UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM M. TURNER,

Plaintiff-Appellant,

v.

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBHAS SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN DOES OF KOB

No. 17-2105
(D.C. No. 1:15-CV-00339 RB-SCY)
(D. N.M.)

CHANNEL 4 NEWS OF ALBUQUERQUE; KOB-TV; MARY SMITH, New Mexico Assistant Attorney General,

Defendants-Appellees

ORDER AND JUDGMENT*

(Filed Dec. 12, 2018)

Before **LUCERO**, **HOLMES**, and **EID**, Circuit Judges.

Plaintiff-appellant Dr. William Turner sued various municipal and state officials and others for allegedly violating his constitutional rights in connection with proceedings against him for practicing engineering without a license. The district court dismissed Turner's suit as untimely under New Mexico's statute of limitations. We affirm.

I.

The Middle Rio Grande Conservancy District ("MRGCD" or the "District") is a municipal corporation

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

that manages water in the Albuquerque Basin. Turner, a hydrogeologist, was elected to a four-year term on the MRGCD Board of Directors ("MRGCD Board"). App. at 14.[1] During a public meeting of the MRGCD Board in February 2006, Turner gave a presentation accusing certain board members of official malfeasance. *Id.* at 19. In particular, Turner alleged that the former Executive Director of the MRGCD Board, Subhas Shah,[2] had authorized the deposit of rock rubble in ditch roads within the MRGCD. *Id.* Turner drew from mathematical formulas to argue that fortifying ditch roads with rock rubble impeded water flow and could lead to flooding in ditch levees. App. at 321. Turner's presentation allegedly made clear that he was not an engineer and recommended that the Board consult a licensed engineer before taking corrective measures. *Id.*

In April 2007, the District's public information officer, Dennis Domrzalski, filed a complaint against Turner with the Board of Licensure for Professional Engineers ("BOL"). *Id.* at 20. Shah allegedly dictated the complaint and ordered Domrzalski to file it. *Id.* The complaint alleged that Turner had practiced engineering without a license during his presentation to the MRGCD Board. *Id.* at 20, 322. On February 26, 2010, the BOL concluded that Turner had practiced

---

[1] Turner's two-volume, consecutively paginated Appendix is cited as "App." followed by the page number.

[2] The district court's Memorandum and Opinion and the MRGCD's brief spell Subhas Shah's name as we have here. That appears to be the correct spelling notwithstanding a variant spelling on the district court's caption.

engineering without a license, *id.* at 21, 322, imposed a civil penalty, and directed Turner to pay the costs of the BOL administrative hearing, *id.* at 322. *See* N.M. Stat. Ann. §§ 61-23-2 & 3. Turner appealed the BOL decision to the Second Judicial District Court of New Mexico. *Id.* At Turner's request, the court stayed enforcement of the BOL decision during the appeal.

Determining that the BOL decision was not supported by substantial evidence, the court reversed. *Id.* at 323. The court further ruled that the Board's application of the licensure statute violated Turner's First Amendment right to share his concerns about an engineering issue at a public meeting. *Id.* The New Mexico Attorney General's office appealed and, in April 2013, the New Mexico Court of Appeals affirmed. *See N.M. Bd. of Licensure for Prof'l Eng'rs & Prof'l Surveyors v. Turner*, 303 P.3d 875, 883 (N.M. Ct. App. 2013).

On April 23, 2015, over five years after the BOL decision, Turner filed this suit under 42 U.S.C. § 1983 and § 1985 in the United States District Court for the District of New Mexico. App. at 302. His complaint alleged that the District, Shah, Domrzalski, and unnamed District employees (collectively, "MRGCD Defendants") violated, among other things, his constitutional right to free speech.[3] *See id.* at 22. The

[3] The amended complaint also named as defendants former BOL executive director Eduard Ytuarte, former BOL chair of the engineering committee John Romero, and New Mexico Assistant Attorney General Mary Smith (collectively, "State Defendants"). In three orders, the district court ruled that Turner's suit against the State Defendants was untimely. The court also held that

MRGCD Defendants moved to dismiss. *Id.* at 298. The district court granted the motion. The court ruled, in relevant part, that Turner's claims under § 1983 and § 1985 accrued when the BOL decision issued on February 26, 2010, and thus were time barred by New Mexico's three-year statute of limitations.[4] *Id.* at 302–03.

Turner contends that the statute of limitations did not start until appellate review of the BOL decision was completed in 2013, making this federal civil rights suit timely. Reviewing the district court's contrary determination de novo, *see Leathers v. Leathers*, 856 F.3d 729, 757 (10th Cir. 2017), we affirm.

Ytuarte and Romero were protected by judicial immunity, and that Smith was protected by prosecutorial immunity. *See Turner v. Middle Rio Grande Conservancy Dist.*, No. 1:15-CV-00339 RB/SCY, 2017 WL 4542877, at *3 (D. N.M. Feb. 10, 2017) (Ytuarte); *Turner v. Middle Rio Grande Conservancy Dist.*, No. 1:15-CV-00339 RB/SCY, 2017 WL 4534836, *3 (D. N.M. Feb. 7, 2017) (Romero); *Turner v. Middle Rio Grande Conservancy Dist.*, No. 1:15-CV-00339 RB/SCY, 2017 WL 4271310, *4–5 (D. N.M. Jan. 30, 2017) (Smith). Turner does not challenge the district court's rulings that the State Defendants are immune from his suit. Turner also sued a television news station and unknown individuals associated with the station, but those defendants were dismissed with prejudice by stipulation in May 2016 and were not involved in the case after that. Order, *Turner v. Middle Rio Grande Conservancy Dist.*, No. 1:15-CV-00339 RB/SCY (May 18, 2016).

[4] Because we conclude that Turner's claims are barred by the governing statute of limitations, we do not address the district court's additional rulings that Turner failed to state a claim against MRGCD under § 1983 or a claim against any of the three MRGCD Defendants under § 1985(3).

II.

States and municipalities have a "strong interest in timely notice of alleged misconduct by their agents." *See Wallace v. Kato*, 549 U.S. 384, 397 (2007). The length of the statute of limitations for § 1983 and § 1985 claims is drawn from the forum state's limitations period for personal injury torts. *See Robinson v. Maruffi*, 895 F.2d 649, 653–54 (10th Cir. 1990). The parties agree that New Mexico's three-year limitations period governs this case. N.M. Stat. Ann. § 37-1-8.

Though state law prescribes the length of time within which Turner must bring his claim, federal common law determines when the "claim accrues and the limitations period starts to run." *See Mondragón v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). A plaintiff's claim has "accrued" when it is complete—that is, "when the plaintiff can file suit and obtain relief" in court. *Wallace*, 549 U.S. at 388 (internal quotations omitted). The district court determined that Turner's § 1983 and § 1985 claims accrued on February 26, 2010, the date that the BOL concluded that Turner had practiced engineering without a license. App. at 303. Using this accrual date, the court concluded that Turner's claims expired on February 26, 2013, more than two years before he filed the present suit on April 23, 2015.

Turner argues that his claim did not accrue, and the limitations clock did not begin to run, until the New Mexico Court of Appeals affirmed the lower court's reversal of the BOL decision in April 2013,

making the present suit timely. Turner's primary support for his position is *Heck v. Humphrey*, 512 U.S. 477 (1994). We conclude that *Heck* is inapposite and reject Turner's other arguments for reversal.[5]

A.

Turner contends that *Heck v. Humphrey* "demonstrates" that New Mexico's "statute of limitations was tolled" until appellate review of the BOL decision ended. Aplt. Br. at 13 (capitalization omitted). *Heck*, however, does not toll a limitations period; rather, it bars imprisoned plaintiffs from filing § 1983 suits where the civil rights claim would necessarily imply that the plaintiff's conviction or sentence is invalid. *Heck*, 512 U.S. at 481–82. Such claims must instead be presented through a habeas corpus petition. *Heck* is therefore inapposite to the case at hand, which involves civil fines and not detention.

Heck v. Humphrey arises from the "potential overlap" between § 1983 and the federal habeas corpus

[5] Count Six of Turner's amended complaint alleges a "malicious prosecution" claim. Ordinarily, a malicious prosecution claim "accrues, at the earliest, when favorable termination occurs," *see Mondragón*, 519 F.3d at 1083, which here would have been after the BOL decision. But "[u]nlike a malicious prosecution claim . . . a First Amendment retaliatory-prosecution claim does not require a favorable termination of the underlying action." *See Mata v. Anderson*, 635 F.3d 1250, 1252–53 (10th Cir. 2011). At oral argument, Turner's counsel confirmed that his malicious prosecution claim was predicated solely on a First Amendment violation. Oral Arg. at 3:35–3:58. Therefore, the malicious prosecution claim also accrued on the date of the BOL decision.

statute. *Id.* at 481. The case concerned whether a state prisoner alleging that he had been unconstitutionally tried and convicted could seek monetary damages under § 1983. *Id.* The Court held that a damages award under § 1983 was not an available remedy when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. Such § 1983 suits are not cognizable until the plaintiff proves that the underlying conviction or sentence has been cleared away. *Id.* at 486–87. Otherwise, § 1983 would become a vehicle to upset state criminal judgments and bypass Congress's requirement that habeas petitioners exhaust adequate state remedies before seeking the writ in federal court. *See id.* at 480–82.

Heck bars § 1983 suits only when the plaintiff is in custody and the civil rights claim calls into question the fact or duration of the plaintiff's confinement. *Heck* does not toll the statute of limitations for § 1983 claims, as Turner suggests. Rather, *Heck* says that there is no § 1983 action "at all" for claims implying the invalidity of confinement until the plaintiff is no longer in custody. *Id.* at 483. Because the focus is whether the plaintiff is in custody, *Heck* also bars § 1983 suits where the plaintiff is subject to a civil detention. *See Cohen v. Clemens*, 321 F. App'x 739, 742 (10th Cir. 2009) (unpublished) (concluding that *Heck* precludes an alien detainee from challenging his detention through a *Bivens* suit for damages against immigration officials).

The *Heck* bar does not apply to plaintiffs like Turner who are not subject to physical confinement and thus are outside the "potential overlap" between § 1983 and habeas corpus. Turner was not criminally convicted or subject to a civil detention. The BOL fined Turner for practicing engineering without a license. *See* N.M. Stat. Ann. § 61-23-2. Turner never paid the fine and administrative hearing costs because he obtained a stay of enforcement of the BOL's order while his state-court appeal was pending. *See* App. at 281. To be sure, had Turner not obtained a stay and then failed pay the civil penalties, he may have faced misdemeanor charges. *See* N.M. Stat. Ann. § 61-23-27.11(C). But the attenuated risk of criminal charges is insufficient to call *Heck* into play. The *Wallace* court rejected the theory that an "anticipated future conviction" deferred the accrual date for a § 1983 claim. *Wallace*, 549 U.S. at 393. We conclude that *Heck* is inapposite.

B.

Turner offers three other reasons why his claims did not accrue until April 2013. None has merit.

First, he argues that state appellate review of the BOL decision was a "continuing wrong" that deferred the accrual date. Aplt. Br. at 20. "[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury." *See Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430 (10th Cir. 1996). The limitations period runs when "the wrong is over and done with." *Id.* Even

assuming that the continuing wrong doctrine applies to § 1983 suits, that doctrine is inapplicable here because the alleged violation of Turner's free speech rights was "over and done with" once the BOL issued its decision in 2010. The subsequent stay of enforcement and appellate review of the BOL decision is not a continuing violation of Turner's constitutional rights. *See Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011) (explaining that the accrual date is deferred "by continual unlawful acts, not by continual ill effects from the original violation" (internal quotation marks omitted)).

Second, Turner asserts that his suit is timely because, had the present suit been filed before the New Mexico appeals court completed its review of the BOL decision, Turner's federal claims could have been dismissed under *Younger* abstention. *See* Aplt. Br. at 17; *see also Younger v. Harris*, 401 U.S. 37 (1971). That argument is ill-founded. Abstention is "an extraordinary and narrow exception," *Allegheny Cty. v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959), to a district court's "virtually unflagging obligation" to decide cases properly within its jurisdiction, *see Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). And in the rare case where "abstention may be an appropriate response to the parallel state-court proceedings," *Heck*, 512 U.S. at 487 n.8, the district court is not empowered to suspend the state-prescribed limitations period; the district court can instead "stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Wallace*, 549 U.S. at 394

(noting that state law, not federal common law, generally sets "tolling rules").

That is why the *Wallace* Court rejected "the far-reaching proposition that equitable tolling is appropriate to avoid the risk of concurrent litigation." *Id.* at 396. Abstention principles, then, do not permit § 1983 plaintiffs to bring (otherwise stale) claims in federal court. Indeed, suspending state limitations periods under *Younger* would transform abstention from a federal-state comity doctrine into something that encroaches on the "strong interest [of states] in timely notice of alleged misconduct by their agents." *Wallace*, 549 U.S. at 397.

Turner's third argument draws upon New Mexico statutory law. He contends that his suit is timely because "[w]hen the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation." N.M. Stat. Ann. § 37-1-12. Turner contends that § 37-1-12 stopped the clock on the statute of limitations during appellate review of the BOL decision.

