FEDERAL PRACTICE

JUDICIAL LAW

■ **Appellate jurisdiction; appeal from denial of motion for temporary restraining order.** Rejecting defendants' argument that it lacked jurisdiction over one plaintiff's appeal from the denial of the plaintiffs' motion for a temporary restraining order, the 8th Circuit found that the district court's order "had the practical effect of denying a preliminary injunction." ***Wise v. Dept. of Transportation***, ___ F.3d ___ (8th Cir. 2019).

■ **Sanctions order vacated pending reconsideration.** Last month this column noted the imposition of sanctions against a *qui tam* defendant by Magistrate Judge Rau. The defendant appealed the order, and Judge Ericksen subsequently vacated the order and sent the dispute to Magistrate Judge Leung, with instructions to reconsider the motion for sanctions "in light of Defendant's objections and with the benefit of oral argument." ***United States ex rel. Higgins v. Boston Scientific Corp.***, 2019 WL 6328135 (D. Minn. 11/25/2019).

■ **Sanctions; informal collection of documents after discovery deadline.** Where the plaintiffs obtained releases from members of the plaintiff class, sought documents from third parties "long after" the close of fact discovery and the filing of dispositive motions, and then produced 10,000 documents to the defendant, Magistrate Judge Thorson rejected plaintiffs' arguments that they had merely supplemented their document production as Fed. R. Civ. P. 26(e) requires and that their "informal" document collection was not governed by deadlines in the scheduling order. Instead, the magistrate judge determined that "[f]act discovery is fact discovery," found that sanctions were warranted, and prohibited all parties from utilizing the documents in the litigation. ***Murphy ex rel. Murphy v. Harpstead***, 2019 WL 6650510 (D. Minn. 12/6/2019).

■ **Motion to amend to add additional parties; standing to oppose.** Where the plaintiffs sough to amend their complaint to add additional parties, Magistrate Judge Menendez found that the existing defendant had standing to oppose the motion on the basis of futility, where it was "virtually certain" that the same argument would be raised by the prospective defendants if the amendment was allowed. ***Brewster v. United States***, 2019 WL 6318613 (D. Minn. 11/26/2019).

■ **Duplicative counterclaim dismissed.** Where a law firm that represented the plaintiff in a personal injury action sought a *quantum meruit* recovery, Judge Montgomery denied that request, the law firm's appeal was pending in the 8th Circuit, the law firm was sued for malpractice in a separate action by the same plaintiff, and the law firm asserted a counterclaim seeking a *quantum meruit* recovery, Judge Montgomery granted the plaintiff's motion to dismiss the counterclaim, finding that the counterclaim was "duplicative" of the law firm's claim in the first litigation. Judge Montgomery also rejected the law firm's request that she stay—rather than dismiss—the counterclaim. ***Trice v. Napoli Shkolnik PLLC***, 2019 WL 6324867 (D. Minn. 11/26/2019).

■ **Fed. R. Civ. P. 45(f); "exceptional circumstances;" motion to quash subpoena transferred.** Magistrate Judge Menendez transferred a motion to quash a subpoena to the district where the underlying action is pending pursuant to Fed. R. Civ. P. 45(f), noting that a number of other subpoena-related disputes had already been transferred, and finding "a significant risk of inconsistent decisions" if the motion was not transferred. ***Pete v. Big Picture Loans, LLC***, 2019 WL 6250715 (D. Minn. 11/22/2019).

■ **Fed. R. Civ. P. 30(b)(6); irrelevant topics.** Reversing an order by Magistrate Judge Rau, Judge Brasel granted a defendant's motion for a protective order, finding that three topics listed in the plaintiff's Fed. R. Civ. P. 30(b)(6) deposition notice were not relevant to the plaintiff's claims. ***Kroening v. Del Monte Fresh Produce N.A., Inc.***, 2019 WL 6524893 (D. Minn. 12/4/2019).

■ **Attempt to amend allegations in opposition to summary judgment motion rejected.** Granting defendants' motions for summary judgment, Judge Magnuson rejected the plaintiff's attempt to raise new allegations in her opposition to the motions, finding that "[a] plaintiff may not amend a complaint in briefs or in oral argument, but must file an amended complaint." ***Uradnik v. Inter Faculty Association***, 2019 WL 6608784 (D. Minn. 12/5/2019).

■ **Multiple decisions relating to costs.** Where the parties discussed the formats in which ESI would be produced, but did not reduce an agreement to writing or include any agreement in their Rule 26(f) report, Judge Tostrud held that defendant was nevertheless entitled to recover more than $3,300 for the costs of producing ESI as single-page TIFFs with OCR under 28 U.S.C. §1920(4). ***Wing Enterprises, Inc. v. Tricam Indus., Inc.***, 2019 WL 5783485 (D. Minn. 11/6/2019).

