CASE No.: 12-55087

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIN K. BALDWIN,

Plaintiff-Appellant

v.

UNITED STATES DISTRICT COURT,
FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent-Appellee

and FRANZ E. MILLER, Interested Party.

APPEAL FROM THE U.S. DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA
CIVIL CASE No. 5:11-EDCV-01300

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Pursuant To Federal Rules Of Appellate Procedure 35 And 40
Re February 16, 2012 Order of this Court by
Motions Panel Circuit Judges Schroeder, Leavy and Clifton

Erin K. Baldwin, Plaintiff-Appellant, *In Propria Persona*
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COMES PLAINTIFF-APPELLANT, ERIN K. BALDWIN ("Baldwin"), *In Propria Persona,* to present this Petition for Rehearing with request for Rehearing *En Banc* in connection with the February 16, 2012 Order of this Court by Motions Panel Circuit Judges Schroeder, Leavy and Clifton ("Subject Order").

1. Baldwin asserts that the February 16, 2012 "panel decision" conflicts, both procedurally, and substantively, with decisions of this Court and the United States Supreme Court, therefore, consideration by the full court is necessary.

2. Baldwin also asserts that the Subject Order was not made by Motions Panel Circuit Judges Schroeder, Leavy and Clifton, as represented. Rather, the Subject Order is an invention and fabrication of U.S. Ninth Circuit Court of Appeals Appellate Commissioner, Peter L. Shaw; Senior Staff Attorney, Ed Schiffer; Supervising Staff Attorney, Susan Gelmis; and Motions Attorney, Monica Fernandez. Baldwin requests an immediate and full investigation into this matter.

INTRODUCTION AND BACKGROUND

3. The Subject Order states:

> "A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See 28 U.S.C. §1291; Chacon v. Babcock, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties)."
>
> "Consequently, this appeal is dismissed for lack of jurisdiction. All pending motions are denied as moot. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket."

4. As a preliminary matter, Baldwin wishes to address the final sentence in the Subject Order, *i.e.,* "No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." In accordance with

Federal Rules of Appellate Procedure, Rules 35 and 40, Baldwin has the right to file a petition requesting rehearing. "Appellate jurisdiction can be challenged at any time, and objections to jurisdiction cannot be waived," [1] and the "Merits Panel has an independent duty to determine appellate jurisdiction, even where the Motions Panel has denied same." [2]

5. In fact, the Ninth Circuit makes this right clear on Page 3 of its literature entitled, "*After Opening a Case – Pro Se Appeals*": "In some cases, the judges may decide a case before the completion of briefing, but you will first be given an opportunity to tell the Court why the case should not be summarily decided. 9th Cir. R. 3-6."

6. This Court's policy of issuing an Order to Show Cause why the appeal should not be dismissed prior to dismissing an appeal is well-established. However, Baldwin was deprived of this measure and as such, was deprived of her Fourteenth Amendment rights to equal protection of the law, right to access the courts and due process of law. [3]

7. Baldwin also asserts that the action of dismissing Baldwin's appeal without issuing an Order to Show Cause is discriminatory and an abuse of discretion with the intent to adversely prejudice the advancement of an unrepresented, indigent appellant's issues on appeal. The U.S. Supreme Court has held that both due process and equal protection concerns are implicated by restrictions on an indigents' exercise of the right of appeal.[4]

8. In order to avoid the aforesaid implications as well as the confirmation that this Court has jurisdiction over Baldwin's appeal, this Court has refused and continues to refuse to rule on Baldwin's *In Forma Pauperis* ("IFP") application transferred to this Court from the

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1 *Fiester v. Turner,* 783 F.2d 1474, 1475 (9th Cir. 1986).

2 *Dannenberg v. Software Toolworks, Inc.,* 16 F.3d 1073, 1074 n.1 (9th Cir. 2004); *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 990 n.1 (9th Cir. 2002).