The problem for Turner, as the district court noted, is that § 37-1-12 "refers only to injunctions or other orders that preclude 'the commencement' of an action." App. at 315 (quoting *Butler v. Deutsche Morgan Grenfell, Inc.*, 140 P.3d 532, 537 (N.M. Ct. App. 2006)). No injunction or order prevented Turner from bringing his federal claims in a separate lawsuit in federal court

within three years following the BOL decision. Section 37-1-12, therefore, did not toll the limitations period.

III.

In sum, we conclude that New Mexico's three-year statute of limitations on Turner's § 1983 and § 1985 claims began to run when the BOL issued its decision. Since Turner did not file this suit until five years after that date, his suit is untimely. The judgment is affirmed.

Entered for the Court

Allison H. Eid
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. **No. 1:15-cv-00339 RB/SCY**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; and JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

FINAL ORDER

(Filed Feb. 24, 2017)

THE COURT, having issued a Memorandum Opinion and Order on February 24, 2017, enters this Final Order in compliance with Rule 58 of the Federal Rules of Civil Procedure. Judgment is entered in favor of Defendants and against Plaintiff and this matter is dismissed with prejudice.

IT IS SO ORDERED.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. **No. 1:15-cv-00339 RB/SCY**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; and JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Feb. 24, 2017)

THIS MATTER comes before the Court upon Defendants Middle Rio Grande Conservancy District, Subhas Shah, and Dennis Domrzalski's ("MRGCD Defendants") Motion to Dismiss. (Doc. 70.) Jurisdiction arises under 28 U.S.C. §§ 1331 and 1367. Having considered the submissions of counsel and relevant law, the Court will **GRANT** this motion.

I. Background

On April 23, 2015 Plaintiff filed suit in this Court against the Middle Rio Grande Conservancy District ("MRGCD"), MRGCD employees, and members of the Board of Licensure for Professional Engineers and Professional Land Surveyors ("BOL"). (Doc. 1.) In his First Amended Verified Complaint to Recover Damages Due to Deprivations of Civil Rights/Violations of the United States and New Mexico Constitutions, Civil Conspiracy, and for Common Law Torts ("Amended Complaint"), Plaintiff alleges the following facts. (Doc. 3.)

Plaintiff is "an internationally recognized hydrogeologist with more than 40 years of national and international consulting experience in hydrology, geology, and related fields." (*Id.*) In June 2005, Plaintiff was elected to a four-year term on the Board of Directors of the MRGCD. (*Id.*) During his campaign and throughout his term on the MRGCD Board of Directors, Plaintiff sought to expose and correct multiple acts of malfeasance perpetrated by Defendant Shah, Former

Executive Director of the MRGCD, and Defendant Domrzalski, Former Public Information Officer of the MRGCD. (*Id.*) On February 27, 2006, Plaintiff delivered a presentation to the MRGCD in which he asserted that it was inappropriate to utilize "unengineered rip-rap" to reinforce ditch roads within the MRGCD. (*Id.*)

On April 24, 2007, Defendant Domrzalski filed a complaint with the BOL that accused Plaintiff of practicing engineering without a license. (Doc. 3.) Defendant Shah was the executive director of the MRGCD, as well as the Former Chief Engineer and Chairman of the BOL. (*Id.*) Defendant Shah dictated the complaint to Defendant Domrzalski. (*Id.*) Defendants Shah and Domrzalski knew that Plaintiff was immune from the complaint because he was a board member of the MRGCD and they filed the complaint with the intent to harass Plaintiff and oust him from the MRGCD Board. (*Id.*) Defendant Shah pressured Defendant Eduard Ytuarte, Former Executive Director of the BOL, to hold an administrative hearing to cast negative publicity on Plaintiff before the MRGCD Board elections. (*Id.*)

On February 26, 2010, the BOL issued a decision concluding that Plaintiff had practiced engineering without a license in connection with his presentation concerning the un-engineered rip-rap. *See N.M. Bd. of Licensure for Prof'l Eng's & Prof'l Surveyors v. Turner*, 303 P.3d 875, 878 (N.M. Ct. App. 2013). At the time the BOL issued its decision, Defendant Romero was Chair of the Engineering Committee of the BOL. (Doc. 3.)

Defendant Romero drafted the decision in consultation with Defendant Ytuarte. (*Id.*)

Plaintiff appealed the BOL decision to the Second Judicial District Court of the State of New Mexico. (Doc. 3.) On September 29, 2011, the Second Judicial District Court found that Plaintiff had not engaged in the practice of engineering without a license and that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*) The New Mexico Attorney General's Office, through Defendant Smith, appealed the decision to the New Mexico Court of Appeals. (*Id.*) On April 24, 2013, the New Mexico Court of Appeals upheld the District Court's decision that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*)

In Counts I, II, III, IV, V, and VI of the Amended Complaint, Plaintiff alleges a violation of his right to procedural due process, a violation of his rights under the First Amendment, a violation of his rights to equal protection and to be free from discrimination, conspiracy to violate his constitutional rights, civil conspiracy, malicious prosecution/abuse of process, defamation, and slander against the MRGCD Defendants. (*Id.*) These claims are based on the factual allegations that the MRGCD Defendants filed the BOL complaint, acted in concert and influenced the BOL to issue a notice of violation, demanded that Plaintiff agree to a settlement, solicited the Attorney General to pursue the administrative BOL hearing and appeal the district court's decision, and made defamatory statements about Plaintiff. (*Id.*)

The MRGCD Defendants have moved to dismiss on the grounds that the claims against them are barred by the statute of limitations and the New Mexico Tort Claims Act, and for failure to state a claim. (Doc. 76.) In his response brief, Plaintiff contends that the claims are valid and not barred by the statute of limitations. (Doc. 88.) Plaintiff concedes that the tort claims against the MRGCD Defendants in their official capacities are barred by the statute of limitations of the New Mexico Tort Claims Act, he does not have a viable conspiracy claim under 42 U.S.C. §1985(1) or a malicious prosecution claim under the Fourth Amendment, and he does not allege a state tort claim for malicious abuse of process claim. (*Id.*)

II. Legal Standard

In order to withstand a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiffs' amended complaint alone is legally sufficient to state a claim for which relief may be granted." *Brokers' Choice of Am., Inc. v. NBC Universal*, 757 F.3d 1125, 1135–36 (10th Cir. 2014); *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The plaintiff must nudge his "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. When deciding a motion to dismiss under Rule 12(b)(6), the Court assumes that all of the plaintiff's well-pleaded factual allegations are true and views them in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679; *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

III. Discussion

A. Statute of Limitations

The MRGCD Defendants assert that Plaintiff's claims under 42 U.S.C. §§ 1983 and 1985 are barred by the statute of limitations. The statute of limitations for claims brought under Sections 1983 and 1985 is governed by the personal injury statute of limitations for the state in which the federal district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008); *Graham v. Taylor*, 640 F. App'x 766, 769 (10th Cir. 2016). In New Mexico, the statute of limitations period for personal injury actions is three years. N.M. Stat. Ann. § 37-1-8. Plaintiff concedes that the three-year statute of limitations applies to his civil rights claims.

The issue in this case is when Plaintiff's claims accrued. While state law provides the statute of limitations period, federal law determines the date on which the claim accrues and the statute begins to run. *Mondragon*, 519 F.3d at 1078 (citing *Wallace v. Kato*,

549 U.S. 384, 387 (2007)); *Graham*, 640 F. App'x at 769. State law also determines any tolling of the limitations period, although federal law may allow for additional tolling in rare circumstances. *Mondragon*, 519 F.3d at 1078 (citation omitted).

Defendants argue that Plaintiff's civil rights claims accrued no later than February 26, 2010, when the BOL issued its decision. Plaintiff filed this action more than five years later on April 23, 2015, making the claim time-barred. Plaintiff responds that his claims accrued on April 24, 2013, when the New Mexico Court of Appeals issued its decision, or the statute of limitations was tolled until that date. Plaintiff relies on *Heck v. Humphrey*, 512 U.S. 477 (1994) for the notion that the statute of limitations was tolled while the appeal was pending.

Under federal law, § 1983 claims generally rely on the common law tort principle that the claim accrues when the plaintiff "has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Febar Corp. of Cal.*, 522 U.S. 192, 201 (1997)) (internal citations omitted). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Price v. Philpot*, 420 F.3d 1158, 1162 (10th Cir. 2005). It is not necessary that the plaintiff know of all the evidence that he ultimately relies on for the statute of limitations to accrue. *Id.* Additionally, *Heck* applies only to claims that would imply the invalidity of a criminal conviction or

sentence. *See Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999). As Plaintiff was not criminally convicted or sentenced, *Heck* is inapplicable.

The BOL issued its decision on February 26, 2010. Plaintiff had reason to know of his alleged injury no later than that date. However, Plaintiff did not file this lawsuit until April 23, 2015, which was more than three years after the claims accrued. Accordingly, Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985 are barred by the statute of limitations.

B. New Mexico Tort Claims Act (NMTCA)

Defendants assert that Plaintiff's state tort claims are barred by the NMTCA. Plaintiff concedes that the tort claims against MRGCD defendants in their "official capacities" are barred by the NMTCA's two-year statute of limitations. However, this is a distinction without a difference. The NMTCA is the "exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim." N.M. Stat. Ann. § 41-4-17(A). A public employee of New Mexico may not be sued unless the plaintiff's cause of action fits within one of the exceptions granted to governmental entities and public employees in the

NMTCA. *See Begay v. State*, 723 P.2d 252, 255 (N.M. Ct. App. 1985), *rev'd on other grounds by Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986). The NMTCA provides a waiver of sovereign immunity only for claims in specified categories. Plaintiff concedes that his claims against the MRGCD Defendants do not fit within any of these categories.

Additionally, the NMTCA provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death." N.M. Stat. Ann. § 41-4-15. The last action of the BOL that could potentially support Plaintiff's tort claims against the MRGCD Defendants occurred on February 26, 2010. Plaintiff filed this action on April 23, 2015, which was more than two years after the date of occurrence. Accordingly, Plaintiff's tort claims against the MRGCD Defendants are barred by the two-year statute of limitations in the NMTCA.

C. Failure to state a Section 1983 claim against Defendant MRGCD

Defendant MRGCD asserts that Plaintiff has failed to allege facts that would support a claim against it. In response, Plaintiff asserts that the claims against Defendant MRGCD are based on the alleged actions of Defendant Shah as a "decision maker." (Doc. 88.)

It bears underscoring that there is no *respondeat superior* liability under Section 1983. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013). A local government body may be held liable "only for its own unconstitutional or illegal policies and not for the tortious acts of its employees." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). To establish a claim under Section 1983 against a local government body for the acts of employees, a plaintiff must prove: (1) that an employee committed a constitutional violation, and (2) that a policy or custom of the government body directly caused the injury alleged. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). The Amended Complaint fails to identify a policy or custom on the part of Defendant MRGCD that led to any injury. Accordingly, Plaintiff has failed to state a Section 1983 claim against Defendant MRGCD.

D. 42 U.S.C. Section 1985(3) Conspiracy

Defendants contend that Plaintiff has failed to state a claim under 42 U.S.C. § 1985(3). A claim arises under this section of the statute where two or more persons conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. *See* 42 U.S.C. § 1985(3); *Jones v. Norton*, 809 F.3d 564, 576 (10th Cir. 2015) (holding that a plaintiff must allege a conspiracy

based on discriminatory animus in order to assert a plausible claim under Section 1985(3)).

While § 1985(3) does not create any substantive rights, it provides a remedy when individuals conspire to deprive a member of a protected class of equal protection of the laws or equal privileges and immunities under the laws. *See Gallegos v. City & Cnty. of Denver*, 984 F.2d 358, 362 (10th Cir. 1993) *(citing Dixon v. City of Lawton*, 898 F.2d 1443, 1448 (10th Cir. 1990)). "The essential elements of a § 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993).

Notably, the plaintiff must demonstrate that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). As the Supreme Court has stated, the "invidiously discriminatory animus" element requires "that the defendant have taken his action 'at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.'" *Id.* at 275–76 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

Moreover, to support a conspiracy claim, a plaintiff must show a meeting of the minds or agreement among the defendants and a concerted action. *See*

Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504, 533 (10th Cir. 1998) (discussing § 1983 conspiracy claim). In this case, Plaintiff alleges that Defendants conspired against him based on that fact that his wife and sons are Jewish and Plaintiff is affiliated with the Jewish community. (Doc. 88.) Plaintiff has failed to provide any factual details of the alleged conspiracy or to allege a discriminatory animus behind any of the MRGCD Defendants' actions grounded in Plaintiff's race, sex, religion, or national origin. For these reasons, Plaintiff has failed to state a claim under 42 U.S.C. § 1985(3).

IV. Conclusion

Plaintiff's claims against the MRGCD Defendants are barred by the statute of limitations and the New Mexico Tort Claims Act. Additionally, Plaintiff has failed to state a claim against Defendant MRGCD and failed to state a claim or under 42 U.S.C. § 1985(3).

THEREFORE,

IT IS ORDERED that the MRGCD Defendants' Motion to Dismiss (Doc. 70) is **GRANTED**.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. **No. 1:15-cv-00339 RB/SCY**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; and JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Feb. 10, 2017)

THIS MATTER comes before the Court upon Defendant Eduard Ytuarte's Motion for Judgment on the Pleadings. (Doc. 78.) Jurisdiction arises under 28 U.S.C. §§ 1331 and 1367. Having considered the submissions of counsel and relevant law, the Court will **GRANT** this motion.

