Drew H. Sherman, SBN 237045
drew.sherman@adlilaw.com
A. Tyler Mellos, SBN 294501
tyler.mellos@adlilaw.com
ADLI LAW GROUP, P.C.
444 South Flower St., Suite 3100
Los Angeles, California 90071
Telephone: (213) 623-6546
Facsimile: (213) 623-6554

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WBS, INC., a California Corporation,

Plaintiff,

vs.

JUAN CROUCIER, an individual; CROUCIER PRODUCTIONS, INC., a California Corporation; ROB HOFFMAN, an individual; ONE MANAGEMENT, a business of unknown formation; and DOES 1 through 10, inclusive

Defendants.

Case No. CV 15-7251-DDP (JCx)

Hon. Dean D. Pregerson, Presiding

PLAINTIFF WBS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

F.R.C.P. 59 AND 60; C.D. CAL. L.R. 7-18

Hearing: January 9, 2017
Time: 10:00 a.m.
Courtroom: 9C
Hon. Dean D. Pregerson

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff, WBS, Inc., ("WBS") submits this Memorandum of Points and Authorities regarding its Notice of Motion and Motion for Reconsideration under F.R.C.P. 59(e) and 60, and C.D. Cal. L.R. 7-18(c) of this Court's ruling on Plaintiff's and Defendant Juan Croucier's ("Croucier" or "Defendant") Motions for Summary Judgment or Partial Summary Judgment ("MSJ") as follows:

I. INTRODUCTION

This Court made findings on evidence and thereupon ruled on the Parties' MSJs relying on the evidence presented before it; however, the evidence relied upon was filed and presented to this Court in bad faith by the Defendant. This Court did not have previous state Court minute orders, findings of fact, and rulings when deciding the MSJs in this action. The Defendant recognized this deficiency in the Court's record of information in this case and used that as an opportunity to perpetrate a fraud on this Court. The Defendant and the Attorneys knew, or should have known, they were filing pleadings and declarations with this Court and in the record with information contrary to previously adjudicated issues. Regardless, this Court did not have the complete evidence it needed to rule on the MSJs. In addition, Defendant's counterclaims should have been precluded by the *Rooker-Feldman* Doctrine. Moreover, this Court did not find triable issues of fact where there were issues that should have gone to the jury.

II. STATEMENT OF FACTS

This action was commenced by Plaintiff on September 15, 2015 after three demand letters and multiple communications with Defendant and his then current Attorney did not dissuade Defendant from infringing Plaintiff's four registered trade and service marks (the "Marks") (See Declaration of Drew H. Sherman "Dec. of Sherman"). The Complaint was served on Defendant in October 9, 2015 and a few days later Defendant contacted Plaintiff's counsel requesting an extension for time

ADLI LAW GROUP, P.C.
(213) 623-6546

to answer the Complaint because he needed to retain new counsel (See Dec. of Sherman). The Defendant finally retained new counsel and answered the Complaint on October 30, 2015.

This Court set a Scheduling Conference for early January 2016. The Defendant filed amended answer to Plaintiff's Complaint on March 4, 2016 (See Dec. of Sherman). Defendant's third law firm moved this Court for leave to file a second amended answer to add counterclaims.

Plaintiff's counsel warned Defendant about filing this motion for leave to file a counterclaim and even provided Defendant with documents that evidenced facts which negated the Defendant's counterclaims including, but not limited to, correspondence to and from Defendant's, then current, counsel in 1996 discussing the Partnership's dissolution by the other partners, Defendant's expulsion from the Partnership by the other partners, Stephen Pearcy ("Pearcy"), Warren DeMartini ("DeMartini"), and Robert Blotzer ("Blotzer"), the use of the Marks by, as alleged by Defendant, former members of the Partnership, and a 2002 judgment against Pearcy declaring the transfer of the Marks to WBS as legitimate (See Dec. of Sherman).

The 2002 Judgment in the Los Angeles County Superior Court action, case number BC 245356, *Pearcy v. WBS, et al*, August 19, 2002 (the "Judgment") (See Dkt. No. 148 and 148-1) was made known to Croucier's counsel by Plaintiff at the early stages of this litigation when Croucier was served with a Rule 11 motion (See Dec. of Sherman). The Judgment contains the evidence of the make-up of the Partnership's partners in 1997 when Croucier was expelled. In the Judgment, the Honorable David Workman, L.A. County Superior Court judge, incorporated his ruling on the defendants and cross-complainants in that action, WBS, Blotzer, and DeMartini, motion for summary adjudication, which he granted on February 6, 2002

ADLI LAW GROUP, P.C.
(213) 623-6546

and entered on March 29, 2002, (the "2002 Ruling") into the Judgment (See Dkt. No. 148-1 pg. 3).

In the 2002 Ruling, Judge Workman found the Marks to be owned by WBS and that there was no "competent evidence to show invalidity of the sale [of the Marks] to WBS, Inc.," in the face of Pearcy's argument in opposition that the Marks remained with the Partnership because the termination of Croucier from the Partnership did not follow the California Corporation's Code, thereby making the transfer invalid (See Dec. of Sherman). The evidence relied upon by Judge Workman for the 2002 Ruling was the same letter expelling Croucier from the Partnership that Plaintiff submitted as evidence in this litigation (See Dec. of Sherman). In addition, the declarations of Blotzer and DeMartini, wherein DeMartini stated under oath that Croucier was terminated from the Partnership and that DeMartini was one of the partners that voted for the expulsion also supporting Judge Workman's decision in the 2002 Ruling (See Dec. of Sherman). Even Pearcy stated in his declaration opposing the motion for summary adjudication in 2002, that Croucier did not want to "participate in and wanted no part of the RATT Partnership" (See Dec. of Sherman).

