In the
United States Court of Appeals
for the Ninth Circuit

Nos. 12-35238, 12-35319

OBSIDIAN FINANCE GROUP, LLC, *ET AL.*,

Plaintiffs-Appellees and Cross-Appellants,

v.

CRYSTAL COX,

Defendant-Appellant and Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 3:11-cv-00057-HZ
The Honorable Marco A. Hernandez

RESPONSE TO MARC J. RANDAZZA'S MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Marc J. Randazza's proposed *amicus* brief essentially asks this Court to give issue preclusive effect (using offensive issue preclusion) to certain factual statements in other decisions. But the other decisions cited by the proposed brief are not entitled to such effect. And indeed, the proposed brief does not even discuss issue preclusion, instead relying on judicial notice, which is not apposite here.

Because of this pervasive error—and other related errors, briefly mentioned below—the proposed brief will not be helpful to the decision on petition for rehearing. Because of this, and because "the post-disposition deliberations" on Cox's petition for rehearing do not "involve novel or particularly complex issues," the filing of the proposed *amicus* brief is not "appropriate." Cir. Adv. Comm. Note to Rule 29-2.

1. The proposed brief asks this Court to rely on statements in the decisions in *Randazza v. Cox*, Case No. 2:12-cv-02040-GMN-PAL, 2012 U.S. Dist. LEXIS 178048 (D. Nev. Dec. 14, 2012), and *Randazza v. Cox*, 920 F. Supp. 2d 1151 (D. Nev. 2013). But these are decisions on motions for a temporary restraining order and a preliminary injunction. The "granting [of] a preliminary injunction . . . is not a final judgment sufficient for collateral estoppel purposes." *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977).

2. The proposed brief also asks this Court to rely on a document attached to the Proposed Brief, *In re: The Proposed Disciplinary Treatment of the License of Crystal L. Cox*, Case No. 1105-2013 (Mont. Bd. of Realty Reg. July 5, 2013). This document, however, is denominated "*Proposed* Findings of Fact; Conclusions of Law; and Recommended Order." It thus also does not represent a "final judgment sufficient for collateral estoppel purposes." *Starbuck*, 556 F.2d at 457 n.13. "To invoke nonmutual offensive issue preclusion," a party must prove that "the issues were decided against [the other party] in final judgments." *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999); *see also Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (holding the same).

Nothing in the record or in the proposed *amicus* brief indicates that the proposed findings were actually adopted by the Montana Board of Realty Regulation. But even if they were (as they may have been), nothing in the record indicates that the time for appealing those findings has elapsed. "In determining the collateral estoppel effect of a state court judgment, federal courts must, as a matter of full faith and credit, apply that state's law of collateral estoppel." *In re Bugna*, 33 F.3d 1054, 1057 (9th Cir. 1994). And Montana courts appear not to treat judgments as eligible for collateral estoppel effect until the appeals of the judgments are completed, or the time for

appeal has expired. *See, e.g.*, *Martelli v. Anaconda-Deer Lodge County*, 852 P.2d 579, 581 (Mont. 1993) (stating that collateral estoppel requires, among other things, a "final judgment," and explaining that "the present case meets" that requirement because "[t]he Division issued an order of final determination which Martelli could have appealed to the Workers' Compensation Court" but "Martelli did not appeal the Division's order so it became a final judgment").

The proposed *amicus* brief does not discuss issue preclusion, but instead argues that,

> [T]he Court may . . . judicially notice the contents of . . . the Montana Board of Realty Regulation's proceedings against Cox (Exhibit B). *Biggs v. Terhune*, 343 F.3d 910, 916 n. 3 (9th Cir. 2003) (taking judicial notice of facts from administrative proceeding, as "[m]aterials from a proceeding in another tribunal are appropriate for judicial notice").

Proposed *Amicus* Brief 9. But *Biggs v. Terhune*, 334 F.3d 910 (9th Cir. 2003), *overruled on other grounds*, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), *overruled on other grounds*, 131 S. Ct. 859 (2011), simply involved judicial notice of documents from an administrative proceeding. It did not purport to take judicial notice of *the facts found* by an administrative agency.

"Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice." *Wyatt v. Terhune*, 315 F.3d 1108,

1114 n. 5 (9th Cir. 2003); *see also Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 n.14 (9th Cir. 2005) ("We decline Ford and Sutter's request to take judicial notice of a Journal Entry by the Court of Common Pleas of Cuyahoga County, Ohio because they are offering the factual findings contained in the order for the purpose of proving the truth of the factual findings contained therein."). "[E]ven though a court may take judicial notice of a 'document filed in another court . . . to establish the fact of such litigation and related filings,' a court cannot take judicial notice of the factual findings of another court." *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 830 (5th Cir. 1998). Taking judicial notice of another court's factual findings is improper because

> (1) such findings do not constitute facts "not subject to reasonable dispute" within the meaning of Rule 201; and (2) "were [it] permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous."

Id. (footnotes omitted). *A fortiori*, the same must be true as to facts found in administrative agency decisions.

Thus, facts allegedly found by other decisions might be usable by this Court if the requirements of issue preclusion ("collateral estoppel" in *Taylor*) are satisfied—but, for the reasons given above, those requirements are

not satisfied here. And judicial notice may not be used as an end-run around the issue preclusion requirements.

3. The proposed brief also relies on *Randazza v. Cox*, Case No. D2012-1525 (WIPO Nov. 30, 2012). But a "WIPO [World Intellectual Property Organization] decision has no collateral estoppel or *res judicata* effect and is entitled to no deference." *Maruti.Com v. Maruti Udyog Ltd.*, 447 F. Supp. 2d 494, 496 n.10 (D. Md. 2006); *see also Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona*, 330 F.3d 617, 626 (4th Cir. 2003) (giving "the decision of the WIPO panelist no deference in deciding" a Lanham Act action).

Indeed, the very decision that the proposed *amicus* brief cites actually *refuses* to rely on the facts found by a WIPO panelist. The proposed brief cites "*Compana LLC v. Aetna, Inc.*, Case No. C05-0277RSL, *2006 U.S. Dist. LEXIS 29028* at *11-12 (W.D. Wash. May 12, 2006)," as "specifying that FRE 201 allows judicial notice of WIPO arbitration proceedings." Proposed *Amicus* Brief 9. But here is the full passage from *Compana* (emphasis added):

> The Court, however, can take judicial notice of the undisputed facts that the decisions were issued and that the findings therein were the findings of the NAF or WIPO. Fed. R. Evid. 201(b); *see, e.g., Biggs v. Terhune*, 334 F.3d 910, 916 n. 3 (9th Cir.2003) (taking judicial notice of proceedings before the Board of Prison Terms; "materials from a proceeding in another tribunal are appropriate for judicial notice").

> *The Court will not, however, take judicial notice of the truth of the findings of fact.*

The proposed brief is citing *Compana* as support for precisely what the *Compana* court said it was not doing—"tak[ing] judicial notice of the truth of the findings of fact." *Id.*

Moreover, the other case dealing with judicial notice of WIPO proceedings—a case that the proposed brief does not cite (though the case, like *Compana*, is a Ninth Circuit district court decision)—makes this equally clear. "The Court will take judicial notice of the undisputed fact that the decision was issued and found in favor of Defendants, but *will not take judicial notice of the truth of the WIPO's findings of fact. See Compana v. Aetna*, 2006 WL 1319456 at *3 (W.D.Wash.2006)." *Hostnut.Com, Inc. v. Go Daddy Software, Inc.*, 2006 WL 2573201, *4, Case No. CV05-0094-PHX-DGC (D. Ariz. Sept. 6, 2006) (emphasis added).

* * *

In light of these pervasive errors in the proposed *amicus* brief, Cox asks this court to deny Marc Randazza's motion for leave to file that brief.

Respectfully submitted,

s/ Eugene Volokh
Eugene Volokh

Counsel for Defendant-Appellant and Cross-Appellee Crystal Cox

February 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 4, 2014. All participants in the case are registered CM/ECF users.

Dated: February 4, 2014

s/ Eugene Volokh
Eugene Volokh

Counsel for Defendant-Appellant and Cross-Appellee Crystal Cox