack on a prior appellate
20 court decision, and there are three independent reasons why the case is untenable and sanctions
21 are warranted. First, this Court lacks jurisdiction, as set forth in RAP 12.2 and related case law.
22 Second, collateral estoppel bars Eugster's claim because the Court of Appeals already rejected
23 the argument he raises here. Third, Eugster has failed to state a claim for relief because it is well
24
25
26
27

1 established that a reviewing court may affirm on any basis the record supports. Given these
2 governing precedents and principles, no reasonable attorney would have asserted this meritless
3 suit. *See Harrington*, 67 Wn. App. at 911-12 (“[N]o reasonable attorney would have made the
4 wholly unsubstantiated allegations contained in this case.”). This is especially true given that the
5 WSBA, when notifying Eugster that it intended to seek fees under CR 11, specifically identified
6 and explained these grounds for dismissal. *Flevaris Decl.*, Ex. A at 4; *see also id.*, Ex. B at 2, 4.
7 Eugster’s refusal to withdraw his Complaint once notified of these fundamental deficiencies
8 further demonstrates his failure to conduct a reasonable inquiry. Eugster has therefore violated
9 CR 11, and he should be ordered to pay the WSBA its attorney fees and expenses.
10

11 The WSBA also should be awarded its fees and expenses under RCW 4.84.185, a
12 separate and independent ground for the reimbursement of expenses incurred in defending
13 against frivolous lawsuits. *See Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (1999).
14 A lawsuit is frivolous and a fee award is warranted under RCW 4.84.185 when the entire suit
15 “cannot be supported by any rational argument on the law or facts.” *Stiles v. Kearney*, 168 Wn.
16 App. 250, 260, 277 P.3d 9 (2012) (internal quotations omitted). Courts find this requirement
17 satisfied when a “reasonable inquiry” would reveal that the plaintiff’s position is untenable,
18 *Kearney*, 95 Wn. App. at 416-17, or when binding case law precludes the claims asserted, *see*
19 *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 313-14, 202 P.3d 1024 (2009). Unlike
20 CR 11, prior notice is not required, but the award must be entered only after the action has been
21 dismissed or otherwise terminated. *See RCW 4.84.185; see also Reid v. Dalton*, 124 Wn. App.
22 113, 124, 100 P.3d 349 (2004).
23

24 As established above, Eugster’s Complaint is unsupported by law or fact and a reasonable
25 inquiry would have revealed that his position is untenable because this Court lacks jurisdiction,
26
27

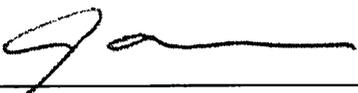
1 collateral estoppel bars his claim, and he cannot state a valid claim for relief. In light of
2 established law, Eugster “should have concluded that advancing [his complaint] was untenable.”
3 *Kearney*, 95 Wn. App. at 417; *see also Highland*, 149 Wn. App. at 313-14. Attorney fees should
4 therefore also be awarded under RCW 4.84.185, after this action is dismissed.
5

6 **V. CONCLUSION**

7 Eugster’s Complaint is a blatantly improper collateral attack on a prior ruling of the Court
8 of Appeals. His claim fails as a matter of law because this Court lacks jurisdiction to reconsider
9 a prior Court of Appeals decision, collateral estoppel bars his sole argument, and he has failed to
10 state a claim for relief. For each and all of these reasons, this Court should dismiss the
11 Complaint with prejudice and award the WSBA its attorney fees and expenses incurred in
12 defending against this meritless lawsuit.
13

14
15 DATED this 11th day of October, 2018.

16
17 PACIFICA LAW GROUP LLP

18
19 By 

20 Jessica A. Skelton, WSBA #36748
21 Taki V. Flevaris, WSBA #42555
22 Pacifica Law Group LLP
23 1191 2nd Ave, Ste. 2000
24 Seattle, WA 98101

25 Attorneys for Defendants the Washington
26 State Bar Association, Paula Littlewood,
27 Douglas J. Ende, and Francesca D’Angelo

APPENDIX

Index to filings in:

Eugster v. Washington State Bar Ass'n, 198 Wn. App. 758, 397 P.3d 131 (2017) (“*Eugster VI*”)

Document	Page(s)
Defendants’ Memorandum of Authorities in Support of Motion to Dismiss (attached <i>Eugster VI</i> appellate decision omitted)	App_01 – App_39
Conclusions and Order Granting Defendants’ Motion to Dismiss Complaint	App_040 - App_044
Brief of Respondents (attached <i>Eugster VI</i> appellate decision omitted)	App_045 – App_086
Motion for Reconsideration	App_087 – App_101
Order Denying Motion for Reconsideration	App_102 – App_104
Petition for Discretionary Review	App_105 – App_125
Order Terminating Review	App_126
Mandate and Opinion	App_127
Complaint on Remand	App_128– App_136
Letter to S. Eugster from Hon. Judge McKay	App_137 – App_139

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. CARUSO and
SANDRA L. FERGUSON,

Appellants,

v.

WASHINGTON STATE BAR
ASSOCIATION, ET AL.,

Respondents.

No. 17-35410

APPELLANT'S RESPONSE TO
APPELLEES' SUPPLEMENTAL
MOTION FOR ATTORNEY FEES

ARGUMENT

WSBA Governance Task Force

In 2012, at a time when the executive leadership of the WSBA and the justices of the Washington Supreme Court were trying to come up with a bar association which would be an “access to justice bar association,” the WSBA created a WSBA Governance Task Force. The Task Force presented its final report in the summer of 2014.

The main feature of the Task Force Report was the creation of a fiction that the Supreme Court had ultimate and plenary authority over the bar association and its members. Washington Supreme Court General Rules, General Rule GR 12 (“The Washington Supreme Court has inherent and plenary authority to regulate the practice of law in Washington.”)

Time to Overturn *Lathrop v. Donohue*

Early March 2015, Mr. Eugster filed an action in District Court in Seattle against the WSBA and the justices of the Washington Supreme Court seeking to overturn *Lathrop v. Donohue*, 367 U.S. 820 (1961). He wanted to have the court say his fundamental rights under the First and Fourteenth Amendments of United States Constitution to freedom of non-association and speech were being violated. This action is known as Eugster III.

The WSBA promptly retaliated against Mr. Eugster by reactivating a grievance against him which had already been investigated and was dormant. An Office of Discipline Counsel (ODC) investigator was brought in, and further investigation of Mr. Eugster began again. OCE counsel, Kevin Bank, was replaced by ODC Francesca D'Angelo to lead the new investigation.

In the fall of 2015, ODC D'Angelo informed Mr. Eugster she might seek an order for hearing from a Review Committee of the Disciplinary Board (there are three review committees).

Mr. Eugster commenced an action in Superior Court of the State of Washington for Spokane County on November 9, 2015, No. 15-2-04614-9. The action was a Civil Rights Action under 42 U.S.C. § 1983. The crux of the case was a claim that the WSBA Washington Discipline System violated Mr. Eugster's right to procedural due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. This action is known as Eugster IV.

When WSBA ODC D'Angelo, in fact, sought an order for hearing from the Review Committee she was working with, Mr. Eugster filed an action in District Court in Spokane, WAED No 2:15-cv-00352-TOR. The state and federal courts have concurrent jurisdiction under such circumstances. This action is known as Eugster V.

