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Executive Council of Iowa

CAPITOL BUILDING
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February 5, 2024

Mr. Leif Olson
Chief Deputy Attorney General
Attorney General's Office
Hoover Bldg.
LOCAL

Dear Mr. Olson:

The Executive Council, in a meeting held this date, approved your request for retention of special counsel to represent District Judges of the Fifth Judicial District of Iowa, Judge David Nelmark and Judge Scott Beattie in matter McCleary v. Nelmark and Beattie (9:24-cv-00006-DLC) in United States District Court of Montana.

Firm:	Landmark Law PLLC
Attorney:	Dale Schowengerdt 7 West 6th Avenue Suite 518 Helena, MT 59601
Rate:	\$400.00 per hour

If you have any questions on the matter, please advise.

Sincerely,

Victoria Newton

Victoria Newton
Executive Secretary

BRENNA BIRD
ATTORNEY GENERAL

LEIF OLSON
CHIEF DEPUTY ATTORNEY GENERAL



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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

January 29, 2024

Victoria Newton
Executive Secretary
Executive Council
State Capitol
L O C A L

Re: Request for Special Local Counsel
McCleary v. Nelmark and Beattie, United States District Court
of Montana

Dear Victoria:

Our office requests authorization pursuant to Iowa Code section 13.7 to retain special local counsel to represent District Judges of the Fifth Judicial District of Iowa, Judge David Nelmark and Judge Scott Beattie in matter *McCleary v. Nelmark and Beattie* (9:24-cv-00006-DLC) in United States District Court of Montana.

Landmark Law PLLC, 7 West 6th Avenue, Suite 518, Helena, MT 59601, has been contacted and has agreed to serve as local counsel in this matter. Dale Schowengerdt has agreed to handle the matter at the rate of \$400.00 per hour.

Accordingly, our office recommends that Landmark Law PLLC be retained to represent Judge Beatty and Judge Nelmark in this matter. Attorney fees and costs will be paid from General Fund.

Sincerely,

Leif Olson
Chief Deputy Attorney General

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MONTANA

JAYSEN MCCLEARY,
Plaintiff,

Case No.:
Rule 57 Speedy Hearing Requested

v.

HONORABLE JUDGE DAVID NELMARK,
HONORABLE JUDGE SCOTT BEATTIE,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff Jaysen McCleary, Pro Se, and by way of Complaint for Declaratory Judgement for Violation of Due Process rights and Injunctive relief hereby alleges and avers as follows:

PARTIES

1. Plaintiff Jaysen McCleary is a citizen of Montana, is over the age of 18, is otherwise *sui juris*, and is the owner of Bela Animal Legal Defense and Rescue, LLC, a bison rescue founded in March 2016 currently located in Victor Montana.
2. Honorable Judge David Nelmark is a District Judge of the Fifth Judicial District of Iowa and a citizen of Iowa.
3. Honorable Judge Scott Beattie is a District Judge of the Fifth Judicial District of Iowa and a citizen of Iowa.
4. The above-named Defendants or their successors are sued in their official capacity only for prospective declaratory and injunctive relief.

CLERK OF SUPREME COURT
JAN 10, 2024
ELECTRONICALLY FILED

JURISDICTION AND VENUE

5. This action arises under the Constitution and laws of the United States.
6. This Court has jurisdiction pursuant to Article III of the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1332 (diversity).
7. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. § 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Honorable Court.
9. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the property related to the action is situated in the State of Montana.
10. The amount in controversy exceeds \$75,000.

RELEVANT BACKGROUND

10. This matter stems from a damages judgment against Jaysen McCleary, individually, in Polk County case LACL143177. In the underlying case, the Starbucks (Plaintiffs), with the assistance of their attorney Michael Kent, sued McCleary for a defamation that 1) never occurred because there was no publication, 2) was not and is not actionable because it is undisputed that the words the Starbucks sued McCleary for were exclusively included in official filings, during the course of litigation, which renders the action void ab initio per the immunity provided by the absolute litigation privilege ("Iowa recognizes an absolute privilege (or immunity) from liability for defamation which takes place in a judicial setting." *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991), 3) there has been no determination that the statement was false, and 4) the case was filed outside the two year statute of limitations.

11. Liability in LACL143177 was never established on the merits of the case, via a jury trial; instead, it was established in 2020 via a summary judgment in favor of the Plaintiffs entered by Honorable Judge Nelmark on the basis of a self-made standard – the “punishment” of McCleary for not addressing in writing every single deranged paragraph of a 123 plus pages Motion for summary Judgement filed by the Starbucks – when McCleary had already raised, repeatedly, for months, all the arguments and defenses that he could have possibly raised via dozens of Motions and oral arguments (including first and foremost the absolute litigation privilege defense). The punishment was inflicted illegally because there is no law in Iowa, Montana, or anywhere in the United States of America, that gives a District Judge the authority to enter summary judgment in favor of a party *for anything other than the absence of a disputed issue of material facts*. As the attached appellate brief shows, (Ex A) Starbucks themselves admitted on the record - in their Motion for Summary Judgement and at the 2020 Summary Judgement hearing - that there were disputed issues of material facts in the case; therefore, that admission alone prevented an entry of summary judgment in their favor.¹ Nonetheless, Honorable Nelmark ignored the absolute litigation privilege principle that rendered the defamation claim void ab initio and ignored that the words were never published to third party, and granted summary judgment, by crafting his own punishment-focused standard, entered summary judgment in favor of the Plaintiffs, and sent

¹ “Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). When the facts are undisputed and the only issue is the legal consequence of those facts, summary judgment may be entered. *Lubben v. Chi. Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 597 (Iowa 1997). In order for [a party] to overcome a motion for summary judgement, she must come forth with specific facts demonstrating the existence of genuine issues for the trial. Iowa R. Civ. P. 1.981(5). Inferences drawn from the facts must be resolved in favor of [the non-movant]. See *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984). An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law; an inference is not legitimate if it is based upon speculation or conjecture. *Phillips v. Covenant Clinic*, 625 N.W. 2d 714, 718 (Iowa 2001). Summary judgement is not proper if reasonable minds could draw different inferences. *Knapp*, 345 N.W.2d at 121.” *Shea v. Lorenz*, 869 N.W.2d 196, (Iowa Ct. App. 2015).

the case straight to the damage phase, thereby exempting Kent and the Starbucks from the impossible task to prove liability on a void-ab-initio action.

12. As the attached appellate brief and ruling show, (Ex A and B), the damage phase of LACL143177 was another phase of the case so riddled with abuses and illegalities on the part of the Iowa Judiciary, Kent, and the Starbucks that the Court of Appeal could not avoid vacating the 8 million dollars judgment on February 22, 2023, and remanding for a new trial. *Starbuck v. McCleary*, 993 N.W.2d 245 (Iowa Ct. App. 2023).

13. The new trial date is currently set for April 29, 2024.

14. The issues of the illegality of the defamation action and of the summary judgment entered by Honorable Nelmark remain and have been ignored by the Iowa Judiciary.

15. Despite the reversal of the money judgment, the Starbucks, their attorney Kent, and Honorables Beattie and Nelmark have continued to act as if the reversal never occurred subjecting McCleary to extremely aggressive actions to transfer control of his Bison Rescue's Montana titles to 7 vehicles and McCleary's personal assets to Kent and the Starbucks even though, since the reversal in February 2023, the Starbucks have had no standing to collect a penny from Mr. McCleary or to control a cent of his assets because there is no judgment in their favor and no creditor/debtor contractual relation between them and McCleary.

14. In 2021 Mr. Kent registered the money judgment with the Ravalli County District Court but, after the reversal, he never informed the very same Court that the Judgement had been reversed; McCleary had to intervene to inform the Court but the 8 million dollar lien is still in place on his bison rescue because Kent who had to remove it, never did so.

15. On December 6, 2021, in order to ramp up their collection efforts, the Starbucks filed another action, Polk County No. EQCE087175, [falsely] alleging fraudulent conveyance against

McCleary's LLC bison rescue and one count of piercing the corporate veil against both McCleary and Bela. In November of 2023 both cases LACL143177 and EQCE087175, were consolidated and are currently assigned to Honorable Scott Beattie.

16. Because there is no debtor creditor relationship between Bela Animal Legal Defense and Rescue LLC and the Starbucks, as well as no money judgment in favor of the Starbucks against Jaysen McCleary, the [illegal] claim in EQCE087175 is not ripe for litigation but such very material detail – which implicate due process – has simply been ignored by the Honorable Nelmark and Beattie, the Starbucks and Kent, and the proceedings in both EQCE087175 and LACL143177 have been allowed to stand and continue *on a presumption/anticipation* that the jury in the new trial will again award a money judgment to the Starbucks.

17. Iowa law instructs that such presumption is not enough to support standing: The reversal and vacation of the money judgment in the parent action (the defamation action) automatically places the Starbucks back in the exact same position they were before the judgement and renders any injury to the monetary interests that the Starbucks claim on Bela/Mr. McCleary's assets *anticipatory* which is ***not sufficient for standing***. (See *Matter of the Estate of Kitchen* and *In re Trust of Willcocksonm infra*; see also *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 870 (Iowa 2005): “the injury the plaintiffs claim is anticipatory, which, as we have said, is not sufficient for standing. See *Polk County*, 133 Iowa at 713-14, 110 N.W. at 1055.... *Nor was such action an injury in fact as distinguished from an abstract injury.* In addition, *any injury to the interest these plaintiffs claim is anticipatory and therefore not sufficient for standing.*” *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 870-71 (Iowa 2005) (emphasis added).

