

No. 23-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE HAZZARD,

Plaintiff/Appellant,

v.

MAYOR LIBBY SCHAAF, et al.

Defendants/Appellees.

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U.S. COURT OF APPEALS

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On Appeal from the United States District Court
for the Northern District of California
Case No. 22-cv-02921-JSW
Hon. Jeffrey S. White

APPELLANT'S INFORMAL REPLY BRIEF

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I. INTRODUCTION

In his Informal Opening Brief (“Opening Brief”), Appellant presented three issues to this Court.

The first of these issues was that the District Court had not given Appellant a right to be heard. In their Answering Brief (“Answer”), Appellees claim that since the District Court considered Appellant’s written briefs, that alone qualifies as the right to be heard; however, there are many examples in case law of such a limitation not being valid.

Appellant’s second and third issues presented in his Opening Brief (the legal status of Oakland Promise as a 501(c)(3) nonprofit, tax-exempt, public-benefit corporation (“501(c)(3)”) and whether or not Oakland Promise’s merger with East Bay College Fund (“EBCF”) was valid) are each dismissed in the Answer as not being worthy of consideration by a federal court because they are supposedly state matters. However, it is abundantly clear that the status of a **corporation** and the validity of a **merger** are both indeed **federal issues**, and not state issues.

Since it is **patently obvious** that these issues need to be determined in a federal court, and since neither of these issues has been adequately addressed by either the District Court or Appellees, a review of the Opening Brief is clearly in order so that each issue can be judged on its merits.

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II. STATEMENT OF THE CASE

In their Answer (at p. 1), Appellees claim that “ruling without oral argument is a common practice in federal courts across the country ...,” and that Judge Jeffrey S. White’s (“Judge White”) actions in denying an opportunity for oral argument were “well within the court’s discretion and were entirely proper. However, the power vested in the “discretionary” authority of the court must be exercised with “fairness” and furthermore the court’s decision must be “reasonable” and with the protection of “due process.” And although the court may make a ruling on the motions submitted by the parties “without an oral hearing,” pursuant to Federal Rules of Civil Procedure (“FRCP”), Rule 78, it can potentially create the possibility, where there are clear errors made by the court in understanding of the substantial evidence, that the matter can only be reconciled by an oral hearing of the parties. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Anderson v. Bessemer City*, 470 U.S. 564, 571-73 (1985); *Howard ex Rel. Wolff v. Barnhart*, 341 F.3d. 1006 (9th Cir. 2003).

Furthermore, Judge White’s decision to not allow Appellant an opportunity to be heard was arbitrary and capricious, without consideration of the compelling and substantial evidence presented by the Appellant. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010);

People of the State of California v. F.C.C., 39 F.3d 919 (9th Cir 1994) (clearly denying a party's due process, as is the case in the instant matter).

The main issue in Appellant's argument is Oakland Promise's legal status as a 501(c)(3). Neither the District Court nor Appellees have ever adequately addressed the questions posed by Appellant as to that status, nor have they addressed Appellant's evidence showing that Oakland Promise is **not** a 501(c)(3). To cite but one example of the many questions raised and examples cited in the Opening Brief, Appellees have consistently refused to provide a Determination Letter which they should have received from the Internal Revenue Service ("IRS") attesting to Oakland Promise's status as a 501(c)(3).

A. Factual Background.

In 2015, Oakland Mayor Libby Schaff launched the Oakland Promise initiative, a program designed to ensure that "every child in Oakland graduates from high school with resources and skills to complete college." The Initiative consisted of a cross-sector partnership between the Oakland Unified School District ("OUSD"), the mayor's office and the EBCF, buttressed by a city council memorandum of understanding to implement the Initiative. It should be noted, however, that this initiative was not a city of Oakland-sponsored activity, nor was Mayor Schaaf able to secure an independent source of funding without a fiscal sponsor.

In 2016, Mayor Schaaf entered into a fiscal sponsor relationship with the Oakland Public Education Fund (“OPEF” or “The Ed Fund”) which allowed the Oakland Promise project to legally raise funds under OPEF’s 501(c)(3) status (EIN # 43-2014630). As the fiscal sponsor, OPEF held all fiduciary and legal responsibilities of Mayor Schaaf’s Oakland Promise.