3 *Holt v. Commonwealth of Virginia,* 381 U.S. 131 (1965), *inter alia*.

4 *Griffin v. Illinois*, 351 U.S. 12, 34 , 35 (1956); *Douglas v. California,* 372 U.S. 353, 361 (1963).

District Court nearly two months ago, on January 13, 2012. Ten days after the district court was divested of jurisdiction over Baldwin's IFP application, U.S. District Court Judge Dolly M. Gee ("Judge Gee") attempted to deny Baldwin's IFP application claiming that it was not taken in good faith, was frivolous and without merit. Clearly, Judge Gee's denial is void for lack of jurisdiction and disposition of Baldwin's IFP application is still pending with this Court.

9. Public policy favoring disposition of cases on their merits counsels strongly against dismissal. The Ninth Circuit, in *Eldridge v. Block*, [5] held: "This policy favoring resolution on the merits 'is particularly important in civil rights cases.'"

10. This Court summarily dismissed Baldwin's appeal without searching for the "availability of less drastic sanctions," [6] without warning Baldwin of the chance of dismissal, and without allowing Baldwin the opportunity to show cause why her appeal should not be dismissed. "Nothing in the record demonstrates that Baldwin was on notice that the case would be dismissed." [7]

11. If it is this Court's policy to refrain from "considering matters not specifically and distinctly raised and argued in the opening brief, nor arguments and allegations raised for the first time on appeal," [8] dismissing Baldwin's appeal without allowing her to file an opening brief is unconscionable and unconstitutional. In fact, the necessity of an opening brief and a responsive brief is stated in this Court's policies and procedures: "After briefing has been completed, the case management attorneys review the briefs and record in each case, in order to identify the primary issues raised in the case, and to assign a numerical weight to the case, reflecting the relative amount of judge time that likely will have to be spent on the matter."

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5 832 F.2d 1132, 1137 (9th Cir.1987)

6 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992).

7 *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir.1992).

8 *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam).

12. The Subject Order also ignores the fact that this appeal is related [9] to Case Nos. 11-57210, 12-55081, and 12-70296 pursuant to Federal Rules of Appellate Procedure ("FRAP"), Rule 28-2.6. All of Baldwin's appeals arise from the same district court proceeding, involve closely related issues, and are successively filed to demonstrate an ongoing pattern of retaliation and viewpoint discrimination against Baldwin in violation of her First Amendment rights. The Ninth Circuit in *RK Ventures, Inc. v. City of Seattle*, [10] astutely recognizes the "Continuing Violations Doctrine," its applicability to Section 1983 claims, and this Court's jurisdiction over First Amendment and Equal Protection issues raised by Baldwin in her appeal:

> "We nonetheless hold that appellants have standing under §1983 to pursue their First Amendment and equal protection claims in their own right. … We conclude that appellants have created a triable issue of a constitutional violation under both the Equal Protection Clause and the First Amendment. With respect to the equal protection claim, appellants raise a genuine issue of dissimilar treatment."

13. Had this Court made a constitutional inquiry prior to dismissing Baldwin's appeal as set forth in the U.S. Supreme Court holdings in *Saucier v. Katz* [11] and *Pearson v. Callahan,* [12] it would have correctly assessed Baldwin's right to appeal on constitutional grounds. These grounds have been adequately pled in Baldwin's papers before this Court and, in fact, is the subject of an Emergency Petition for First Amendment Writ brought before this Court on January 26, 2009 in Case No. 12-70296 and also improperly dismissed on February 15, 2012. [13]

14. These constitutional grounds rest on the existence of two permanent injunctions issued against Baldwin that represent unconstitutional prior restraints of Baldwin's protected speech and freedom of the press. These facts were brought to federal court on August 16, 2011

