Nos. 23-35097, 23-35130

# In the United States Court of Appeals for the Ninth Circuit

BRUCE GILLEY,

*Plaintiff-Appellant*,

v.

TOVA STABIN, ET AL.,

*Defendants-Appellees*.

Appeal from a Preliminary Injunction Denial
of the United States District Court
for the District of Oregon, The Hon. Marco A. Hernandez
(Dist. Ct. No. 3:22-cv-01181-HZ)

## PLAINTIFF-APPELLANT'S REPLY RE: URGENT MOTION TO DISMISS CROSS-APPEAL FOR LACK OF JURISDICTION

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## REPLY

### I. THERE IS NO PRESUMPTIVE RIGHT TO CROSS-APPEAL THE DENIAL OF JURISDICTIONAL MOTIONS

The putative cross-appellants would have this Court believe that there is some sort of presumptive right to challenge subject-matter jurisdiction by way of a cross-appeal. On the contrary, absent extraordinary circumstances, the denial of a motion to dismiss for lack of jurisdiction is not subject to interlocutory appeal. *Credit Suisse v. United States Dist. Court,* 130 F.3d 1342, 1345-46 (9th Cir. 1997); *see also* ECF No. 2-1 at 4 (citing additional authorities).

Moreover, the two cases cited by UO as allegedly governing authority are readily distinguishable. *Smith v. Arthur Andersen Ltd. Liab. P'ship*, 421 F.3d 989, 998 (9th Cir. 2005) was a complex class-action case involving a dispute between settling and non-settling defendants. There the non-settling defendants sought to challenge the bankruptcy trustee's standing as part of the review of the district court's approval of a partial settlement with bar orders. *Id.*

Unlike *Smith,* this case is not a class-action case, but a civil rights case requesting equitable relief and nominal damages for one plaintiff. 3-ER-308–334 (Dist. Ct. ECF No. 29). The present case also does not involve a corporate bankruptcy, a trustee, a settlement, settling and non-settling defendants, or bar orders of any kind.

Similarly, *Kwai Fun Wong v. United States INS*, 373 F.3d 952, 961 (9th Cir. 2004) involved the appeal of a qualified-immunity order where some of the basis for the motion to dismiss were inextricably intertwined with the issue of the existence, or not, of a clearly established legal right. Conversely, no UO defendant raised any immunity defense in the motion to dismiss UO now seeks to appeal. 1-ER-2–37.

The cases that UO claims govern here presented unusual circumstances that do not apply to this case. As a result, the default rule should apply: a non-final order on a motion to dismiss for lack of jurisdiction is not appealable on an interlocutory basis.

## II. UO PREVAILED ON STANDING AS TO GILLEY'S PRE-ENFORCEMENT CHALLENGE TO THE GUIDELINES

UO further obfuscates the issues in this case by suggesting that its cross-appeal properly raises the issue of standing, specifically whether Gilley is sufficiently likely to be blocked again. ECF No. 11 at 10-11. To be sure, Gilley's standing to raise a pre-enforcement challenge is relevant to his likelihood of success on the merits and Gilley does argue that he has standing in his Opening Brief, appealing the denial of a preliminary injunction. ECF No. 12 at 50-56. But that is because Gilley *lost* the standing issue below—the district court found that he lacked standing to mount a pre-enforcement challenge as part of its basis for

denying the preliminary injunction. 1-ER-31–32; 1-ER-35–36 (Dist Ct. ECF No. 57 at 30-31, 34-35).

It defies logic for UO to claim that it would be entitled to a cross-appeal on an issue that it won below. *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 520 (9th Cir. 1999) ("A prevailing party usually may not appeal a decision in its favor"). UO has ample opportunity to raise its arguments in favor of the district court's ruling on standing in its response to the appeal, without the additional briefing of a cross-appeal.

## III. UO IS SEEKING AN IMPROPER INTERLOCUTORY REVIEW ON GILLEY'S BACKWARD-LOOKING CLAIM FOR NOMINAL DAMAGES

UO's notice of cross appeal (Dist. Ct. ECF No. 61 at 2) challenges the district court's jurisdiction over *all* of Gilley's claims, including his backward-looking claim for nominal damages. The district court did find that Gilley's claim for nominal damages was not moot (1-ER-18–20; Dist. Ct. ECF No. 57 at 17-19) and that he might succeed on his backward-looking claims for those damages. 1-ER-28; 1-ER-33; 1-ER-35; Dist. Ct. ECF No. 57 at 27, 32, 34. Thus, Gilley presently has a live, backward-looking claim for nominal damages, which he might win or lose. Gilley's open claim for nominal damages has not been finally adjudicated in the district court and is therefore not appealable.

Moreover, none of the cases cited by UO stand for the proposition that a plaintiff's appeal from a denial of a motion for a preliminary

injunction creates pendent appellate jurisdiction for a backward-looking claim for nominal damages. Indeed, by its very nature, Gilley's claim for injunctive relief is forward-looking, seeking to enjoin ongoing harms; not backward looking.

UO will have ample opportunity to appeal Gilley's claim for nominal damages after the district court enters a final judgment. What UO seeks now is to jump the gun and bring an improper interlocutory appeal of a non-final order.

## IV. UO'S ACTIONS ARE MULTIPLYING EXPENSES IN THIS MATTER

UO has retained two large law-firms to represent it in this matter and yet it complains of an "extraordinary use of public resources." ECF No. 11 at 14. UO itself is contributing to the expenditure of resources, public or otherwise, by filing an improper notice of cross-appeal, which has both necessitated this motion and would potentially cause more briefing and attorney time to be invested into the appeal on the merits.

In any event, there is no efficiency exception to appellate jurisdiction. No doubt many parties would like to appeal any number of district court orders on an interlocutory basis on grounds of alleged efficiency. But under the Court's version of efficiency, they must await a final judgment to raise their claims.

## CONCLUSION

This Court should dismiss the University Defendants' cross-appeal (No. 23-35130) for lack of jurisdiction and issue a revised briefing schedule on an expedited basis.

Respectfully submitted,

*s/Angus Lee*

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## CERTIFICATION

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d) and is set in 14-point Century Schoolbook font.

*s/Endel Kolde*