18. The controlling case law and lack of the constitutional requirements of standing and related Court jurisdiction have been brought to the attention of Honorables Nelmark and Beattie several times but they have ignored and/or ruled against the arguments.

15. The obsessive and illegal collection efforts and abusive Court-imposed restrictions on McCleary's finances – in the absence of a money judgment - have continued to the point that the Courts have *illegally garnished McCleary's federal disability money* and have imposed severe restrictions on the nonprofit organization Bela Animal Legal Defense and Rescue, which is not a party to the tort action in LACL143177 and cannot legally be a creditor of the Starbucks .

16. Finally, on December 29, 2023, Honorable Nelmark – who does not serve on the civil calendar any longer because he has been assigned to the criminal calendar and does not preside on EQCE087175 any longer because the case was consolidated with LACL143177 under Honorable Beattie in November 2023 -, issued an order that commands McCleary to report to Polk County Jail on January 10, 2024, to serve 23 days in jail as punishment for violating an injunction that prohibited McCleary from spending Bela's funds when all that McCleary really did was to use the charity's donations made to Bela to buy much needed grass hay for his bison.

17. As the facts of the case show, the injunction is void because it was issued on a money judgment that was not against the LLC rescue and does not exist against Jaysen McCleary any longer and has not been replaced by a new judgment, without a bond, and no affidavit. The injunction is void because the Starbucks have no viable claim on sequestering or controlling Bela's money as Bela was never a debtor of the Starbucks and never could be a debtor of the Starbucks; the money was donated to Bela for the purpose of feeding the bison and supporting the rescue, and McCleary has a legal obligation to spend that money to feed the bison, to avoid

being criminally charged in Montana for felony animal cruelty, and to honor the donors' wishes (affirmative defense of necessity).

18. The order of contempt upon which the sentence for 23 days of jail time rests is void as it was predicated upon a statute, Iowa Code 664A.7, that does not regulate the conduct that Mr. McCleary has been accused of (violating the injunction by spending assets). Therefore, the sentence is illegal.

18. This action for declaratory and injunctive relief focuses on a small set of the abuses and violation of Due Process rights suffered by Mr. McCleary in cases EQCE087175 and LACL143177 in the past few years; a small set of Orders issued by Honorables Nelmark and Beattie which McCleary respectfully asks this Honorable Court to declare void and relieve him from them because they violate his federal constitutional rights to due process.

FACTS OF THE CASE

I. Void Orders, sentences based on material misinformation or erroneous assumptions, arbitrary decisions.

19. On April 6, 2022, in Polk County Case No. EQCE087175, pursuant to Iowa Code § 684.7(1)(c), Honorable Nelmark granted in part the Starbucks's request for injunctive relief against Bela Animal Legal Defense and Rescue, ordering Bela to immediately "*refrain from spending or transferring any funds* that would result in its Bank of America Account ending in 8949 account balance dropping below its last known balance of \$60,461.13. (Ex D). Honorable Nelmark ignored the fact that when he issued the order the balance in Bela's account was already close to zero because the reality of managing the rescue is that 27 bison cause a lot of money to be spent quickly on any given day.

20. Iowa Code § 684.7(1)(c) is a statute that deals with “*Remedies of Creditors*” and contemplates injunctions.²

21. To be clear, Bela has never been a “debtor” of the Starbucks. Even before the judgment was vacated by the Court of Appeals, there was no debtor creditor relationship. See *Turner v. Cook*, 362 F.3d 1219, 1228 (9th Cir. 2004) (holding that tort judgments are generally not “debt” under the FDCPA); see also *Fleming v. Pickard*, 581 F.3d 922, 925-26 (9th Cir. 2009) (Ex E Petition for Writ of Certiorari the Iowa Supreme Court, page 3, incorporated by reference).

20. The temporary injunction was issued ex parte, without a supporting affidavit, and – more importantly - without a bond requirement, in violation of Iowa R. Civ. P. 1.1508³. “The purpose of the bond is to protect the party who is enjoined from damages resulting from an injunction that proves to have been improperly granted. See *City of Corning v. Iowa-Nebraska Light Power Co.*, 225 Iowa 1380, 1385, 282 N.W. 791, 794 (1938).” See *Financial Marketing Servs. v. Hawkeye Bank* 588 N.W.2d 450 (Iowa 1999).

21. The temporary injunction was and is still void because the underlying claim in Case No. EQCE087175 is not ripe (as there is no money judgement in favor of the Starbucks that makes McCleary and Bela their debtors), and consequently the district court does not have subject matter jurisdiction. (“If a claim is not ripe for adjudication, a court is without jurisdiction to hear

² Section 684.7 - Remedies of creditors : “1. In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in section 684.8, may obtain any of the following: ...

c. Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, any of the following:(1) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property.(2) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee.(3) Any other relief the circumstances may require.” Iowa Code § 684.7

³ The order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability to be incurred. Such bond with sureties to be approved by the clerk shall be conditioned to pay all damages which may be adjudged against the petitioner by reason of the injunction. *Rule 1.1508 - Bond*, Iowa R. Civ. P. 1.1508

the claim and must dismiss it." *Iowa Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996)).

22. Furthermore, the law is clear that all the Orders based on the reversed 2021 judgment in case no. LACL143177 should have been set aside, and the Starbucks were not and are not entitled to the benefit of any Contempt Order they sought on the basis of the reversed money judgment and/or obtained.

"[R]eversal of a judgment nullifies not only that judgment but any order based upon it." *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996). (emphasis added).

"A reversal of an entire judgment negates the judgment and any orders based upon it." *Royal Business Machines v. Lorraine Corp.*, 633 F. 2d 34. 49. Quoted and adopted in *Harris v. Pirch*, 677 F.2d 681, 689 (8th Cir. 1982) (emphasis added).

"Civil contempt proceedings are intended "to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled." *Id.* (emphasis added)

This is true even when the underlying punishment is imprisonment. "If the relief provided is a sentence of imprisonment, it is remedial if the 'defendant stands committed unless and until he performs the affirmative act required by the court's order....'" *Id.* (quoting *Hicks ex. rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721, 731 (1988)). *Spitz v. Iowa Dist. Court for Mitchell Cnty.*, 881 N.W.2d 456, 464-65 (Iowa 2016)

" The purpose of a civil contempt order is to provide a remedy for one of the parties. *Shillitani v. United States*,384 U.S. 364, 368, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *Gompers v. Bucks Stove Range Co.*,221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911). ***If the complaining party is no longer entitled to the benefit of the contempt order,***

the contempt proceedings should be terminated. Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946). . . . See *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); *Hall v. Beals*, 396 U.S. 45, 50, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969); *Shillitani v. United States, supra*, 384 U.S. at 365, 86 S.Ct. 1531” *In re Grand Jury Proceedings*, 574 F.2d 445, 447 (8th Cir. 1978).

“Federal decisions are persuasive in the absence of contrary Iowa decisions.” *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981); *Thompson v. McDonnell Douglas Corp.*, 552 F.2d 220, 223 (8th Cir. 1977); *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975). *First Judicial Dist. Dep't of Correctional Servs. v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 87 (Iowa 1982)].

McCleary’s attorneys conducted research for many hours and were unable to find Iowa case law with the exact same dicta of *Pedigo*, *Harris*, and *Parker, supra*. However, Defendant believes that there is no Iowa appellate precedent which contains the same exact dicta as *Pedigo*, *Harris*, and *Parker* most likely because the principles of law that *Pedigo*, *Harris*, and *Parker* affirm are so basic and fundamental that no Court in Iowa has ever placed itself in the position of violating such basic principles, prompting an appeal on the topic.

Still, McCleary’s attorneys found a 2009 Supreme Court of Iowa case which, rather than discussing the principle of law stated in *Pedigo* and *Harris*, applies them: “On December 6, 2007, the supreme court ruled on motions to set aside the district court's July 10, 11, and 18, 2007 orders. **It noted that the garnishment orders were based on the wrongful-death judgment, which subsequently had been vacated by the court's October 18, 2007 order. Thus, the supreme court set aside the July 10, 11, and 18, 2007 orders.**” [See *Lyon v. Heemstra*, 772 N.W.2d 15 (Iowa Ct. App. 2009) (emphasis added).

"The effect of a general and unqualified reversal of a judgment, order, or decree *is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered*, except as restricted by the opinion of the appellate court." *Phoenix Fin. Corp. v. Bridge Co.*, 237 Iowa 165, 172 (Iowa 1946). *See also Henricksen v. Henricksen (In re Estate of Henricksen)*, No. 18-0308, at *8 (Iowa Ct. App. Feb. 6, 2019)(emphasis added): "Here, the petition to vacate was granted and placed the *parties back into the same position as before the ruling.*" (emphasis added).