WSBA BOARD OF GOVERNORS AMENDS BYLAWS

The WSBA Governance Task Force Report and Recommendations which had been approved by the WSBA Board of Governors resulted in a broad set of amendments to the WSBA Bylaws which were presented to and adopted by the Board of Governors in late September 2016. The new bylaws changed the WSBA from an integrated association of lawyers to an integrated association of lawyers, limited practice officers, and limited license legal technicians.

This change presented circumstances which were not governed by *Lathrop v. Donohue* 367 U.S. 820 (1961) wherein the Supreme Court in a plurality opinion

upheld the constitutionality of compelling lawyers to be members of the Wisconsin State Bar Association, a typical “integrated bar association” patterned on the model for integrated bar association advanced by the Judicature Society. *Redeeming a Profession*, 2 J. AM. JUD. SOC. 105, 111 (1918).

Lathrop v. Donohue – That was 1961, for heaven’s sake, things change

Ever since *NAACP v. Alabama*, 357 U.S. 449 (1958), freedom of association has been a fundamental right deserving of First Amendment protection.

Correspondingly, “[f]reedom of association . . . plainly presupposes a freedom not to associate.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The fundamental First Amendment right of association or non-association is not absolute: “Infringements on that right may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* (Footnote omitted.)

This test of exacting or strict scrutiny test was described in *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012) (“mandatory associations are permissible only when they serve a ‘compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms’”).

In late December 2016, early January 2017, Mr. Eugster was retained by attorneys Robert E. Caruso and Sandra L. Ferguson to represent them in action against the WSBA. The action was commenced on January 3, 2017, in District Court at Seattle, WA WD 2:17-cv-0003-RSM. The action asserted the WSBA and WSBA Washington Discipline System violated their fundamental rights under the First, Fifth and Fourteenth Amendments. It too was a Civil Rights action under 42 U.S.C. § 1983. The complaint included a class action claim. On February 21, 2017 plaintiff's filed their amended complaint; the class action claim had been removed. WA WD No. 2:17-cv-00003-RSM.

Not long after the filing, the lawyers in the case arranged a conference to talk about the amended case. The lawyers Mr. Eugster, Paul L. Lawrence, Jessica A. Skelton, and Taki V. Flevaris were participants in a telephone call on February 23, 2017. Mr. Eugster explained the Amended Complaint. The explanation addressed the difference between the WSBA, a single member lawyer association in Eugster IV and Eugster V and the WSBA, a multiple member legal professionals association of lawyers, limited practice officers, and limited license legal technicians as of 2017. Mr. Eugster also pointed out that exacting or strict scrutiny would be applied in testing the infringements of the fundamental rights of his plaintiff's First, Fifth and Fourteenth Amendments to the United States Constitution. When Mr. Eugster was finished, Paul Lawrence, the lead attorney

for the WSBA, told Mr. Eugster that if he proceeded with the case, he and the other attorneys, Jessica Skelton and Taki Flevaris, would seek fees personally from Mr. Eugster.

17. On February 23, 2017, Plaintiff, as the lawyer for Mr. Caruso and Ms. Ferguson, conferred by telephone to discuss the case with the attorneys for Ms. Littlewood and the to the others.

18. During the conference call, Plaintiff explained the case, which had then been amended, to Mr. Lawrence, Ms. Skelton, and Mr. Flevaris and made it a point to emphasize that the WSBA of the case was an association of lawyers, limited practice officers, and limited license legal technicians.

19. In response, Mr. Lawrence told Plaintiff, in the presence of Ms. Skelton, and Mr. Flevaris, that if he proceeded with the action, they would seek fees [~~from~~] personally from him.

On behalf of his clients, Mr. Eugster filed a Motion for Summary Judgment, and to deal with the current problems, injunctions against a disciplinary action which was on-going against Mr. Caruso, and threatened against Mr. Ferguson -- a Motion For Preliminary Injunction.

The WSBA lawyers responded with a Motion to Dismiss and Opposition to Plaintiffs' Motions For Summary Judgment and Preliminary Injunction. The thrust of the Motion to Dismiss directed to Mr. Eugster was experienced as painful cruel, a false attack.

When Mr. Eugster responded, the WSBA lawyers presented him with notice they would seek Rule 11 sanctions against him.

And they did. The trial judge ruled in their favor on the motion to dismiss and in their favor gaining an order against Mr. Eugster for substantial attorney's fees in excess of \$28,000.

Clearly, Mr. Lawrence, who signed the pleadings for himself, Ms. Skelton, and Mr. Flevaris was doing what they said they would do if Mr. Eugster continued to represent his clients against the WSBA.

Since then Mr. Lawrence, Ms. Skelton, and Mr. Fevaris have sought fees and sanctions against Mr. Eugster in several other actions.

1. In the same case, *Caruso and Ferguson* WAWD 2.17-cv-00003-RSM, the WSBA lawyers sought and obtained a prefiling order, a sanction, from the trial judge. The order has been appealed.

2. In *Eugster v. WSBA and Judges of the Supreme Court*, WAED No. 2.17 - cv-00352-TOR, they sought attorney fees and sanctions against Mr. Eugster after Judge Thomas O. Rice decided the case. Their motion was denied.

The case had already been appealed. Ninth Circuit, No. 18-35421; Mr. Eugster's Reply Brief was filed on November 12, 2018.

3. In *Eugster v. Littlewood*, Spokane County Superior Court Case No. 17-2-04631-5, the WSBA attorneys have filed a motion for attorney fees against Mr. Eugster under Washington's frivolous action statute, RCW 4.84.185. The action is an action against the WSBA Executive Director to gain access to the email

addresses of the members of the WSBA so that Mr. Eugster can communicate with his fellow members of the WSBA,

4. *Eugster v. Littlewood*, Spokane County, Case No. 18-2-00542-1 is a personal injury action against the WSBA and its lawyers. The case has been dismissed and is on appeal to the Washington Court of Appeals III. The WSBA and its attorneys sought a frivolous action judgment against Mr. Eugster, but the motion was denied.

5. *Eugster v. Court of Appeals of the State of Washington* (regarding No. 34345-6 III) Superior Court for Spokane County No. 18-2-01561-2 -- motions for dismissal and sanctions are being sought by the defendants. This action seeks to correct a decision by the Court of Appeals which made in excess of its appellate jurisdiction under WASH. CONST. Art. IV, Section 30 and the state statute governing Washington Court of Appeals appellate jurisdiction, RCW 2.06.030.

6. Motions for Fees Against Eugster in appeals emanating from *Caruso and Ferguson* in appeal numbers No. 17-35401 and No. 17-35529. WSBA lawyers filed motions for fees in each appeal. The motions are duplicates. Fees in No. 17-35529 claimed were \$48,459.25. The fees claimed in No. 17-35410 are \$51,585.50. The difference between the two is \$3,124.25. This amount represents increased claim "fees on fees" of \$3,124.25. The fees on fees part of the total claim, as it stands now, is \$24,255.75 of \$51,585.75. This represents 47% of the

total amount claimed by the WSBA and its attorneys. This will be explained below. Exhibits 1 and 2.

MOTIONS FOR FEES ON APPEAL

The motions are duplicates of one another in all respects, that is, they are exactly the same. For example, see the following breakdown of the of the two motions.