Defendant has known about the Judgment since 2002, and his attorneys have known since April 2016. Yet, with this knowledge, Defendant and his counsel continued to advanced arguments and positions that they knew to be contrary to law.

III. ARGUMENT

Defendant's fraud on this Court by not properly making the Court aware of the facts regarding the Marks. These omissions caused this Court to not consider material information, which has led this Court to make material mistakes of fact, thereby, generating a ruling and findings which are manifestly unjustly.

ADLI LAW GROUP, P.C.
(213) 623-6546

A. Legal Standard.

A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)." *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).

Rule 59(e) of the Federal Rules of Civil Procedure allow litigants relief from an order or ruling by a Court's reconsideration of its decisions (1) to correct manifest errors of law or fact that led to the judgment or ruling; (2) to present newly discovered or previously unavailable evidence; (3) to apply an intervening change of law; and (4) to prevent manifest injustice. *McDowell v. Calderon*, 197 F. 3D 1253, 1255 n. 1 (9th Cir. 1999). Further, Rule 59(e) has also been employed where litigants' attorneys have breached their duty to the court to research the facts and law, obligated under Rule 11, which facilitated a clearly erroneous judgment. *Van Derheydt v. County of Placer*, 32 Fed. Appx. 221, 223 (9th Cir. 2002).

In *Van Derheydt*, the Ninth Circuit reversed a denial of a motion for reconsideration under Rule 59(e) by way of the first and fourth grounds for relief under Rule 59(e). *I*d. at 222. It found that, even though the argument presented by the moving party was first raised in the motion for reconsideration, because the appellate court found that the opposing party misled the district court by its failure to properly investigate the law, as obligated by Rule 11, before filing its motion to dismiss. *Id*. at 223. The Ninth Circuit reasoned that the opposing party's breach of its duty under Rule 11 caused an erroneous district court ruling. *Id*.

Rule 60 of the Federal Rules of Civil Procedure provides that "a court may relieve a party or its legal representative from a final judgment, order, or proceeding" for any of several reasons, including "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). A Rule 60(b) motion may seek relief from an excusable mistake on the part of a party or counsel, or if the district court has made a

ADLI LAW GROUP, P.C.
(213) 623-6546

substantive error of law or fact in its judgment or order. *Bretana v. Int'l Collection Corp.*, 2010 U.S. Dist. LEXIS 27786, at *2-3 (N.D. Cal. Mar. 24, 2010) (*citing Utah ex. Rel. Div. of Forestry v. United States*, 528 F.3d 712, 722-23 (10th Cir. 2008)). Rule 60(b) exists to prevent the judgment from becoming a vehicle of injustice. *Siepel v. Bank of Am., N.A.*, 2007 U.S. Dist. LEXIS 14430 *4 (E.D. Mo. 2007) (citing *Harley v. Zoesch*, 413 F. 3d 866, 871 (8th Cir. 2005)). It is remedial in nature and must be liberally applied. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1262 (9th Cir. 2010).

In *Siepel*, the parties were involved in litigation in both federal court and Florida state court regarding claims that were nearly identical. The defendant bank prevailed in both litigations and both courts awarded the defendant bank attorney's fees and costs. However, in the Florida state court action, the defendant bank requested substantially lower attorney's fees and costs, and that state court reached its decision prior to the federal district court reaching its decision on the issue of attorney's fees and costs. As such, the plaintiff moved the district court to alter or amend the judgment by vacating the award of attorney's fees and costs under F.R.C.P. 59(e) and 60(b). Finding that a judgment, in addition to its state court judgment, would give the defendant a double recovery on the same injury, thereby allowing the federal court judgment to serve as a vehicle of injustice, the federal district court granted, in part, the motions to alter or amend the judgment. *Id*. at *4-5. The federal district court reasoned that by virtue of the state court's decision being handed down prior to the federal court decision; respecting the comity between state and federal courts to prevent the manifest injustice of a double recovery. *Id*.

Local Rule 7-18(c) further permits reconsideration upon "a manifest showing of a failure to consider material facts presented to the court before the decision." C.D. Cal. L. R. 7-18. Moreover, "[n]o motion for reconsideration shall in any manner

ADLI LAW GROUP, P.C.
(213) 623-6546

repeat any oral or written argument made in support of or in opposition to the original motion." *Id.*

In weighing the merits of Plaintiff's and Defendants' Motions for Summary Judgment, the Court granted Defendant's summary judgment stating, "there is no triable issue with respect to the validity of the assignment of the RATT marks to WBS. Because the assignment was invalid, WBS cannot make the threshold showing that it has an ownership interest in the marks." (Order, 12:10-13). With all deference, the Court's ruling on the summary judgment motion is proper for reconsideration under F.R.C.P. 59(e), as well as Local Rule 7-18(c) and 60(b)(1), because, as the district court in *Van Derheydt* was the subject of a breach of duty, this Court too was victim to Croucier and his lawyer's failure, intentional or not, to research the facts surrounding the Marks and the transfer to WBS. What's more, this Court did not have all the evidence before it necessary to realize Defendant and his declarant witness have been lying to this Court, thus creating a situation akin to that in Siepel whereby the district court used Rules 59(e) and 60(b) to recognize the *Rooker-Feldman* Doctrine so that the judgment cannot be used as a vehicle for injustice. As well, this Court has made errors of law and fact in ruling on the MSJs, and this motion is necessary to prevent a manifest injustice.