23. In addition, as illustrated in the paragraphs below, even before the injunction became void for lack of standing and subject matter jurisdiction (which were lost with the reversal of the money judgment in February 2023), the contempt order itself, which followed the injunction, was issued pursuant to a statute that does not regulate the conduct the contempt intended to address and is therefore void per se, ab initio, irrespective of the injunction.

24. To wit, on October 20, 2022, Honorable Nelmark found McCleary in contempt for expending Bela's funds, *pursuant to Iowa code 664A.7* (Ex F)

22. Notably, *Iowa code 664A.7* is entitled "Violation of no-contact order or protective order – contempt or simple misdemeanor penalties" and that is exactly and exclusively what the chapter controls. For the Court's reference sec. 664A.7 and related section 664A.2 (civil protective order) are included in footnote no. 3 below. ⁴ The subject matter of each statute mentioned in

⁴ " **1.** Violation of a no-contact order issued under this chapter or a protective order issued pursuant to chapter 232, 235F, 236, 236A, or 598, including a modified no-contact order, is punishable by summary contempt proceedings. **2.** A hearing in a contempt proceeding brought pursuant to this section shall be held not less than five and not more than fifteen days after the issuance of a rule to show cause, as determined by the court. **3.** If convicted of or held in contempt for a violation of a no-contact order or a modified no-contact order for a public offense referred to in section 664A.2, subsection 1, or held in contempt of a no-contact order issued during a contempt proceeding brought pursuant to section 236.11 or 236A.12, the person shall be confined in the county jail for a minimum of seven days. A jail sentence imposed pursuant to this subsection shall be served on consecutive days. No portion of the mandatory minimum term of confinement imposed by this subsection shall be deferred or suspended. A deferred judgment, deferred sentence, or suspended sentence shall not be entered for a violation of a no-contact order, modified no-contact order, or protective order and the court shall not impose a fine in lieu of the minimum

section 664A.2 has been included in parentheses.

23. The “definitions” of chapter 664 show, per se, that Honorable Nelmark found McCleary in contempt under the authority of a statute that does not regulate the conduct that Honorable Nelmark found McClearty guilty of, the violation of an injunctions to refrain from spending or transferring funds.

“For purposes of this chapter:

1. *"No-contact order"* means a court order issued in a criminal proceeding requiring the defendant to have no contact with the alleged victim, persons residing with the alleged victim, or members of the alleged victim's immediate family, and to refrain from harassing the alleged victim, persons residing with the alleged victim, or members of the alleged victim's family.

2. *"Protective order"* means a protective order issued pursuant to chapter 232, a court order or court-approved consent agreement entered pursuant to this chapter or chapter 235F, a court order or court-approved consent agreement entered pursuant to chapter 236 or 236A, including a valid foreign protective order under section 236.19, subsection 3, or section 236A.19, subsection 3, a temporary or permanent protective order or order to vacate the homestead under chapter 598, or an order that establishes conditions of release or is a protective order or sentencing order in a criminal prosecution arising from a domestic abuse assault under section 708.2A or older individual assault under section 708.2D, or a civil injunction issued pursuant to section 915.22.

sentence, although a fine may be imposed in addition to the minimum sentence.**4.** If convicted or held in contempt for a violation of a civil protective order referred to in section 664A.2, the person shall serve a jail sentence. A jail sentence imposed pursuant to this subsection shall be served on consecutive days. A person who is convicted of or held in contempt for a violation of a protective order referred to in section 664A.2 may be ordered by the court to pay the plaintiff's attorney's fees and court costs.**5.** Violation of a no-contact order entered for the offense or alleged offense of domestic abuse assault in violation of section 708.2A or for the offense or alleged offense of older individual assault in violation of section 708.2D, or a violation of a protective order issued pursuant to chapter 232, 235F, 236, 236A, 598, or 915 constitutes a public offense and is punishable as a simple misdemeanor. Alternatively, the court may hold a person in contempt of court for such a violation, as provided in subsection 3.**6.** A person shall not be held in contempt or convicted of violations under multiple no-contact orders, protective orders, or consent agreements, for the same set of facts and circumstances that constitute a single violation.” Iowa Code § 664A.7.

Iowa Code § 664A.2 **1.** This chapter applies to no-contact orders issued for violations or alleged violations of sections 708.2A, 708.2D, 708.7, 708.11, 709.2, 709.3, and 709.4, and any other public offense for which there is a victim [criminal statutes] **2.** A protective order issued in a civil proceeding shall be issued pursuant to chapter 232 [juvenile justice] , 235F [elder abuse] , 236 [domestic abuse], 236A [sexual abuse], 598 [dissolution of marriage], or 915 [Victim of Criminal Offenses Right Act]. Punishment for a violation of a protective order shall be imposed pursuant to section 664A.7.

3. "*Victim*" means a person who has suffered physical, emotional, or financial harm as a result of a public offense, as defined in section 701.2, committed in this state.

Iowa Code § 664A.1

24. Therefore, the order of contempt of October 20, 2022, is void and unenforceable because the conduct it restrains is not among the grounds for which protective orders are specifically authorized under Iowa Code Iowa code 664A.7 . *See Ney v. Ney*, 891 N.W.2d 446, 450 (Iowa 2017) for the same proposition and for the proposition that statutory requirements supersede equitable requirements.

25. Whereas the contempt order is void because it is based on a statute that does not contemplate the violation McCleary has been accused of committing, the finding of contempt also violated McCleary due process right when Honorable Nelmark intentionally and callously ignored McCleary's affirmative defense of necessity thereby intentionally depriving McCleary of his due process right to meet the charges by defense.

22. On several occasions, not just during the hearing that led to the contempt order of October 20, 2022, McCleary explained to Honorable Nelmark that feeding and caring for 27 bison is no small endeavor, both physically and financially, and that he had and has to expend all Bela's funds to feed the bison and to provide them veterinary care. The idea that the sanctuary can function by constantly maintaining a balance of \$60,000 or \$48,000 in its account is simply unrealistic as on any single day something can happen that requires an expenditure of several thousands of dollars AND the account has never carried a balance that high. The only reason the money was that high in the balance that Honorable Nelmark used as a reference for his Order was that, at that particular time, the balance reflected the sale of an old truck that McCleary had just replaced with a stronger new truck.

22. McCleary brought the Iowa animal neglect law to the attention of Honorable Nelmark: “A person is guilty of animal abuse if the person intentionally injures, maims, disfigures, or destroys an animal owned by another person, in any manner, including intentionally poisoning the animal.” Iowa Code § 717B.2 (2019). A person is guilty of animal neglect if the person “[f]ails to supply the animal during confinement with a sufficient quantity of food or water” or “deprives [the animal] of necessary sustenance ... by any means which causes unjustified pain, distress, or suffering.” *Id.* § 717B.3(1)(a), (c). Proof of serious injury or death is not required. *See id.* § 717B.3(3) (distinguishing a serious misdemeanor, which requires proof of serious injury or death, with a simple misdemeanor, which does not). *State v. Morrise*, 949 N.W.2d 649, n.2 (Iowa Ct. App. 2020).

23. The State of Montana, where McCleary lives and where the sanctuary is located, similarly instructs that: **(1)** A person commits the offense of cruelty to animals if, without justification, the person knowingly or negligently subjects an animal to mistreatment or neglect by: ... **c)** failing to provide an animal in the person's custody with:**(i)** food and water of sufficient quantity and quality to sustain the animal's normal health;**(ii)** minimum protection for the animal from adverse weather conditions, with consideration given to the species;**(iii)** in cases of immediate, obvious, serious illness or injury, licensed veterinary or other appropriate medical care.” Mont. Code § 45-8-211.

24. The justification provided by McCleary for expending Bela’s funds is legal justification ordinarily called “defense of necessity” in both Iowa and Montana. A person that acts out of necessity is compelled to act and therefore cannot *willfully* violate and injunction. (Besides, as illustrated in the Cause of Actions below, an individual cannot be held in contempt for violating a void order).

25. In finding McCleary guilty of one count of contempt, Honorable Nelmark was solely focused on the movement of funds in Bela's bank account. (1/2/23 Order at 2) *he paid no attention to what those funds had been used for*. With that omission the required standard in Iowa that willful violation must be proven beyond a reasonable doubt was certainly not met.

26. Furthermore, Honorable Nelmark's reaction to the necessity defense repeatedly raised by McCleary included a question of did you see "some sort of hungry buffalo exception in my Order?", remarks like: "continuing to run a nonprofit, which, however good it may be, there is no fundamental right to run a nonprofit agency to rescue buffalo." (9/29/23 Hearing Tr. at 66, 70) and written comments like: " Even if Mr. McCleary's reasons for spending the funds were noble, as he claims, such conduct was willful in that it was contrary to a clear Order of this Court and was done in disregard for the rights of the Plaintiffs on whose behalf the injunction was issued." (EX .. Order of December 29, 2023, page 2). The remarks demonstrate intentional and callous disregard for the defense of necessity and prove that Honorable Nelmark intentionally did not verify what the funds were used for and intentionally issued a sentence based on material disinformation and/or omissions.