No. 17-35529	No. 17-35410
I. INTRODUCTION	I. INTRODUCTION
The WSBA’s counsel spent a reasonable amount of hours and charged reasonable rates to defend against each appeal. Accordingly, the WSBA respectfully requests that this Court order Eugster to pay those fees, totaling \$48,459.25	The WSBA’s counsel spent a reasonable amount of hours and charged reasonable rates to defend against each appeal. Accordingly, the WSBA respectfully requests that this Court order Eugster to pay those fees, totaling \$48,459.25.
III. ARGUMENT	III. ARGUMENT
A. Eugster’s Appeals Were Frivolous and Warrant a Fee Award.	A. Eugster’s Appeals Were Frivolous and Warrant a Fee Award.
Both of Eugster’s appeals were frivolous and warrant a fee award against him under Rule 38, Section 1927, and the Court’s inherent authority. Here, the arguments Eugster advanced on appeal lacked any merit, the result was obvious, and both appeals abusively wasted the WSBA’s and the Court’s resources. For each of these reasons, the appeals were frivolous,	Both of Eugster’s appeals were frivolous and warrant a fee award against him under Rule 38, Section 1927, and the Court’s inherent authority. Here, the arguments Eugster advanced on appeal lacked any merit, the result was obvious, and both appeals abusively wasted the WSBA’s and the Court’s resources. For each of these reasons, the appeals were frivolous,

<p>and a fee award is thus warranted under Rule 38, Section 1927, and the Court’s inherent authority.</p> <p>In sum, each and every one of the arguments Eugster advanced in these appeals lacked any merit and was raised recklessly and without basis. These appeals were thus frivolous, and a fee award is warranted.</p>	<p>and a fee award is thus warranted under Rule 38, Section 1927, and the Court’s inherent authority.</p> <p>In sum, each and every one of the arguments Eugster advanced in these appeals lacked any merit and was raised recklessly and without basis. These appeals were thus frivolous, and a fee award is warranted.</p>
<p style="text-align: center;">2. The Result of the Appeals was Obvious.</p>	<p style="text-align: center;">2. The Result of the Appeals was Obvious.</p>
<p>Eugster’s attempt to distinguish this case with a “false distinction” made the outcome no less obvious. No. 17-35410, ECF # 19 at 647. As he did before the district court, Eugster repeatedly emphasized on appeal that the WSBA had amended its bylaws to add limited license practitioners as members. <i>See, e.g.</i>, No. 17-35410, ECF # 18 at 20-23. But once again, Eugster failed to explain or demonstrate why that would make any difference to the claims presented. <i>See id.</i></p> <p>This only further supports a fee award here.</p>	<p>Eugster’s attempt to distinguish this case with a “false distinction” made the outcome no less obvious. No. 17-35410, ECF # 19 at 647. As he did before the district court, Eugster repeatedly emphasized on appeal that the WSBA had amended its bylaws to add limited license practitioners as members. <i>See, e.g.</i>, No. 17-35410, ECF # 18 at 20-23. But once again, Eugster failed to explain or demonstrate why that would make any difference to the claims presented. <i>See id.</i></p> <p>This only further supports a fee award here.</p>
<p style="text-align: center;">3. These Appeals Were an Improper and Abusive Waste of WSBA and Judicial Resources</p>	<p style="text-align: center;">3. These Appeals Were an Improper and Abusive Waste of WSBA and Judicial Resources.</p>
<p>The disproportionate attention Eugster gave to the irrelevant, tangential arguments he raised in both appeals wasted the WSBA’s and the Court’s</p>	<p>The disproportionate attention Eugster gave to the irrelevant, tangential arguments he raised in both appeals wasted the WSBA’s and the Court’s</p>

<p>time and resources, further warranting sanctions. On appeal, Eugster spent the majority of his briefing asserting tangential and meritless claims of fraud, bias, and procedural error.</p> <p>Eugster has demonstrated a lack of care with respect to the demand his frivolous arguments place on the Court and on the WSBA. This waste of resources warrants an award of attorney fees to compensate the WSBA and to deter Eugster from continuing to drain judicial resources. For this added reason, a fee award is appropriate under Rule 38, Section 1927, and the Court's inherent authority.</p>	<p>time and resources, further warranting sanctions. On appeal, Eugster spent the majority of his briefing asserting tangential and meritless claims of fraud, bias, and procedural error.</p> <p>Eugster has demonstrated a lack of care with respect to the demand his frivolous arguments place on the Court and on the WSBA. This waste of resources warrants an award of attorney fees to compensate the WSBA and to deter Eugster from continuing to drain judicial resources. For this added reason, a fee award is appropriate under Rule 38, Section 1927, and the Court's inherent authority.</p>
IV. CONCLUSION	IV. CONCLUSION
<p>Eugster should be ordered to compensate the WSBA for the fees it has incurred defending against these frivolous appeals. In conclusion, the WSBA respectfully requests that this Court award it \$48,459.25 in attorney fees on appeal.</p>	<p>Eugster should be ordered to compensate the WSBA for the fees it has incurred defending against these frivolous appeals. In conclusion, the WSBA respectfully requests that this Court award it \$48,459.25 in attorney fees on appeal.</p>

Each motion seeks fees from Mr. Eugster personally; each addresses the conduct of Mr. Eugster, that is to say, is the person whose conduct is said to be the basis for the fees claims. Each seeks \$48,459.25 in attorney fees on appeal. See above. This amount includes approximately \$21,131.50 as attorney fees incurred in

seeking the fees on the appeal. The lawyers claim they are entitled to “fees on fees.”

In the Supplemental motion, the lawyers add another \$3,124.25 to the fees on fees amount. Now the total is \$24, 255.75, fees on fees.

Thus, the total claimed is \$48,459.25 plus \$3,124.25, equaling \$51,585.50.

Thus, of the total of \$51,585.50 claimed, only \$27,375.75 is the amount of fees sought under the motion ($\$51,585.50 - \$24,255.75 = \$27,327.75$). The fees on fees sought by the lawyers for the WSBA make up a whopping 47% of the total claimed ($\$24,255.75 / \$51,585.50 = 0.4702$).

Fees on Fees Not Allowed

Fees on fees are not allowed under Rule 38. *Blixseth v. Yellowstone Mountain Club, LLC*, 854 F.3d 626, 631 (9th Cir. 2017) (“The award of fees and costs under Rule 38 thus must be limited to appellees' direct fees and costs for defending against the frivolous appeal, and may not include the fees and costs incurred regarding the imposition of sanctions. *See Cooter & Gell*, 496 U.S. at 406–07, 110 S.Ct. 2447 ; *Sunbelt*, 608 F.3d at 466–67 & n.4 ; *Lyddon*, 996 F.2d at 214 ; *Lockary*, 974 F.2d at 1178 ; *see also Haeger*, 813 F.3d at 1242, 1254 (affirming award of attorneys' fees and costs incurred after a misleading discovery response as a sanction under court's inherent power to compensate party for losses sustained as a result of misconduct).”)

Real Amount Subject to Motion

Getting back to the motion at hand. It is had to imagine that the law of the federal courts would allow the WSBA and its lawyers to claim \$24,255.75 to collect \$27,327.75. That's what the WSBA lawyers think. One must shudder.

Thankfully, the wisdom of the court is otherwise.

This issue has been addressed and decided, fees on fees are not allowed. *See* above. And, any claim otherwise is frivolous. The claim is unfair and punishing. Moreover, it is mean, cruel.

Let us assume one were to allocate half of that to No. 17-35401. The amount would be \$13,66.88 ($\$51,585.50 - \$24,255.75 = \$27,327.75 / 2 = \$13,663.88$). Is that the amount the WSBA and its lawyers are entitled to? Let us take another look at what the law tells us.