I. Background

On April 23, 2015 Plaintiff filed suit in this Court against the Middle Rio Grande Conservancy District ("MRGCD"), MRGCD employees, and members of the Board of Licensure for Professional Engineers and Professional Land Surveyors ("BOL"), including Defendant Ytuarte. (Doc. 1.) In his First Amended Verified Complaint to Recover Damages Due to Deprivations of Civil Rights/Violations of the United States and New Mexico Constitutions, Civil Conspiracy, and for Common Law Torts ("Amended Complaint"), Plaintiff alleges the following facts. (Doc. 3.)

Plaintiff is "an internationally recognized hydrogeologist with more than 40 years of national and international consulting experience in hydrology, geology, and related fields." (*Id.*) In June 2005, Plaintiff was elected to a four-year term on the Board of Directors of the MRGCD. (*Id.*) During his campaign and throughout his term on the MRGCD Board of Directors, Plaintiff sought to expose and correct multiple acts of malfeasance perpetrated by Defendant Shah,

Executive Director of the MRGCD, and Defendant Domrzalski, Public Information Officer of the MRGCD. (*Id.*) On February 27, 2006, Plaintiff delivered a presentation to the MRGCD in which he asserted that it was inappropriate to utilize "un-engineered rip-rap" to reinforce ditch banks within the MRGCD. (*Id.*)

On April 24, 2007, Defendant Dennis Domrzalski, Former MRGCD Public Information Officer, filed a complaint with the BOL accusing Plaintiff of practicing engineering without a license. (Doc. 3.) Defendant Shah was the Executive Director of the MRGCD, as well as the Chairman of the BOL. (*Id.*) Defendant Shah dictated the complaint to Defendant Domrzalski. (*Id.*) Defendants Shah and Domrzalski knew that Plaintiff was immune from the complaint because he was a board member of the MRGCD and they filed the complaint with the intent to harass Plaintiff and oust him from the MRGCD Board. (*Id.*) Defendant Shah pressured Defendant Eduard Ytuarte, Former Executive Director of the BOL, to hold an administrative hearing to cast negative publicity on Plaintiff before the MRGCD Board elections. (*Id.*)

On February 26, 2010, the BOL issued a decision concluding that Plaintiff had practiced engineering without a license in connection with his presentation concerning the un-engineered rip-rap. *See NM Bd. of Licensure for Prof'l Eng'g & Prof'l Surveyors v. Turner*, 303 P.3d 875, 878 (N.M. Ct. App. 2013). At the time the BOL issued its decision, Defendant Ytuarte was the Executive Director of the BOL and Defendant Romero was Chair of the Engineering Committee of the BOL.

(Doc. 3.) Defendant Romero drafted the decision in consultation with Defendant Ytuarte. (*Id.*)

Plaintiff appealed the BOL decision to the Second Judicial District Court of the State of New Mexico. (*Id.*) On September 29, 2011, the Second Judicial District Court found that Plaintiff had not engaged in the practice of engineering without a license and that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*) The New Mexico Attorney General's Office, through Defendant Smith, appealed the decision to the New Mexico Court of Appeals. (*Id.*) On April 24, 2013, the New Mexico Court of Appeals upheld the District Court's decision that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*)

In Counts I, IV, V, and VI of the Amended Complaint, Plaintiff alleges violation of procedural due process, conspiracy to violate Plaintiff's constitutional rights, civil conspiracy, and malicious prosecution/abuse of process against Defendant Ytuarte. (Doc. 3.) These claims are based on the factual allegations that Defendant Ytuarte was the Executive Director of the BOL when the decision was issued, Defendant Ytuarte issued a notice of violation to Plaintiff, and the decision was reached during meetings without a formal hearing. (*Id.*)

Defendant Ytuarte moves for judgment on the pleadings on the grounds that the claims against him are barred by the statute of limitations, judicial immunity, qualified immunity, and the New Mexico Tort

Claims Act. (Doc. 78.) In his response brief, Plaintiff contends that the New Mexico Tort Claims Act is inapplicable, the claims are not barred by the statute of limitations, and Defendant Ytuarte is not entitled to judicial immunity or qualified immunity. (Doc. 91.)

II. Legal Standard

When analyzing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court applies the same standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In order to withstand a motion for judgment on the pleadings or a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must nudge his "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court accepts as true all of the factual allegations in the complaint and construes those facts in the light most favorable to the plaintiff. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1284 (10th Cir. 2008).

III. Discussion

A. Statute of Limitations

Defendant Ytuarte asserts that Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985 are barred by the statute of limitations. The statute of limitations for claims brought under Sections 1983 and 1985 is governed by the personal injury statute of limitations for the state in which the federal district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008); *Graham v. Taylor*, 640 F. App'x 766, 769 (10th Cir. 2016). In New Mexico, the statute of limitations period for personal injury actions is three years. N.M. Stat. Ann. § 37-1-8. Plaintiff concedes that the three-year statute of limitations applies to his civil rights claims.

The issue in this case is the date on which Plaintiff's claims accrued. While state law provides the statute of limitations period, federal law determines the date on which the claim accrues and the statute of limitations begins to run. *Mondragon*, 519 F.3d at 1078 (citing *Wallace v. Kato*, 549 U.S. 384 (2007)); *Graham*, 640 F. App'x at 769. State law also determines any tolling of the limitations period, although federal law may allow for additional tolling in rare circumstances. *Mondragon*, 519 F.3d at 1078 (citation omitted).

Defendant Ytuarte argues that Plaintiff's civil rights claims accrued when the BOL issued its decision on February 26, 2010. Plaintiff filed this action more than five years later on April 23, 2015, making them time-barred under state law. Plaintiff responds that

his claims accrued on April 24, 2013, when the New Mexico Court of Appeals issued its decision. Plaintiff relies on *Heck v. Humphrey*, 512 U.S. 477 (1994) for the notion that the statute of limitations was tolled while the appeal was pending.

Under federal law, § 1983 claims generally rely on the common law tort principle that the claim accrues when the plaintiff "has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Febar Corp. of Cal.*, 522 U.S. 192, 201 (1997)) (internal citations omitted). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Price v. Philpot*, 420 F.3d 1158, 1162 (10th Cir. 2005). It is not necessary that the plaintiff know of all the evidence that he ultimately relies on for the statute of limitations to accrue. *Id.* Additionally, *Heck* is not helpful to Plaintiff because it applies only to claims that would imply the invalidity of a criminal conviction or sentence. *See Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999). As Plaintiff was not criminally convicted or sentenced, *Heck* is inapplicable.

The BOL issued its decision on February 26, 2010. Plaintiff had reason to know of his alleged injury no later than that date. However, Plaintiff did not file this lawsuit until April 23, 2015, more than three years after the claims accrued. Accordingly, Defendant Ytuarte is entitled to judgment on the pleadings as to

Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985.

B. Judicial Immunity

Defendant Ytuarte claims entitlement to judicial immunity. Judges acting in their judicial capacity are absolutely immune from civil lawsuits based on their actions, unless the judge acted clearly without any colorable claim of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)). "A judge is immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Moss v. Kopp*, 559 F.3d 1155, 1163–64 (10th Cir. 2009) (internal quotations marks and citations omitted). A judge lacks immunity only when he acts in the "clear absence of all jurisdiction," *Bradley*, 80 U.S. at 351, or performs an act that is not "judicial" in nature. *Sparkman*, 435 U.S. at 360.

The Tenth Circuit has recognized that "officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion." *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (citing *Butz v. Economou*, 438 U.S. 478, 514 (1978)). For an official at an administrative hearing to enjoy absolute immunity,

"(a) the officials' functions must be similar to those involved in the judicial process, (b) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct." *Id.* (quoting *Horwitz v. State Bd. of Med. Examr's*, 822 F.2d 1508, 1513 (10th Cir. 1987) (internal quotation marks omitted).

Plaintiff alleges that Defendant Ytuarte was the Executive Director of the BOL when the decision was issued and he issued a notice of violation to Plaintiff. Additionally, Plaintiff alleges that Defendant Ytuarte reached the decision during BOL meetings without an actual hearing.[1] The BOL is the agency tasked with the regulation of the licensure of engineers and surveyors in New Mexico. *See* N.M. Stat. Ann. § 61-23-24. The BOL had jurisdiction to "investigate and initiate a hearing on a complaint against a person who does not have a license, who is not exempt from the Engineering and Surveying Practice Act [N.M. Stat. Ann. § 61-23-1] and who acts in the capacity of a professional engineer within the meaning of Engineering and Surveying Practices Act." N.M. Stat. Ann. § 61-23-23.1 (A). Therefore, Defendant Ytuarte acted within the jurisdiction of the BOL when the decision and notice of violation

[1] The New Mexico Court of Appeals decision states that the BOL's engineering committee conducted an administrative hearing on December 16, 2009 and was presented with testimony and documentary evidence from the BOL's prosecutor and Plaintiff. *See N.M. Bd. of Licensure for Prof'l Eng'g and Prof'l Surveyors v. Turner*, 303 P.3d 875, 878 (N.M. Ct. App. 2013).

were issued. Accordingly, Defendant Ytuarte is protected by absolute judicial immunity.

C. Qualified Immunity

Defendant Ytuarte raises the defense of qualified immunity in response to Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985. In order to overcome Defendant Ytuarte's claim of qualified immunity, Plaintiff must show that (1) Defendant Ytuarte violated a constitutional right; and (2) that right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The Court may consider either part of this two-prong test first. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

In determining whether Defendant Ytuarte violated Plaintiff's due process rights, the Court must determine: "(1) did [Plaintiff] possess a protected interest such that the due process protections were applicable; and, if so, then (2) was [Plaintiff] afforded an appropriate level of process." *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir. 2011) (quoting *Merrifield v. Bd. of Cnty. Comm'rs*, 654 F.3d 1073, 1078 (10th Cir. 2011)). "An individual has a property interest in a benefit for purposes of due process protection only if he has a 'legitimate claim of entitlement' to the benefit, as opposed to a mere 'abstract need or desire' or 'unilateral expectation.'" *Teigen v. Renfrow*, 511 F.3d 1072, 1078–79 (10th Cir. 2007) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Plaintiff has failed to

allege sufficient facts that he had a clearly established protected property right. Additionally, there is no Tenth Circuit or Supreme Court case that would indicate that the process received by Plaintiff in connection with the BOL decision or notice of violation was inadequate. Accordingly, Defendant Ytuarte is entitled to qualified immunity as to Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985.

D. The New Mexico Tort Claims Act (NMTCA)

Defendant Ytuarte asserts that Plaintiff's tort claims are barred by the NMTCA. The NMTCA is the "exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim." N.M. Stat. Ann. § 41-4-17(A). A public employee of New Mexico may not be sued unless the plaintiff's cause of action fits within one of the exceptions granted to governmental entities and public employees in the NMTCA. *See Begay v. State*, 723 P.2d 252, 255 (N.M. Ct. App. 1985), *rev'd on other grounds by Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986).

The NMTCA provides a waiver of sovereign immunity only for claims in specified categories. Plaintiff's claims against Defendant Ytuarte do not fit within any of these categories. The one waiver that

could potentially permit a claim for malicious abuse of process applies only to claims against law enforcement officers. See N.M. Stat. Ann. § 41-4-12. This waiver is inapplicable herein because Defendant Ytuarte, the Former Executive Director of the BOL, was not a "law enforcement officer" within the meaning of the NMTCA.

The NMTCA defines "law enforcement officer" to mean "a full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the National Guard when called to active duty by the governor." N.M. Stat. Ann. § 41-4-12. This definition encompasses only those persons whose principal duties include those of a direct law enforcement nature. *See Anchondo v. N.M. Corr. Dep't*, 666 P.2d 1255, 1256 (N.M. 1983) (holding that the Secretary of Corrections and a state penitentiary warden were not "law enforcement officers" within the meaning of the NMTCA).

Notably, state officials whose duties involve principally administrative, technical, or regulatory matters are not considered law enforcement officers for the purposes of the NMTCA. *See Limacher v. Spivey*, 198 P.3d 370, 376 (N.M. Ct. App. 2008) (holding that an employee of the Office of the State Engineer of New Mexico was not a law enforcement officer); *Dunn v. McFeeley*, 984 P.2d 760, 766 (N.M. Ct. App. 1999) (holding that a medical investigator and crime laboratory technician were not "law enforcement officers" within

meaning of the NMTCA); *Dunn v. State of N.M.*, 859 P.2d 469, 470–71 (N.M. Ct. App. 1993) (holding that the Director of the Motor Vehicle Division of the Taxation and Revenue Department of New Mexico was not a "law enforcement officer" within meaning of the NMTCA). The principal duties of Defendant Ytuarte as the Former Executive Director of the BOL were not of a direct law enforcement nature. Rather, Defendant Ytuarte's duties were administrative, technical, and regulatory in nature. Accordingly, Plaintiff's claims against Defendant Ytuarte do not fall within a waiver of immunity under the NMTCA.

Plaintiff contends that Defendant Ytuarte is not immune from tort liability under the NMTCA because he acted outside the scope of his duties as the Former Executive Director of the BOL. Under the NMTCA, the State is only liable for torts committed by public employees while acting within their "scope of duty." *See* N.M. Stat. Ann. § 41-4-4(D). The NMTCA defines "scope of duties" as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." N.M. Stat. Ann. § 41-4-3(G).