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9 However, not yet consolidated for briefing purposes.
10 307 F.3d 1045, 1061 (9th Cir. 2002).
11 533 U.S. 194 (2001).
12 555 U.S. 223 (2009).
13 Petition for Rehearing was filed in Case No. 12-70296 on February 22, 2012 and is currently pending before this Court.

in a Section 1983 Complaint and constitute an ongoing federal controversy and a deliberate case of viewpoint discrimination. Due to the fact that these injunctions were underwritten by the State Bar of California, *inter alia,* and the State Bar of California is intimately involved in the selection of state and federal judicial officers, Baldwin's constitutionally-protected right to petition for a redress of grievances has been severely handicapped. In fact, the district court and now, this Court, has done everything in its power to dismiss Baldwin's claims. The Subject Order is no exception.

15. This Court dismissed Baldwin's appeal alleging it had:

a. reviewed "the record" pertaining to Baldwin's appeal. However, the Subject Order fails to state the standard of review this Court used, fails to acknowledge that "the record" is void a showing from adverse parties, and fails to acknowledge that Baldwin was not given warning of a potential dismissal and/or given the opportunity to show cause why the appeal should not be dismissed.

b. determined it could not hear Baldwin's appeal because the order forming the basis of Baldwin's appeal "is not final" because "it does not dispose of all claims as to all parties." However, the Subject Order fails to acknowledge that this appeal is based on constitutional grounds, related to other appeals pursuant to FRAP Rule 28‑2.6, and must be heard as an interlocutory order to avoid irreparable harm.

c. correctly ruled on Baldwin's dismissal based on a 31-year old case *Chacon v. Babcock*.[14] However, the Subject Order fails to acknowledge that *Chacon* is the authority to dismiss an appeal based on partial summary judgment of claims not certified by Rule 54(b) and

[14] 640 F.2d 221, 222 (9th Cir. 1981).

is entirely irrelevant to Baldwin's case; that *Chacon* is a case improperly used in boilerplate dismissal orders by Ninth Circuit motions attorneys in pro se appeals.

16. The Ninth Circuit in, *Payne v. Borg*, [15] held: "The relevant standards of review are critical to the outcome of this case" and in *Walsh v. Centeio*, [16] "The outcome of the instant case turns on the standard of review." If this Court had, in fact, properly reviewed the record, it could not have dismissed Baldwin's appeal. This is evidenced by material facts contained in Baldwin's Notice of Related Appeal that support the fact that the District Court:

a. Intentionally acted without jurisdiction. The Ninth Circuit has held: "Although the district court retains jurisdiction 'to make orders appropriate to preserve the status quo,' it may not 'adjudicate substantial rights directly involved in the appeal.'"[17]

b. Deliberately altered the record on appeal to prejudice Baldwin's claims and to conceal their own misconduct**:** The Ninth Circuit has held: "The appellate court is entitled to review a fixed, rather than mobile record." [18]

c. Entirely avoided the required constitutional inquiry. [19]

d. Committed criminal obstruction of justice by advancing false facts in written and published orders made available to the public that they knew were false in order to discredit Baldwin personally thereby harming Baldwin's appeal and her Section 1983 claims. [20]

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15 982 F.2d 335, 338 (9th Cir. 1992).

16 692 F.2d 1239, 1241 (9th Cir. 1982).

17 *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982)

18 *Kern Oil & Refining Co. v. Tenneco Oil Co.* 840 F.2d 730 (9th Cir. 1988).

19 *Saucier v. Katz,* 533 U.S. 194 (2001) and *Pearson v. Callahan*, 555 U.S. 223 (2009).

20 Title 18 U.S.C.A. §1503: "rendering false testimony, including the propagating, publishing and dissemination of false facts, theories and conclusions as well as the intent to retaliate against witnesses, victims, or parties for their participation in federal investigations or legal proceedings, including intimidation, physical force, threats, misleading conduct, and harassment."