23. On November 29, 2022, Honorable Nelmark issued the sentence for the contempt as follows: "The Court imposes a \$500 fine pursuant to Iowa Code § 665.4(2) and sentences Mr. McCleary to 30 days in jail, with mittimus withheld for all but seven days. *The remaining 23 days will deemed purged if there are no further violations of Court Orders prior to the trial in this matter.*"

(Ex G)

22. The sentence is illegal because it is based on a void order.

23. The sentence as phrased is procedurally illegal because the standard for holding an individual in contempt of Court is *willful* violation, not just violations.

24. On October 2, 2023, Honorable Nelmark – again – ignored the defense of necessity raised by McCleary and found Mr. McCleary in contempt of the court for spending Bela’s assets. (Ex H)

25. The Order also contains contradictory remarks. In page 4 of the Order, Honorable Nelmark wrote:

a) “The Court finds that the following sentence is an appropriate sentence *to punish Mr. McCleary and/or to deter him from future conduct.*”; and

b) “IT IS FURTHER ORDERED ADJUDGED AND DECREED THAT Jaysen McCleary is sentenced to 60 days in jail. *Mr. McCleary may purge* the 60 days (or any remaining portion thereof) by filing with the Clerk of Court \$48,136.08. Such amount shall be held in escrow until the conclusion of this case.”

25. The first statement (to punish and deter) indicates that Honorable Nelmark intended to hold Mr. McCleary in criminal contempt; however, the second sentence that allows for purging indicates that the contempt was civil.⁵

⁵ “There are two types of contempt: civil and criminal. Many courts have recognized that civil contempt proceedings in which there is the possibility of imprisonment are quasi-criminal in nature and thus require certain due process rights. *See, e.g., Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 708 (Iowa 1986). The distinction between civil and criminal contempt is based upon the purpose of the contempt proceeding, namely whether it is meant to punish or meant to coerce. *See* 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.7(e), at 68 (2003).

Criminal contempt is punitive in nature. *Id.* These proceedings are intended to “preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders.” *Id.* Civil contempt, on the other hand, is remedial and coercive in nature. *Id.* The parties who have the chief interest in the outcome of civil contempt proceedings are individuals whose private rights or remedies are being protected by the proceedings. *Id.* Civil contempt proceedings are intended “to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled.” *Id.* This is true even when the underlying punishment is imprisonment. “If the relief provided is a sentence of imprisonment, it is remedial if the ‘defendant stands committed unless and until he performs the affirmative act required by the court’s order...’” *Id.* (quoting *Hicks ex. rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721, 731 (1988)).” *Spitz v. Iowa Dist. Court for Mitchell Cnty.*, 881 N.W.2d 456, 464-65 (Iowa 2016)

“A sentence is illegal if it is so ambiguous that it fails to reveal its meaning "with fair certainty." *United States v. Alverson*, 666 F.2d 341, 348 (9th Cir. 1982) (citing *United States v. Moss*, 614 F.2d 171, 175, 176 n. 4 (8th Cir. 1980))

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

26. The Order of October 2, 2023 is ambiguous as includes language for both criminal and civil contempt.

27. McCleary relied on the portion of the Order that was more favorable to him and placed \$48,136.08 in escrow with the Court to avoid jail.

28. On December 29, 2023, Honorable Nelmark – who no longer serves on the civil calendar – took the time to issue yet another Order against McCleary. Honorable Nelmark revived his void November 29, 2022 order to hold that McCleary must now serve the 23 days he had suspended on November 29, 2022, and must report to jail in Des Moines to serve his sentence on January 11, 2024. (Ex I)

29. Beyond the illegality of the sentence, jailing McCleary for almost a month right before trial provides a tactical advantage to the Starbucks because it enables them to undermine McCleary’s trial preparation, especially at a time where McCleary’s last counsel withdrew and McCleary needs time to find alternate counsel and greatly prejudices McCleary in the preparation for trial.

30. In his Order of December 29, 2023, Honorable Nelmark made the following remarks in support of his decisions to order McCleary to report to jail:

a) “Mr. McCleary argues that no jail time is necessary because he has recently complied with the Court’s Orders and promises to do so in the future. The Court notes that Mr. McCleary recently placed funds in escrow, but that was only to avoid serving 60-days on a different contempt action.” (12.29.23 Order at 2). Therefore, the record shows that Honorable Nelmark first provided McCleary with the opportunity to purge and then held it against McCleary that he decided to purge when it is clear that the very purpose of a civil contempt is to allow for the “[contemnors] to carry the keys of their prison in their own pockets” *See Hicks v. Feiock*, 485 U.S. 624 (1988).

b) “The other asserted compliance by Mr. McCleary was in providing titles to certain vehicles to Plaintiffs’ counsel. *In its October 11, 2023, Order*, the Court required that the titles be turned over *by October 18, 2023*. Mr. McCleary did not comply with the Order. Rather, on October 17, 2023, he filed a Motion for Additional Time, and on October 18, 2023, he filed a Motion to Amend or Enlarge. It was only when that Motion was denied on October 21, 2023, that Mr. McCleary took steps to turn over the titles.” – To be clear, the Order forced McCleary to turn over titles to his vehicles – Montana property worth around \$300,000 - *when there is no money judgement in favor of the Starbucks nor any collection action and any order intended for the Starbucks to exercise dominion and control over the Bison rescue’s assets is illegal*. In addition, Honorable Nelmark’s remarks indicate that a litigant’s decision to avail himself of available legal procedure and remedies is a decision that must be held against that litigant. No law exists in the US that supports such principle. Finally, Iowa Rule of Civil Procedure 1.904 (2) allows for a motion to reconsider, enlarge, or amend another court order, ruling, judgment, or decree and prescribes that the motion must be filed within 15 days after the filing of the order, judgment, or decree to which it is directed. In August of 2020 Honorable Nelmark issued a standing order that

allowed McCleary double time based on McCleary's disability. As the record shows, Honorable Nelmark's Order of October 11, 2023, violates both rule 1.904 (2) and the Court's own standing order.

c) "On October 19, 2023, Mr. McCleary again emailed the Court, twice. The first email had been intended for Mr. McCleary's counsel and the second email was an apology to the Court for sending the first email. On October 20, 2023, Mr. McCleary emailed the Court again. This time, he included a "courtesy copy" of a pro se pleading he filed the same day. The email was clearly a violation of the Court's prior orders. Further, given that Mr. McCleary and Bela Animal Legal Defense and Rescue have legal counsel, Mr. McCleary should not have made the pro se filing in the first place. Although the Court has not imposed additional sanctions for these emails, they further illustrate an ongoing lack of compliance with the Court's orders." This portion of the Order ignores the fact that, on October 20, 2023, the rapport between McCleary and his counsel had deteriorated and McCleary had decided to go Pro Se until he could find new counsel.

d) "the Court also issued a November 7, 2023, Order Granting Plaintiffs' Motion for Sanctions based on Mr. McCleary sending an unprofessional email to Plaintiffs' counsel on October 17, 2023." To be clear: Mr. Kent - for years now - has included the following image



in every email communication that he sent to anyone in cases EQCE087175 and LACL143177. Mr. Kent has no business with any bison. On the other hand, Mr. McCleary once suffered 6

broken ribs in an incident with one of the bison that live at the sanctuary, an incident that almost killed him. Honorable Nelmark is well aware of the incident and has sufficient information to understand that Mr. Kent uses that image only to mock Mr. McCleary for that incident; still Honorable Nelmark sanctioned McCleary for one single email and has taken no adverse action towards Mr. Kent for sending out hundreds of communications with that highly inappropriate and offensive image for years.

31. In sum the reasons for ordering McCleary to report to jail on January 10, 2024 – on the basis of a void order – are pretextual and fall short of satisfying the standards for holding an individual in contempt.

II. Deprivation of Meaningful Opportunity to be Heard.

32. As already mentioned, on November 29, 2022, McCleary was sentenced in a separate contempt action to 30 days in jail, with mittimus for all but seven days withheld. The court further ordered that the “remaining 23 days will be deemed purged if there are no further violations of Court Orders prior to trial in this matter.” (11/29/22 Order). Towards the end of the September 29, 2023 contempt hearing (which addressed the September 7 contempt applications and the February 16 contempt application), Kent, with no prior notice, requested that McCleary be ordered to serve the remaining 23-day jail sentence from the November 29, 2022 order.

(9/29/23 Hearing Tr. at 73-75).

33. McCleary’s counsel pointed out that the request was not part of the hearing set for that day and asked that the matter be set for a separate hearing. (9/29/23 Hearing Tr. at 76-78). The court did not set a separate hearing.

34. McCleary, who was in Montana (where Bela and its rescued animals are located), was listening to the hearing by phone, but was not able to be heard. Had he known that Plaintiffs

were seeking to impose 23 days in jail from the November 29, 2022 order, he would have made every effort to participate in person, or to at least be able to testify in his defense. Moreover, he is entitled to the ADA accommodation of realtime court reporting. McCleary's counsel realized his failure to request realtime court reporting mid-hearing, and asked the court for the accommodation. (9/29/23 Hearing Tr. at 54). The court declined – even though it granted Plaintiffs' counsel a 45-minute break so he could go home and find documents that he failed to properly file. (9/29/23 Hearing Tr. at 49, 55). So, not only was McCleary not able to meaningful participate in the hearing regarding a jail sentence he had no notice of, but he was unable to follow what was being said due to the lack of realtime court reporting. To top it off, there were some phone issues which prevented McCleary from being heard at all.