B. Prior Court Rulings Estop Defendant And Pearcy In This Action

"Federal courts give preclusive effect to state court judgments to the extent required by statute and by the *res judicata* principals embodied in federal common law." *Holder v. Holder*, 305 F. 3d 854, 864 (9th Cir. 2002) (citing 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure §4469 (2d Ed. 2002)). Section 1738 of Title 28 to the U.S. Code provides that the judicial proceedings of any state court shall have the full faith and credit in every court within the United States. 28 U.S.C. §1738. The Ninth Circuit recognizes the need for courts to give difference to judgments of other courts to determine whether *res judicata* or

ADLI LAW GROUP, P.C.
(213) 623-6546

collateral estoppel principals apply. *Young Money Entm't, LLC v. Digerati Holdings, LLC*, 2012 U.S. Dist. LEXIS 163619, *11 (C.D. Cal. 2012) (citing *Holder*, 305 F. 3d at 866).

Collateral estoppel precludes the retrying of an issue previously determined by a valid and final judgment so as to protect litigants from having to relitigate the same issue again and again. *Young Money*, 2012 U.S. Dist. LEXIS 163619 at *14 (citing *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). *Judicial estoppel is an equitable doctrine that precludes* a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F. 3d 778, 782 (9th Cir. 2001) (citing *Rissetto v. Plumbers & Steamers Local 343*, 94 F. 3d 597, 600-601 (9th Cir. 1996)). Judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different positions. *Id*. at 783 (*Rissetto*, 94 F. 3d at 605). Estoppel doctrines, such as judicial estoppel or collateral estoppel, apply substance over form as the doctrines are intended to protect the courts from litigants engaged in fraudulent representations. *Chicago, Rock Island & Pac. Ry. Co. v. Schendel*, 270 U.S. 611, 620 (1926).

The 2002 litigation of *Pearcy v. WBS, et al*, not only estopped Pearcy from making the representations he did in his declaration on record with this Court, but, also, Croucier is collaterally estopped from challenging the transfer of the Marks to WBS.

1. Defendant is Collaterally Estopped from Challenging the Transfer

When applying collateral estoppel to cases arising under California or federal law, courts must find that (1) the issue decided in the previous proceeding is identical to the current issue; (2) there was a final judgment on the merits in the first proceeding;

ADLI LAW GROUP, P.C.
(213) 623-6546

and (3) the party seeking to relitigate the issue was a party or privy to the first proceeding. *Hydranautics v. Filmtec Corp.*, 204 f. 3d 880, 885 (9th Cir. 2000).

Generally, collateral estoppel will not apply to a subsequent litigation if the same parties from the first litigation are not the same parties to the second litigation. *Taylor v. Stargell*, 553 U.S. 880, 892 (2008). However, the rule has exceptions through which a non-party to a prior action may nevertheless be precluded from asserting an identical issue previously determined by a valid final judgment on the merits. *Id*. at 893. Two of the exceptions are applicable to the case at bar. One exception lies where there is a pre-existing substantive legal relationship between the person to be bound and a party to the judgment wherein they are in privity with each other. *Taylor*, 553 U.S. at 894. The other is found when one of the parties to the previous litigation adequately represented the non-party against whom estoppel is sought in the second litigation because they shared the same interests in the litigation that they would have been litigating for the same result. *Id*. Adequate representation has been defined as, at a minimum to be, the interests of the non-party and the litigant are aligned and either party understood that they were acting in a representative capacity (or the first court took care to protect the interests of the non-party. Id. at 899 (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *Richards* v. *Jefferson County*, 517 U.S.793, 801-802 (1996)).

"Historically, privity between parties was only recognized in limited categories of legal relationships when two parties had identical or transferred rights with respect to a particular legal interest, chiefly:…partners and their partnerships." *Bronson v. Green Tree Servicing, LLC*, 2009 U.S. Dist. LEXIS 20221, at *16 (E.D. Cal. 2009) (citing *Headwaters Inc. v. United States Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005) (citing Restatement (Second) of Judgments, §§ 43-61 (1982))).

In *Bronson*, plaintiff individual sued defendant lenders of money, alleging unlawful conduct with respect to the execution and servicing of two loans after

ADLI LAW GROUP, P.C.
(213) 623-6546

plaintiff defaulted on her loan. The lenders declared bankruptcy, and the assets were bought out of the bankruptcy court by other third parties. The plaintiff brought an action against the new owners of the notes. The lenders challenged on res judicata grounds claiming to be in privity with the entities that had declared bankruptcy. The district court agreed and granted the partial summary judgment. The plaintiff filed a third amended complaint and added more defendants. The lenders moved to dismiss the third amended complaint on *res judicata* ground since they had already addressed any claims by the debtor plaintiff in bankruptcy court and were in privity with them.