17. If this Court used the *de novo* review standard it would have been required to disregard the district court's position entirely and look "anew" at the issues contained in Baldwin's Notice of Related Appeal "as if no decision previously had been rendered." [21] As such, it would have required this Court to make an independent constitutional inquiry, [22] evaluate whether the federal rules of civil procedure were properly interpreted, [23] decide whether the facts of Baldwin's case satisfy the legal rules, [24] and/or whether clear error was present on the part of the District Court. [25] None of these decisions were made prior to dismissing Baldwin's appeal. Had they been, dismissal would not have been warranted.

18. If this Court used the clearly erroneous review standard Baldwin's appeal would not have been dismissed because under this standard, "findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." [26] Since an "entire record" does not exist, namely any showing from adverse parties, said showing would necessarily be required prior to determination of a clearly erroneous decision. The dismissal of Baldwin's appeals prior to briefing gives rise to Baldwin's argument for viewpoint discrimination. This is particularly evident given Baldwin's arguments that district court judges acted without jurisdiction to alter the record on appeal with alleged "findings of fact" that attacked Baldwin's credibility in order to conceal their own misconduct and to prejudice Baldwin's Section 1983 claims and issues of appeal. (*See,* fn. 20, *supra.)*

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21 *Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1004 (9th Cir. 2006).

22 *United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1141 (9th Cir. 2007).

23 *United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1159 n.4 (9th Cir. 2004)

24 *Pullman*‑*Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982); *Suzy's Zoo v. Commissioner*, 273 F.3d 875, 878 (9th Cir. 2001)

25 *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027 n.13 (9th Cir. 2008); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 783 (9th Cir. 2000), aff'd, 535 U.S. 302 (2002).

26 *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc).

19. If this Court had used the abuse of discretion review standard it would have had to review Baldwin's issues on appeal for "plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." [27] Baldwin's appeal could not have been dismissed under this review standard because "the district court did not apply the correct law and rested its decisions on clearly erroneous findings of material fact." [28] It is without a doubt that the "district court ruled in an irrational manner." [29] The district court also "made errors of law," [30] "abused its discretion by erroneously interpreting a law," [31] "rested its decision on an inaccurate view of the law, [32] and as stated, *supra,* the "record contains no evidence to support the district court's decision." [33]

20. Title 28 U.S.C. §1291 states: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts ...." In *Cunningham v. Hamilton County, Ohio*, [34] The U.S. Supreme Court interpreted this rule to mean that "an appeal ordinarily will not lie until after final judgment has been entered in a case" and that "a decision is not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The use of the word "ordinarily" implies that there are exceptions to this rule, and these exceptions apply in Baldwin's appeal.

21. Since the rule in 28 U.S.C. §1291 is very broad, the courts look to the Federal Rules of Civil Procedure ("FRCP") to narrow the rule in certain circumstances. For example,

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27 *Rabkin v. Oregon Health Sciences Univ*., 350 F.3d 967, 977 (9th Cir. 2003)

28 *Casey v. Albertson's Inc.,* 362 F.3d 1254, 1257 (9th Cir. 2004).

29 *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003).

30 *Koon v. United States,* 518 U.S. 81, 100 (1996); *Forest Grove School Dist. v. T.A.*, 523 F.3d 1078, 1085 (9th Cir. 2008);*United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002).

31 *United States v. Beltran*‑*Gutierrez*, 19 F.3d 1287, 1289 (9th Cir. 1994).

32 *Richard S. v. Dep't of Developmental Servs.,* 317 F.3d 1080, 1085-86 (9th Cir. 2003).

33 *Oregon Natural Res. Council v. Marsh,* 52 F.3d 1485, 1492 (9th Cir. 1995).

34 527 U.S. 198, 203 (1999).