According to the Supreme Court of New Mexico, "scope of duties" includes "employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity." *Celaya v. Hall*, 85 P.3d 239, 245 (N.M. 2004). The scope of duties is not limited to acts "officially requested, required or authorized because, contrary to legislative intent, it would render all

unlawful acts, which are always unauthorized, beyond the remedial scope of the [NM]TCA." *Id.* In order for an act to be within the scope of duties "there must be a connection between the public employee's actions at the time of the incident and the duties the public employee was "requested, required or authorized" to perform." *Id.* (citing N.M. Stat. Ann. § 41-4-3(G)).

For instance, in *Seeds v. Lucero*, 113 P.3d 859 (N.M. Ct. App. 2005), the New Mexico Court of Appeals held that city officials' "utilizing the machinery of city government" against private individuals for personal motives was covered by the NMTCA. *Id.* at 863. In *Vigil v. State Auditor's Office*, 116 P.3d 854 (N.M. Ct. App. 2005), the Court of Appeals held that the state auditor who conducted audits in violation of statute, and instituted false audits, was covered by the NMTCA. *See id.* at 859. Additionally, in *Henning v. Rounds*, 171 P.3d 317 (N.M. Ct. App. 2007), the New Mexico Court of Appeals held that a school principal's allegedly false and misleading comments and evaluations of a teacher were actions committed within the scope of duties. *See id.* at 320–22. If these types of actions are within the scope of duties, then the actions of Defendant Ytuarte in issuing the BOL decision and notice of violation clearly fall within his scope of duties as the Former Executive Director of the BOL.

Plaintiff contends that his conspiracy allegations fall outside the scope of the NMTCA. More specifically, Plaintiff argues that the conspiracy places Defendant Ytuarte outside the protection of the NMTCA and subjects him to personal liability. It bears underscoring

that "a public employee may be within the scope of authorized duty even if the employee's acts are fraudulent, intentionally malicious, or even criminal." *Seeds*, 113 P.3d 862 (citing *Risk Mgmt. Div. v. McBrayer*, 14 P.3d 43, 48 (N.M. Ct. App. 2000) (explaining that "the legislature likely foresaw the possibility that a public employee could abuse the duties actually requested, required or authorized by his state employer and thereby commit malicious, even criminal acts that were unauthorized, yet incidental to the performance of those duties")). Consequently, assuming arguendo that Defendant Ytuarte engaged in a conspiracy, his wrongful motive would be irrelevant, as long as there is "a connection between the public employee's actions at the time of the incident and the duties the public employee was requested, required or authorized to perform." *Celaya*, 85 P.3d at 245. In that Defendant Ytuarte's actions in issuing the BOL decision and notice of violation were within the scope of his duties as the Former Executive Director of the BOL, his actions were within the scope of authorized duty. For this reason, Defendant Ytuarte is covered by the NMTCA.

Additionally, the NMTCA provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death." N.M. Stat. Ann. § 41-4-15. The last action of the BOL that could potentially support Plaintiff's tort claims against Defendant Ytuarte occurred on February 26, 2010. Plaintiff filed this action on April 23, 2015, more than five years after

the date of occurrence. Accordingly, Plaintiff's tort claims against Defendant Ytuarte are barred by the two-year statute of limitations in the NMTCA.

IV. Conclusion

Plaintiff's claims against Defendant Ytuarte are barred by the statute of limitations, judicial immunity, qualified immunity, and the New Mexico Tort Claims Act.

THEREFORE,

IT IS ORDERED that Defendant Eduard Ytuarte's Motion for Judgment on the Pleadings (Doc. 78) is **GRANTED**.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. **No. 1:15-cv-00339 RB/SCY**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; and JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Feb. 7, 2017)

THIS MATTER comes before the Court upon Defendant John T. Romero's Motion for Judgment on the Pleadings. (Doc. 76.) Jurisdiction arises under 28 U.S.C. §§ 1331 and 1367. Having considered the submissions of counsel and relevant law, the Court will **GRANT** this motion.

I. Background

On April 23, 2015 Plaintiff filed suit in this Court against the Middle Rio Grande Conservancy District ("MRGCD"), MRGCD employees, and members of the Board of Licensure for Professional Engineers and Professional Land Surveyors ("BOL"), including Defendant Romero. (Doc. 1.) In his First Amended Verified Complaint to Recover Damages Due to Deprivations of Civil Rights/Violations of the United States and New Mexico Constitutions, Civil Conspiracy, and for Common Law Torts ("Amended Complaint"), Plaintiff alleges the following facts. (Doc. 3.)

Plaintiff is "an internationally recognized hydrogeologist with more than 40 years of national and international consulting experience in hydrology, geology, and related fields." (*Id.*) In June 2005, Plaintiff was elected to a four-year term on the Board of Directors of the MRGCD. (*Id.*) During his campaign and throughout his term on the MRGCD Board of Directors, Plaintiff sought to expose and correct multiple acts of

malfeasance perpetrated by Defendant Shah, Executive Director of the MRGCD, and Defendant Domrzalski, Public Information Officer of the MRGCD. (*Id.*) On February 27, 2006, Plaintiff delivered a presentation to the MRGCD in which he asserted that it was inappropriate to utilize "un-engineered rip-rap" to reinforce ditch roads within the MRGCD. (*Id.*)

On April 24, 2007, Defendant Dennis Domrzalski, Former MRGCD Public Information Officer, filed a complaint with the BOL accusing Plaintiff of practicing engineering without a license. (Doc. 3.) Defendant Shah was the executive director of the MRGCD, as well as the Chairman of the BOL. (*Id*.) Defendant Shah dictated the complaint to Defendant Domrzalski. (*Id.*) Defendants Shah and Domrzalski knew that Plaintiff was immune from the complaint because he was a board member of the MRGCD and they filed the complaint with the intent to harass Plaintiff and oust him from the MRGCD Board. (*Id.*) Defendant Shah pressured Defendant Eduard Ytuarte, Former Executive Director of the BOL, to hold an administrative hearing to cast negative publicity on Plaintiff before the MRGCD Board elections. (*Id.*)

On February 26, 2010, the BOL issued a decision concluding that Plaintiff had practiced engineering without a license in connection with his presentation concerning the un-engineered rip-rap. *See NM Bd. of Licensure for Prof'l Eng's & Prof'l Surveyors v. Turner*, 303 P.3d 875, 878 (N.M. Ct. App. 2013). At the time the BOL issued its decision, Defendant Romero was Chair of the Engineering Committee of the BOL. (Doc. 3.)

Defendant Romero drafted the decision in consultation with Defendant Eduard Ytuarte, the Former Executive Director of the BOL. (*Id.*)

Plaintiff appealed the BOL decision to the Second Judicial District Court of the State of New Mexico. (Doc. 3.) On September 29, 2011, the Second Judicial District Court found that Plaintiff had not engaged in the practice of engineering without a license and that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*) The New Mexico Attorney General's Office, through Defendant Smith, appealed the decision to the New Mexico Court of Appeals. (*Id*.) On April 24, 2013, the New Mexico Court of Appeals upheld the District Court's decision that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*)

In Counts I, IV, V, and VI of the Amended Complaint, Plaintiff alleges violation of procedural due process, conspiracy to violate Plaintiff's constitutional rights, civil conspiracy, and malicious prosecution/ abuse of process against Defendant Romero. (Doc. 3.) These claims are based on the factual allegations that Defendant Romero was the Chair of the Engineering Committee of the BOL when the BOL's decision was issued, Defendant Romero reached the decision during meetings without an actual hearing, and Defendant Romero drafted the decision in consultation with Defendant Ytuarte. (*Id.*)

Defendant Romero moves for judgment on the pleadings on the grounds that the claims against him

are barred by the statute of limitations, judicial immunity, qualified immunity, and the New Mexico Tort Claims Act. (Doc. 76.) In his response brief, Plaintiff contends that the New Mexico Tort Claims Act is inapplicable, the claims are not barred by the statute of limitations, and Defendant Romero is not entitled to judicial immunity or qualified immunity. (Doc. 90.)

II. Legal Standard

When analyzing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court applies the same standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In order to withstand a motion for judgment on the pleadings or a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must nudge his "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court accepts as true all of the factual allegations in the complaint and construes those facts in the light most favorable to the plaintiff. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1284 (10th Cir. 2008).

III. Discussion

A. Statute of Limitations

Defendant Romero asserts that Plaintiffs claims under 42 U.S.C. §§ 1983 and 1985 are barred by the statute of limitations. The statute of limitations for claims brought under Sections 1983 and 1985 is governed by the personal injury statute of limitations for the state in which the federal district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008); *Graham v. Taylor*, 640 F. App'x 766, 769 (10th Cir. 2016). In New Mexico, the statute of limitations period for personal injury actions is three years. N.M. Stat. Ann. § 37-1-8. Plaintiff concedes that the three-year statute of limitations applies to his civil rights claims.

The issue in this case is when Plaintiff's claims accrued. While state law provides the statute of limitations period, federal law determines the date on which the claim accrues and the statute begins to run. *Mondragon*, 519 F.3d at 1078 (citing *Wallace v. Kato*, 549 U.S. 384 (2007)); *Graham*, 640 F. App'x at 769. State law also determines any tolling of the limitations period, although federal law may allow for additional tolling in rare circumstances. *Mondragon*, 519 F.3d at 1078 (citation omitted).

Defendants argue that Plaintiff's civil rights claims accrued on February 26, 2010, when the BOL issued it decision, and are thus time barred, because the Complaint was filed on April 23, 2015—more than five years later. Plaintiff responds that his claims

accrued on April 24, 2013, when the New Mexico Court of Appeals issued its decision. Plaintiff relies on *Heck v. Humphrey*, 512 U.S. 477 (1994) for the notion that the statute of limitations was tolled while the appeal was pending.

Under federal law, § 1983 claims generally rely on the common law tort principle that the claim accrues when the plaintiff "has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Febar Corp. of Cal.*, 522 U.S. 192, 201 (1997)) (internal citations omitted). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Price v. Philpot*, 420 F.3d 1158, 1162 (10th Cir. 2005). It is not necessary that the plaintiff know of all the evidence that he ultimately relies on for the statute of limitations to accrue. *Id.* Additionally, *Heck* is not helpful to Plaintiff because it applies only to claims that would imply the invalidity of a criminal conviction or sentence. *See Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999). As Plaintiff was not criminally convicted or sentenced, *Heck* is inapplicable.

The BOL issued its decision on February 26, 2010. Plaintiff had reason to know of his alleged injury no later than that date. However, Plaintiff did not file this lawsuit until April 23, 2015, which was more than three years after the claims accrued. Accordingly, Defendant Romero is entitled to judgment on the

pleadings as to Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985.

B. Judicial Immunity

Defendant Romero claims entitlement to judicial immunity. Judges acting in their judicial capacity are absolutely immune from civil lawsuits based on their actions, unless the judge acted clearly without any colorable claim of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)). "A judge is immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Moss v. Kopp*, 559 F.3d 1155, 1163–64 (10th Cir. 2009) (internal quotations marks and citations omitted). A judge lacks immunity only when he acts in the "clear absence of all jurisdiction," *Bradley*, 80 U.S. at 351, or performs an act that is not "judicial" in nature. *Sparkman*, 435 U.S. at 360.

The Tenth Circuit has recognized that "officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion." *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (citing *Butz v. Economou*, 438 U.S. 478, 514 (1978)). For an official at an administrative hearing to enjoy absolute immunity, "(a)

the officials' functions must be similar to those involved in the judicial process, (b) the officials' actions must be likely to result in damages lawsuits by disappointed parties, and (c) there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct." *Guttman*, 446 F.3d at 1033 (quoting *Horwitz v. State Bd. of Med. Examr's*, 822 F.2d 1508, 1513 (10th Cir. 1987) (internal quotation marks omitted).

Plaintiff alleges that Defendant Romero, who was the Chair of the Engineering Committee of the BOL, drafted the administrative decision adverse to Plaintiff. The BOL is the agency tasked with the regulation of the licensure of engineers and surveyors in New Mexico. *See* N.M. Stat. Ann. § 61-23-24. Even assuming that Defendant Romero reached the decision during meetings without a formal hearing and drafted the decision in consultation with Defendant Ytuarte, Defendant Romero acted within the jurisdiction of the BOL to "investigate and initiate a hearing on a complaint against a person who does not have a license, who is not exempt from the Engineering and Surveying Practice Act [N.M. Stat. Ann. § 61-23-1] and who acts in the capacity of a professional engineer within the meaning of Engineering and Surveying Practices Act." N.M. Stat. Ann. § 61-23-23.1(A). Therefore, Defendant Romero acted within the jurisdiction of the BOL when the decision issued that determined Plaintiff had practiced engineering without a license. Accordingly, Defendant Romero is protected by absolute judicial immunity.