In granting the lenders partial summary judgment on the plaintiff's second amended complaint, the court ruled that several of the claims had already been adjudicated when the defaulting lenders had purchased the loans out of the bankruptcy court. *Bronson*, 2009 U.S. Dist. LEXIS 20221, at *16. The district court found that several of the claims were the same as those raised in the bankruptcy court and the court had issued a final judgment on the merits of those claims. *Id*. Additionally, because the plaintiff was attempting to relitigate issues that had already been resolved in the bankruptcy, when the defendant lenders were corporate partners with and successors in interest to the assets the entities that had gone through bankruptcy, the district court held that the defendants were in privity with each other and could benefit from the summary judgment. *Id*.

The case at bar is similar to the fact pattern in Bronson in that, here, Defendant and Stephen Pearcy were in privity with each other since they were both partners in the RATT general partnership and Pearcy was claiming an interest in and to the RATT trademarks, just as Defendant is in the action before this Court. Further, inherently, Pearcy was claiming an invalid transfer of the Marks to WBS just as Defendant is doing in this action (See Dec. of Sherman). Furthermore, Pearcy in the state court action even made the argument that Croucier's expulsion was not proper (See Dec. of Sherman). Thus, not only did Pearcy adequately represent Croucier and make the

ADLI LAW GROUP, P.C.
(213) 623-6546

same argument Croucier made in this action, but Pearcy also recognized that Croucier was expelled from the RATT Partnership which directly refutes the declaration Croucier submitted in Reply to his Motion for Partial Summary Judgment.

Hence, this case presents the quintessential collateral estoppel in that the issue being litigated (validity of the transfer of the Marks to WBS in 1997) in this action has already been decided by a final judgment on the merits, and the parties in the two actions, though not the same, are in privity with each other to make Pearcy's day in court adequate for Croucier. Croucier should be subject to the state court ruling of 2002 wherein Judge Workman determined that the transfer of the Marks to WBS was valid.

As such, reconsideration under Rules 59(e) and/or 60(b) is proper to prevent a manifest injustice and/or correct errors of fact upon which the judgment is based.

2. Pearcy Cannot Deny Knowledge of Croucier's Expulsion

A "court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton*, 270 F. 3d at 782 (quoting *Russell v. Rolfs*, 893 F. 2d 1033, 1037 (9th Cir. 1990)). Courts have been provided three factors from which to determine whether to apply the doctrine of judicial estoppel: 1) whether the party taking a position inconsistent with its earlier position; 2) whether the party succeed in persuading the court to accept its earlier position thereby creating a perception that one of the courts was misled; and 3) whether the inconsistent position provide an unfair advantage to the party or impose an unfair detriment on the opposing party. *Baughman v. Walt Disney*, 685 F. 3d 1131, 1133 (9th Cir. 2012) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001)). Yet, the Supreme Court in *New Hampshire* made it clear that with "these factors, we do not establish inflexible

ADLI LAW GROUP, P.C.
(213) 623-6546

prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire*, 532 U.S. at 751. But, in the case at bar, the Pearcy's declaration falls squarely in the three enumerated factors of *New Hampshire* leading to the employ of judicial estoppel.

A party's later position must be clearly inconsistent with its previous position. *Id*. at 750. Additionally, chicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the analysis. Pearcy is taking a position with the declaration he submitted, through Croucier, in this action, wherein he states that Croucier was never expelled from the RATT Partnership, that is inconsistent and a knowing misrepresentation with his previous statements in the 2002 state court action. There, to the court and on the record, Pearcy stated multiple times, in pleadings, declarations, and other filings, that he was well aware of the expulsion of Croucier from the RATT partnership in addition to the fact that Croucier, after Pearcy inquiring if Croucier would be interested in rejoining the Partnership, represented to Pearcy that Croucier did not want to rejoin the Partnership (See Dec. of Sherman). Hence, Pearcy's declaration is inconsistent with previous statements made to a court, but, also they are blatant misrepresentations to this Court. The first factor for judicial estoppel has been met.

For the second factor in deciding judicial estoppel, the courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would indicate a fraud on the court. *Id*. Even just appearances of a fraud on the court through the court's acceptance of an inconsistent position meets the criteria of the second factor for judicial estoppel. *Hamilton*, 270 F. 3d at 782. A party can be estopped, even if the previous tribunal did not rely upon the first position, if the party

ADLI LAW GROUP, P.C.
(213) 623-6546

is now playing "fast and loose" with the court. *Rissetto,* 94 F. 3d at 601; *Baughman,* 685 F. 3d 1131, 1134.

In *Baughman*, the Ninth Circuit found against the plaintiff on summary judgment using judicial estoppel by reasoning that her ADA claim that she could not use a motorized wheelchair was completely contradictory to her earlier lawsuits that she could only use a motorized wheelchair. *Id*. When the court relies on statements that become material to the court's ruling, the party making those statements cannot then state the opposite in a later action. *Id*.

With regard to Pearcy's statements in the 2002 state court action, though Pearcy did not prevail and there was no settlement, Pearcy's knowledge of Croucier's termination from the Partnership and claim that the termination was not valid per a provision of the corporations code allowed the court to find that Pearcy, Blotzer, and DeMartini were the remaining partners in the Partnership with the ability to transfer the Marks (See Dec. of Sherman). Pearcy's representations regarding Croucier's expulsion from the Partnership were material to the 2002 Ruling. Now, here, in the case at bar, Pearcy's statements that Croucier was expelled from the Partnership, or even having the discussion regarding any proposed termination, has conned this Court into believing that Croucier has remained in the Partnership for the last 20 years, and thereby allowing this Court to find an invalid transfer of the Marks to WBS. This was Pearcy clearly playing fast and loose with the courts. Hence, it appears, in fact, the Court was misled.