A September 19, 2019 Independent Auditors’ Report prepared by Hood & Strong LLP (“H&S Report”) states that, “The Ed Fund and Oakland Promise have entered into an Exit- Project Transfer Agreement (The Agreement) dated July 1, 2019. The agreement requires the Ed Fund to assign, transfer, convey, grant and deliver to Oakland Promise any and all of the Ed Fund’s rights, title, and interest in the Project Assets. Oakland Promise assumes and agrees to pay, perform, and discharge when due, all of the Project liabilities. The Agreement also requires transfers of ownership in the investment account held by East Bay Community Foundation ... and the revocable funds held by the San Francisco Foundation Funds transfer will take place within 60 days following the July 1, 2019, agreement date. As indicated in the Fiscally Sponsored Agreement, the Ed Fund will hold 10% of the fund balance based on the Project Assets dated August 31, 2019.” (Exhibit 17 to the original Complaint in this matter filed on May 17, 2022 (Dkt. # 1), at p. 15 (p. 113 of the pdf).)

On September 11, 2019, the Ed Fund wired \$4,317,016.00 to Oakland Promise. However, Mayor Schaaf **has not provided any verifiable documentation** that another fiscal sponsor relationship has been secured.

Appellant's argument provides for prima facia facts regarding Oakland Promise which Judge White has chosen to intentionally ignore—an abuse of the court's discretion. *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011); *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003). In addition, Appellees' Answer declines to address substantial evidence. *Richardson, supra*, 402 U.S. at 401; *Gebhart, supra*, 595 F.3d at 1043; *Howard ex. Rel. Wolff, supra*, 341 F.3d. at 1011.

As stated above, many questions were raised and much evidence was shown in Appellant's Opening Brief regarding Oakland Promise's legal status as a 501(c)(3), but two items in particular stand out (neither of which has been addressed by either the District Court or Appellees):

- 1) City Attorney Barbara Parker's Legal Opinion of March 3, 2020 in which she states that, "Prior to 2019, Oakland Promise was not a Public Benefit Corporation" (see Memorandum of Points and Authorities In Opposition to (Appellees') Motion to Dismiss (Appellant's) First Amended Complaint filed on December 1, 2022 (ECF 33), Exhibit B, at p. 9 (p. 22 of the pdf)); and

2) A September 17, 2020 response by former California Attorney General Xavier Becerra to a FOIA request from Appellant, in which Becerra states, **“Oakland Promise has never filed any documentation indicating the organization is a (501(c)(3)).”** (See First Amended Complaint filed on October 31, 2022 (ECF 30), Exhibit D (ECF 30-4), page 1 (emphasis added).)

III. LEGAL STANDARD

A district court’s findings of fact are reviewed under the clearly erroneous standard. *United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997); FRCP 52(a)(6); *Easley, supra*, 532 U.S. at 242.

An abuse of discretion occurs when a district court rules in an irrational manner (*Chang, supra*, 327 F.3d. at 925) or makes an error of law (*Koon v. United States*, 518 U.S. 81, 100 (1996).)

An abuse of discretion also occurs “when the court is convinced firmly the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam). Substantial evidence means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court of appeals must consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the district

court's decision. *Richardson, supra*, 402 U.S. at 401; *Gebhart, supra*, 595 F.3d at 1043; *Howard ex Rel. Wolff, supra*, 341 F.3d at 1011 (9th Cir. 2003).

Under the legal standard for reviewing the decision of the district court for reasonableness, the reviewing court must determine whether the district court exercised its discretion, based on consideration of relevant factors and supported by the record. *California v. FCC, supra*, 75 F.3d. at 1358.

IV. SUMMARY OF ARGUMENT

A review of the factual record clearly indicates that Appellant's primary argument has been focused on the official legal status of Oakland Promise as a 501(c)(3), and that the principals of the organization should be ordered to provide the required legal documentation verifying their approval that Oakland Promise is legally a 501(c)(3).

While the District Court has discretion under FRCP 78, this discretion is not sovereign and can be exercised in an arbitrary and capricious manner, resulting in decisions by the court which are not consistent with the factual records of the case, as in the instant matter. Both the court and Appellees have attempted to reframe Appellant's arguments, as evident by Appellees' Answer; additionally, although the District Court scheduled numerous hearings to give the appearance that the procedure was fair and that the Appellant was afforded his due process, each of the hearings ended up being vacated or canceled without reason, and then on January

3, 2023 (just days before the scheduled hearing of January 10, 2023), Judge White issued his Order and Judgment (“Final Order”), again without stating a reason and without the matter ever being heard. This is a classic example of the court’s decision being arbitrary, capricious and recklessly abusive.

