UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 20–55181

Adam Bereki,

Plaintiff–Appellant,

v.

Karen and Gary Humphreys,

Defendants–Appellees.

NOTICE / REQUEST FOR CONSIDERATION OF ADDITIONAL AUTHORITIES

Appeal from the Judgment of the United States District Court

For the Central District of California

Case No. 8:19–CV–02050

(Consuelo Bland Marshall)

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In Propria Persona

I respectfully submit the following additional authorities and request this Court's consideration thereof in further support of my Motion For Appointment of Counsel and to Proceed In Forma Pauperis (Dkt.3) and Statement of Why This Appeal Should Go Forward (Dkt.6). These are not new authorities presenting new arguments but rather authorities in further support of the arguments already presented.

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These additional authorities will provide support for the following issues raised in the District Court. First, that Business and Professions Code §7031 prescribes a penalty *not* disgorgement. Second, that because §7031 is penal, both the State trial and appellate Courts were required to apply the excessive fines clause protections, but refused to resulting in a void judgment. Third, that because §7031 is a public regulatory law pursuant to the police powers of California, Appellees were required to provide evidence of an injury in fact separate and apart from the whole community. They failed to present any such evidence. As a result, they lacked standing to any relief whatsoever, depriving the Court of subject matter jurisdiction resulting in a void judgment. The legislature cannot transfer the power Constitutionally conferred to the governor to ensure the laws are faithfully executed to the People. And Fourth, that for each of the aforementioned reasons, the District Court had subject matter

jurisdiction and therefore a non-discretionary duty to hear and determine this case.

a. §7031 Imposes a penalty, not "disgorgement"

Four days ago on Jun 22, 2020, the United States Supreme Court announced its opinion in *Liu v. SEC*, 2020 U.S. Lexis 3374, a case that vacated this Court's void judgment (754 Fed. Appx. 505 (2018)) and remanded it for further proceedings consistent with the opinion. In *Liu,* just like in the instant case, the District Court imposed a penalty under the guise and label of non-punitive equitable "disgorgement". On appeal, just like the instant case, this Court upheld the trial Court's findings for "disgorgement" when in fact and law no judgment for equitable disgorgement was ever made. A Court of equity has no jurisdiction to impose a penalty. As a result, the judgment was void.

The judgment imposed in *Liu* was a penalty as opposed to non-punitive disgorgement because the District Court required the Defendants to forfeit about $27 million dollars *without* offsets for potentially legitimate business expenses such as marketing, construction costs, and lease payments. In like fashion, offsets were also denied in the instant case. Appellees received more than a years-worth of remodel construction work on their custom vacation home that was never even evidenced to have been performed by me, but instead by my licensed company which is not a statutory violation. The State trial and appellate

Courts refused to consider these benefits conferred and ordered a full forfeiture of all of the compensation Appellees paid for the work even though the work was arguably valued at the same amount the Court ordered be forfeited. Moreover, $758,000 of the $930,000 ordered to be forfeited was paid directly to my company and money I never possessed.

Despite raising the exact issues addressed by the *Liu* Court and upon which the Court found in favor of the Defendants, the California Fourth District Court of Appeal found they were entirely without merit:

> "Bereki challenges its application [disgorgement] under the specific facts of this case. He first asserts disgorgement is an improper remedy because it gives the Humphreys a double benefit- the remodel improvements and the money they otherwise would have paid for them. In the context of the statute at issue, however, courts have uniformly rejected such an argument and required disgorgement, even though this remedy often produces harsh results. [Citations]. Full disgorgement is required; offsets and reductions for labor and materials received are not permitted." Dkt. 3, Appendix [AE]– Opinion, p.11.

Yet in another case involving "disgorgement", the same appellate Court that included the the justice who authored the opinion in the instant case held that:

("[t]he elements of an unjust enrichment claim are the receipt of a benefit and the unjust retention of the benefit at the expense of another. The mere fact that a person benefits is not of itself sufficient to require the other to make restitution therefor. There is no equitable reason for invoking restitution when the plaintiff gets the exchange that he or she expected [such as a remodel to their home]"). *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593 (2008).

As the Supreme Court held in *Liu:*

"Courts may not enter disgorgement awards that exceed the gains made upon any business or investment, when both the receipts and payments are taken into the account." [Citations]; see also Restatement (Third) §51, Comment *h*, at 216 (reciting the general rule that a defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement). Accordingly, courts must deduct legitimate expenses before ordering disgorgement […]. A rule to the contrary that "make[s] no allowance for the cost and expense of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery." p.29.