Clearly Pearcy planned his misrepresentations for his benefit as an invalid transfer of the Mark to WBS 20 years ago unwinds 20 years of Pearcy's own missteps and bad acts thereby creating an unfair advantage for Pearcy and an unfair detriment for WBS. Judicial estoppel should be "invoked only when a party's inconsistent behavior otherwise will result in a miscarriage of justice." *Mull v. Motion Picture Indus. Health Plan*, 2015 U.S. Dist. LEXIS 180269, at *43 (C.D. Cal. 2015); *Milton*

ADLI LAW GROUP, P.C.
(213) 623-6546

H. Greene Archives, Inc. v. Marilyn Monroe, LLC, 692 F.3d 983, 1000 (9th Cir. 2012). In *Greene*, the estate of Marilyn Monroe attempted to get a favorable position to institute a right of publicity action in California when the estate had previously benefited from its representation that Ms. Monroe was a New York resident, not California. The Circuit Court determined that judicial estoppel was appropriate to prevent an "about face" position for a litigant from a previous action they were in, which would lead to a miscarriage of justice. *Id*.

In the situation at issue before this Court, without the exercise of judicial estoppel, Pearcy and Croucier would be allowed to perpetrate a fraud on the Court and a miscarriage of justice. By intentionally ignoring his previous statements to the L.A. County Superior Court, Pearcy has assisted to invalidate an otherwise valid transfer of corporate assets, has found vengeance from the previous 2002 Ruling, and has put himself back in the controlling position of his former band and partnership when he was previously terminated because of his inability to control his addictions. To allow retribution to win the day by knowingly mispresenting facts to the Court, would damage judicial integrity in the courts.

In sum, judicial estoppel is necessary with regards to Pearcy's declaration, as filed by Croucier with his reply to Plaintiff's opposition to his motion for summary judgment, as the declaration puts forth an inconsistent position by Pearcy, on which the California state court relied in 2002, and which would allow an unfair advantage and injustice to occur.

Therefore, reconsideration under Rules 59(e) and/or 60(b) is proper to prevent a manifest injustice and/or correct errors of fact upon which this Court's decisions regarding the MSJs are based.

C. Pearcy's Declaration Is A Sham Affidavit

This Court gave weight to Pearcy's declaration (Dkt. No. 150-2), which Croucier filed in support of his reply to Plaintiff's opposition to his MSJ, even

ADLI LAW GROUP, P.C.
(213) 623-6546

though Plaintiff's counsel objected to the declaration as a sham declaration verbally at the hearing on the MSJ (See Dkt. No. 181 pg. 11 fn. 7). However, this Court did not recognize Plaintiff's objection to Pearcy's declaration because the objection was not made in writing or supported by evidence to the contrary (See Dkt. No. 181 pg. 11 fn. 7).

"'The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.'" *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009) (*quoting Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). This sham affidavit rule prevents "a party who has been examined at length on deposition" from "rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony," which "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy*, 952 F.2d at 266. As discussed above, Pearcy's declaration should not have been allowed in based primarily on judicial estoppel.

However, even Plaintiff's counsel's verbal objection should have triggered this Court to rule on the declaration's admissibility and credibility on its own. A verbal objection to a sham affidavit at a summary judgment hearing carries the requisite procedural triggers that written objections carry with them. *Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861(1989) (citing *Woods v. Allied Concord Financial Corp.*, 373 F.2d 733, 734 (5th Cir. 1967)). More importantly, it is the obligation of the district court to "make a factual determination that the contradiction was actually a 'sham.'" *Van Asdale v. Int'l Game Tech*, 577 F. 3d 989, 998 (9th Cir. 2009) (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F. 2d 262, 267 (9th Cir. 1991)).

In *Van Asdale*, former employees of an computer gaming company brought whistleblower actions against their former employer. The district court granted a

ADLI LAW GROUP, P.C.
(213) 623-6546

summary judgment motion in favor of the defendant employer partially because it found one of the plaintiff's declarations to be a sham affidavit in contradiction to their deposition testimony. On appeal, the Ninth Circuit reversed the district court's grant of summary judgment. *Van Asdale,* 577 F. 3d at 999. In reversing the district court, the circuit court held that the district court did not make a specific factual finding regarding the "sham affidavit," but, rather, summarily made the ruling without the analysis instructed by *Kennedy*. *Id*.

Like *Van Asdale*, in the case at bar, this Court simply accepted Pearcy's sham declaration, even though Plaintiff's counsel lodged an objection at the oral argument, without any analysis or finding as to whether the declaration should have been considered a sham affidavit. Indeed, this Court did not provide the requisite *Kennedy* analysis in its written opinion on the MSJs either. Thus, as with *Van Asdale,* in order to avoid a manifest injustice, this Court should reconsider its position on the Pearcy declaration given the validity of Plaintiff's objection and the obligation for the Court to make a specific finding on its own, without being instigated by a party objection. Given the findings in the 2002 Ruling and Judgment, just as with the need for judicial estoppel with regards to Pearcy's declaration, this Court should also find Pearcy's declaration to be a sham declaration when compared with his prior sworn testimony from 2002.