35. October 17, McCleary filed a motion for rehearing, citing technical issues that prevented McCleary from being heard on the phone and at one point being cut off from the hearing altogether. (10/17/23 Motion for Rehearing). McCleary further pointed out his right to actively participate in the contempt hearing against him. This motion was denied. Further, the court only generally found that McCleary “continued to violate” the court's prior orders via his conduct in December 2022 – without citing to any specific conduct. (10/18/23 Order at 1). Again, there is no evidence that any conduct was a willful disobedience to any court order. Instead, the record supports that McCleary was fulfilling his duties to Bela, its donors, and its rescued animals by continuing to provide necessary care for the animals. There is not sufficient evidence to find that McCleary's conduct was willful disobedience, and certainly not to the degree that would warrant 23 days in jail.

36. On October 18, the court entered an order finding that McCleary “continued to violate the Court’s prior Orders via his conduct in December 2022.” (10/18/23 Order). The court ordered McCleary to report to the Polk County Jail by November 6, 2023, to serve 23 days in jail.

37. That Order was stayed pending appeals and eventually re-confirmed with the December 29, 2023 described above.

III. Illegal garnishment of McCleary disability money

38. On April 5, 2022, Honorable Beattie issued an Order Condemning Funds and commanding Release of Funds to the Plaintiffs (the Starbucks). A garnishment of McCleary’s funds followed.

39. The Order illegally condemned McCleary’s disability money.

40. Specifically, the \$12,828.03 was sourced from a deposit from Social Security Disability on June 16, 2021 in the amount of \$2,255 and a deposit from MassMutual Disability on July 6, 2021 in the amount of \$12,028.35.

41. “Under 42 U.S.C. § 407, social security benefits are neither assignable nor subject to other legal process. *See Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973).” *In re Marriage of Schonts*, 345 N.W.2d 145, 146 (Iowa Ct. App. 1983)

42. Furthermore, in relevant parts, Iowa Code § 627.6 instructs that: “A debtor who is a resident of this state may hold exempt from execution the following property: ...

6(b). A benefit or indemnity paid under an accident, health, or disability insurance policy

....

8t(a) A social security benefit, unemployment compensation, or any public assistance

8(c) A disability or illness benefit.”

43. McCleary, pro se, had resisted the garnishment as being from exempt funds in multiple filings and identified the exempt nature of the funds garnished, including:

a. On July 13, 2021, McCleary stated that his motion “puts the Plaintiff on notice

that the money they are garnishing is exempt from the collection because it is solely from disability.”

- b. On September 20, 2021, McCleary again noticed the court that the Starbucks had garnished disability money.
- c. On November 4, 2021, the McCleary filed a Motion for Immediate Stay of Execution and Garnishment until Hearing, in which McCleary identified that the garnishment was of “disability and primary source of income.”

44. After counsel for McCleary entered their appearance, the following filings were made identifying exempt income:

- a. On July 12, 2022, a Notice and Affidavit of Property Exempt from Execution identified “disability income from Social Security” and “MassMutual disability payments.”
- b. On September 30, 2022, A Response to Supplement to Motion to Levy on Assets was filed which identified and explained the exempt nature of the federal disability payments, and the MassMutual disability payments.
- c. On September 30, 2022, an Appendix to Defendant’s Response to Supplement to Motion to Levy on Assets was filed, including the Social Security Administration documents and the MassMutual disability records demonstrating that the income received is disability income.
- d. On October 17, 2022, a Supplement to Notice of Exemptions was filed which again detailed the income that is received by Defendant is disability income.

45. On March 7, 2023, Honorable Judge Beattie entered two orders recognizing the Receiver should not control the income from Social Security Disability and Massachusetts Mutual

disability because it is exempt pursuant to 42 USC §407(a), and Iowa Code §627.6(8).

46. The Orders makes it clear that Thomas and Anysley Starbucks never had the right to collect any funds from Social Security or MassMutual in the first place, and that the garnishment was therefore granted in violation of federal and state law.

47. In addition, on February 22, 2023, the Court of Appeals of Iowa reversed and vacated the 2021 money judgment upon which the execution proceeding rests. "The effect of a general and unqualified reversal of a judgment, order, or decree *is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered*, except as restricted by the opinion of the appellate court." *Phoenix Fin. Corp. v. Bridge Co.*, 237 Iowa 165, 172 (Iowa 1946). *See also Henricksen v. Henricksen (In re Estate of Henricksen)*, No. 18-0308, at *8 (Iowa Ct. App. Feb. 6, 2019)(emphasis added): "Here, the petition to vacate was granted and placed the *parties back into the same position as before the ruling.*" (emphasis added).

48. Therefore, pursuant to the Order of April 5, 2022, which was illegal ab initio because it conflicts with the controlling federal and state statutes, and pursuant to a no longer existent right to collect, the Starbucks have illegally been holding disability money that belongs to McCleary, with full knowledge of the plain illegality of their actions.

49. To these days, the Starbucks have not returned to McCleary the illegally garnished funds and Honorable Beattie has issued no Order that compels the Starbucks to return the illegally ganrished disability money to McCleary.

STANDING

50. McCleary has suffered several injuries in fact on account of Defendants' actions. There is a causal connection between the injuries and the Defendants' conduct complained of.

51. It is certain not just likely that the injuries would be redressed by a favorable decision
52. Under the circumstances, there exists a clear, substantial, and continuing threat to McCleary's due process rights, his liberty and life, his finances, and mental wellbeing as long as the current controversies of due process remain unresolved.
53. Accordingly, McCleary needs and seeks resolution of the due process issues raised in this complaint for declaratory and injunctive relief. In particular, McCleary seeks the intervention of this Court to avoid being forced to report to jail in Iowa to serve a sentence illegally imposed as described above and for the return of his property illegally taken from him via a number of void orders. On at least such basis, McCleary is entitled to declaratory and injunctive relief.

COUNT I

Violation of due process rights to a fair determination of the willfulness requirement beyond a reasonable doubt (Honorable Nelmark)

54. McCleary incorporates by reference the preceding paragraphs.
55. Per Iowa law the standard of proof in contempt proceedings is beyond a reasonable doubt and a party requesting a finding of contempt retains the burden to prove willfulness beyond a reasonable doubt. See *Christensen v. Iowa Dist. Court*, 578 N.W.2d 675, 678 (Iowa 1998).
56. "A 'reasonable doubt' is a fair doubt derived from the evidence or lack of evidence in the case. *United States v. Post* [D.C.], 128 Fed. 950, 957." See *State v. Wong Sun*, 114 Mont. 185 (Mont. 1943).
57. As stated above, in finding McCleary guilty of one count of contempt, Honorable Nelmark was solely focused on the movement of funds in Bela's bank account. (1/2/23 Order at 2); *he paid no attention to what those funds had been used for*. The Starbucks produced no evidence that the funds were not used to feed the bison or for the activities of the rescue, Honorable

Nelmark did not ask the Starbucks to produce that evidence and, when McCleary tried to introduce that evidence, by raising the defense of necessity, Honorable Nelmark intentionally disparaged and ignored the defense. The omissions and lack of evidence made it impossible for the Starbucks to meet their burden of persuasion beyond a reasonable doubt. Nonetheless, Honorable Nelmark found *beyond a reasonable doubt* that McCleary *willfully* violated the [void] injunction on Bela's funds.

58. "The due process clause of the United States Constitution forbids fundamental unfairness in the use of evidence." *Blackburn v. Alabama* (1969), 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242. Here the prejudice to McCleary is found in Honorable Nelmark's fundamentally unfair decision to focus solely on the movements of the funds in Bela's account and *to pay no attention to what those funds had been used for, which was the defense of necessity that McCleary tried to interpose.*

59. "It is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." Justice Marshall in *Board of Regents v. Roth*, 408 U.S. 564, 589.

60. An actual and justifiable controversy exists because Honorable Nelmark ordered McCleary to report to jail in Iowa on January 11, 2024, and to serve 23 days on the basis of that fundamental unfairness in the use of evidence during the contempt proceedings. Since McCleary's liberty is at stake here the justifiable controversy is of constitutional magnitude because, as the Supreme Court of Montana stated in *Nygaard v. Hillstead and Coyle* (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645: "It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, Section 17.

61. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark violated McCleary's due process rights when he paid no attention to how McCleary used the funds he was ordered not to spend and found that McCleary's violation was willful beyond a reasonable doubt.

COUNT II

Violation of due process rights to a sentence not based on material omissions or misinformation

(Honorable Nelmark)

62. McCleary incorporates by reference the preceding paragraphs.

63. As stated above, in finding McCleary guilty of one count of contempt, Honorable Nelmark was solely focused on the movement of funds in Bela's bank account. (1/2/23 Order at 2); *he paid no attention to what those funds had been used for*. The Starbucks produced no evidence that the funds were not used to feed the bison or for the activities of the rescue, Honorable Nelmark did not ask the Starbucks to produce that evidence and, when McCleary tried to introduce that evidence, by raising the defense of necessity, Honorable Nelmark intentionally disparaged and ignored the defense. The omissions and lack of evidence made it impossible for the Starbucks to meet their burden of persuasion beyond a reasonable doubt. Nonetheless, Honorable Nelmark found *beyond a reasonable doubt* that McCleary *willfully* violated the [void] injunction on Bela's funds.