But the Law Says None -- Res Judicata

The panel of judges on the *Caruso and Ferguson* appeals have rendered two orders.

In No. 17-35529 the court said:

Appellee Washington State Bar Association's motion for attorney's fees (Docket Entry No. 27) is denied because the result of the appeal of the district court's award of sanctions under Fed. R. Civ. P. 11 was not obvious and the arguments of error were not wholly without merit. *See Grimes v. Comm'r*, 806 F.2d 1451, 1454 (9th Cir. 1986).

In No. 17-35410 the court said:

Appellee Washington State Bar Association's motion for attorney's fees (Docket Entry No. 49) is granted. *See In re George*, 322 F.3d 586, 591 (9th Cir. 2003). The determination of an appropriate amount of fees is referred to the Appellate Commissioner, who shall conduct whatever proceedings he deems appropriate, and who shall have authority to enter an order awarding fees. *See* 9th Cir. R. 39-1.9. The order is subject to reconsideration by the panel. *Id.*

RES JUDICATA

"Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." (citation and internal quotation marks omitted); *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) ("Res judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits."). *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003).

"Under the doctrine of res judicata, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action' even if that judgment 'may have been wrong or rested on a legal principle subsequently overruled in another case.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)"

Issue preclusion

“Res judicata encompasses the doctrines of claim preclusion and issue preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 892 & n. 5, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). Issue preclusion, the doctrine more clearly applicable to this case, applies when: “(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.” *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir.2000) (internal quotation marks omitted).”) *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011).

Both motions address the same set of facts and in the same context. Both have the same parties on each side of the motions. A final order has been rendered in favor of Mr. Eugster.

That order is res judicata in No. 17-35410.

CONCLUSION

In consideration of the above, the court should deny fees to the WSBA.

November 23, 2018.

Respectfully submitted,

s/Stephen Kerr Eugster

EUGSTER LAW OFFICE PSC
2418 W Pacific Ave.
Spokane, WA 99201
(509) 624-5566
eugster@eugsterlaw.com

EXHIBIT 1

This exhibit consists of two parts. The first is Exhibit D of Mr. Flevaris' Declaration in the Motion for Fees. This is a spreadsheet showing the time entries for the work done on the appeals and the fees on fees for purposes of the motion filed for the work done on the appeals.

The second part is a calculator tape showing a tally of the entries for the fees on fees portion of the spreadsheet.

EXHIBIT D

Time Report
Billed

Washington State Bar Association / Caruso/Eugster vs. WSBA (10087-6)

Date	Name	Title	Hours	Amount	Rate	Narrative
07/17/2017	Taki V. Flevaris	Associate	0.50	117.50	235.00	Analyze issues related to pending appeal and joinder
08/02/2017	Jessica A. Skelton	Equity Partner	0.40	118.00	295.00	Confer with client regarding status of case and next steps
09/25/2017	Taki V. Flevaris	Associate	0.70	164.50	235.00	Email client regarding status of bar proceedings; draft email to client regarding status of appeals and next steps
09/25/2017	Jessica A. Skelton	Equity Partner	0.20	59.00	295.00	Analyze status of discipline proceedings for Younger argument
09/25/2017	Taki V. Flevaris	Associate	2.00	470.00	235.00	Review and analyze Caruso's opening brief; review prior briefing
09/25/2017	Taki V. Flevaris	Associate	0.30	70.50	235.00	Research fraud on the court claim
10/04/2017	Claire E. McNamara	Associate	0.70	164.50	235.00	Analyze fraud allegations and procedural challenges in Caruso appeal
10/09/2017	Claire E. McNamara	Associate	2.20	517.00	235.00	Draft statement of facts section for appellee's brief in Caruso appeal
10/10/2017	Claire E. McNamara	Associate	2.20	517.00	235.00	Outline legal arguments and draft legal merits section of appellee's brief in Caruso appeal
10/11/2017	Claire E. McNamara	Associate	3.60	846.00	235.00	Draft legal merits and fraud section of appellee's brief in Caruso appeal
10/12/2017	Claire E. McNamara	Associate	4.60	1,081.00	235.00	Draft fraud section and research procedural claim section for appellee's brief in Caruso appeal
10/13/2017	Claire E. McNamara	Associate	5.20	1,222.00	235.00	Draft leave to amend section for appellee's brief in Caruso appeal and revise other sections
10/16/2017	Claire E. McNamara	Associate	4.30	1,010.50	235.00	Revise legal sections in appellee's brief in Caruso appeal
10/17/2017	Claire E. McNamara	Associate	4.10	963.50	235.00	Revise section addressing fraud claims and alleged procedural error, and draft introduction and conclusion in appellee's response brief in Caruso appeal

Date	Name	Title	Hours	Amount	Rate	Narrative
10/20/2017	Claire E. McNamara	Associate	1.00	235.00	235.00	Analyze additional grounds for dismissal and work on strategy for response to Caruso appellate brief
10/20/2017	Taki V. Flevaris	Associate	2.00	470.00	235.00	Review, analyze, and edit draft response brief
10/26/2017	Claire E. McNamara	Associate	0.30	70.50	235.00	Revise introduction and summary of argument of appellee's brief in Caruso appeal
10/27/2017	Claire E. McNamara	Associate	2.80	658.00	235.00	Revise statement of facts, procedural history and disciplinary history in appellee's brief in Caruso appeal
10/27/2017	Taki V. Flevaris	Associate	0.10	23.50	235.00	Draft note to C. McNamara regarding potential motion for judicial notice
10/30/2017	Claire E. McNamara	Associate	4.30	1,010.50	235.00	Revise statement of the case, excerpts of record cites, summary of argument and initial merits argument section in appellee's brief in Caruso appeal.
10/31/2017	Claire E. McNamara	Associate	1.60	376.00	235.00	Revise constitutional argument sections of appellee's brief in Caruso appeal
11/01/2017	Claire E. McNamara	Associate	1.20	282.00	235.00	Revise argument sections of appellee's brief in Caruso appeal on due process, disciplinary authority and procedural issues
11/02/2017	Claire E. McNamara	Associate	5.50	1,292.50	235.00	Draft argument sections of appellee's brief in Caruso appeal on the Younger doctrine, res judicata, ripeness and immunity, and revise conclusion, summary of argument and introduction
11/03/2017	Taki V. Flevaris	Associate	0.40	94.00	235.00	Review and analyze draft response brief
11/03/2017	Claire E. McNamara	Associate	4.40	1,034.00	235.00	Revise fraud section and edit full appellee's brief in Caruso appeal
11/10/2017	Jessica A. Skelton	Equity Partner	0.40	118.00	295.00	Draft e-mail summarizing next steps in appeal for client
11/10/2017	Taki V. Flevaris	Associate	10.40	2,444.00	235.00	Revise draft Caruso response brief
11/11/2017	Taki V. Flevaris	Associate	2.40	564.00	235.00	Revise draft Caruso response brief
11/13/2017	Jessica A. Skelton	Equity Partner	2.10	619.50	295.00	Revise draft Caruso response brief