In the instant case, both the State trial and appellate Courts held Business and Professions Code §7031(b) was a cause of action for "disgorgement". But this is not true. §7031(b) mentions nothing about

disgorgement or any equitable remedy whatsoever. Moreover, "disgorgement" is not a term defined anywhere in California statutory law. There is, consequently, no known cause of action named "disgorgement".

But not only is §7031 not a cause of action for disgorgement, none of the requirements for stating an equitable claim for disgorgement were evidenced at trial including an accounting for profits and offsets for benefits conferred. In fact, the trial and appellate Courts both flatly refused to consider offsets.

In exact polarity, the California Supreme Court has unambiguously held §7031 imposes a "stiff all-or-nothing **penalty**" for violating the licensing laws and <u>not</u> equitable "disgorgement". *MW Erectors, Inc. v. Neiderhauser Ornamental & Metal Works Co., Inc.,* 36 Cal. 4th 412, 426 (2005).

The result is that in California, a totally fictitious cause of action called "disgorgement" has been crafted by judicial fiat under the heading of Business and Professions Code §7031 that has no inherent remedial or equitable principles associated whatsoever and is being used to carefully conceal penalties that transcend centuries-old constitutional protections.

Despite the fact that countless defendants over decades have challenged §7031's penal nature, they have been met on nearly every

occasion by Courts who admit §7031 produces "harsh and unfair" penal results but then turn a blind eye to affording any Constitutional relief:

> "In [*Alatriste v. Cesar's Designs*, 183 Cal. App. 4th 656, 673] the court rejected the unlicensed contractor's argument that disgorgement was "unfair and 'serves no purpose other than punishment. As noted, the legislative committee reports show that, in enacting section 7031[, subdivision (b)], the Legislature was specifically aware that permitting reimbursement may result in harsh and unfair results to an individual contractor and could result in unjust enrichment to a homeowner, but nonetheless decided that the rule was essential to effectuate the important public policy of deterring licensing violations and ensuring that all contractors are licensed.

In other words, the Legislature and Courts know §7031 was not an equitable remedy for "disgorgement" because to receive relief in a Court of equity a Plaintiff must do equity. This cannot happen if the homeowner is unjustly enriched, which, in this instance, is simply another name for a penalty.

But the judicial abuse does not stop there. Even when the constitutionality of §7031 is directly challenged, the Courts refuse to take constitutionally mandated action, claiming themselves powerless to do anything about the unconstitutionality of the statute despite being a Court of review. ("As a judicial body, we are not permitted to second-guess

these policy choices"). *Rambeau v. Barker*, 2010 Cal. App. 4th (2010) Unpub. Lexis 5610. On its face and as applied §7031 imposes a virtually limitless penalty for violation of the licensing laws. The public policy choices of a State do not supersede State or Federal Constitutional protections.

Courts have a "solemn duty to look at the substance of things, whenever they enter upon the inquiry [of] whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution"). *Mugler v. Kansas*, 123 U.S. 623, 626 (1887). The Court of appeal refused to perform this inquiry despite my direct challenge on appeal.

The People of California and their businesses have repeatedly been threatened with or financially destroyed by this heinous abuse of power and dereliction of duty. See for e.g. the bankruptcy of Paul Bardos from a judgment in the amount of §917,043.09 for violating §7031(b). *Twenty Nine Palms v. Bardos*, 210 Cal. App. 4th 1435 (2014). Mr. Bardos was ulimately forced into bankruptcy and lost his home despite the fact that he, like me, had met and passed all of the qualifications for a contractor's license.

"To accord a type of relief that has never been available before and especially a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a "default rule," not of flexibility but of omnipotence". *Grupo Mexicano De Dessarollo v. Alliance Bond Fund*, 527 U.S. 308, 322 (1999). "Even when sitting as a court in equity, we have no authority to craft a "nuclear weapon" of the law like the one advocated here". *Id.* p.333.