C. Qualified Immunity

Defendant Romero raises the defense of qualified immunity in response to Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985. In order to overcome Defendant Romero's claim of qualified immunity, Plaintiff must show that (1) Defendant Romero violated a constitutional right; and (2) that right was "clearly established" at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The Court may consider either part of this two-prong test first. *al-Kidd*, 563 U.S. at 735 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

In determining whether Defendant Romero violated Plaintiff's due process rights, the Court must determine: "(1) did [Plaintiff] possess a protected interest such that the due process protections were applicable; and, if so, then (2) was [Plaintiff] afforded an appropriate level of process." *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir. 2011) (quoting *Merrifield v. Bd. of Cnty. Comm'rs*, 654 F.3d 1073, 1078 (10th Cir. 2011)). "An individual has a property interest in a benefit for purposes of due process protection only if he has a 'legitimate claim of entitlement' to the benefit, as opposed to a mere 'abstract need or desire' or 'unilateral expectation.'" *Teigen v. Renfrow*, 511 F.3d 1072, 1078–79 (10th Cir. 2007) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Plaintiff has failed to allege sufficient facts that he had a clearly established protected property right. Additionally, there is no Tenth Circuit or Supreme Court case that would indicate that the process received by Plaintiff in connection

with the BOL decision was inadequate. Accordingly, Defendant Romero is entitled to qualified immunity as to Plaintiff's civil rights claims under 42 U.S.C. §§ 1983 and 1985.

D. The New Mexico Tort Claims Act (NMTCA)

Defendant Romero asserts that Plaintiffs tort claims are barred by the NMTCA. The NMTCA is the "exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim." N.M. Stat. Ann. § 41-4-17(A). A public employee of New Mexico may not be sued unless the plaintiffs cause of action fits within one of the exceptions granted to governmental entities and public employees in the NMTCA. *See Begay v. State*, 723 P.2d 252, 255 (N.M. Ct. App. 1985), *rev'd on other grounds by Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986).

The NMTCA provides a waiver of sovereign immunity only for claims in specified categories. Plaintiff's claims against Defendant Romero do not fit within any of these categories. The one waiver that could potentially permit a claim for malicious abuse of process applies only to claims against law enforcement officers. See N.M. Stat. Ann. § 41-4-12. This waiver is

inapplicable herein because Defendant Romero, Former Chair of the Engineering Committee of the BOL, was not a "law enforcement officer" within the meaning of the NMTCA.

The NMTCA defines "law enforcement officer" to mean "a full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the National Guard when called to active duty by the governor." N.M. Stat. Ann. § 41-4-12.. This definition encompasses only those persons whose principal duties include those of a direct law enforcement nature. *See Anchondo v. NM Corr. Dep't*, 666 P.2d 1255, 1256 (N.M. 1983) (holding that the Secretary of Corrections and a state penitentiary warden were not "law enforcement officers" within the meaning of the NMTCA).

Notably, state officials whose duties involve principally administrative, technical, or regulatory matters are not considered law enforcement officers for the purposes of the NMTCA. *See Limacher v. Spivey*, 198 P.3d 370, 376 (N.M. Ct. App. 2008) (holding that an employee of the Office of the State Engineer of New Mexico was not a law enforcement officer); *Dunn v. McFeeley*, 984 P.2d 760, 766 (N.M. Ct. App. 1994) (holding that a medical investigator and crime laboratory technician were not "law enforcement officers" within meaning of the NMTCA); *Dunn v. State of NM*, 859 P.2d 469, 470-71 (N.M. Ct. App. 1993) (holding that the Director of the Motor Vehicle Division of the Taxation and

Revenue Department of New Mexico was not a "law enforcement officer" within meaning of the NMTCA). The principal duties of Defendant Romero as Former Chair of the Engineering Committee of the BOL were not of a direct law enforcement nature. Rather, Defendant Romero's duties were administrative, technical, and regulatory in nature. Accordingly, Plaintiff's claims against Defendant Romero do not fall within a waiver of immunity under the NMTCA.

Plaintiff contends that Defendant Romero is not immune from tort liability under the NMTCA because he acted outside the scope of his duties as Former Chair of the Engineering Committee of the BOL. Under the NMTCA, the State is only liable for torts committed by public employees while acting within their "scope of duty." *See* N.M. Stat. Ann § 41-4-4(D). The NMTCA defines "scope of duties" as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." N.M. Stat. Ann. § 41-4-3(G).

According to the Supreme Court of New Mexico, "scope of duties" includes "employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity." *Celaya v. Hall*, 85 P.3d 239, 245 (N.M. 2004). The scope of duties is not limited to acts "officially requested, required or authorized because, contrary to legislative intent, it would render all unlawful acts, which are always unauthorized, beyond the remedial scope of the [NM]TCA." *Id.* In order for an act to be within the scope of duties "there must be

a connection between the public employee's actions at the time of the incident and the duties the public employee was "requested, required or authorized" to perform." *Id.* (citing N.M. Stat. Ann. § 41-4-3(G)).

For instance, in *Seeds v. Lucero*, 113 P.3d 859 (N.M. Ct. App. 2005), the New Mexico Court of Appeals held that city officials' "utilizing the machinery of city government" against private individuals for personal motives was covered by the NMTCA. *Id.* at 863. In *Vigil v. State Auditor's Office*, 116 P.3d 854 (N.M. Ct. App. 2005), the Court of Appeals held that the state auditor who conducted audits in violation of statute, and instituted false audits, was covered by the NMTCA. *See id.* at 859. Additionally, in *Henning v. Rounds*, 171 P.3d 317 (N.M. Ct. App. 2007), the New Mexico Court of Appeals held that a school principal's allegedly false and misleading comments and evaluations of a teacher were actions committed within the scope of duties. *See id.* at 320–22. If these types of actions are within the scope of duties, then the actions of Defendant Romero in issuing the BOL decision clearly fall within the scope of his duties.

Plaintiff contends that his conspiracy allegations fall outside the scope of the NMTCA. More specifically, Plaintiff argues that the conspiracy places Defendant Romero outside the protection of the NMTCA and subjects him to personal liability. It bears underscoring that "a public employee may be within the scope of authorized duty even if the employee's acts are fraudulent, intentionally malicious, or even criminal." *Seeds*, 113 P.3d 862 (citing *Risk Mgmt. Div. v. McBrayer*, 14

P.3d 43, 48 (N.M. Ct. App. 2000) (explaining that "the legislature likely foresaw the possibility that a public employee could abuse the duties actually requested, required or authorized by his state employer and thereby commit malicious, even criminal acts that were unauthorized, yet incidental to the performance of those duties")). Consequently, assuming *arguendo* that Defendant Romero engaged in a conspiracy, his wrongful motive would be irrelevant, as long as there is "a connection between the public employee's actions at the time of the incident and the duties the public employee was requested, required or authorized to perform." *Celaya*, 85 P.3d at 245. In that Defendant Romero's actions in issuing the BOL decision were within the scope of his duties as Chair of the Engineering Committee of the BOL, his actions were with-in the scope of authorized duty. For this reason, Defendant Romero is covered by the NMTCA.

Additionally, the NMTCA provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death." N.M. Stat. Ann. § 41-4-15. The last action of the BOL that could potentially support Plaintiffs tort claims against Defendant Romero occurred on February 26, 2010. Plaintiff filed this action on April 23, 2015, some three years after the statute of limitations had expired. Accordingly, Plaintiff's tort claims against Defendant Romero are barred by the two-year statute of limitations in the NMTCA.

IV. Conclusion

Plaintiff's claims against Defendant Romero are barred by the statute of limitations, judicial immunity, qualified immunity, and the New Mexico Tort Claims Act.

THEREFORE,

IT IS ORDERED that Defendant John T. Romero's Motion for Judgment on the Pleadings (Doc. 76) is **GRANTED**.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. **No. 1:15-cv-00339 RB/SCY**

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; and JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Jan. 30, 2017)

THIS MATTER came before the Court upon Defendant Mary Smith's Motion for Judgment on the Pleadings. (Doc. 73.) Jurisdiction arises under 28 U.S.C. §§ 1331 and 1367. Having considered the submissions of counsel and relevant law, the Court will **GRANT** this motion.

I. Background

On April 23, 2015 Plaintiff filed suit in this Court against the Middle Rio Grande Conservancy District ("MRGCD"), MRGCD employees, members of the Board of Licensure for Professional Engineers and Professional Land Surveyors ("BOL"), and Defendant Mary Smith, an Assistant New Mexico Attorney General. (Doc. 1.) In his First Amended Verified Complaint to Recover Damages Due to Deprivations of Civil Rights/Violations of the United States and New Mexico Constitutions, Civil Conspiracy, and for Common Law Torts ("Amended Complaint"), Plaintiff alleges the following facts. (Doc. 3.)

Plaintiff is "an internationally recognized hydrogeologist with more than 40 years of national and international consulting experience in hydrology, geology, and related fields." (*Id.*) In June 2005, Plaintiff was elected to a four-year term on the Board of Directors of the MRGCD. (*Id.*) During his campaign and throughout his term on the MRGCD Board of Directors, Plaintiff sought to expose and correct multiple acts of

malfeasance perpetrated by Defendant Shah, Executive Director of the MRGCD, and Defendant Domrzalski, Public Information Officer of the MRGCD. (*Id.*) On February 27, 2006, Plaintiff delivered a presentation to MRGCD in which he asserted that it was inappropriate to dump "un-engineered rip-rap" into multiple ditch roads within the MRGCD. (*Id.*)

On April 24, 2007, Defendant Dennis Domrzalski, Former MRGCD Public Information Officer, filed a complaint with the BOL accusing Plaintiff of practicing engineering without a license. (Doc. 3.) Defendant Subash Shah was the executive director of the MRGCD, as well as the Chairman of the BOL. (*Id.*) Defendant Shah dictated the complaint to Defendant Domrzalski. (*Id.*) Defendants Shah and Domrzalski knew that Plaintiff was immune from the complaint because he was a board member of the MRGCD and they filed the complaint with the intent to harass Plaintiff and oust him from the MRGCD Board. (*Id.*) Defendant Shah pressured Defendant Eduard Ytuarte, Former Executive Director of the BOL, to hold an administrative hearing to cast negative publicity on Plaintiff before the MRGCD Board elections. (*Id.*)

On February 26, 2010, the BOL issued a decision concluding that Plaintiff had practiced engineering without a license in connection with his presentation concerning the un-engineered rip-rap. *See N.M. Bd. of Licensure for Prof'l Eng's and Prof'l Surveyors v. Turner*, 303 P.3d 875, 878 (N.M. Ct. App. 2013). At the time the BOL issued its decision, Defendant John T.

Romero was Chair of the Engineering Committee of the BOL. (Doc. 3.)

Plaintiff appealed the BOL decision to the Second Judicial District Court of the State of New Mexico. (Doc. 3.) On September 29, 2011, the Second Judicial District Court found that Plaintiff had not engaged in the practice of engineering without a license and that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id.*) The New Mexico Attorney General's Office, through Defendant Smith, appealed the decision to the New Mexico Court of Appeals and also filed an action against Plaintiff in the Second Judicial District Court alleging violation of BOL rules regarding the practice of engineering without a license. (*Id.*) On April 24, 2013, the New Mexico Court of Appeals upheld the District Court's decision that the BOL's decision violated Plaintiff's First Amendment rights to free speech. (*Id*.)

Plaintiff alleges, in his Amended Complaint, Counts V and VI, claims for civil conspiracy and malicious prosecution/abuse of process against Defendant Assistant Attorney General Mary Smith. These claims are based on the factual allegations that Defendant Smith appealed the Second Judicial District's decision to the New Mexico Court of Appeals and filed an action against Plaintiff in the Second Judicial District Court alleging violation of BOL rules regarding the practice of engineering without a license. (Doc. 3.)

Defendant Smith moves for judgment on the pleadings on the grounds that the two claims against

her are barred by the New Mexico Tort Claims Act and prosecutorial immunity. (Doc. 73.) In his response brief, Plaintiff contends that the New Mexico Tort Claims Act is inapplicable and Defendant Smith is not entitled to prosecutorial immunity. (Doc. 89.)

II. Legal Standard

When analyzing a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court applies the same standard applicable to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In order to withstand a motion for judgment on the pleadings or a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must nudge his "claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court accepts as true all of the factual allegations in the complaint and construes those facts in the light most favorable to the plaintiff. *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1284 (10th Cir. 2008).

III. Discussion

A. The New Mexico Tort Claims Act

1. The claims against Defendant Smith do not fall within a waiver of immunity

Defendant Smith asserts that Plaintiff's claims against her are barred by the New Mexico Tort Claims Act ("NMTCA"). The NMTCA is the "exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim." N.M. Stat. Ann. § 41-4-17(A). A public employee of New Mexico may not be sued unless the plaintiffs cause of action fits within one of the exceptions granted to governmental entities and public employees in the NMTCA. *See Begay v. State*, 723 P.2d 252, 255 (N.M. Ct. App. 1985), *rev'd on other grounds by Smialek v. Begay*, 721 P.2d 1306 (N.M. 1986).

The NMTCA provides a waiver of sovereign immunity only for claims in specified categories. The one waiver that could potentially permit a claim for malicious abuse of process applies only to claims against law enforcement officers. *See* N.M. Stat. Ann. § 41-4-12. This waiver is inapplicable herein because Defendant Smith, an assistant attorney general, is not a "law enforcement officer" within the meaning of the NMTCA.