Date	Name	Title	Hours	Amount	Rate	Narrative
11/14/2017	Jessica A. Skelton	Equity Partner	0.90	265.50	295.00	Confer with Court regarding case schedule and consolidation of briefing and update client regarding same
11/14/2017	Claire E. McNamara	Associate	2.50	587.50	235.00	Apply for 30 day automatic extension to file appellee's brief; review Eugster's opening appellate brief
11/16/2017	Taki V. Flevaris	Associate	2.10	493.50	235.00	Outline response brief in fees appeal
11/16/2017	Claire E. McNamara	Associate	1.30	305.50	235.00	Review district court filings related to fees motion to prepare to draft fee appeal
11/17/2017	Taki V. Flevaris	Associate	4.50	1,057.50	235.00	Outline and draft response to fees brief
11/17/2017	Claire E. McNamara	Associate	0.40	94.00	235.00	Research safe harbor provision of Rule 11(c)
11/17/2017	Claire E. McNamara	Associate	0.20	47.00	235.00	Strategize about response to fee appeal
11/17/2017	Claire E. McNamara	Associate	2.30	540.50	235.00	Draft case history for fee appeal response
11/18/2017	Claire E. McNamara	Associate	3.70	869.50	235.00	Draft statement of facts and procedural history in appellees' brief for fee appeal
11/20/2017	Claire E. McNamara	Associate	3.50	822.50	235.00	Draft procedural history and fraud sections in appellee brief in fees appeal
11/21/2017	Claire E. McNamara	Associate	5.40	1,269.00	235.00	Draft fraud, district court recusal and merits sections of appellee's brief in Eugster fee appeal
11/22/2017	Claire E. McNamara	Associate	3.50	822.50	235.00	Draft merits and notice sections of appellee's brief in fee appeal
11/26/2017	Claire E. McNamara	Associate	2.40	564.00	235.00	Revise argument sections and draft harassment section of appellee's brief in fee appeal
11/27/2017	Claire E. McNamara	Associate	3.20	752.00	235.00	Revise argument sections and draft notice and inability to pay sections of appellee's brief in fee appeal
11/28/2017	Jessica A. Skelton	Equity Partner	0.50	147.50	295.00	Review recent correspondence from S. Eugster and respond to same

Start
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Date	Name	Title	Hours	Amount	Rate	Narrative
11/28/2017	Claire E. McNamara	Associate	0.70	164.50	235.00	Revise facts and introductory sections of appellee's brief in fee appeal
11/29/2017	Jessica A. Skelton	Equity Partner	0.60	177.00	295.00	Revise response to Caruso's opening brief
11/29/2017	Claire E. McNamara	Associate	1.60	376.00	235.00	Review Eugster's fee appeal brief and revise appellee's brief in response
11/30/2017	Jessica A. Skelton	Equity Partner	0.50	147.50	295.00	Continue revising opposition to Caruso's opening brief
12/01/2017	Taki V. Flevaris	Associate	0.30	70.50	235.00	Analyze briefing strategy and timing
12/01/2017	Jessica A. Skelton	Equity Partner	0.50	147.50	295.00	Continue revising response to Caruso's brief
12/05/2017	Taki V. Flevaris	Associate	0.30	70.50	235.00	Review and revise draft fees brief
12/05/2017	Claire E. McNamara	Associate	0.80	188.00	235.00	Review and edit appellees' fee award response brief
12/06/2017	Taki V. Flevaris	Associate	0.40	94.00	235.00	Review and revise draft fees brief
12/11/2017	Taki V. Flevaris	Associate	1.60	376.00	235.00	Review and revise draft fees brief
12/13/2017	Taki V. Flevaris	Associate	2.30	540.50	235.00	Revise fees brief
12/14/2017	Claire E. McNamara	Associate	4.80	1,128.00	235.00	Revise appellees' fees brief
12/15/2017	Taki V. Flevaris	Associate	0.40	94.00	235.00	Analyze arguments regarding amount of fees
12/15/2017	Claire E. McNamara	Associate	6.80	1,598.00	235.00	Revise appellees' fees brief
12/17/2017	Claire E. McNamara	Associate	3.70	869.50	235.00	Revise appellees' fees brief
12/18/2017	Taki V. Flevaris	Income Partner	0.30	70.50	235.00	Research judicial notice issue
12/18/2017	Taki V. Flevaris	Income Partner	6.00	1,410.00	235.00	Revise draft fees brief
12/19/2017	Jessica A. Skelton	Equity Partner	4.40	1,298.00	295.00	Draft and revise appellees' response brief to Eugster's attorney fees appeal

Date	Name	Title	Hours	Amount	Rate	Narrative
12/20/2017	Claire E. McNamara	Associate	1.20	282.00	235.00	Cite check appellees' fees brief
12/20/2017	Jessica A. Skelton	Equity Partner	2.80	826.00	295.00	Finish drafting and revising appellees' response brief to Eugster's attorney fees appeal and send to client for review
12/21/2017	Claire E. McNamara	Associate	2.00	470.00	235.00	Cite check appellees' fees brief
12/22/2017	Claire E. McNamara	Associate	1.00	235.00	235.00	Final review and edit of appellees' fees brief
12/22/2017	Jessica A. Skelton	Equity Partner	1.50	442.50	295.00	Incorporate client revisions into response to fees brief; finalize and confirm filing of same
1/2/2018	Jessica A. Skelton	Equity Partner	0.20	59.00	295.00	Draft motion for attorney fees
01/03/2018	Claire E. McNamara	Associate	9.00	2,115.00	235.00	Revise appellees' brief addressing Caruso's arguments and claims on merits
01/04/2018	Claire E. McNamara	Associate	0.90	211.50	235.00	Research request for fees on appeal
01/16/2018	Jessica A. Skelton	Equity Partner	1.10	324.50	295.00	Revise motion for judicial notice and confirm exhibits for same
01/16/2018	Taki V. Flevaris	Income Partner	1.60	472.00	295.00	Review and analyze Eugster's reply brief on fees
2/2/2018	Jessica A. Skelton	Equity Partner	0.55	162.25	295.00	Review and comment on relating briefing in disciplinary proceeding
03/23/2018	Jessica A. Skelton	Equity Partner	0.50	147.50	295.00	Analyze 9th circuit decisions in merits and fees appeals and draft e-mail to client regarding next steps in light of same
03/26/2018	Claire E. McNamara	Associate	1.40	329.00	235.00	Analyze Ninth Circuit ruling and rules associated with fee request under Federal Rule 38
03/26/2018	Taki V. Flevaris	Income Partner	0.10	29.50	295.00	Analyze potential fees motion
03/27/2018	Claire E. McNamara	Associate	2.00	470.00	235.00	Research request for relief pursuant to FRAP 38
03/27/2018	Claire E. McNamara	Associate	2.60	611.00	235.00	Draft fee award memorandum