64. "A defendant has a due process right "to explain, argue, and rebut any information which may lead to a deprivation of life or liberty." *Simmons*, ¶ 11. Due process guarantees against a sentence predicated on misinformation. *Simmons*, ¶ 11. Misinformation will justify relief from a sentence only if that sentence was based "misinformation of constitutional magnitude." *Bauer v. State*, 1999 MT 185, ¶ 20, 295 Mont. 306, 983

P.2d 955 (quoting *Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948), and *United States v. Tucker*, 404 U.S. 443, 447, 92 S. Ct. 589, 592 (1972)).” *City of Polson v. Lovato*, DA 16-0497, 3-4 (Mont. 2017).

65. When Honorable Nelmark intentionally decided to focus on the movements in Bela’s fund and to pay no attention to what those funds were used for, and then sentenced McCleary to 23 days in jail on the basis of that deliberate unfair use of the evidence, Honorable Nelmark issued a sentence predicated on *deliberate* misinformation. He simply refused to pay attention to the correct information that the Iowa and US Constitution required him to pay attention to.
66. Honorable Nelmark’s remarks that his order did not have “some sort of hungry buffalo exception” and that “continuing to run a nonprofit, which, however good it may be, there is no fundamental right to run a nonprofit agency to rescue buffalo.” (9/29/23 Hearing Tr. at 66, 70) and written comments like: “ Even if Mr. McCleary’s reasons for spending the funds were noble, as he claims, such conduct was willful in that it was contrary to a clear Order of this Court and was done in disregard for the rights of the Plaintiffs on whose behalf the injunction was issued”, prove that Honorable Nelmark deliberately chose to issue a sentence predicated on misinformation and material omissions, in contravention to the Iowa and US Constitution.
67. Since the Iowa and US Constitution required Honorable Nelmark to pay attention to the information and evidence that he chose to ignore, and he did ignore the evidence with the obvious intent to eventually send McCleary to jail, the misinformation and material omissions were of constitutional magnitude.
68. “It is procedural due process that is our fundamental guarantee of fairness, our protection

against arbitrary, capricious, and unreasonable government action." Justice Marshall in *Board of Regents v. Roth*, 408 U.S. 564, 589.

69. An actual and justifiable controversy exists because Honorable Nelmark ordered McCleary to report to jail in Iowa on January 11, 2024, and to serve 23 days on the basis of sentences predicate on misinformation and material omissions. Since McCleary's liberty is at stake here the justifiable controversy is of constitutional magnitude because, as the Supreme Court of Montana stated in *Nygaard v. Hillstead and Coyle* (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645: "It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, Section 17.
70. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark violated McCleary's due process rights when he chose to issue a sentence predicated on material omissions and misinformation.

COUNT III

Violation of due process right to meaningful opportunity to be heard

71. McCleary incorporates by reference the preceding paragraphs.
72. Towards the end of the September 29, 2023 contempt hearing Kent, with no prior notice, requested that McCleary be ordered to serve the remaining 23-day jail sentence form the November 29, 2022 order. (9/29/23 Hearing Tr. at 73-75).
73. McCleary's counsel pointed out that that request was not part of the hearing set for that day and asked that the matter be set for a separate hearing. (9/29/23 Hearing Tr. at 76-78). Honorable Nelmark *did not set a separate hearing*.
74. McCleary, who was in Montana was listening to the hearing by phone, but was not able to be heard. Had he known that Plaintiffs were seeking to impose 23 days in jail from the

November 29, 2022 order, he would have made every effort to participate in person, or to at least be able to testify in his defense. Moreover, he is entitled to the ADA accommodation of realtime court reporting. McCleary's counsel realized his failure to request realtime court reporting mid-hearing, and asked the court for the accommodation. (9/29/23 Hearing Tr. at 54). *Honorable Nelmark declined* – even though it granted Plaintiffs' counsel a 45-minute break so he could go home and find documents that he failed to properly file. (9/29/23 Hearing Tr. at 49, 55). Therefore, not only was McCleary not able to meaningful participate in the hearing regarding a jail sentence he had no notice of, but he was unable to follow what was being said due to the lack of realtime court reporting. To top it off, there were some phone issues which prevented McCleary from being heard at all.

75. October 17, 2023, McCleary filed a motion for rehearing, citing technical issues that prevented McCleary from being heard on the phone and at one point being cut off from the hearing altogether. (10/17/23 Motion for Rehearing). McCleary further pointed out his right to actively participate in the contempt hearing against him. *Honorable Nelmark denied the Motion*.
76. On October 18, the court entered an order finding that McCleary “continued to violate the Court’s prior Orders via his conduct in December 2022.” (10/18/23 Order). The court ordered McCleary to report to the Polk County Jail by November 6, 2023, to serve 23 days in jail.
77. That Order was stayed pending appeals and eventually re-confirmed with the December 29, 2023 discussed above.
78. Due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner.” *See, e.g., Smith v. Board of Horse Racing*, 1998 MT 91, ¶ 11, 288 Mont. 249, ¶ 11, 956 P.2d 752, ¶ 11 (quoting *Connell v. State, Dept. of Social Services* (1997), 280 Mont.

491, 496, 930 P.2d 88, 91; *Small v. McRae* (1982), 200 Mont. 497, 506, 651 P.2d 982, 987).

79. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v.*

Kelly (1970), 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (quoting *Grannis v.*

Ordean (1914), 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363).

80. An actual and justifiable controversy exists because Honorable Nelmark ordered McCleary to report to jail in Iowa on January 11, 2024 and to serve 23 days on the basis of contempt proceedings where Honorable Nelmark deprived McCleary of a meaningful opportunity to be heard. Since McCleary's liberty is at stake here the justifiable controversy is of constitutional magnitude because, as the Supreme Court of Montana stated in *Nygaard v. Hillstead and Coyle* (1979), 180 Mont. 524, 528-529, 591 P.2d 643, 645: "It is fundamental that "[n]o person shall be deprived of life, liberty, or property without due process of law." 1972 Mont. Const. Art. II, Section 17.

81. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark violated McCleary's due process rights when he chose to deprive McCleary of a meaningful opportunity to be heard at the September 29, 2023 contempt proceedings and when he denied McCleary's Motion for re-hearing.

COUNT IV

Violation of due process rights through illegal garnishment of disability money (Honorable Beattie)

82. McCleary incorporates by reference the preceding paragraphs.

83. On April 5, 2022, Honorable Beattie issued an Order Condemning Funds and commanding Release of Funds to the Plaintiffs (the Starbucks). A garnishment of McCleary's funds followed.

84. The Order illegally condemned McCleary's disability money.
85. "Under 42 U.S.C. § 407, social security benefits are neither assignable nor subject to other legal process. *See Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973)." *In re Marriage of Schonts*, 345 N.W.2d 145, 146 (Iowa Ct. App. 1983).
86. In relevant parts, Iowa Code § 627.6 instructs that: "A debtor who is a resident of this state may hold exempt from execution the following property: ...
- 6(b).** A benefit or indemnity paid under an accident, health, or disability insurance policy
 -
 - 8t(a)** A social security benefit, unemployment compensation, or any public assistance
 - 8(c)** A disability or illness benefit."
87. McCleary denounced the illegality in multiple filings.
88. Finally, on March 7, 2023, Honorable Judge Beattie entered two orders *recognizing* the Receiver should not control the income from Social Security Disability and Massachusetts Mutual disability because it is exempt pursuant to 42 USC §407(a), and Iowa Code §627.6(8).
89. However, despite the Orders of March 2023, Honorable Beattie never issued an Order that compelled the Starbucks to return the funds to McCleary and the Starbucks never returned that money to McCleary. Therefore, the illegality of Honorable Beattie's garnishment Order stands and so does the injury McCleary suffered on account of it.
90. "[W]here . . . failure to follow statutory requirements has been clearly established, we must conclude that due process rights have been abridged." *Isern v. Summerfield* Mont. 461 (Mont. 1998).
91. "It is procedural due process that is our fundamental guarantee of fairness, our protection

against arbitrary, capricious, and unreasonable government action." Justice Marshall in *Board of Regents v. Roth*, 408 U.S. 564, 589.

92. An actual and justifiable controversy exists because McCleary has been deprived of his property in violation of a federal statute and his due process rights.

93. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Beattie violated McCleary's due process rights when he ordered the garnishment of McCleary disability money and he continues to violate McCleary's due process rights by limiting his orders to a declaration that the garnishment was illegal without issuing any order for the return of that money to McCleary.

COUNT V

Declaratory and Injunctive relief against Honorable Nelmark's Order to report to jail

93. McCleary incorporates by reference the preceding paragraphs.

94. On April 6, 2022, in Polk County Case No. EQCE087175, pursuant to Iowa Code § 684.7(1)(c), Honorable Nelmark granted in part the Starbucks's request for injunctive relief against Bela Animal Legal Defense and Rescue, ordering Bela to immediately "*refrain from spending or transferring any funds* that would result in its Bank of America Account ending in 8949 account balance dropping below its last known balance of \$60,461.13.