Rejecting the plaintiff's argument that the cost of a hearing transcript ordered by the defendants in conjunction with his appeal was not taxable because "no evidence was presented at the hearing," Judge Nelson affirmed the clerk's taxation of costs for the transcript. ***Kushner v. Buhta***, 2019 WL 5677869 (D. Minn. 11/1/2019).

Judge Nelson found that an award of costs to the defendants in an ADA action was "inappropriate" where the action was dismissed for lack of jurisdiction and no judgment was entered in favor of the defendants, meaning that the defendants were not the "prevailing party." ***Dalton v. Simonson Station Stores, Inc.***, 2019 WL 5566712 (D. Minn. 10/29/2019).

In contrast, Judge Tostrud found that ADA defendants were prevailing parties where the action was dismissed for lack of subject matter jurisdiction and judgment was entered, and also rejected the plaintiff's argument that the clerk's cost judgment should be vacated based on his inability to pay. ***Smith v. Bradley Pizza, Inc.***, 2019 WL 6650475 (D. Minn. 12/6/2019).

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IMMIGRATION LAW

JUDICIAL LAW

■ **Applications for asylum by those who travel through a third county without first seeking relief there.** As previously noted in the November 2019 edition of *Bench & Bar*, the U.S. Supreme Court issued an order on 9/11/2019 staying the U.S. District Court's injunction (enjoining the government from implementing its 7/16/2019 rule barring asylum eligibility for individuals entering or attempting to enter the United States through

the southern border while traveling through a third country without first seeking relief in that country) during the pendency of the court litigation on the mandatory bar to asylum eligibility. ***Barr, el al. v. East Bay Sanctuary Covenant, et al.,*** 588 U.S. ____ (2019). *https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf*

Since then, the U.S. District Court for the Southern District of California has granted plaintiffs' motions for provisional class certification and a preliminary injunction enjoining the government from relying on the 7/16/2019 rule to deny asylum eligibility to those non-Mexican asylum seekers who were "metered" at the United States-Mexico border *before* the ban went into effect. "Metering" is a procedure employed by the U.S. Department of Homeland Security restricting the number of asylum seekers accepted for inspection and processing at U.S. ports of entry—leaving them to thus wait and stay in Mexico. "[A]lthough the regulation clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019, the Government is now attempting to apply the Asylum Ban beyond its unambiguous constraints to capture the subclass of Plaintiffs who are, by definition, not subject to this rule. The Government's position that the Asylum Ban applies to those who attempted to enter or arrived at the southern border seeking asylum before July 16, 2019 contradicts the plain text of their own regulation." ***Al Otro Lado, Inc., et al. v. McAleenan, et al.***, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. 11/19/2019). *https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/litigation_aol_order_granting_plantiffs_motion_for_professional_class_certification.pdf*

■ **Willful injury causing bodily harm is a "crime of violence" and hence an aggravated felony.** The 8th Circuit Court of Appeals held that the petitioner's conviction for willful injury causing bodily harm in violation of Iowa Code §708.4(2) was indeed a "crime of violence" under 18 USC §16(a) and thus qualified as an aggravated felony under INA §101(a)(43)(F), rendering the petitioner ineligible for asylum and withholding of removal. It further held the Board of Immigration Appeals' grant of the Department of Homeland Security's appeal of the immigration judge's grant of deferral of removal under the Con-

vention Against Torture was warranted. ***Jima v. Barr***, No. 19-1104, *slip op.* (8th Cir. 11/8/2019). *https://ecf.ca8.uscourts.gov/opndir/19/11/191104P.pdf*

■ **Immigrants and proof of health coverage.** On 10/4/2019, the president issued Proclamation No. 9945, suspending the entry of immigrants who "will financially burden the United States healthcare system," effective 11/3/2019 at 12:01 a.m. (EDT). That means any individual applying for an immigrant visa after that date and time must (with certain limited exceptions) provide evidence to the consular officer at the visa interview that (s)he will be covered by approved health insurance within 30 days of U.S. entry or has financial resources to pay for "reasonable foreseeable medical costs." Otherwise, the visa application will be denied. **84 *Fed. Reg.*, 53991-94** (10/9/2019). *https://www.govinfo.gov/content/pkg/FR-2019-10-09/pdf/2019-22225.pdf*

On 10/30/2019, a complaint was filed contending, among other things, that the proclamation seeks to rewrite our nation's immigration laws by creating a new ground of inadmissibility rejected by Congress while imposing requirements that are extremely difficult, if not impossible, to meet. In short, "the Proclamation contravenes well-established and duly enacted immigration and healthcare laws, exceeds the scope of the President's statutory authority, and violates Constitutional separation of powers and equal protection principles." ***Doe, et al.* v. *Trump, et al.***, No. 3:19-cv-01743-SB (D. Or. 10/30/2019). *https://www.courtlistener.com/recap/gov.uscourts.ord.148990/gov.uscourts.ord.148990.1.0_2.pdf*