The NMTCA defines "law enforcement officer" to mean "a full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the National Guard when called to active duty by the governor." N.M. Stat. Ann. § 41-4-12. § 41-4-3(D). Prosecuting attorneys are not considered law enforcement officers for the purposes of the NMTCA. *See Coyazo v. State*, 120 N.M. 47, 51 (N.M. Ct. App. 1995). In *Coyazo*, the New Mexico Court of Appeals utilized a "practical approach" when it made that determination, and noted that "it is clear that district attorneys and their staffs are not engaged in the same activities as the officer on patrol when involved in the judicial phase of the criminal process." *Id.* Thus, the New Mexico Court of Appeals held that district attorneys were not law enforcement officers within the meaning of the NMTCA.

The duties of the New Mexico attorney general's office are defined in N.M. Stat. Ann. § 8-5-2. They involve the general representation of the state, and are not limited to criminal prosecutions. According to Plaintiff's allegations, Defendant Smith, appealed the decision to the New Mexico Court of Appeals and filed an action against Plaintiff in the Second Judicial District Court alleging violation of BOL rules regarding the practice of engineering without a license. (Doc. 3.) The appeal and the district court action involve civil, rather than criminal, representation. If a district attorney, whose primary duty is criminal prosecution, is not

a law enforcement officer, then an assistant attorney general is certainly not a law enforcement officer. Accordingly, Plaintiff's claims against Defendant Smith do not fall within a waiver of immunity under the NMTCA.

2. Defendant Smith acted within the scope of her duties

Plaintiff contends that Defendant Smith is not immune from tort liability under the NMTCA because she acted outside the scope of her duties as an Assistant Attorney General. Under the NMTCA, the State is only liable for torts committed by public employees while acting within their "scope of duty." *See* N.M. Stat. Ann § 41-4-4(D). The NMTCA defines "scope of duties" as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." N.M. Stat. Ann. § 41-4-3(G).

According to the Supreme Court of New Mexico, "scope of duties" includes "employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity." *Celaya v. Hall*, 85 P.3d 239, 245 (N.M. 2004). The scope of duties is not limited to acts "officially requested, required or authorized because, contrary to legislative intent, it would render all unlawful acts, which are always unauthorized, beyond the remedial scope of the [NM]TCA." *Id.* In order for an act to be within the scope of duties "there must be a connection between the public employee's actions at

the time of the incident and the duties the public employee was "requested, required or authorized" to perform." *Id.* (citing N.M. Stat. Ann. § 41-4-3(G)).

For instance, in *Seeds v. Lucero*, 113 P.3d 859 (N.M. Ct. App. 2005), the New Mexico Court of Appeals held that city officials' "utilizing the machinery of city government" against private individuals for personal motives was covered by the NMTCA. *Id.*, 113 P.3d at 863. In *Vigil v. State Auditor's Office*, 116 P.3d 854 (Ct. App. 2005), the New Mexico Court of Appeals held that the state auditor who conducted audits in violation of statute, and instituted false audits, was covered by the NMTCA. *See id.* at 859. Additionally, in *Henning v. Rounds*, 171 P.3d 317 (N.M. Ct. App. 2007), the New Mexico Court of Appeals held that a school principal's allegedly false and misleading comments and evaluations of a teacher were actions committed within the scope of duties. *See* 171 P.3d at 320-22. If these types of actions are within the scope of duties, then the actions of Defendant Smith in filing the appeal and district court action clearly fall within the scope of duties of an Assistant Attorney General. Accordingly, Defendant Smith is covered by the NMTCA.

3. Plaintiff's claims are barred by the statute of limitations in the NMTCA

The NMTCA provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence

resulting in loss, injury or death." N.M. Stat. Ann. § 41-4-15. According to Plaintiff's Amended Complaint, the New Mexico Court of Appeals upheld the Second Judicial District Court's reversal of the BOL order on April 15, 2013. Thus, any damage suffered by Plaintiff as a consequence of the appeal must have occurred before that date. However, Plaintiff did not file suit until April 23, 2015, more than two years after the conclusion of the appeal. Accordingly, Plaintiff's claims against Defendant Smith are time-barred by the two-year statute of limitations in the NMTCA.

Plaintiff asserts that the NMTCA is inapplicable because his claims against Defendant Smith are based on 42 U.S.C. § 1983. In order to state a claim under Section 1983, Plaintiff must allege deprivation of a federally protected right by a person acting under color of state law. *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016). To the extent that Plaintiff alleges a claim under Section 1983 it would be barred by the statute of limitations.

The statute of limitations for claims brought under 42 U.S.C. § 1983 is governed by the personal injury statute of limitations for the state in which the federal district court sits. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008) (citing *Wilson v. Garcia*, 471 U.S. 251 (1985)); *Graham v. Taylor*, 640 F. App'x 766, 769 (10th Cir. 2016). In New Mexico, the statute of limitations period for personal injury actions is three years. N.M. Stat. Ann. § 37-1-8. While state law provides the statute of limitations period, federal law determines the date on which the claim accrues and

the statute begins to run. *Mondragon*, 519 F.3d at 1078 (citing *Wallace v. Kato*, 549 U.S. 384 (2007)); *Graham*, 640 F. App'x at769.

Under federal law, § 1983 claims generally rely on the common law tort principle that the claim accrues when the plaintiff "has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Febar Corp. of Cal.*, 522 U.S. 192, 201 (1997)) (citations omitted). Defendant Smith's last relevant action occurred on September 24, 2011, when she filed the Reply Brief in the Court of Appeals. (Doc. 101-1.) In that Plaintiff filed this action more than three years later; any Section 1983 action would be time-barred.

B. Prosecutorial Immunity

Defendant Smith claims entitlement to absolute prosecutorial immunity. A prosecutor acting within the scope of her prosecutorial function is protected by absolute immunity from civil suits. *See Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). In evaluating an assertion of absolute immunity, the Supreme Court of the United States applies a functional approach, "focus[ing] on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question of whether it was lawful." *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993). When a prosecutor is acting as an advocate, and performing duties intimately associated with the judicial process, immunity

attaches and bars any civil suit against her. *See Imbler*, 424 U.S. at 431; *Buckley*, 509 U.S. at 272–273.

The Supreme Court has stated that activities involving professional judgment are in the nature of advocacy, and are therefore protected by absolute immunity. *See Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); *Buckley*, 509 U.S. at 274. In *Kalina*, the Supreme Court found such activities as drafting of the certification to the court, determining that the evidence justified a probable cause finding, deciding to file charges, presenting information, and making a motion to the court to be the work of an advocate, involving "the exercise of professional judgment." 522 U.S. at 130. The Tenth Circuit has explained that "absolute prosecutorial immunity extends to state attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991). Any acts undertaken by Defendant Smith in the course of her role as an Assistant Attorney General are entitled to absolute immunity.

The actions on which Plaintiff's claims against Defendant Smith are based are all within the functions of an Assistant Attorney General acting as an advocate. Plaintiff is aggrieved with the way in which Defendant Smith filed the district court action and prosecuted the appeal. The conduct of Defendant Smith that Plaintiff calls into question is precisely the type of conduct covered by prosecutorial immunity. Indeed, the Amended Complaint contains no factual

allegation of any conduct by Defendant Smith outside of her role as an Assistant Attorney General. Therefore, the claims against Defendant Smith are barred by absolute prosecutorial immunity.

IV. Conclusion

Plaintiff's claims against Defendant Smith are barred by the New Mexico Tort Claims Act and prosecutorial immunity.

THEREFORE,

IT IS ORDERED that Defendant Mary Smith's Motion for Judgment on the Pleadings (Doc. 73) is **GRANTED**.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DR. WILLIAM M. TURNER,

Plaintiff,

v. No. 1:15-CV-00339-RB/SCY

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBASH SHAH, Former Executive Director of the Middle Rio Grande Conservancy District (MRGCD) and former Chief Engineer and former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; JOHN DOES, Members or Former Members of the MRGCD; MARY SMITH, New Mexico Assistant Attorney General; JOHN DOES, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN DOES, of KOB Channel 4 News of Albuquerque; and KOB-TV,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Jun. 1, 2017)

This matter is before the Court on Plaintiff's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro., Rules [sic] 59, filed on March 24, 2017 (Doc. 116). Jurisdiction arises under 28 U.S.C. §§ 1331 and 1367.

On February 24, 2017, the Court entered its Final Order in favor of Defendants and dismissed the case with prejudice. (Doc. 115.) The Court had previously granted Defendants' MRGCD, Shah, and Domrzalski's Motion to Dismiss (*see* Docs. 70, 114), Defendant Smith's Motion for Judgment on the Pleadings (*see* Docs. 73, 111), Defendant Romero's Motion for Judgment on the Pleadings (*see* Docs. 76, 112), and Defendant Ytuarte's Motion for Judgment on the Pleadings (*see* Docs. 78, 113).

Dr. William Turner (Plaintiff) now moves the Court to reconsider these four opinions and argues that the Court overlooked and/or misconstrued controlling law and overlooked factual details as alleged in Plaintiff's First Amended Complaint. (*See* Doc. 116.) Having considered the submissions of counsel and relevant law, the Court will DENY the motion.

I. Procedural and Factual Background

On April 23, 2015, Plaintiff filed suit in this Court against a variety of Defendants. (Doc. 1.) Plaintiff's

First Amended Verified Complaint alleges seven causes of action: (1) violations of his Due Process and Fifth Amendment rights against Defendants Shah, Domrzalski, Romero, and Ytuarte; (2) violations of his First Amendment rights by Defendants Shah, Domrzalski, John Does of MRGCD, and John Does of the Board of Licensure for Professional Engineers and Professional Land Surveyors (BOL); (3) violations of his Equal Protection rights and discrimination by Defendants Shah, Domrzalski, and John Does of KOB Channel 4; (4) conspiracy to violate Plaintiff's First and Fourteenth Amendment (equal protection) rights pursuant to 42 U.S.C. § 1985(3) by Defendants Shah, Domrzalski, Ytuarte, and John Does of BOL; (5) civil conspiracy by Defendants Shah, Domrzalski, Romero, Ytuarte, Smith, and John Does of MRGCD; (6) malicious prosecution/abuse of process by Defendants Shah, Domrzalski, John Does of the MRGCD, Ytuarte, Romero, John Does of the BOL, and Smith; and (7) claims pursuant to the New Mexico Tort Claims Act, defamation, and slander by Defendants Shah, Domrzalski, and John Doe of KOAT. (*See* Doc. 3.)

The Court provided a summary of the pertinent facts in a light most favorable to Plaintiff in its original Memorandum Opinion and Orders and incorporates those facts herein. (*See* Docs. 111, at 1–4; 112, at 1–4; 113, at 1–4; 114, at 1–4.)

II. Legal Standards

A. Motion to Alter or Amend Judgment Standard

A motion to alter or amend judgment pursuant to "rule 59(e) is an 'inappropriate vehicle[] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion.'" *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1218 (D.N.M. 2014) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Id.* (quoting *Servants of Paraclete*, 204 F.3d at 1012 (internal citation omitted)). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* (quoting *Servants of Paraclete*, 204 F.3d at 1012 (internal citation omitted)). "A district court has considerable discretion in ruling on a motion to reconsider under rule 59(e)." *Id.* (citing *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997)).

B. Motion to Dismiss Standard

The Court uses the same standard to analyze both a motion to dismiss and a motion for judgment on the pleadings. *Atl. Richfield Co. v. Farm Credit Bank of*

Wichita, 226 F.3d 1138, 1160 (10th Cir. 2000) (citation omitted). In order to withstand a motion to dismiss or a motion for judgment on the pleadings, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must nudge his "claims across the line from conceivable to plausible. . . ." *Twombly*, 550 U.S. at 570. The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). The Court accepts as true all of the factual allegations in the complaint and construes those facts "in the light most favorable to the plaintiff." *See Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1284 (10th Cir. 2008).

III. Analysis

Plaintiff alleges seven discrete points of error with the Court's opinions: (1) "[t]he [C]ourt overlooked the controlling uniform precedent(s) of the Tenth Circuit and other various other [sic] circuits on the accrual of 1983 malicious prosecution and conspiracy claims"; (2) "[f]or 1983 malicious prosecution, Plaintiff's 'charge of violation' was a 'criminal proceeding'"; (3) the "[C]ourt overlooked the policy or custom or practice identified by Plaintiff in his amended complaint and the Tenth Circuit's precedent in support"; (4) the "Court overlooked the factual details and/or discriminatory

animus alleged by Plaintiff in his amended complaint"; (5) "[t]he Court Decision is in conflict with controlling precedent from the 10th Circuit Court of Appeals"; (6) "Plaintiff has Sufficiently Pled Facts of a Policy or Custom of the MRGCD to Nudge His 42 U.S.C. 1983 Claims for Deprivation of His First Amendment Rights and Conspiracy to Deprive Him of His Constitutional Rights Across the Line for [sic] Conceivable to Plausible Such [that] the Court Committed Clear Error in Dismissing The Claim"; and (7) "Plaintiff believes that the present case is a Bivens type of case where government and quasi-governmental officials of New Mexico have violated Plaintiff's civil rights." (Doc. 116, at 5–19.)

The Court addresses Plaintiff's first, second, and fifth arguments together in Section III(A) and his third, fourth, sixth, and seventh arguments in Section III(B).