95. Iowa Code § 684.7(1)(c) is a statute that deals with "*Remedies of Creditors*" and includes injunction not to spend funds.

96. To be clear, Bela a LLC has never been a "debtor" of the Starbucks. Even before the judgment was vacated by the Court of Appeals, there was no debtor creditor relationship. See *Turner v. Cook*, 362 F.3d 1219, 1228 (9th Cir. 2004) (holding that tort judgments are generally not "debt" under the FDCPA); see also *Fleming v. Pickard*, 581 F.3d 922, 925-26 (9th Cir. 2009).

97. The temporary injunction was issued ex parte, without a supporting affidavit, and – more importantly - without a bond requirement, in violation of Iowa R. Civ. P. 1.1508.

98. “The purpose of the bond is to protect the party who is enjoined from damages resulting from an injunction that proves to have been improperly granted. See *City of Corning v. Iowa-Nebraska Light Power Co.*, 225 Iowa 1380, 1385, 282 N.W. 791, 794 (1938).” See *Financial Marketing Servs. v. Hawkeye Bank* 588 N.W.2d 450 (Iowa 1999). Therefore, the granting of the injunction without bond violated McCleary’s procedural and substantive due process rights.

99. The temporary injunction was and is still void because the underlying claim in Case No. EQCE087175 is not ripe (as there is no money judgement in favor of the Starbucks that makes McCleary and Bela their debtors), and consequently the district court does not have subject matter jurisdiction. (“If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it.” *Iowa Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996)).

100. Furthermore, the law is clear that all the Orders based on the reversed 2021 judgment in case no. LACL143177 should have been set aside, and the Starbucks were not and are not entitled to the benefit of any Contempt Order they sought on the basis of the reversed money judgment and/or obtained. “[R]eversal of a judgment nullifies not only that judgment but any order based upon it.” *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996). (emphasis added).

101. Despite all of the above, Honorable Nelmark has illegally utilized the void injunction to find McCleary in contempt of the Court for violating it. The violations were not willful as described above; however, Honorable Nelmark ignored evidence and the lack thereof and still

found McCleary's in contempt for expending Bela's funds, [in violation of McCleary's due process rights.]

102. Then Honorable Nelmark used the contempt findings to force McCleary to place \$48,136.08 in escrow with the Court (to avoid going to jail for 60 days).

103. *And* Honorable Nelmark used the contempt findings to also force McCleary to place in escrow with Michael Kent, the attorney for the Starbucks, not even the Court, the titles of McCleary's vehicles, Montana property, a total value of \$300,000.

104. Finally, Honorable Nelmark also used the void order of contempt to order McCleary to report to jail on January 11, 2024, and serve 23 days.

105. Like Iowa law, the law of 9th circuit too holds that "Unless a claim is ripe, [the Courts] do not have jurisdiction to hear it." *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947); and *Hart and Wechsler's The Federal Courts and the Federal System*, 145-146 (2d ed. 1973)." *See Austin v. City and County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). The claim in Case No. EQCE087175 is not ripe, therefore the injunction (issued in violation of McCleary's due process rights) was an order that Honorable Nelmark entered without jurisdiction.

106. "The order of the court, entered in the absence of jurisdiction, is void." *State v. District Court* (1926), 75 Mont. 147, 242 P. 959. *In re the Marriage of Schultz v. Schultz*, 184 Mont. 245 (Mont. 1979)

107. "An order issued by a court without jurisdiction is void on its face: "[i]f [an] order is void on its face for want of jurisdiction, *it is the duty of this and every other court to disregard it.*" *Wilson v. Carr* , 41 F.2d 704, 706 (9th Cir. 1930) (emphasis added).

108. Also, “A party cannot be held in contempt for disobeying an order which the court had no authority to make.” *Phillips v. Loberg* (1980), Mont., 607 P.2d 561, 564, 37 St.Rep. 401.

109. “It is, of course, elementary that there can be no contempt for disobedience of a void order, (*State ex rel. O’Grady v. District Court*, 61 Mont. 346, 202 P. 575.)” *State ex Rel. Costello v. District Court* 284 P. 128 (Mont. 1930).

110. An actual and justifiable controversy exists because McCleary is in the process of being deprived of his liberty in violation of Iowa, Montana, and Federal Law and of his due process rights.

111. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark’s Orders finding McCleary in contempt for expending Bela’s funds are void and he cannot be held in contempt for violating them; that Honorable Nelmark’s Order of December 29, 2023, which instructs McCleary to report to jail on January 11, 2024, is also void and unenforceable, and McCleary seeks this Court’s injunctive relief against all such Orders pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure 65.

COUNT VI

Declaratory and Injunctive relief for the return of the Montana property, the titles to McCleary’s vehicles

112. McCleary incorporates by reference the preceding paragraphs.

113. On April 6, 2022, in Polk County Case No. EQCE087175, pursuant to Iowa Code § 684.7(1)(c), Honorable Nelmark granted in part the Starbucks’s request for injunctive relief against Bela Animal Legal Defense and Rescue, ordering Bela to immediately “*refrain from spending or transferring any funds* that would result in its Bank of America Account ending in 8949 account balance dropping below its last known balance of \$60,461.13.

114. Iowa Code § 684.7(1)(c) is a statute that deals with “*Remedies of Creditors*” and contemplates injunctions to halt or prohibit the expenditure of funds.

115. To be clear, Bela has never been a “debtor” of the Starbucks. Even before the judgment was vacated by the Court of Appeals, there was no debtor creditor relationship. See *Turner v. Cook*, 362 F.3d 1219, 1228 (9th Cir. 2004) (holding that tort judgments are generally not “debt” under the FDCPA); see also *Fleming v. Pickard*, 581 F.3d 922, 925-26 (9th Cir. 2009).

116. The temporary injunction was issued ex parte, without a supporting affidavit, and – more importantly - without a bond requirement, in violation of Iowa R. Civ. P. 1.1508.

117. “The purpose of the bond is to protect the party who is enjoined from damages resulting from an injunction that proves to have been improperly granted. See *City of Corning v. Iowa-Nebraska Light Power Co.*, 225 Iowa 1380, 1385, 282 N.W. 791, 794 (1938).” See *Financial Marketing Servs. v. Hawkeye Bank* 588 N.W.2d 450 (Iowa 1999). Therefore, the granting of the injunction without bond violated McCleary’s procedural and substantive due process rights.

The temporary injunction was and is still void because the underlying claim in Case No.

EQCE087175 is not ripe (as there is no money judgement in favor of the Starbucks that makes McCleary and Bela their debtors), and consequently the district court does not have subject matter jurisdiction. (“If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it.” *Iowa Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996)).

118. Furthermore, the law is clear that all the Orders based on the reversed 2021 judgment in case no. LACL143177 should have been set aside, and the Starbucks were not and are not entitled to the benefit of any Contempt Order they sought on the basis of the reversed money judgment and/or obtained. “[R]eversal of a judgment nullifies not only that judgment but any

order based upon it." *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996).
(emphasis added).

119. Despite all of the above, Honorable Nelmark has illegally utilized the void injunction to find McCleary in contempt of the Court for violating it. The violations were not willful as described above; however, Honorable Nelmark ignored evidence and the lack thereof and still find McCleary's in contempt for expending Bela's funds, [in violation of McCleary's due process rights.]

120. Then Honorable Nelmark used the contempt findings to force McCleary to place \$48,136.08 in escrow with the Court (to avoid going to jail for 60 days)

121. *And* Honorable Nelmark used the contempt findings to also force McCleary to place in escrow with Michael Kent, the attorney for the Starbucks, not even the Court, the titles of all the vehicles that McCleary owns, Montana property, a total value of \$300,000.

122. Finally, Honorable Nelmark also used the void order of contempt to order McCleary to report to jail on January 11, 2024, and serve 23 days.

123. Like the Iowa law, the law of 9th circuit too holds that "Unless a claim is ripe, [the Courts] do not have jurisdiction to hear it." *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947); and *Hart and Wechsler's The Federal Courts and the Federal System*, 145-146 (2d ed. 1973)." *See Austin v. City and County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). The claim in Case No. EQCE087175 is not ripe, therefore the injunction (issued in violation of McCleary's due process rights) was an order that Honorable Nelmark entered without jurisdiction.

124. “The order of the court, entered in the absence of jurisdiction, is void.” *State v. District Court* (1926), 75 Mont. 147, 242 P. 959. *In re the Marriage of Schultz v. Schultz*, 184 Mont. 245 (Mont. 1979)

125. “An order issued by a court without jurisdiction is void on its face: “[i]f [an] order is void on its face for want of jurisdiction, *it is the duty of this and every other court to disregard it.*” *Wilson v. Carr* , 41 F.2d 704, 706 (9th Cir. 1930) (emphasis added).

126. Also, “A party cannot be held in contempt for disobeying an order which the court had no authority to make.” *Phillips v. Loberg* (1980), Mont., 607 P.2d 561, 564, 37 St.Rep. 401.

127. “It is, of course, elementary that there can be no contempt for disobedience of a void order, (*State ex rel. O’Grady v. District Court*, 61 Mont. 346, 202 P. 575.)” *State ex Rel. Costello v. District Court* 284 P. 128 (Mont. 1930).