On 11/26/2019, in response to the plaintiffs' motion, the U.S. District Court for the District of Oregon, Portland Division, issued a preliminary injunction enjoining the defendants from taking any action to implement or enforce Presidential Proclamation No. 9945 until the court resolves the case on the merits or until such time as the parties agree to amend, supersede, or terminate the preliminary injunction. ***Doe, et al.* v. *Trump, et al.***, No. 3:19-cv-01743-SI (D. Or. 11/26/2019). *https://www.courtlistener.com/recap/gov.uscourts.ord.148990/gov.uscourts.ord.148990.95.0.pdf*

ADMINISTRATIVE ACTION

■ **USCIS announces utilization of H-1B electronic registration process for upcoming 2021 cap season.** On 12/6/2019, USCIS announced the implementation of a registration process for the upcoming H-1B lottery. Employers intending to file H-1B cap-subject petitions for the upcoming 2021 cap season, including those petitions eligible for the advanced degree exemption, will be required to first electronically register and pay a $10 H-1B registration fee. The initial registration period for employers (or their authorized representatives) to register with basic information about the employer and each sponsored worker will run from 3/1/2020 through 3/20/2020. The H-1B random selection process will be applied to the registrations with those selected then eligible to file H-1B cap-subject petitions. *https://www.uscis.gov/news/news-releases/uscis-announces-implementation-h-1b-electronic-registration-process-fiscal-year-2021-cap-season*

■ **Poland designated a Visa Waiver Program country.** On 11/8/2019, the acting secretary of the Department of Homeland Security, Kevin McAleenan, published notice that Poland had been designated for inclusion in the Visa Waiver Program, effective 11/11/2019. Eligible citizens, nationals, and passport holders from designated Visa Waiver Programs may apply for admission to the United States at U.S. ports of entry for a period of 90 days or less for business or pleasure without first obtaining a nonimmigrant visa, provided they are otherwise eligible for admission. Other countries included in the Visa Waiver Program are: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom (i.e., British citizens who have the unrestricted right of permanent abode in the United Kingdom, consisting of England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man). **84 *Fed. Register*, 60316-18** (11/8/2019). *https://www.govinfo.gov/content/pkg/FR-2019-11-08/pdf/2019-24328.pdf*

■ **Continued retention of Temporary Protected Status for beneficiaries from El Salvador, Honduras, Nepal, Nicaragua, Sudan, and Haiti.** On 11/4/2019, the U.S. Department of Homeland Security announced that in order to continue its compliance with the preliminary injunction orders of the U.S. District Court for the Northern District of California in *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. 10/3/2018) and the U.S. District Court for the Eastern District of New York in *Saget, et al. v. Trump, et al.*, No. 18-cv-1599 (E.D.N.Y. 4/11/2019), and with the order of the U.S. District Court for the Northern District Court of California to stay proceedings in *Bhattarai v. Nielsen*, No. 19-cv-00731 (N.D. Cal. 3/12/2019), beneficiaries of Temporary Protected Status (TPS) designations for El Salvador, Honduras, Nepal, Nicaragua, and Sudan will continue to retain their TPS status while the preliminary injunction under *Ramos* remains in effect. Beneficiaries of TPS designation for Haiti will retain their TPS status while either of the preliminary injunctions under *Ramos* or *Saget* remain in effect. As a result, TPS designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan will continue through 1/4/2021. **84 *Fed. Register*, 59403-10** (11/4/2019). *https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24047.pdf*

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PROBATE & TRUST LAW

JUDICIAL LAW

■ **Minn. Stat. §524.3-721: Compensation paid by an estate.** The estate of Prince Rogers Nelson hired appellants NorthStar Enterprises Worldwide Inc. and CAK Entertainment Inc. to act as entertainment advisors to monetize the estate's intellectual property. Appellants entered into an agreement with the estate whereby they would receive a 10% commission on all money paid to the estate pursuant to agreements entered into as a result of services provided by appellants. Appellants were to receive the commission "simultaneously with the payment to" the estate of any amounts due under such agreements. The estate entered into a contract with Jobu Presents LLC to organize and promote a tribute concert and a contract with Universal Music Group for the distribution and marketing of certain of Prince's recordings. Jobu and Universal made initial payments totaling over $33 million and appellants collectively received over $3 million in commissions. The agreements with Jobu and Universal ultimately fell apart and the estate refunded the entire amount received.