FRCP Rule 54(b) sets forth the final judgment rule in multi-claim and multiparty cases. Under that rule, the court may "direct entry of a final judgment" on fewer than all the claims or as to fewer than all the parties "if the court expressly determines that there is no just reason for delay." Said express determination must be so stated in the order with facts to support same. The Subject Order is absent said determination and this rule speaks to the disposition of claims, rather than of legal theories or requests for relief. [35]

22. Although Baldwin's case is a multi-claim and multiparty case, Baldwin's appeal does not propose a review of partial summary judgment of claims and therefore, a Rule 54(b) certification is not required. As stated in Title 28 U.S.C. §2072,

> "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. **Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title**."

23. The U.S. Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.,* [36] determined three distinct factors which inform the classification of a district court order as a "final decision" for purposes of §1291. Such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." [37] As stated, *supra,* Baldwin's appeals have been successively filed and related to each other by a common underlying issue,

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[35] Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742-43 (1976).

[36] 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949)

[37] Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); Abney v. United States, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651; Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528.

namely, the existence of two permanent injunctions that not only deprive Baldwin of her First Amendment rights but also drive the balance of her Section 1983 claims.

24. Without a federal court determination of the validity of these injunctions, Baldwin's Section 1983 claims will be repeatedly attacked without legal merit and solely for the purpose of side-stepping the inevitable court order that will correctly deem the injunctions not only unconstitutional but responsible for three years of heinous retaliatory and malicious prosecution against Baldwin including gross violation of Baldwin's liberty and property interests.

25. This Court and the district court and everyone involved knows these injunctions are unconstitutional but no one wants to be the one that steps up to the plate and declares it in a court order. The ramifications are staggering but must be implemented. The longer this is dragged out, the more serious the ramifications become.

26. The Cohen test set forth *supra* is on point here. The common issue of the permanent injunctions and the "pink elephant" issue of the validity of same would be well-served by applying said test. By ruling on the validity of the injunctions now:

a. the disputed question underlying the totality of Baldwin's Section 1983 claims would be conclusively determined; and

b. an important issue (whether the injunctions are valid) would be resolved allowing the balance of Baldwin's Section 1983 claims to be clearly and effectively litigated.

27. Reserving the determination of the validity of the permanent injunctions until final judgment would be ludicrous because without said determination, a final judgment cannot be entered. There is no rational or logical reason to pass on this decision until final judgment and the fair and equitable outcome of Baldwin's Section 1983 depends on it. It would be akin to baking a lemon meringue pie and deciding to add the meringue after the pie has been consumed.

It doesn't make sense because a lemon meringue pie without the meringue is not a lemon meringue pie. And it never will be regardless of the manipulative maneuvers of the chef.

28. Since the "record on appeal" only consists of the January 4, 2012 Order of Judge Carter and Baldwin's Notice of Appeal, it is incomprehensible how this Court could justify dismissing Baldwin's appeal. There is no (a) showing by adverse parties; (b) constitutional question inquiry; (c) evidence, hearings or briefs; (d) request for Baldwin's brief on an Order to Show Cause; nor (e) request for response from adverse parties. If the issues on appeal have not been acknowledged by this Court, how can this Court determine whether it has jurisdiction over these issues?

29. The Ninth Circuit in *Warren v. Commissioner, Internal Revenue Service* [38] held:

> "The purpose of requesting briefing … is to obtain more information in order to make a more informed and reasoned decision about whether to address an issue and, if so, how the issue should be resolved. Information, speech, and truth do not hurt; they only shed light. That is a fundamental tenet not only of our judicial system but of our democracy. It is possible, however, that in some instances those who do not want to allow speech -- or briefs -- have a preordained view of important issues and may, for some reason, not want to discover or even acknowledge what the law or the Constitution requires."

30. The Order upon which Baldwin's appeal is based states:

> Before the Court are two presently pending motions in the above-captioned case: an Amended Request for Leave to Amend the "Corrected" Second Amended Complaint filed by Plaintiff Erin K. Baldwin ("Plaintiff") (Docket 25) and a Motion to Dismiss filed by Defendant Franz E. Miller (Docket 26).

