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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM M. WINDSOR, Plaintiff-Appellant, v. SEAN M. BOUSHIE; UNIVERSITY OF MONTANA, Defendants-Appellees.	No. 14-36042 D.C. No. 9:13-cv-00311-DLC MEMORANDUM[*]

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, Chief Judge, Presiding

Submitted January 18, 2017[**]

Before: TROTT, TASHIMA, and CALLAHAN, Circuit Judges.

William M. Windsor appeals pro se from the district court's order declaring him a vexatious litigant and its judgment dismissing his diversity action as frivolous. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of discretion. *Denton v. Hernandez,* 504 U.S. 25, 33-34 (1992) (dismissal of a complaint as frivolous); *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1056-57 (9th Cir. 2007) (vexatious litigant order). We affirm.

The district court did not abuse its discretion in dismissing Windsor's action as frivolous because Windsor's complaint, liberally constured, lacks an arguable basis in fact. *See Denton*, 504 U.S. at 32-33 (a claim lacks an arguable basis in fact "when the facts alleged rise to the level of the irrational or the wholly incredible . . . .").

The district court did not abuse its discretion in declaring Windsor a vexatious litigant and imposing a pre-filing order against him because it gave Windsor notice and an opportunity to be heard, developed an adequate record for review, made findings regarding his frivolous litigation history, and narrowly tailored the restrictions in the pre-filing order. *See Molski*, 500 F.3d at 1056-61 (discussing factors to consider before imposing pre-filing restrictions). Contrary to Windsor's contention, the district court satisfied the requirement of providing an opportunity to be heard by written submission rather than an oral or evidentiary hearing.

We reject as meritless Windsor's various contentions regarding Magistrate Judge Lynch.

Appellee Boushie's request for sanctions, set forth in his answering brief, is denied. *See* Fed. R. App. P. 38 (requiring a separate motion for fees); *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 828 (9th Cir. 2009) (a request made in an appellate brief does not satisfy Rule 38).

AFFIRMED.