D. Croucier's Counterclaims Are Barred By The *Rooker-Feldman* Doctrine

"Rooker-Feldman is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state court judgments." *Bianchi v. Rylaarsdam,* 334 F.3d 895, 898 (9th Cir. 2003). "*Rooker-Feldman* doctrine is based on "comity" and 'seeks to prevent state and federal courts . . . [from] fighting each other for control of a particular case.'" *Id*. at 902, fn. 6 (quoting *Kropelnicki v. Siegel*, 290 F.3d 118, 128 (2d Cir. 2002)). "'[I]f the precise claims raised in a state court proceeding are

ADLI LAW GROUP, P.C.
(213) 623-6546

raised in the subsequent federal proceeding, *Rooker-Feldman* plainly will bar the action.'" *Id*. at 899 (quoting *Phifer v. City of New York*, 289 F.3d 49, 55-56 (2nd Cir. 2002)).

Additionally, "[i]f claims raised in the federal court action are "inextricably intertwined" with the state court's decision such that the adjudication of the federal claims would undercut the state ruling…, then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Id*. *Rooker-Feldman* does not simply "compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint[,]" but, more importantly, under *Rooker-Feldman*, "[the courts] must pay close attention to the *relief* sought by the federal-court plaintiff." *Id.* (quoting *Kenman Eng'g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002)). Thus, the *Rooker-Feldman* doctrine prevents lower federal courts from exercising jurisdiction over any claim that is "inextricably intertwined" with the decision of a state court, even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principles. *Bianchi*, 334 F. 3d at 900, fn. 4. "Stated plainly, '*Rooker-Feldman* bars any suit that seeks to disrupt or "undo" a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims.'" *Id*. at 901 (quoting *Kenman*, 314 F. 3d at 478).

In *Bianchi*, the plaintiff filed an action against Bank of America in California state superior court, wherein he disqualified a judge who would later sit on the state appeals court panel deciding his appeal from the underlying action. His appeal was unsuccessful, as well as his petition to the State Supreme Court and another round with the California Court of Appeals. Finally, the plaintiff brought a suit against the three court of appeals justices in federal court claiming violation of due process and sought to have the California state court judgment set aside and vacated, and a new

ADLI LAW GROUP, P.C.
(213) 623-6546

panel put in place for the appellate court. The three justices moved to dismiss the action under F.R.C.P. 12(b)(1) and 12(b)(6). The federal court granted the judges' motions to dismiss, employing the *Rooker-Feldman* Doctrine by reasoning that the relief and demand the plaintiff sought would necessarily require reviewing and overturning the state court decision. *Id*. at 902.

Per the Ninth Circuit, there are two kinds of cases in which a "*de facto* appeal," forbidden under the *Rooker-Feldman* doctrine, might be brought. *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003). "First, the federal plaintiff may complain of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff, based on an allegedly erroneous ruling by that court." *Id*. The second forbidden *de facto* appeal identified by the Ninth Circuit, occurs where the federal plaintiff complains of "a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff was one of the litigants." *Id*.

If a plaintiff is "bring[ing] a forbidden de facto appeal" such that the *Rooker-Feldman* doctrine applies, the doctrine will not only prohibit the federal plaintiff from litigating the de facto appeal, but also any issue that is "inextricably intertwined" with the state court's judgment. *Cooper v. Ramos*, 704 F.3d 772, 778-79. A claim is "inextricably intertwined" with a state court judgment "'"if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'"" *Thompson v. Santa Cruz County Human Servs. Dep't*, 2013 U.S. Dist. LEXIS 58307, at *17 (N.D. Cal. 2012) (quoting Cooper, 704 F. 3d at 779) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987)); *see also Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) (providing that claims are "'inextricably intertwined' with the state court's decision" *if "the adjudication of... [such] claims would undercut the state ruling*") (emphasis added).

ADLI LAW GROUP, P.C.
(213) 623-6546

In *Thompson*, the plaintiffs brought their action seeking to enjoin the enforcement of a state Juvenile Court that ordered the plaintiffs' two children be removed from their home and into foster care. Even though the plaintiffs did moist of tasks required to gain custody back of their children, they did not make all the markers the Juvenile Court required. The judge in the Juvenile Court then allowed the foster parents to adopt the plaintiffs' children. The plaintiffs appealed but were unsuccessful.

Subsequently, the plaintiffs filed a complaint in the Northern District of California against the foster parents, the judge from the Juvenile Court, and the County Human Services department seeking, *inter alia*, an injunction reversing the termination of parental rights and an order for the children be reunited with the plaintiffs. The defendants moved to dismiss the complaint under F.R.C.P. 12(b)(1) and 12(b)(6). The district court granted the defendants motions and dismissed the plaintiffs' complaint without leave to amend. *Thompson*, 2013 U.S. Dist. LEXIS 58307, at *37. The district court granted the motions reasoning, *inter alia*, that the *Rooker-Feldman* Doctrine barred the plaintiffs' claims since the relief sought by the plaintiffs would have required the district court to find that the state court committed legal errors and the remedy would be relief form the state court judgment. *Id*. at 17-21.

Just as the courts in *Bianchi* and *Thompson* did not have jurisdiction over the federal action because the relief being sought would have necessitated the district courts to find legal or factual errors in the state court decisions, as well as undercut the state court decisions by making an opposite ruling regarding the subjects of the litigations, here, in the case at bar, the ruling by this Court on the parties' MSJs has undone the Los Angeles County Superior Court ruling by Judge Workman from 2002. As well, inherently, this Court has also determined that there were errors of law or fact in Judge Workman's findings by its ruling on the MSJs.