31. The Ninth Circuit in *Scott v. Eversole Mortuary*, [39] held: "Where the district court expressly denies leave to amend, the order is final and appealable." Judge Carter had already denied Baldwin's request for leave to amend her Complaint in his December 2, 2011 Order. However, in her January 19, 2012 Order, Judge Gee misrepresents that Baldwin's request to file

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[38] 282 F.3d 1119 (9th Cir.2002).

[39] 522 F.2d 1110, 1112 (9th Cir. 1975).

her third amended complaint is not appealable and that the district court will retain jurisdiction, until the appeal is resolved:

> "Although it is clear that the Ninth Circuit lacks jurisdiction over Plaintiff's appeal, see, e.g., Skoog v. County of Clackamas, 469 F.3d 1221, 1228-29 (9th Cir. 2006) (finding no appellate jurisdiction over interlocutory appeal from denial of leave to file fourth amended complaint), and a district court need not refrain from deciding a matter on appeal where it is clear that appellate jurisdiction is lacking, see United States v. Hickey, 580 F.3d 922, 928 (9th Cir. 2009) ("Filing an appeal from an unappealable decision does not divest the district court of jurisdiction.") (citing Estate of Conners v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993), the Court declines to proceed in this instance. Accordingly, Plaintiff's amended request for leave to amend is hereby STAYED until the Ninth Circuit resolves her appeal."

32. The Subject Order is absent acknowledgment that the district court had been divested of jurisdiction "over orders and judgments encompassed by the notice to the Court of Appeals" on December 19, 2009, and as such, Judge Gee's Orders and Judge Carter's Orders are void for lack of jurisdiction.

33. Judge Carter disregarded the current status of the case and intentionally altered the record on appeal to conceal his misconduct, *i.e.,* failing to recuse himself from Baldwin's case when he was well aware that conditions existed that required him to do so.

34. Carter's Order continues:

> These motions have not yet been ruled upon because shortly after these motions were filed, Plaintiff filed a Motion to Disqualify Judge David O. Carter (Docket 27). Judge Josephine Tucker denied the Motion to Disqualify on December 21, 2011 (Docket 31).

35. Here, Judge Carter intentionally misrepresents the facts to conceal his own misconduct. Baldwin filed her Amended Request on December 6, 2011 and her Motion to Disqualify on December 13, 2011. A full week is ample time to rule on an amended request.

36. The truth is that Judge Carter did not want to rule on the Amended Request because in so doing he would have been required to make a constitutional inquiry leading to the

inevitable order that the permanent injunctions entered against Baldwin were unconstitutional. This ruling would have also implicated his friend and colleague, U.S. District Court Judge Cormac J. Carney, who remanded Baldwin's cases back to state court in June of 2011, without first making the required constitutional inquiry.

37. Second, Defendant Miller's Motion to Dismiss had no bearing whatsoever on Judge Carter's Motion to Disqualify because the briefing schedule on the Motion to Dismiss extended any ruling on same at least two months out. Besides, Judge Carter knew he could not rule on Defendant Millers' Motion to Dismiss without first granting Baldwin's Motion for Leave to Amend which he had already denied and that denial made the matter directly appealable despite the intentionally erroneous January 18, 2012 Order by Judge Gee, *supra.*

38. The Order made by Judge Carter on January 4, 2012 continues:

> Plaintiff alleges in her Motion to Disqualify that this Court has "committed egregious acts of judicial misconduct" and "took actions to jeopardize Plaintiff's case." Plaintiff goes on to argue that she was "denied the right to withhold consent to a magistrate judge hearing her case" by this Court in its October 11, 2011 Order. Motion to Disqualify, 26.