In his dissent in *Liu*, Justice Thomas aptly saw the writing on the wall criticizing the majority for, in effect, failing to go all the way by addressing all of the issues pertaining to the nationwide abuses surrounding "disgorgement". ("The majority's treatment of disgorgement as an equitable remedy threatens great mischief. The term disgorgement itself invites abuse because it is a word with no fixed meaning. As long as courts continue to award "disgorgement", both courts and the SEC will continue to have license to expand their own power". *Id.* pp. 37-39. No, they won't. It is a crime to violate due process. 18 USC §241-242. ("Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge; it means according to law"). *Estate of Buchman*, 123 Cal. App. 2d 546, 559-60 (1954).

Because §7031 imposes a penalty and <u>not</u> the *non-punitive* equitable remedy of disgorgement, both the trial and appellate Courts had a mandatory, non-discretionary, ministerial duty to ensure the judgment minimally met the criteria required by the excessive fines clauses of both the California Constitution (Article I, Section 17) and the Constitution for the United States (Eight Amendment). I specifically raised this issue at trial and on appeal as well:

> "Bereki contends the disgorgement remedy is penal in nature and, therefore, a contractor defending against such a claim must be afforded all criminal rights and protections. Not so. Disgorgement is a civil consequence- "an equitable remedy"- for performing work without a required contractor's license." Dkt. 3, Appendix [AE]– Opinion, p.8.

A few paragraphs later in the same opinion however, the appellate Court then contradicted itself admitting "[t]he disgorgement is not remedial in nature." *Id.* p.11. Disgorgement itself *is* considered remedial in nature. But when offsets are denied it is no longer disgorgement and instead purely penal.

Under the California Constitution, ("[t]he touchstone […] inquiry under the Excessive Fines Clause is the principle of proportionality. The following four considerations bear on proportionality: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability

to pay"). *People v. Cowan*, 47 Cal. App. 5th 32, 47 (2020). While the United States Supreme Court has not held whether wealth and income are relevant to the determination of proportionality, (*Id.* p. 46), the other factors mentioned above all bear on proportionality under the Eighth Amendment.

Both the State trial and appellate Courts refused to perform even one of these analyses despite the direct challenges to the trial Court's jurisdiction I made at both the trial and appellate level raising this precise issue. See First Amended Verified Complaint pp.97-101. (Dkt. 11 – District Court, case no. 8:19–CV–02050). ("[T]he [Excessive Fine's] Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. *Furman v. Georgia*, 408 U.S. 238, 258 (1972).

To reiterate, the judgment affirmed by the appellate Court for me to forfeit $930,000 is more than 46 times my qualifying net worth and 186 times the comparable criminal monetary penalty of a fine up to $5,000[1]. ("As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood"). *Timbs v. Indiana, 586 U.S.* ____ 688 (2019) citing *BFI v. Kelco Disposal Inc.* , 492 U. S. 257, 271 (1989).

[1] Business and Professions Code §7028.

("A Court of California does not have jurisdiction to render judgment which violates California Constitution or the Constitution for the United States"). *County of Ventura v. Tillet*, 133 Cal. App. 3d 105, 110 (1982); Cal. Code of Civil Procedure §410.10;

While it is generally thought that subject matter jurisdiction applies only to the type of case (ie probate, juvenile etc.) it actually applies to *every issue* in a case and most certainly when the supreme Law of the Land withholds authority (jurisdiction) to not do a certain thing, such as impose an excessive fine. ("It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent"). *Gibbons v. Ogden*, 22 U.S. 1, 181. (1824).

Because the trial and appellate Courts refused to perform the requisite checks to ensure the judgment met State and Federal Constitutional restraints, the judgment is void for want of subject matter jurisdiction and a Bill of Attainder in violation of Article I, Section 10 because it imposes punishment without a judicial determination of rights.

b. Appellees Lacked Standing for Any Relief Whatsoever and the 'Judgment' Violates the Separation of Powers Doctrine

Because §7031 purports to create a cause of action for violation of a public regulatory law under the police powers of California – or what is more commonly known as a "public right" – Appellees were required to allege a concrete and particularized injury in fact that was actual and not hypothetical or conjectural to have standing. ("Even in limited cases where private plaintiffs could bring a claim for the violation of public rights, they had to allege that the violation caused them some extraordinary damage, beyond the rest of the [community]"). *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J. concurring) (internal quotations omitted). This is because California's tripartite and republican form of government constitutionally mandates that the executive shall ensure the laws are faithfully executed and does not grant the power to enforce the penal laws of the State to the People of California. §7031 is purely penal and prescribes punishment in the form of a complete forfeiture without any nexus to an injury stemming from the failure to be licensed. Justice Hurwitz, in his concurring opinion in *Town of Gilbert Prosecutors Office v. Downie*, 218 Ariz. 466 p.24 (Sup. Ct. 2008) puts it best:

> "If the restitution statutes are read to require that the amount paid is invariably the measure of restitution, an untenable result would obtain -- a homeowner who received flawless work from an unlicensed contractor would be refunded the full amount paid but

would nonetheless also retain the work performed. It is impossible for me to view such a victim as having suffered any loss, economic or otherwise […]" p. 30.

The police power must be exercised by the Constitutionally delegated agents of the People. ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed"). *Id.* p 1553 (internal quotations omitted) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992).

Appellees not only presented no evidence of an injury in fact, they deliberately filed a Motion for Severance[2] to sever each and every one of their causes of action that could have provided such standing. The Motion was granted by the Court allowing them to sever their first cause of action for "disgorgement" from all remaining causes. But the moment this happened Appellees were without standing and the Court without jurisdiction.

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[2] Dkt.20 Exhibit K part 1, p. 780 District Court. The District Court appears to have a made a clerical error in the numbering of the Trial Court transcript filed. The Motion For Severance is part of Exhibit K but may not be in Part 1 as labeled by the Court.

Appellees literally thought they could get a near million-dollar penal judgment in their favor by calling it "disgorgement" and trampling upon the foundational principles of law and equity that have governed this nation since its inception that make up our republican form of government. In the words of the Supreme Court of Arizona again, this abuse of power has lead to "absurd and troubling results", like a near million dollar fine for violating a simple licensing requirement. *Gilbert, supra* p.24.

While the California Constitution does not overtly have a "case or controversy" requirement like the United States Constitution, similar requirements are inherent in the separation of powers designating the three separate branches of California's government that vests each branch with certain distinct and exclusive powers. Specifically under Article V, Section 1, "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." The legislature has no authority to delegate this power to Appellees.

Additionally, California was admitted as a common law state into *this union* and ("[c]ommon-law courts, […] have required a further showing of injury for violations of "public rights" — rights that involve duties owed "to the whole community, considered as a community, in its social aggregate capacity." [Citation]. Such rights include "free

navigation of waterways, passage on public highways, and general compliance with regulatory law"). *Id.* p. 1551.

Finally, the judicial power of the United States must be capable of acting upon public rights cases such as this involving the private invocation of the police power of a State. A State cannot legislate the Constitution for the United States out of existence or prevent it from acting upon public rights cases by uprooting historical common law and standing doctrines upon which the judicial power of California and the United States are derived.

In response to this issue raised on appeal, the Court held:

> "Equally meritless is Bereki's contention that there was no justiciable claim under the statute because there was no evidence the Humphreys were injured by his lack of a contractor' s license. Bereki cites no authority for that novel proposition. Injury is not an element of a cause of action under the statute." Dkt. 3, Appendix [AE]– Opinion, p.11.

As a result of Appellees failure to present any evidence of a concrete and particularized injury in fact separate and apart from the rest of the community while alleging violation of a public regulatory penal law, they

lacked constitutional standing[3] to any relief whatsoever. ("A lack of standing is a jurisdictional defect"). *People ex rel. Becerra v. Superior Court*, 29 Cal. App. 5th 486, 496 (2018). *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See also First Amended Verified Complaint pp.73-82. (Dkt. 11 – District Court, case no. 8:19–CV–02050).

The Court therefore lacked subject matter jurisdiction and had a mandatory, non-discretionary, ministerial duty to dismiss the case. Instead, the Court went on to create the "great mischief" referred to by Justice Thomas, further resulting in a heinous miscarriage of justice that violates every single protection in the California Constitution and the Bill of Rights designed to guard against arbitrary despotic behavior by government. Each of these constitutional checks was created as a proverbial stop sign to completely withdraw power from government in each instance yet the Court blew through each and every stop sign like it didn't even exist with the appellate Court following suit.