Date	Name	Title	Hours	Amount	Rate	Narrative
03/28/2018	Claire E. McNamara	Associate	0.40	94.00	235.00	Gather data for and draft outline of fee award memorandum
03/29/2018	Jessica A. Skelton	Equity Partner	0.20	59.00	295.00	Analyze basis for attorney fees on appeal
03/29/2018	Claire E. McNamara	Associate	4.90	1,151.50	235.00	Draft background and initial argument sections in fee award memorandum
04/01/2018	Claire E. McNamara	Associate	3.20	752.00	235.00	Draft argument sections for fee award memorandum about reasonableness of fee request and frivolity of appeal
04/03/2018	Taki V. Flevaris	Income Partner	0.10	29.50	295.00	Review draft cost bills
04/05/2018	Taki V. Flevaris	Income Partner	0.30	88.50	295.00	Revise outline of fees brief
04/05/2018	Taki V. Flevaris	Income Partner	0.10	29.50	295.00	Research fees against attorney on appeal
04/05/2018	Claire E. McNamara	Associate	1.00	235.00	235.00	Analyze motion for rule 38 fee award
04/06/2018	Taki V. Flevaris	Income Partner	0.50	147.50	295.00	Analyze fees briefing and argument
04/09/2018	Claire E. McNamara	Associate	3.40	799.00	235.00	Draft memorandum for attorney fees for merits appeal
04/10/2018	Claire E. McNamara	Associate	6.40	1,504.00	235.00	Revise introduction and background section of motion for attorney fees; draft section on meritless nature of appeal; draft obvious outcome section; review invoices and draft supporting declaration
04/11/2018	Claire E. McNamara	Associate	0.70	164.50	235.00	Revise sections related to meritless appeal and obvious outcome
04/13/2018	Taki V. Flevaris	Income Partner	1.30	383.50	295.00	Revise motion for attorney fees
04/17/2018	Taki V. Flevaris	Income Partner	0.20	59.00	295.00	Draft update to client
04/20/2018	Taki V. Flevaris	Income Partner	1.40	413.00	295.00	Revise motion for fees on appeal
05/07/2018	Claire E. McNamara	Associate	0.20	47.00	235.00	Revise motion for fees on appeal

Date	Name	Title	Hours	Amount	Rate	Narrative
05/08/2018	Claire E. McNamara	Associate	4.30	1,010.50	235.00	Revise and fill in citations in motion for fees on appeal
05/17/2018	Claire E. McNamara	Associate	1.00	235.00	235.00	Revise motion for attorney fees on appeal
			200.35	48,459.25		

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472. +
162. +
147.5 +
329. +
29.5 +
470. +
611. +
94. +
59. +
1,151.5 +
752. +
29. +
88.5 +
29.5 +
235. +
147.5 +
799. +
10,504. +
164. +
383.5 +
59. +
413. +
47. +
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EXHIBIT 2

This Exhibit B of the Mr. Flevaris' Declaration in support of Supplemental Motion identifies time entries for the appeal fees on fees entries for the fees for bringing the fees motion (fees on fees). The calculator tape quantifies the new fees of fees the WSBA, and its attorneys have added for purposes of the Supplemental Motion.

EXHIBIT A

Time Report
 Billed

Washington State Bar Association / Caruso/Eugster vs. WSBA (10087-6)

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
08/02/2017	Jessica A. Skelton	Equity Partner	0.40	<u>0.20</u>	118.00	<u>59.00</u>	295.00	Confer with client regarding status of case and next steps
09/25/2017	Taki V. Flevaris	Associate	0.70	<u>0.35</u>	164.50	<u>82.25</u>	235.00	Email client regarding status of bar proceedings; draft email to client regarding status of appeals and next steps
09/25/2017	Jessica A. Skelton	Equity Partner	0.20	0.20	59.00	59.00	295.00	Analyze status of discipline proceedings for Younger argument
09/25/2017	Taki V. Flevaris	Associate	2.00	2.00	470.00	470.00	235.00	Review and analyze Caruso's opening brief; review prior briefing
09/25/2017	Taki V. Flevaris	Associate	0.30	0.30	70.50	70.50	235.00	Research fraud on the court claim
10/04/2017	Claire E. McNamara	Associate	0.70	0.70	164.50	164.50	235.00	Analyze fraud allegations and procedural challenges in Caruso appeal
10/09/2017	Claire E. McNamara	Associate	2.20	2.20	517.00	517.00	235.00	Draft statement of facts section for appellee's brief in Caruso appeal
10/10/2017	Claire E. McNamara	Associate	2.20	2.20	517.00	517.00	235.00	Outline legal arguments and draft legal merits section of appellee's brief in Caruso appeal
10/11/2017	Claire E. McNamara	Associate	3.60	3.60	846.00	846.00	235.00	Draft legal merits and fraud section of appellee's brief in Caruso appeal
10/12/2017	Claire E. McNamara	Associate	4.60	4.60	1,081.00	1,081.00	235.00	Draft fraud section and research procedural claim section for appellee's brief in Caruso appeal
10/13/2017	Claire E. McNamara	Associate	5.20	5.20	1,222.00	1,222.00	235.00	Draft leave to amend section for appellee's brief in Caruso appeal and revise other sections
10/16/2017	Claire E. McNamara	Associate	4.30	4.30	1,010.50	1,010.50	235.00	Revise legal sections in appellee's brief in Caruso appeal
10/17/2017	Claire E. McNamara	Associate	4.10	4.10	963.50	963.50	235.00	Revise section addressing fraud claims and alleged procedural error, and draft introduction and conclusion in appellee's response brief in Caruso appeal
10/20/2017	Claire E. McNamara	Associate	1.00	1.00	235.00	235.00	235.00	Analyze additional grounds for dismissal and work on strategy for response to Caruso appellate brief
10/20/2017	Taki V. Flevaris	Associate	2.00	2.00	470.00	470.00	235.00	Review, analyze, and edit draft response brief

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
10/26/2017	Claire E. McNamara	Associate	0.30	0.30	70.50	70.50	235.00	Revise introduction and summary of argument of appellee's brief in Caruso appeal
10/27/2017	Claire E. McNamara	Associate	2.80	2.80	658.00	658.00	235.00	Revise statement of facts, procedural history and disciplinary history in appellee's brief in Caruso appeal
10/27/2017	Taki V. Flevaris	Associate	0.10	0.10	23.50	23.50	235.00	Draft note to C. McNamara regarding potential motion for judicial notice
10/30/2017	Claire E. McNamara	Associate	4.30	4.30	1,010.50	1,010.50	235.00	Revise statement of the case, excerpts of record cites, summary of argument and initial merits argument section in appellee's brief in Caruso appeal.
10/31/2017	Claire E. McNamara	Associate	1.60	1.60	376.00	376.00	235.00	Revise constitutional argument sections of appellee's brief in Caruso appeal
11/01/2017	Claire E. McNamara	Associate	1.20	1.20	282.00	282.00	235.00	Revise argument sections of appellee's brief in Caruso appeal on due process, disciplinary authority and procedural issues
11/02/2017	Claire E. McNamara	Associate	5.50	5.50	1,292.50	1,292.50	235.00	Draft argument sections of appellee's brief in Caruso appeal on the Younger doctrine, res judicata, ripeness and immunity, and revise conclusion, summary of argument and introduction
11/03/2017	Taki V. Flevaris	Associate	0.40	0.40	94.00	94.00	235.00	Review and analyze draft response brief
11/03/2017	Claire E. McNamara	Associate	4.40	4.40	1,034.00	1,034.00	235.00	Revise fraud section and edit full appellee's brief in Caruso appeal
11/10/2017	Jessica A. Skelton	Equity Partner	0.40	<u>0.20</u>	118.00	<u>59.00</u>	295.00	Draft e-mail summarizing next steps in appeal for client
11/10/2017	Taki V. Flevaris	Associate	10.40	10.40	2,444.00	2,444.00	235.00	Revise draft Caruso response brief
11/11/2017	Taki V. Flevaris	Associate	2.40	2.40	564.00	564.00	235.00	Revise draft Caruso response brief
11/13/2017	Jessica A. Skelton	Equity Partner	2.10	2.10	619.50	619.50	295.00	Revise draft Caruso response brief
11/14/2017	Jessica A. Skelton	Equity Partner	0.90	<u>0.45</u>	265.50	<u>132.75</u>	295.00	Confer with Court regarding case schedule and consolidation of briefing and update client regarding same
11/14/2017	Claire E. McNamara	Associate	2.50		587.50		235.00	Apply for 30-day automatic extension to file appellee's brief; review Eugster's opening appellate brief
11/16/2017	Taki V. Flevaris	Associate	2.10		493.50		235.00	Outline response brief in fees appeal
11/16/2017	Claire E. McNamara	Associate	1.30		305.50		235.00	Review district court filings related to fees motion to prepare to draft fee appeal