128. An actual and justifiable controversy exists because McCleary has been deprived of his property without due process of law, in violation of Iowa, Montana, and Federal Law and of his due process rights.

129. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark’s Orders finding McCleary in contempt for expending Bela’s funds are void and McCleary cannot be held in contempt for violating them; that Honorable Nelmark’s Order of October 11, 2023 which instructed McCleary to place the titles of all his vehicles with the Starbucks’ attorney Michael Kent, is also void and unenforceable, and McCleary seeks this Court’s injunctive relief against all such Orders pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure 65.

COUNT VII
Declaratory and Injunctive relief for the return of \$48,136.08.

130. McCleary incorporates by reference the preceding paragraphs.

131. On April 6, 2022, in Polk County Case No. EQCE087175, pursuant to Iowa Code § 684.7(1)(c), Honorable Nelmark granted in part the Starbucks’s request for injunctive relief against Bela Animal Legal Defense and Rescue, ordering Bela to immediately “*refrain from spending or transferring any funds* that would result in its Bank of America Account ending in 8949 account balance dropping below its last known balance of \$60,461.13.

132. Iowa Code § 684.7(1)(c) is a statute that deals with “*Remedies of Creditors*” and contemplates injunctions to halt or prohibit the expenditure of funds

133. To be clear, Bela has never been a “debtor” of the Starbucks. Even before the judgment was vacated by the Court of Appeals, there was no debtor creditor relationship. See *Turner v. Cook*, 362 F.3d 1219, 1228 (9th Cir. 2004) (holding that tort judgments are generally not “debt” under the FDCPA); see also *Fleming v. Pickard*, 581 F.3d 922, 925-26 (9th Cir. 2009).

134. The temporary injunction was issued ex parte, without a supporting affidavit, and – more importantly - without a bond requirement, in violation of Iowa R. Civ. P. 1.1508.

135. “The purpose of the bond is to protect the party who is enjoined from damages resulting from an injunction that proves to have been improperly granted. See *City of Corning v. Iowa-Nebraska Light Power Co.*, 225 Iowa 1380, 1385, 282 N.W. 791, 794 (1938).” See *Financial Marketing Servs. v. Hawkeye Bank* 588 N.W.2d 450 (Iowa 1999). Therefore, the granting of the injunction without bond violated McCleary’s procedural and substantive due process rights.

136. The temporary injunction was and is still void because the underlying claim in Case No. EQCE087175 is not ripe (as there is no money judgement in favor of the Starbucks that makes McCleary and Bela their debtors), and consequently the district court does not have subject matter jurisdiction. (“If a claim is not ripe for adjudication, a court is without jurisdiction to hear

the claim and must dismiss it." *Iowa Coal Mining Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996)).

137. Furthermore, the law is clear that all the Orders based on the reversed 2021 judgment in case no. LACL143177 should have been set aside, and the Starbucks were not and are not entitled to the benefit of any Contempt Order they sought on the basis of the reversed money judgment and/or obtained. "**[R]eversal of a judgment nullifies not only that judgment but any order based upon it.**" *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996). (emphasis added).

138. Despite all of the above, Honorable Nelmark has illegally utilized the void injunction to find McCleary in contempt of the Court for violating it. The violations were not willful as described above; however, Honorable Nelmark ignored evidence and the lack thereof and still find McCleary's in contempt for expending Bela's funds, [in violation of McCleary's due process rights.]

139. Then Honorable Nelmark used the contempt findings to force McCleary to place \$48,136.08 in escrow with the Court (to avoid going to jail for 60 days).

140. *And* Honorable Nelmark used the contempt findings to also force McCleary to place in escrow with Michael Kent, the attorney for the Starbucks, not even the Court, the titles of all the vehicles that McCleary owns, Montana property, a total value of \$300,000.

141. Finally, Honorable Nelmark also used the void order of contempt to order McCleary to report to jail on January 11, 2024, and serve 23 days.

142. Like Iowa law, the law of 9th circuit too holds that "Unless a claim is ripe, [the Courts] do not have jurisdiction to hear it." *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947); and *Hart and Wechsler's The Federal Courts*

and the Federal System, 145-146 (2d ed. 1973).” See *Austin v. City and County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). The claim in Case No. EQCE087175 is not ripe, therefore the injunction (issued in violation of McCleary’s due process rights) was an order that Honorable Nelmark entered without subject matter jurisdiction.

143. “The order of the court, entered in the absence of jurisdiction, is void.” *State v. District Court* (1926), 75 Mont. 147, 242 P. 959. *In re the Marriage of Schultz v. Schultz*, 184 Mont. 245 (Mont. 1979)

144. “An order issued by a court without jurisdiction is void on its face: “[i]f [an] order is void on its face for want of jurisdiction, *it is the duty of this and every other court to disregard it.*” *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) (emphasis added).

145. Also, “A party cannot be held in contempt for disobeying an order which the court had no authority to make.” *Phillips v. Loberg* (1980), Mont., 607 P.2d 561, 564, 37 St.Rep. 401.

146. “It is, of course, elementary that there can be no contempt for disobedience of a void order, (*State ex rel. O’Grady v. District Court*, 61 Mont. 346, 202 P. 575.)” *State ex Rel. Costello v. District Court* 284 P. 128 (Mont. 1930).

147. An actual and justifiable controversy exists because McCleary has been deprived of his property without due process of law, in violation of Iowa, Montana, and Federal Law and of his due process rights.

148. The requested Relief is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Nelmark’s Orders finding McCleary in contempt for expending Bela’s funds are void and he cannot be held in contempt for violating them; that Honorable Nelmark’s Order of October 29, 2023 which instructed McCleary to place \$48,136.08 in escrow with the Court, is also void and

unenforceable and McCleary seeks this Court's injunctive relief against all such Orders pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure 65.

COUNT VIII

Declaratory and Injunctive relief for the return of Montana property, McCleary's disability money

149. McCleary incorporates by reference the preceding paragraphs.

150. On April 5, 2022, Honorable Beattie issued an Order Condemning Funds and commanding Release of Funds to the Plaintiffs (the Starbucks). A garnishment of McCleary's funds followed.

151. The Order illegally condemned McCleary's disability money.

152. "Under 42 U.S.C. § 407, social security benefits are neither assignable nor subject to other legal process. *See Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973)." *In re Marriage of Schonts*, 345 N.W.2d 145, 146 (Iowa Ct. App. 1983).

153. In relevant parts, Iowa Code § 627.6 instructs that: "A debtor who is a resident of this state may hold exempt from execution the following property: ...

6(b). A benefit or indemnity paid under an accident, health, or disability insurance policy

....

8t(a) A social security benefit, unemployment compensation, or any public assistance **8(c)** A disability or illness benefit."

154. On March 7, 2023, Honorable Judge Beattie entered two orders recognizing the Receiver should not control the income from Social Security Disability and Massachusetts Mutual disability because it is exempt pursuant to 42 USC §407(a), and Iowa Code §627.6(8).

155. However, Honorable Beattie never issued any Order to compel the return of the funds and to this date the Starbucks have not returned the funds to McCleary.

156. “Under federal law an act occurring in violation of a statutory mandate is void ab initio.” *Ewert v. Bluejacket*, 259 U.S. 129, 138, 42 S.Ct. 442, 444, 66 L.Ed. 858 (1922) *Cabazon Band of Mission Ind. v. City of Indio* 694 F.2d 634 (9th Cir. 1982).
157. “An order is void if it is issued by a court in a manner inconsistent with the due process clause of the Fifth Amendment. See, e.g., *Blumer*, 66 B.R. at 113; *In re Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (citing 11 C. Wright and A. Miller, *Federal Practice and Procedure*, section 2862, page 200, (1973)).” *Sillman v. Walker (In re Sillman)*, Case No. 09-22188-E-13 (Bankr. E.D. Cal. Jan. 21, 2014)
158. “A void order is one "of no legal force or effect * * * having no legal force.” (*Forrester MacGinniss v. Boston etc. M. Co.*, 29 Mont. 397, 74 P. 1088, 1091.)” *State ex Rel. McKenzie v. District Court* 107 P.2d 885 (Mont. 1940)
159. An actual and justifiable controversy exists because McCleary has been deprived of his property in violation of a federal and state statute and his due process rights.
160. The relief requested is appropriate. Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, McCleary seeks a declaratory judgment from this Court that Honorable Beattie’s Order which allowed for the garnishment of his disability money is void ab initio and has no legal force and McCleary seeks this Court’s injunctive relief for the return of that money to him pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure 65.

RULE 57 REQUEST FOR SPEEDY HEARING

Pursuant to Rule 57 of the Federal Rules of Civil Procedure, “The court may order a speedy hearing of a declaratory judgment action.” McCleary hereby respectfully requests a speedy hearing of the matters presented in this Complaint based on the urgency of such matters.

PRAYER FOR RELIEF

WHEREFORE, McCleary respectfully requests that the Court:

1. Enter judgment according to the declaratory and injunctive relief sought;
2. Award McCleary its costs in this action;
3. Award such further relief to which McCleary may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

DATED: January 9, 2024

Respectfully submitted,

s/Jaysen McCleary

Jaysen McCleary
1763 Red Crow Road
Victor, Montana 59875