The egregious abuses of power that took place in this case – and many others just like it – continue to cause me and others like Paul Bardos irreparable harm. By operation of statute as a result of the "judgment", I have been forbidden to work in my profession for more than three years pursuant to the permanent and indefinite suspension of my ability to act as a qualifying individual on a contractor's license. Business

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[3] *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Plaintiff must have standing for each type of relief sought.

and Professions Code §7071.17 requires this suspension until I either pay the fine, declare bankruptcy, or the judgment is vacated. I have also been forced into involuntary servitude to study law full time to seek redress in the hope my entire qualifying estate would not be destroyed by bankruptcy and taken by theft under color of law as is being attempted here.

c. Summary

In summation, the US Supreme Court's holdings in *Liu,* and the other cases mentioned herein, unequivocally demonstrate the judgment for "disgorgement" against me as upheld by the Fourth District Court of Appeal in case number G055075 is void because it is not "disgorgement" but instead a penal forfeiture. As a result, upon filing a complaint in the Federal District Court, the Court not only had a duty to ensure I was given a full and fair hearing at trial and on appeal –which clearly did not happen – but also to vacate the void judgement. California Penal Code section §1382 requires that the: "[c]ourt shall order the action to be dismissed... when a person has been held to answer for a public offense and an information is not filed against that person within 15 days". No information was clearly ever filed in the name of the People of California. See also Penal Code §949.

Because the actions taken in the instant case evidence California's anti-constitutional 'public policy' for handling §7031 cases, the People of California have nowhere else to turn but Federal Court to seek redress

for deprivations of rights secured by the California Constitution or the Constitution for the United States. For this reason alone, District Courts have authority to entertain independent actions in equity to vacate void judgments otherwise ("[a] Plaintiff [would be deprived] of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, [as required by] due process"). *Simes v. Huckabee*, 354 F.3d 823, 828 (8th Cir., 2004) citing *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir., 1983).

This Court has also held District Courts can entertain independent actions to vacate void judgments when such claims are also authorized by State law[4]. California law supports such actions. See *Rochin v. Pat Johnson Manufacturing Co.,* 67 Cal. App.4th 1228, 1239 (1998); Cal. Code of Civil Proc. §1916.

The United States Supreme Court has also made it repeatedly clear District Courts can entertain independent actions that attack State Court judgments as void: *Atchison, T & S.F. Ry. Co. v. Wells*, 265 U.S. 101, 103 (1924) (1 year post Rooker); *Simon v. Southern Railway Co.*, 236 U.S. 115, 122 (1915) (pre Rooker); *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004) citing *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604,

[4] *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 993-994 (9th Cir. 2002); *Simon v. Southern Railway Co.*, 236 U.S. 115, 122-3 (1915); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 189 (1920); *Davis v. Bayless,* 70 F.3d 367, 376 (5th Cir. 1995).

608–9 (1990); *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986).

Finally, for more than a century the United States Supreme Court has made it clear that judgments rendered in violation of due process are void and not entitled to full faith and credit elsewhere. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) citing *Pennoyer v. Neff*, 95 U.S. 714, 732-3 (1877).

Despite all of the aforementioned evidence demonstrating the State Court judgment is void, that I was never given a full and fair opportunity to litigate at trial or on appeal, that there has been no judicial determination of my rights, and that Federal Courts have subject matter jurisdiction to hear and determine cases like this, the District Court not only denied my relief with prejudice, but then falsely represented to this Court that my appeal was "frivolous" and taken on "bad faith" and then denied my motion to proceed in forma pauperis.

As a former police officer, I was shocked and deeply saddened to see the atrocity committed upon George Floyd by members of law enforcement whose fundamental duty is to protect and serve the people of their communities. While I am not literally being suffocated, the cries for help I have made to every applicable Court in the nation to stop the egregious abuse of force being perpetrated here echoes George's cries with resounding harmony. It is a heinous crime for a judicial officer to violate due process.

I request this Court vacate the State Court's void judgment as well as the void judgment of the District Court and remand it as quickly as practically possible with instructions to restore my in forma pauperis status and allow me to amend the complaint so that the case may proceed and I am able to obtain redress for the injuries resulting from the abominable miscarriages of justice perpetrated in this case.

Sincerely,

/s/ Adam Bereki
In Propria Persona
June 26, 2020

PROOF OF SERVICE

I hereby certify that I served a complete copy of the Notice dated June 26, 2020 upon the following parties on June 26, 2020:

Via email to:

wbissell@wgb-law.com
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Via First Class Mail to:

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/s/ Adam Bereki 06/26/20