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
11/17/2017	Taki V. Flevaris	Associate	4.50		1,057.50		235.00	Outline and draft response to fees brief
11/17/2017	Claire E. McNamara	Associate	0.40		94.00		235.00	Research safe harbor provision of Rule 11(c)
11/17/2017	Claire E. McNamara	Associate	0.20		47.00		235.00	Strategize about response to fee appeal
11/17/2017	Claire E. McNamara	Associate	2.30		540.50		235.00	Draft case history for fee appeal response
11/18/2017	Claire E. McNamara	Associate	3.70		869.50		235.00	Draft statement of facts and procedural history in appellees' brief for fee appeal
11/20/2017	Claire E. McNamara	Associate	3.50		822.50		235.00	Draft procedural history and fraud sections in appellee brief in fees appeal
11/21/2017	Claire E. McNamara	Associate	5.40		1,269.00		235.00	Draft fraud, district court recusal and merits sections of appellee's brief in Eugster fee appeal
11/22/2017	Claire E. McNamara	Associate	3.50		822.50		235.00	Draft merits and notice sections of appellee's brief in fee appeal
11/26/2017	Claire E. McNamara	Associate	2.40		564.00		235.00	Revise argument sections and draft harassment section of appellee's brief in fee appeal
11/27/2017	Claire E. McNamara	Associate	3.20		752.00		235.00	Revise argument sections and draft notice and inability to pay sections of appellee's brief in fee appeal
11/28/2017	Jessica A. Skelton	Equity Partner	0.50	0.25	147.50	73.75	295.00	Review recent correspondence from S. Eugster and respond to same
11/28/2017	Claire E. McNamara	Associate	0.70		164.50		235.00	Revise facts and introductory sections of appellee's brief in fee appeal
11/29/2017	Jessica A. Skelton	Equity Partner	0.60	0.60	177.00	177.00	295.00	Revise response to Caruso's opening brief
11/29/2017	Claire E. McNamara	Associate	1.60		376.00		235.00	Review Eugster's fee appeal brief and revise appellee's brief in response
11/30/2017	Jessica A. Skelton	Equity Partner	0.50	0.50	147.50	147.50	295.00	Continue revising opposition to Caruso's opening brief
12/01/2017	Taki V. Flevaris	Associate	0.30		70.50		235.00	Analyze briefing strategy and timing
12/01/2017	Jessica A. Skelton	Equity Partner	0.50	0.50	147.50	147.50	295.00	Continue revising response to Caruso's brief
12/05/2017	Taki V. Flevaris	Associate	0.30		70.50		235.00	Review and revise draft fees brief
12/05/2017	Claire E. McNamara	Associate	0.80		188.00		235.00	Review and edit appellees' fee award response brief

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
12/06/2017	Taki V. Flevaris	Associate	0.40		94.00		235.00	Review and revise draft fees brief
12/11/2017	Taki V. Flevaris	Associate	1.60		376.00		235.00	Review and revise draft fees brief
12/13/2017	Taki V. Flevaris	Associate	2.30		540.50		235.00	Revise fees brief
12/14/2017	Claire E. McNamara	Associate	4.80		1,128.00		235.00	Revise appellees' fees brief
12/15/2017	Taki V. Flevaris	Associate	0.40		94.00		235.00	Analyze arguments regarding amount of fees
12/15/2017	Claire E. McNamara	Associate	6.80		1,598.00		235.00	Revise appellees' fees brief
12/17/2017	Claire E. McNamara	Associate	3.70		869.50		235.00	Revise appellees' fees brief
12/18/2017	Taki V. Flevaris	Income Partner	0.30	0.15	70.50	35.25	235.00	Research judicial notice issue
12/18/2017	Taki V. Flevaris	Income Partner	6.00		1,410.00		235.00	Revise draft fees brief
12/19/2017	Jessica A. Skelton	Equity Partner	4.40		1,298.00		295.00	Draft and revise appellees' response brief to Eugster's attorney fees appeal
12/20/2017	Claire E. McNamara	Associate	1.20		282.00		235.00	Cite check appellees' fees brief
12/20/2017	Jessica A. Skelton	Equity Partner	2.80		826.00		295.00	Finish drafting and revising appellees' response brief to Eugster's attorney fees appeal and send to client for review
12/21/2017	Claire E. McNamara	Associate	2.00		470.00		235.00	Cite check appellees' fees brief
12/22/2017	Claire E. McNamara	Associate	1.00		235.00		235.00	Final review and edit of appellees' fees brief
12/22/2017	Jessica A. Skelton	Equity Partner	1.50		442.50		295.00	Incorporate client revisions into response to fees brief; finalize and confirm filing of same
1/2/2018	Jessica A. Skelton	Equity Partner	0.20	0.10	59.00	29.50	295.00	Draft motion for attorney fees
01/03/2018	Claire E. McNamara	Associate	9.00	9.00	2,115.00	2,115.00	235.00	Revise appellees' brief addressing Caruso's arguments and claims on merits
01/04/2018	Claire E. McNamara	Associate	0.90	0.45	211.50	105.75	235.00	Research request for fees on appeal
01/16/2018	Jessica A. Skelton	Equity Partner	1.10	1.10	324.50	324.50	295.00	Revise motion for judicial notice and confirm exhibits for same
01/16/2018	Taki V. Flevaris	Income Partner	1.60		472.00		295.00	Review and analyze Eugster's reply brief on fees

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
2/2/2018	Jessica A. Skelton	Equity Partner	0.55	0.55	162.25	162.25	295.00	Review and comment on relating briefing in disciplinary proceeding
03/23/2018	Jessica A. Skelton	Equity Partner	0.50	<u>0.25</u>	147.50	<u>73.75</u>	295.00	Analyze 9th circuit decisions in merits and fees appeals and draft e-mail to client regarding next steps in light of same
03/26/2018	Claire E. McNamara	Associate	1.40	<u>0.70</u>	329.00	<u>164.50</u>	235.00	Analyze Ninth Circuit ruling and rules associated with fee request under Federal Rule 38
03/26/2018	Taki V. Flevaris	Income Partner	0.10	<u>0.05</u>	29.50	<u>14.75</u>	295.00	Analyze potential fees motion
03/27/2018	Claire E. McNamara	Associate	2.00	<u>1.00</u>	470.00	<u>235.00</u>	235.00	Research request for relief pursuant to FRAP 38
03/27/2018	Claire E. McNamara	Associate	2.60	<u>2.30</u>	611.00	<u>305.50</u>	235.00	Draft fee award memorandum
03/28/2018	Claire E. McNamara	Associate	0.40	<u>0.20</u>	94.00	<u>47.00</u>	235.00	Gather data for and draft outline of fee award memorandum
03/29/2018	Jessica A. Skelton	Equity Partner	0.20	<u>0.10</u>	59.00	<u>29.50</u>	295.00	Analyze basis for attorney fees on appeal
03/29/2018	Claire E. McNamara	Associate	4.90	<u>2.45</u>	1,151.50	<u>575.75</u>	235.00	Draft background and initial argument sections in fee award memorandum
04/01/2018	Claire E. McNamara	Associate	3.20	<u>1.60</u>	752.00	<u>376.00</u>	235.00	Draft argument sections for fee award memorandum about reasonableness of fee request and frivolity of appeal
04/03/2018	Taki V. Flevaris	Income Partner	0.10	<u>0.05</u>	29.50	<u>14.75</u>	295.00	Review draft cost bills
04/05/2018	Taki V. Flevaris	Income Partner	0.30	<u>0.15</u>	88.50	<u>44.25</u>	295.00	Revise outline of fees brief
04/05/2018	Taki V. Flevaris	Income Partner	0.10	<u>0.05</u>	29.50	<u>14.75</u>	295.00	Research fees against attorney on appeal
04/05/2018	Claire E. McNamara	Associate	1.00	<u>0.50</u>	235.00	<u>117.50</u>	235.00	Analyze motion for rule 38 fee award
04/06/2018	Taki V. Flevaris	Income Partner	0.50	<u>0.25</u>	147.50	<u>73.75</u>	295.00	Analyze fees briefing and argument
04/09/2018	Claire E. McNamara	Associate	3.40	<u>1.70</u>	799.00	<u>399.50</u>	235.00	Draft memorandum for attorney fees for merits appeal
04/10/2018	Claire E. McNamara	Associate	6.40	<u>3.20</u>	1,504.00	<u>752.00</u>	235.00	Revise introduction and background section of motion for attorney fees; draft section on meritless nature of appeal; draft obvious outcome section; review invoices and draft supporting declaration