A. Plaintiff's claims accrued on February 26, 2010.

Plaintiff argues that the "favorable termination rule," as defined in *Heck v. Humphrey*, 512 U.S. 477 (1994), applies to his § 1983 claims, thus the Court miscalculated the date his § 1983 claim for malicious prosecution accrued. (Doc. 116, at 5–7, 11–15.) While Plaintiff made substantially similar arguments in his responses to the original motions (see Docs. 88, at 7–14; 89, at 14–15; 90, at 9–11; 91, at 5–6), he argues that the Court overlooked his position and/or relevant law,

because the Court did not specifically address whether the Tenth Circuit's decisions in either *Robinson v. Moruffi*, 895 F.2d 649 (10th Cir. 1990) or *Cohen v. Clemens*, 321 F. App'x 739 (10th Cir. 2009) support the contention that *Heck* is applicable to Plaintiff's claims, or whether N.M. Stat. Ann. § 37-1-12 (1978) tolled the applicable statute of limitations. (Doc. 116, at 5–7, 11–15.)

1. Neither *Cohen* nor *Robinson* are applicable to Plaintiff's claims.

Plaintiff contends "the [C]ourt missed the essential element of a 1983 malicious prosecution claim that the proceeding, whether it is criminal or civil, must finally terminate in Plaintiff's favor." (Doc. 116, at 5.) Plaintiff relies on the reasoning in *Heck* and its progeny to support his position. In *Heck*, the Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has

> *not* been so invalidated is not cognizable under § 1983.

512 U.S. at 486. As the Court noted previously, *Heck* "applies only to claims that would imply the invalidity of a criminal conviction or sentence." (*See*, *e.g.*, Doc. 112, at 6 (citing *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999)).)

Plaintiff contends that *Cohen* extends *Heck* to claims like Plaintiff's. (Doc. 116, at 14.) Plaintiff quotes a sentence from *Cohen*—"the rule in *Heck* is not limited to claims challenging the validity of crimination convictions"—but fails to provide any context from the case. (*Id.* (quoting Cohen, 321 F. App'x at 742 (internal citations omitted)).) Cohen, "an alien detainee" bringing claims against federal officials pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and other federal statutes, alleged that the federal officials "falsified and failed to file immigration forms related to his pending immigration case, thereby causing him to be denied release on bond." *Cohen*, 321 F. App'x at 740–41. In discussing *Heck*'s reach, the Tenth Circuit cited a variety of cases that had applied *Heck*. *Id.* at 742 (quoting *Crow v. Penry*, 102 F.3d 1086, 1087 (10th Cir. 1996) (per curiam) ("*Heck* applies to *Bivens* actions") (internal citation omitted); *Edwards v. Balisok*, 520 U.S. 641 (1997) ("applying *Heck* to a § 1983 claim challenging procedures used to deprive a prison inmate of good time credits"); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1137 (9th Cir. 2005) ("applying *Heck* to a § 1983 claim challenging civil commitment under California's

Sexually Violent Predators Act"); *Hamilton v. Lyons*, 74 F.3d 99, 102–03 (5th Cir. 1996) ("applying *Heck* to a § 1983 claim challenging the coercive nature of a pretrial detainee's confinement prior to giving a statement regarding pending charges")). None of the cited cases are analogous to Plaintiff's.

Plaintiff also relies heavily on the Tenth Circuit's pre-*Heck* decision in *Robinson v. Moruffi*, 895 F.2d at 654–55. Plaintiff made essentially the same argument in his earlier responses to Defendants' motions. (*See* Docs. 88, at 8–9 (discussing *Robinson*); 89, at 15 (incorporating the section from Doc. 88 that references *Robinson*); 90, at 9 (incorporating the section from Doc. 88 that references *Robinson*); 91, at 5 (incorporating the section from Doc. 88 that references *Robinson*).)

In *Robinson*, the plaintiff brought a civil rights action against several defendants alleging a variety of claims, including malicious prosecution under § 1983. 895 F.2d at 650. The plaintiff, who had been charged with murder and armed robbery, had gone through two criminal jury trials: the first ended in convictions, which the New Mexico Supreme Court reversed "due to the prosecutor's improper examination and impeachment of an eyewitness"; the second ended in acquittal. *Id.* at 651–53 (citation omitted). The defendants argued that the plaintiff's malicious prosecution claim was barred by the applicable statute of limitations. *Id.* at 653–54 (citing *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) ("§ 1983 actions best characterized as personal injury actions and subject to New Mexico three-year" statute of limitations); *aff'g Garcia v.*

Wilson, 731 F.2d 640 (10th Cir. 1984); N.M. Stat. Ann. § 37-1-8 (1978)); *see also Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1212 (10th Cir. 2014) ("The law was settled in *Wilson* that for § 1983 claims arising in New Mexico the limitations period is three years, as provided in New Mexico's statute of limitations for personal-injury claims") (citations omitted). The Tenth Circuit held that the plaintiff's claims did not accrue after the New Mexico Supreme Court's reversal of the first convictions, because he "remained subject to those serious charges and went on trial for his life again in October 1983 when the malicious prosecution conspiracy again resulted in presentation of the false case against him." *Robinson*, 895 F.2d at 654. The Tenth Circuit instead found that the plaintiff's claims accrued at the conclusion of the second trial, when he was acquitted. *Id.*

Plaintiff ignores the thread running through all of these cases—detention. *See also Crow*, 102 F.3d at 1087 (*Heck* applies to *Bivens* actions" as well as "to proceedings that call into question the fact or duration of parole or probation.") (citations omitted). The Tenth Circuit explained in *Butler v. Compton*, 482 F.3d 1277 (10th Cir. 2007),

> [t]he purpose behind *Heck* is to prevent litigants from using a § 1983 action, with its more lenient pleading rules, to challenge their conviction or sentence without complying with the more stringent exhaustion requirements for habeas actions. *See Muhammad v. Close*, 540 U.S. 749, 751–52 (2004) (per

> curiam). The starting point for the application of *Heck* then is the existence of an underlying conviction or sentence that is tied to the conduct alleged in the § 1983 action. In other words, a § 1983 action implicates *Heck* only as it relates to the conviction that it would be directly invalidating. There is no such conviction here.

482 F.3d at 1279. Similarly, there was no such conviction or detention for Dr. Turner.

Plaintiff advances the novel theory that because he *could have* faced a misdemeanor charge if he had not paid the fine levied by the BOL, his proceedings should be considered criminal, rather than civil. (Doc. 116, at 12 (discussing N.M. Stat. Ann. § 61-23-27.15E).) Plaintiff cites no controlling authority in support of this theory, and the Court is unpersuaded. As Plaintiff's claim follows civil proceedings that did not result in conviction, detention, commitment, or any criminal proceedings, neither *Heck, Cohen*, nor *Robinson* apply.

2. Section 37-1-12 does not toll the applicable statute of limitations.

Plaintiff next argues that N.M. Stat. Ann. § 37-1-12 tolls the applicable statute of limitations. (Doc. 116, at 115.) This section provides: "When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation." N.M. Stat. Ann. § 37-1-12. Plaintiff

contends that the statute of limitations should be tolled from the date he appealed the BOL's decision to the date the New Mexico Court of Appeals published its own opinion. (Doc. 116, at 115.) Plaintiff does not, however, explain or cite any authority to demonstrate that the proceedings in the district court or the court of appeals stayed or prevented him from filing his claims in this Court. *See Butler v. Deutsche Morgan Grenfell, Inc.*, 140 P.3d 532, 537 (N.M. Ct. App. 2006) (Section 37-1-12 "refers only to injunctions or other orders that preclude 'the commencement' of an action."). Presumably, Plaintiff would argue that *Heck*'s favorable termination rule prevented him from filing his claims here before the New Mexico Court of Appeals' decision. The Court has already found that argument inapplicable. Consequently, Plaintiff fails to establish that § 37-1-12 tolled the statute of limitations.

B. The Court declines to address the balance of Plaintiff's Motion.

In the third, fourth, and sixth sections of his Motion, Plaintiff contends that the Court erred in finding that he had failed to plead facts sufficient to state his claims pursuant to §§ 1983 and 1985. (Doc. 116, at 8–11, 15–18.) Because the Court reaffirms its decision that Plaintiff failed to file his claims within the applicable statute of limitations, these issues are moot.

In his seventh argument, it appears Plaintiff advances a new theory of recovery: a claim pursuant to *Bivens*, 403 U.S. 388. (Doc. 116, at 18–19.) The Court

denies Plaintiff's Motion with respect to this last claim for at least three reasons. First, it is inappropriate to raise a new argument at this juncture. *See Jarita Mesa Livestock Grazing Ass'n*, 58 F. Supp. 3d at 1218; *see also Servants of Paraclete*, 204 F.3d at 1012 ("It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.") (citation omitted). Second, a *Bivens* action is a "private action for damages against *federal* officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (emphasis added) (holding that a plaintiff may not bring a *Bivens* action against private entities acting under color of federal law). Defendants are not federal officers, thus Plaintiff may not bring a *Bivens* claim against them. Finally, even if Plaintiff could bring a *Bivens* claim against these Defendants, "[a] *Bivens* action is subject to the limitation period for an action under 42 U.S.C. § 1983, and that limitation period is set by the personal injury statute in the state where the cause of action accrues." *Roberts v. Barreras*, 484 F.3d 1236, 1238 (10th Cir. 2007) (citations omitted). The Court has already found that Plaintiff's claim is barred by the applicable statute of limitations, hence any *Bivens* claim would also be barred.

IV. Conclusion

The Court has reviewed the facts and the law in a light most favorable to Plaintiff and finds that Plaintiff has failed to establish that the Court previously

misapprehended the facts, Plaintiff's position, or the controlling law.

THEREFORE,

IT IS ORDERED that Plaintiff's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro., Rule 59 (Doc. 116) is **DENIED**.

/s/ Robert Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 17-2105

WILLIAM M. TURNER,
Plaintiff-Appellant,

v.

MIDDLE RIO GRANDE
CONSERVANCY DISTRICT, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court
For the District of New Mexico (Hon. Robert C. Brack)
District Case No. 1:15-00339

APPELLANT'S OPENING BRIEF

A Blair Dunn, Esq.
Dori E. Richards, Esq.
WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060

Dated: September 13, 2017

Oral Argument Requested

[ii] **TABLE OF CONTENTS**

[iv] TABLE OF AUTHORITIES

Cases

Statutes

[1] **STATEMENT OF PRIOR RELATED APPEALS**

There are no prior related appeals in this matter.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction to hear the underlying case pursuant to First, Fifth and Fourteenth Amendments of the United States Constitution, and 28 U.S.C. § 1343, 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. The District Court for the District of New Mexico entered a final judgment in this matter on February 24, 2017 and June 1, 2017, disposing of all claims. Appellants filed a timely Notice of Appeal on June 21, 2017.

STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO DISMISS FILED BY MRGCD APPELLEES AND MOTION FOR JUDGMENT ON PLEADINGS FILED BY APPELLEES MS. SMITH, MR. ROMERO AND MR. YTUARTE.

2. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S RULE 59 MOTION TO ALTER OR AMEND JUDGMENT.

3. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CIVIL RIGHTS CLAIMS

BROUGHT UNDER 42 U.S.C 1983 AND 42 U.S.C 1985(3) AS BARRED BY THE STATUTE OF LIMITATIONS.

4. THE DISTRICT COURT ERRED IN NOT FINDING THAT APPELLANT'S CLAIM(S) ACCRUED ONLY ON APRIL 24, 2013.

[2] 5. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANT FAILED TO STATE CLAIMS UNDER 42 U.S.C 1983 AND 42 U.S.C 1985(3).

6. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANT'S NEW MEXICO TORT CLAIMS ARE BARRED BY STATUTE OF LIMITATIONS.

7. THE DISTRICT COURT ERRED IN FINDING THAT THE RULE IN *HECK V. HUMPHREY*, 512 U.S. 477 IS NOT APPLICABLE TO PLAINITFF'S CASE.

8. THE DISTRICT COURT ERRED IN FINDING THAT APPELLANT FAILED TO SUFFICIENTLY PLEAD FACTS ABOUT THE POLICY OR CUSTOM OF MRGCD IN SUPPORT OF HIS CIVIL RIGHTS CLAIM(S).

STATEMENT OF THE CASE

This matter arises from Appellees' 42 U.S.C. 1983 violations of Appellant's constitutional rights, discrimination, denial of equal protection and 42 U.S.C. 1985 conspiracy to interfere with Appellant's civil rights. Appellant also brings common law torts of malicious abuse of process and conspiracy, as well as slander and

defamation and seeks damages for all alleged violations. The Appellees Middle Rio Grande Conservancy District, Subhas Shan and Dennis Domrzalski ("MRGCD Appellees") move to dismiss Appellant's First Amended Complaint on the basis that: 1) no claims are made against the Appellee MRGCD; 2) all of Appellants claims are barred by the statute of limitations; 3) Appellant has failed to state a §1985 conspiracy claim; and 4) there is no waiver of immunity under the New [3] Mexico Tort Claims Act for Appellant's state law claims as against the MRCGD Appellees.

Appellant's Complaint meets the applicable pleading standard and Appellant's claims are not barred by the statute of limitations. Appellant acknowledges the State law claims as made against the MRGCD Appellees in their official capacity are barred by the NM Tort Claims Act.