ADLI LAW GROUP, P.C.
(213) 623-6546

This Court determined that the transfer of the Marks in 1997 from the Partnership to WBS by the then current partners of Blotzer, DeMartini, and Pearcy was void *ab initio*. This Court reasoned this ruling on the basis that the various writings from and on behalf of Pearcy and DeMartini, along with the Croucier expulsion letter, muddied the waters as to which partners were still in the Partnership at the time of Croucier's expulsion in 1997 (See Dkt. No. 181 pgs. 8-11). And, this confusion as to who made up the remaining partners of the Partnership in 1997, led this Court to find that there was not a triable issue of fact going to Croucier's argument that his expulsion was not done by the unanimous consent of the remaining partners to the Partnership (save for Croucier) (See Dkt. No. 181 pg. 12:1-2). In reaching this conclusion, this Court relied on the fact that there was no evidence in the record about DeMartini's consent of Croucier's expulsion, as well as Pearcy's conflicting writings of 1992, 1995, and 1997, in conjunction with Pearcy's declaration submitted by Croucier as part of his reply to the Plaintiff's opposition to Croucier's MSJ, which created a triable issue as to whether the expulsion of Croucier from the Partnership was ever valid (See Dkt. No. 181 pg. 11:1-16 and fn. 6). However, this Court's reasoning is based on a false premise and intentional deception; the truth mandates an actual opposite ruling.

As part of its reply to Croucier's opposition to Plaintiff's MSJ, Plaintiff requested this Court take Judicial Notice of the Judgment (See Dkt. No. 148 and 148-1). Though this Court did not rule on Plaintiff's request for judicial notice, the Judgment contains the evidence this Court needed to clarify the make-up of the Partnership's partners in 1997 when Croucier was expelled (See Dkt. No. 148-1 pg. 3).

Given the 2002 Ruling, the ruling on Croucier's MSJ necessarily has reviewed errors of fact and law from the 2002 state court action and has undone the Judgment, the Ruling, and the findings of Judge Workman contained therein. Thus, just as in

ADLI LAW GROUP, P.C.
(213) 623-6546

Bianchi and *Thompson*, this Court should not have proceeded to rule on Croucier's MSJ as this Court, per *Rooker-Feldman*, did not have jurisdiction over Croucier's counterclaims. Therefore, this Court should reconsider its rulings on the MSJs under Rules 59(e), 60(b), and L.R. 7-18, to prevent a manifest injustice.

A motion for summary judgment or partial summary judgment is only appropriate when there exists no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. Fed. Rules of Civ. Pro. 56(c); *Adickes v. S. Kress & Co.*, 398 U.S. 144, 157 (1970). [tyler's portions]. An appellate court will only affirm a district court's grant of summary judgment, if the district court found, without weighing conflicting evidence, making credibility determinations on the evidence, and viewing the evidence in a light most favorable to the non-moving party, that there were no triable issues of material fact. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F. 3D 1252, 1257 (9th Cir. 2001); *T.W. Elec. Serv., Inc. V. Pac. Elec. Contractors Ass'n.*, 809 F. 2d 626, 630-631 (9th Cir. 1987) (citing *Matsushita*, 475 U.S. At 587).

E. The MSJ Ruling Was Influenced By Fraud

As discussed above, Rule 59(e) is a proper remedy for a district court to use when a ruling is facilitated by a party's intentional or unintentional fraud on the court as embodied in a breach of duty to investigate. *Van Derheydt*, 32 Fed. Appx. at 223. The facts of the case at bar nearly mirror the facts of Van Derheydt. In the action before this Court, Croucier and his counsel were well aware of the 2002 Ruling. Croucier admitted in his deposition on the record that he followed the 2002 case amongst his former bandmates and even acquired some of the pleadings filed in the action (See Dec. of Sherman). Croucier's attorneys, on the other hand, became aware of the 2002 Ruling as well as the fact that their client had a propensity to not tell the truth when Croucier's attorneys were served with Plaintiff's Rule 11 motion when

ADLI LAW GROUP, P.C.
(213) 623-6546

Croucier attempted to get leave of court to amend his answer and attach a counterclaim (See Dec. of Sherman).

The Rule 11 was served due to Croucier allegations that he just recently became aware of WBS owning the Marks and his claim to a cause of action alleging breach of fiduciary duty against Blotzer when there was written documentation from a lawyer representing Croucier in 1996 clearly evidencing his knowledge and belief that Blotzer was breaching a supposed fiduciary duty to Croucier back in 1996. In fact, this whole litigation whould be time barred for Croucier because there is nothing that Croucier has testified to, argued, or claimed wherein he has known the operative facts for such claims and causes of action since, at least, 2002. Croucier has been blatantly lying to this Court and fabricating the record.

What's worse, Croucier's attorneys have been assisting in the perpetration of this fraud. "A court has the right to expect that counsel will state the controlling law fairly and fully" so the court can perform its tasks properly. *Golden Eagle Distr. Corp. v. Burroughs Corp*, 801 F. 2d 1531, 1537 (9th Cir. 1986). Undoubtedly, this duty of attorneys to be forthright and have candor with the courts is recognized throughout the law. Fed. Rules of Civ. Pro. 11 is designed to ensure that a party filing a pleading with the court certifies the essential matters in the document. The Rule is intended to deter dilatory tactics, abusive pre-trial actions, and streamline litigation to remove frivolous and baseless filings. *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 392-393 (1990). The Rule is designed to prevent lawyers from asserting claims without adequate support as it is no longer acceptable to just file an action and wait until later to determine if there is an actual case behind the pleading. *Hale v. Harney*, 786 F. 2d 688 (5th Cir. 1986).