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
04/11/2018	Claire E. McNamara	Associate	0.70	0.35	164.50	82.25	235.00	Revise sections related to meritless appeal and obvious outcome
04/13/2018	Taki V. Flevaris	Income Partner	1.30	0.65	383.50	191.75	295.00	Revise motion for attorney fees
04/17/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Draft update to client
04/20/2018	Taki V. Flevaris	Income Partner	1.40	0.70	413.00	206.50	295.00	Revise motion for fees on appeal
05/07/2018	Claire E. McNamara	Associate	0.20	0.10	47.00	23.50	235.00	Revise motion for fees on appeal
05/08/2018	Claire E. McNamara	Associate	4.20	2.15	1,010.50	505.25	235.00	Revise and fill in citations in motion for fees on appeal
05/17/2018	Claire E. McNamara	Associate	1.00	0.50	235.00	117.50	235.00	Revise motion for attorney fees on appeal
06/01/2018	Taki V. Flevaris	Income Partner	3.90	1.90	1,150.50	575.25	295.00	Revise motion for fees on appeal
06/06/2018	Taki V. Flevaris	Income Partner	0.5	0.25	147.5	73.75	295	Revise motion for fees and supporting declaration
06/06/2018	Claire E. McNamara	Associate	0.70	0.35	164.50	82.25	235.00	Compile summary of billing for appeals
06/07/2018	Claire E. McNamara	Associate	2.10	1.05	493.50	246.75	235.00	Create time report to submit in support of motion for fees
06/18/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Revise supporting documentation for fees motion
06/21/2018	Claire E. McNamara	Associate	1.10	0.55	258.50	129.25	235.00	Revise time report and motion requesting fees on appeal
06/22/2018	Claire E. McNamara	Associate	1.00	0.50	235.00	117.50	235.00	Revise time report, declaration, and brief for fees on appeal
07/16/2018	Taki V. Flevaris	Income Partner	0.30	0.15	89.50	44.25	295.00	Revise draft spreadsheet of requested fees
07/17/2018	Claire E. McNamara	Associate	0.80	0.40	188.00	94.00	235.00	Revise billing summary to submit with motion for fees on appeal
07/18/2018	Claire E. McNamara	Associate	1.00	0.50	235.00	117.50	235.00	Revise billing summary, declaration, and request for fees on appeal
07/18/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Analyze and revise fee spreadsheet
08/06/2018	Claire E. McNamara	Associate	3.00	1.50	705.00	352.50	235.00	Revise motion for attorney fees on appeal and cite check; revise declaration in support of fees; consolidate all items for filing

Date	Name	Title	Hours	Rev. Hours	Amount	Rev. Amount	Rate	Narrative
08/08/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Revise status update to client
08/08/2018	Taki V. Flevaris	Income Partner	0.80	0.40	236.00	118.00	295.00	Revise fee motion and supporting declaration
08/14/2018	Jessica A. Skelton	Equity Partner	0.30	0.15	88.50	44.25	295.00	Work on strategy for attorney fees motion
09/13/2018	Taki V. Flevaris	Income Partner	0.90	0.45	265.50	132.75	295.00	Revise motion for fees
09/14/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Revise declaration exhibits for fee motion
09/17/2018	Taki V. Flevaris	Income Partner	0.20	0.15	88.50	44.25	295.00	Research filing of fee motion after closing of case
09/19/2018	Jessica A. Skelton	Equity Partner	0.90	0.45	265.50	132.75	295.00	Revise motion for attorney fees
09/20/2018	Taki V. Flevaris	Income Partner	0.70	0.35	206.50	103.25	295.00	Revise motion for fees
09/20/2018	Jessica A. Skelton	Equity Partner	0.20	0.15	88.50	44.25	295.00	Revise motion for attorney fees
09/21/2018	Taki V. Flevaris	Income Partner	0.80	0.40	236.00	118.00	295.00	Revise fees motion
09/25/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Confer with client regarding motion for fees
09/26/2018	Claire E. McNamara	Associate	0.60	0.30	141.00	70.50	235.00	Final review of motion for fees on appeal, checking numbers related to the fee request
09/26/2018	Taki V. Flevaris	Income Partner	0.90	0.40	236.00	118.00	295.00	Review, revise, and finalize motion for fees and related filings
10/02/2018	Taki V. Flevaris	Income Partner	0.10	0.05	29.50	14.75	295.00	Analyze timing of drafting and review for fee reply
10/09/2018	Taki V. Flevaris	Income Partner	0.10	0.05	29.50	14.75	295.00	Analyze timing of forthcoming fee reply
10/15/2018	Claire E. McNamara	Associate	0.80	0.40	188.00	94.00	235.00	Draft reply in support of motion for fees on appeal in light of S. Eugster not filing a response brief
10/16/2018	Taki V. Flevaris	Income Partner	0.10	0.05	29.50	14.75	295.00	Revise reply on fee request
10/17/2018	Claire E. McNamara	Associate	0.50	0.25	117.50	58.75	235.00	Revise reply in support of fees; create replica for fee appeal request
10/29/2018	Jessica A. Skelton	Equity Partner	0.10	0.05	29.50	14.75	295.00	Review orders on attorney fees
11/03/2018	Taki V. Flevaris	Income Partner	0.20	0.10	59.00	29.50	295.00	Review fee chart for splitting between appeals

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27287.8

Start 6/1/2018

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0° G+
575°25 +
73°75 +
82°25 +
246°75 +
29°5 +
129°25 +
117°5 +
44°25 +
94° +
117° +
29°5 +
352°5 +
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132°75 +
29°5 +
44°25 +
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103°25 +
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9th Circuit Case Number(s)

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

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When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

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EUGSTER LAW OFFICE PSC

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Appellate Court Case Number: 36231-1
Appellate Court Case Title: Stephen Kerr Eugster v. Washington State Bar Association, et al
Superior Court Case Number: 18-2-00542-1

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