39. Baldwin ***was*** "denied the right to withhold consent to a magistrate judge hearing her case." Judge Carter's October 11, 2011 Order states:

> "Second, as Judge Pym explained, the consent of parties is not required when ***pretrial proceedings are referred to a magistrate judge*** in accordance with 28 U.S.C. § 636(b). If Plaintiff wishes to make a formal motion for Judge Pym's disqualification, Plaintiff must file a formal motion titled as such. Otherwise, Magistrate Judge Pym will remain assigned to the case for all pretrial proceedings, to the extent permitted by 28 U.S.C. §636(b)."

40. General Order 05-07, entitled, "Reference to a Magistrate Judge," makes it clear that reference to a magistrate judge is ***not limited*** to "pretrial proceedings." The only way Baldwin's entire case would not be heard by a magistrate judge would be:

> "If a pro se civil rights plaintiff ***secures counsel or all the civil rights claims are dismissed without leave to amend***, then the reference under this General Order shall be vacated automatically by the Clerk of the Court, and the case shall be returned to the assigned District Judge with the assigned Magistrate Judge redesignated as the discovery Magistrate Judge."

41. Baldwin was never given the right to withhold consent to a magistrate judge and neither is any other pro se Section 1983 plaintiff. Baldwin opposed reference to a magistrate on August 23, 2011 but said Opposition was never acknowledged nor ruled upon by the district court even though the Ninth Circuit has held: "Parties must object to reference to a magistrate or special master 'at the time the reference is made or within a reasonable time thereafter.'" [40]

42. Baldwin asserts that the district court knew Judge Carter had not issued a special designation granting Judge Pym the authority to rule on dispositive motions. "A magistrate judge lacks authority to enter a final judgment absent special designation by the district court. [41] However, they also knew that if Judge Pym was successful in entering an Order granting Judge Miller's Motion to Dismiss that there was nothing Baldwin could do about it. "A final judgment entered by a magistrate judge who lacks authority is not an appealable order." [42]

43. The Order made by Judge Carter on January 4, 2012 continues:

> These allegations, along with Judge Tucker's recognition of Plaintiff's apparent "pattern to name as a defendant any and every judge who issues an unfavorable ruling against her" suggests that if this Court is not yet a defendant in the above-captioned case, it soon will be. Order on Motion to Disqualify, 6. Accordingly, out of an abundance of caution, this Court chooses to voluntarily recuse itself at the present time.

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40 *Spaulding v. Univ. of Wash*., 740 F.2d 686, 695 (9th Cir. 1984). *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1069-70 (9th Cir. 1991).

41 *Tripati v. Rison*, 847 F.2d 548, 548-49 (9th Cir. 1988); *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir. 1982); *Kamakana v. City and County of Honolulu*, 447 F. 3d 1172, 1178 n.2 (9th Cir. 2006).

42 *Tripati v. Rison*, 847 F.2d 548, 548-49 (9th Cir. 1988) (per curiam).

44. Judge Carter had no evidence to support these facts and wrote them with knowledge that they were false in order to prejudice Baldwin's appeal and Section 1983 constitutional claims, a direct violation of Title 18 U.S.C.A. §1503 (*see*, fn. 20, *supra*).

45. Even though Judge Carter recused himself on January 4, 2012 and said order formed the basis of this appeal, said appeal has less to do with Judge Carter's recusal and much more to do with the fact that Judge Carter:

a. intentionally altered the record on appeal without jurisdiction to do so;

b. deliberately prejudiced Baldwin's Section 1983 claims and appeal by making false statements about Baldwin in violation of Title 18 U.S.C.A. §1503;

c. participated in the concealment of the validity of two permanent injunctions to protect defendants named in Baldwin's complaint; and

d. by so doing, violated Baldwin's constitutional rights.

46. This Court has deprived Baldwin of due process and equal protection of the law, and meaningful access of the courts, by denying her the safeguards afforded other plaintiffs, i.e., warning of dismissal and the opportunity to show cause why her appeal should not be dismissed.

Dated: March 6, 2012

Respectfully submitted,

_____/s/_____
Erin K. Baldwin, Appellant Pro Se