Rule 11 applies to pleadings, motions, and other papers filed with the Court. *Christian v. Mattel, Inc.*, 286 F. 3d 1118, 1131 (9th Cir. 2002). It is the party or attorney signing the pleading who bears the responsibility for improper certifications.

ADLI LAW GROUP, P.C.
(213) 623-6546

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 US 533, 541 (1991). In essence, Rule 11 requires parties and attorneys to certify that they have read the document and, after reasonable inquiry under the circumstances, have a belief that the document being filed is not done for an improper purpose, is warranted by existing law, and it possesses evidentiary support. F.R.C.P. 11(b)(1), (2), and (3). If an attorney or party does not meet this obligation, then, if warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion. F.R.C.P. 11(c). When a lawyer certifies a pleading as required by Rule 11, reasonableness of his/her conduct is measured by reference to a *similar lawyer in the relevant field of law*. *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1427 (9th Cir. Cal. 1986) (emphasis added); *Campbell v. City of Upland*, 1998 U.S. App. LEXIS 24003, *2 (9th Cir. Cal. Sept. 23, 1998); *Sonic Cable Television v. Creekside Mobilehome Community*, 1995 U.S. App. LEXIS 38177, *5-6 (9th Cir. Cal. Dec. 27, 1995). Additionally, when a lawyer has expertise in a field of law and files improper motions "[a] strong inference arises that their [filing the motion]…was for an improper purpose." *Huettig & Schromm, Inc.*, 790 F. 2d at 1427 (9th Cir. 1986).

F. The Court Failed To Consider Dispositive Legal Arguments

The Court found a single, conclusory route for judgment in Croucier's favor, without considering the viability of multiple other possibilities which would lead to judgment in WBS's favor. The existence of other plausible options is precisely for the jury to decide.

1. Dissolution of the Partnership

WBS argues in its Opposition to Croucier's MSJ that the Partnership has been dissolved by operation of law. (See Dkt. 132, 14:27-15:9). The Court did not even consider this argument before concluding that the assignment was invalid. (Dkt. 181, 12:10-12). The Court focused on the undisputed fact that the RATT

ADLI LAW GROUP, P.C.
(213) 623-6546

Partnership required unanimous consent of all other partners in order to transfer ownership his interest. The Court acknowledged that "Pearcy's understanding [was] somewhat difficult to reconcile with the 1997 Bill of Sale and Agreement, which represents that Pearcy, DeMartini, and Blotzer were 'the Partners' of WBS." Had the fact-finder been given the opportunity to consider WBS's argument relating to the dissolution of the Partnership, by operation of law, under Cal. Corp. Code §16111, it would have a reasonable reconciliation.

The existence of the Partnership is a disputed, material fact that relates to directly to whether the assignment of the trademarks was valid. WBS presented argument that the Partnership ceased all business and a division of the major portion of its assets (the trademarks) occurred shows that the Partnership was dissolved. (See Dkt. 132, 14:27-15:9).

At the very least, a triable issue of material fact exists as to whether Croucier objected to this division in anyway.

2. Statute of Limitations

WBS set forth a clear and legitimate argument that the statute of limitations had run for Croucier's counterclaims relating to declaratory relief as to ownership. The Court made no reference to the ample evidence showing that Croucier knew of WBS's assertion of ownership over the trademarks, and his corresponding failure to assert any claims thereto. It is undisputed that Croucier knew of WBS's assertion of ownership of the marks over ten years ago, yet the Court did not address this issue. In fact, this Court seems to have believed that only Plaintiff made the motion for summary judgment, not realizing that Croucier also made a motion for summary judgment. As the Court states in its analysis to the parties' cross-motions, "WBS and Croucier now move for summary judgment on WBS' trademark-related claims against Croucier" (See Dkt. No. 181 pg. 5:11-13. Croucier also moved for summary judgment on his declaratory relief cause of action, which would have required this

ADLI LAW GROUP, P.C.
(213) 623-6546

Court to address the Plaintiff's opposition based on the affirmative defense of the claim being barred by the statute of limitations.

Yet, there is no mention in the ruling on the MSJs as to Croucier declaratory relief cause of action or the statute of limitations defense.

IV. CONCLUSION

In conclusion, this motion for reconsideration should be granted on any number of grounds: judicial estoppel; collateral estoppel; *Rooker-Feldman*, or any other reason enumerated herein. Either this Court did not consider the 2002 Ruling or a fraud was perpetrated on this Court by Croucier and his attorneys. Either way, Plaintiff respectfully asks this Court to grant it motion for reconsideration .

ADLI LAW GROUP, P.C.

Dated: December 13, 2016

Drew H. Sherman
Attorneys for Plaintiff

ADLI LAW GROUP, P.C.
(213) 623-6546

TABLE OF CONTENTS

ADLI LAW GROUP, P.C.
(213) 623-6546

TABLE OF AUTHORITIES

Cases

ADLI LAW GROUP, P.C.
(213) 623-6546

ADLI LAW GROUP, P.C.
(213) 623-6546

Statutes

Rules

Treatises

ADLI LAW GROUP, P.C.
(213) 623-6546