The factual record is clear that if not for the fiscal sponsorship agreement with OPEF (an **actual** 501(c)(3)), Oakland Promise would not have been able to do fundraising, and that at the time of Oakland Promise’s formation, the OPEF was legally responsible for all of Oakland Promise’s fiduciary affairs and for filing all of its 990 tax forms to the IRS.

In 2019, the OPEF terminated its fiscal sponsorship agreement with the principals of Oakland Promise, as noted in the Independent Audit Report of OPEF by the accounting firm of Strong and Hood. This separation was known as the “Exit- Project Transfer Agreement.” (H&S Report, Exhibit 17 to Complaint of May 17, 2022, at p. 15 (p. 113 of the pdf).) Thus, as of July 1, 2019, the OPEF no longer had any further legal responsibility for the fiduciary affairs of Oakland Promise. However, **there is no evidence of any subsequent fiscal sponsorship agreement with any other 501(c)(3), nor is there any evidence that the principals of Oakland Promise have submitted the 1023 application form to the IRS requesting consideration for a legal status designation as a 501(c)(3).** (Appellees have not stated a **single thing** in their pleadings regarding this

substantial piece of evidence, nor has the court addressed it. This issue can only be addressed in an oral hearing, which, as stated above, the District Court refused to convene, **even after such hearings had been scheduled.**)

There is no logical connection between the facts of this case and the decision made by Judge White in his Final Order. His decision was irrational, relied on impermissible factors and ignored the substantial evidence rule. *Howard ex Rel. Wolff*, 341 F.3d at 1006. And contrary to Appellees' claim in their Answer that "while Hazzard criticizes the district court for not addressing the legal status and organizational history of the Oakland Promise, those issues were not relevant to Hazzard's federal claim," in fact, **the legal status of an organization's 501(c)(3) can only be determined by the IRS and the issuance of a Determination Letter verifying such designation.** Thus, it is **clearly** a federal claim. *Jeff D.*, *supra*, 643 F.3d 278.

V. CONCLUSION

Appellant seeks equitable relief, pursuant to 50 U.S.C. § 4042, FRCP 9(a), and Federal Rules of Evidence, Rule 201(e). Appellant has presented substantial evidence and the factual record is unambiguous with regard to the focus of Appellant's primary argument, despite the efforts by Appellees and the District Court to reframe Appellant's argument.

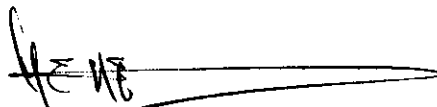
The central issue for review is the official legal status of Appellees' organization known as Oakland Promise as a 501(c)(3), and significant evidence has been provided and questions raised by Appellant in his Opening Brief as to that status.

As noted by two officers of the court, former California Attorney General Xavier Becerra and Appellee City Attorney Barbara Parker, Oakland Promise does not have a legal designation as a 501(c)(3).

In his Final Order, Judge White, while stating that he has reviewed the factual record, **made his decision without any reasonable grounds or adequate consideration of the evidence provided by Appellant**, resulting in an abuse of the court's discretion. The "discretion of the trial judge is not a whimsical, uncontrolled power, but a legal discretion which is subject to the limitations of legal principles governing the subject of its action." *People v. Jacobs*, 156 Cal.App.4th 728 (Cal.Ct.App. 2007). Considering the legal rule of equitable relief, this matter requires a reversal and a remand.

DATED: May 30, 2023

Respectfully submitted,



Gene Hazzard
Plaintiff/Appellant, *Pro Se*

CERTIFICATE OF SERVICE

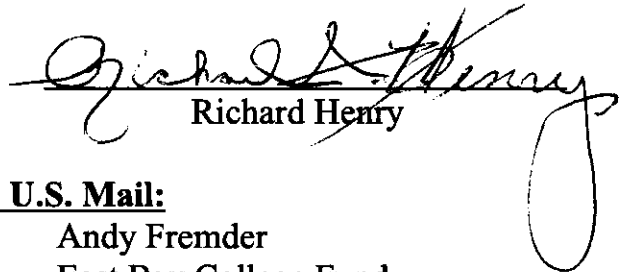
I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2550 Frances St., Oakland, CA 94601.

On May 30, 2023, I served the following documents on the parties listed below by the methods indicated below:

APPELLANT'S INFORMAL REPLY BRIEF

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: May 30, 2023


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