STATEMENT OF THE FACTS

On April 24, 2007, Appellee Domrzalski filed a complaint with the BOL against Appellant for "practicing engineering without a license." (Aplt. App. 020). Appellee Domrzalski testified during deposition that the Complaint was dictated to him by the MRGCD Executive Director, Appellee Shah. (Aplt. App. 020) At the time, Appellee Shah was also the Chairman of the BOL. (Aplt. App. 020) When Appellees Domrzalski and Shah initiated the BOL Complaint against Appellant, Appellees knew that Appellant was immune from such

suit as a Board member of MRGCD. Appellees' sole intention in filing such suit was to harass, quash and oust Appellant from the MRGCD Board. (Aplt. App. 021) Under the Chairmanship of Appellee Shah, BOL found Appellant guilty of "practicing engineering without a license." Appellant appealed the BOL administrative decision to the Second Judicial District Court in Albuquerque. (Aplt. App 021).

[4] The Second Judicial District Court reversed the BOL, finding that the decision was unwarranted and violated Appellants First Amendment Rights. (Aplt. App. 021). The Attorney General for the State of New Mexico, through Mary Smith, appealed the Second Judicial District Court decision to the New Mexico Court of Appeals. (Aplt. App. 021) On April 15, 2013, the Court of Appeals upheld the Second Judicial District Court finding that Appellees' actions violated Appellant's Constitutional Right to free speech. (Aplt/ App. 021).

As Appellees state, the Court may take judicial notice of facts which are a matter of public record. The decision of the NM Court of Appeals in *NM Board of Licensure v. William Turner*, 2013-NMCA-067 was filed on April 24, 2013, not April 15, 2013 as alleged at paragraph 54 of Appellant's First Amended Complaint. (Aplt. App. 320-329. The New Mexico Court of Appeals found that:

1. Turner prepared and presented a report at the February 27, 2007 MRGCD Board of Directors meeting

which expressed his concerns regarding the condition of MRGCD ditches. (Aplt. App. 321)

2. Turner reiterated that he was not an engineer multiple times during the MRGCD Board of Directors meeting, when giving and in response to comments about his presentation. In addition, Turner insisted that MRGCD should hire a registered engineer to deal with the issues highlighted in his report. At the end of Turner's report, he stated that he was not a registered professional engineer and that [5] his report should be reviewed by a registered professional engineer. (Aplt. App. 321)

3. Dennis Domrzalski, a contract employee of MRGCD, thereafter filed a complaint against Turner with the Board, alleging that Turner engaged in the forbidden practice of engineering without a license when he wrote and presented his report at the MRGCD Board of Directors meeting. In a letter responding to the complaint, Turner asserted that he "was never paid for the services, nor were the services ever considered anything more than an opinion by a board member for a reason to obtain a licensed professional engineer's services." (Aplt App. 322)

4. Nonetheless, the Board's professional engineering committee conducted an administrative hearing on December 16, 2009, nearly three years after Turner's February 2007 presentation to the MRGCD Board of Directors. (Aplt. App. 322)

5. On February 26, 2010, the Board issued its Decision and Order containing its findings of fact and

conclusions of law. The Board concluded that Turner had in fact practiced engineering without a license, in violation of the ESPA, NMSA 1978, Sections 61-23-2 (2003) and -3 (2005), "by his investigation and evaluation of the planning and design of 'engineering works and systems' – MRGCD ditches – described in his . . . [r]eport . . . and his presentation of that [r]eport to the MRGCD Board of Directors." *Id*.

[6] 6. The Board ordered Turner to cease and desist from any further unlicensed practice of engineering, pay a $2,500 civil penalty, and pay an additional administrative hearing cost in the amount of $2,670.93. (Aplt. App. 322).

7. Turner timely appealed the Board's decision to the district court. In its appellate capacity, the district court determined that the Board's decision was not supported by substantial evidence. The district court concluded that "Turner's conduct in evaluating an engineering issue, performing engineering calculations, writing his conclusions, and presenting them publicly, cannot constitute the practice of engineering without a license." The district court explained that the Board's actions violated Turner's First Amendment right to freedom of speech. (Aplt. App. 322-323)

8. The New Mexico Board of Licensure for Professional Engineers and Professional Surveyors (the Board) appealed the district court's reversal of the Board's decision finding that William Turner practiced engineering without a license in violation of the Engineering and Surveying Practice Act (ESPA). The Board

argued that the district court erred by (1) determining that the Board's interpretation of the ESPA improperly infringed on Turner's free speech rights; (2) reweighing the evidence in the administrative record and substituting its judgment for that of the Board; and (3) making its own findings of fact. (Aplt. App. 320-321).

[7] 9. The District Court did not engage in fact finding, re-evaluating evidence, or improper appellate review. The District Court's reversal was based upon the Board's failure to adhere to the constitution in applying Section 61-23-2. (Aplt. App. 328).

SUMMARY OF THE ARGUMENT

The District Court erred in failing to address or consider, Appellant's arguments regarding the the [sic] proper statute of limitation or the concerns of 1st Amendment violation through vindictive prosecution.

ARGUMENT

I. APPELLANT'S CLAIMS ARE NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

In this case, the Parties agree that New Mexico's three-year personal injury statute of limitations, N.M.S.A. 1978, § 37-1-8, applies to Appellant's § 1983 claims. "The applicable statute of limitations for a § 1983 claim is drawn from the personal-injury statute

of the state in which the federal district court sits." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Where the Parties disagree is over the date of accrual. Appellees assert that Appellant's federal civil rights allegations encompass violations of his due process rights, first amendment rights, and equal protection rights for actions that occurred in 2007 through 2010. (Aplt. App. 048).

[8] Appellees claim the statute of limitations on Appellant's § 1983 claims "began to accrue on the dates the events are alleged to have occurred." *Id*. Appellees argue that all facts concerning Appellant's claims against the MRGCD's Appellees occurred from 2007 to at the latest March 2010, and therefore Appellant's § 1983 actions are subject to dismissal as beyond the statute of limitations. (Aplt. App. 049). The statute of limitations began to run from the date the Court of Appeals issued its ruling in the matter of *New Mexico Board of Licensure for Professional Engineers and Professional Surveyors v. William Turner*, 2013-NMCA-067, which was on April 24, 2013.(Aplt. App. 320-329).Appellant's case was filed in the District Court on April 23, 2015, within the three-year statute of limitations.

A. Federal Law Determines the Accrual Date of Appellant's Claims While State Law Governs Tolling.

"Federal law determines the date on which the claim accrues and the limitations period starts to run.

State law governs any tolling of that period, except that federal law might also allow additional equitable tolling in rare circumstances." *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008) (internal citations omitted). "A civil rights action accrues when the Appellant knows or has reason to know of the injury which is the basis of the action. Since the injury in a § 1983 case is the violation of a constitutional right, such claims accrue when the Appellant knows or should know that his or her constitutional rights have been violated. This [9] requires the court to identify the constitutional violation and locate it in time." *Smith v. City of Enid By and Through Enid City Com'n*, 149 F.3d 1151, 1154 (10th Cir. 1998).

In this case, Appellant has brought claims against the MRGCD Appellees for: 1) Due Process under the Fifth Amendment (First Cause of Action); 2) First Amendment (Second Cause of Action); 3) Equal Protection and Discrimination (Third Cause of Action); 4) Conspiracy (Fourth & Firth [sic] Causes of Action); 5) Malicious Prosecution & Abuse of Process (Sixth Cause of Action); 6) State Common Law and Tort Act Claims (Seventh Cause of Action). It is important to note that Appellant's claims are fundamentally premised upon a civil – not a criminal – prosecution, stemming from the initiation of an administrative action against Appellant with the NM Board of Licensure on April 24, 2007. However, failing to pay the civil penalty assessed against him statutorily became a criminal charge. Under NMSA 1978, §61-23-27.11(C), the "[f]ailure to pay a fine levied by the board or to otherwise comply with

an order issued by the board pursuant to the Uniform Licensing Act [Chapter 61, Article 1 NMSA 1978] is a misdemeanor and shall be grounds for further action against the licensee by the board and for judicial sanctions or relief."

It is unequivocal that "[g]overnment action which chills constitutionally protected speech or expression contravenes the First Amendment." *Beedle v.* [10] *Wilson*, 422 F.3d 1059, 1066 (10th Cir. 2005), citing to *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) and *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995). "When the § 1983 claim is based on an allegedly unconstitutional conviction or other harm that, if determined to be unlawful, would render a conviction or sentence invalid, accrual is delayed until the conviction or sentence has been invalidated." *McCarty v. Gilchrist*, 646 F.3d 1281, 1289 (10th Cir. 2011) citing to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). "Actions under § 1983 normally accrue on the date of the constitutional violation. However, under *Heck*, a § 1983 claim is not cognizable if it "necessarily require[s] the plaintiff to prove the unlawfulness of his conviction or confinement." 512 U.S. at 486. Accordingly, an Appellant advancing a claim subject to the *Heck* bar is required to show that [the] conviction was reversed or otherwise set aside, *id.* at 487, and the claim does not accrue until the date the conviction is declared invalid, *id*. at 489-90; see also *Wallace*, 549 U.S. at 393 (Heck's principle of deferred accrual "delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that

tort action would impugn.)" *Garza v. Burnett*, 672 F.3d 1217, 1219 (10th Cir. 2012).

Appellant has brought conspiracy claims in this case; which are in part based upon the continued malicious prosecution by Appellees. In *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990), the Tenth Circuit addressed the accrual date of this [11] same type of conspiracy claim. *Robinson* involved § 1983 and § 1985 claims against Albuquerque Police Officers. One issue on appeal was the statute of limitations. The Tenth Circuit held that "the civil rights case of Robinson based on conspiracy for malicious prosecution was not time barred when it was commenced on August 17, 1984 – well within the three-year limitation period following the October 1983 second trial where the false case against Robinson was again presented and Robinson was finally acquitted." 895 F.2d at 655. See also *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) ("An allegation of a conspiracy constitutes a viable claim under Sec. 1983, even if the alleged conspiracy began at a point that would be barred by the statute of limitations."

"Under the continuing wrong doctrine where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury. In other words, the statute of limitations does not begin to run until the wrong is over and done with." *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430-31 (10th Cir. 1996). "New Mexico courts have consistently considered the applicability of the continuing wrong doctrine in a variety of cases. . . .

Thus, although it has not been applied in every possible case, we believe that New Mexico recognizes the doctrine." *Id.* at 4.

The real question in this case is what would be the outcome of a 1983 claim if the appellate court had found that Plaintiff has actually practiced 'engineering' in [12] violation of the professional code. In *Brummett v. Camble*, 946 F.2d 1178, the Fifth Circuit has held that "The question remains whether a § 1983 plaintiff should be required to file suit prior to such termination. Although state law supplies the limitations period for § 1983 claims, federal law determines when the cause of action accrues. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86, 100 S. Ct. 1790, 1794-96, 64 L. Ed. 2d 440 (1980)*; Helton v. Clements*, 832 F.2d 332, 334-35 (5th Cir. 1987). In this circuit, a § 1983 claim accrues when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured*." Helton*, 832 F.2d at 332 (*citing Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980), *on reh'g*, 644 F.2d 1023 (5th Cir. 1981), and *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980)). Relying on this standard, defendants insist that although a state law malicious prosecution claim does not accrue until the underlying criminal proceeding is terminated in the plaintiff's favor, a § 1983 malicious prosecution claim accrues when the plaintiff is indicted.

The perverse result of such a rule is that claimants would have to file § 1983 suits before they even know they have a cause of action, i.e., before a prosecution

has ended favorably to them. Why defendants would advocate the filing of premature lawsuits defies our understanding as well as the uniform precedent of other circuit courts. *See*, *e.g.*, *Robinson v. Moruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d [13] 1144, 1146 (9th Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 194-95 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S. Ct. 1368, 67 L. Ed. 2d 347 (1981); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674 (1st Cir. 1969), *cert. denied*, 398 U.S. 904, 90 S. Ct. 1691, 26 L. Ed. 2d 62 (1970). *See also Wheeler*, 734 F.2d at 254. The cases cited by the defendants and the district court in support of a contrary holding involve § 1983 claims other than those for malicious prosecution. *See*, *e.g.*, *Helton*, 832 F.2d at 332; *Rubin*, 621 F.2d at 116; *Lavellee*, 611 F.2d at 1131.

B. The Supreme Court's Decision in *Heck V. Humphrey* Demonstrates the Statute of Limitations Was Tolled Until April 24, 2013.

In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Supreme Court addressed the question of when a prisoner may bring a § 1983 claim relating to his or her conviction or sentence. The Court held that when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the Appellant would necessarily imply the invalidity

of his conviction or sentence; if it would, the complaint must be dismissed unless the Appellant can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the Appellant's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the Appellant, the action should be allowed to proceed, in the absence of some other [14] bar to the suit. 512 U.S. at 487 (footnotes omitted). Thus, for § 1983 claims necessarily challenging the validity of a conviction or sentence, *Heck* delays the rise of the cause of action until the conviction or sentence has been invalidated. Because the cause of action does not accrue until such time, the applicable statute of limitations does not begin to run until the same time. See *Heck*, 512 U.S. at 489-90. This is also consistent with Tenth Circuit precedent. *Heck* dealt with the "intersection of the two most fertile sources of federal-court prisoner litigation" – the basic federal civil rights statute, 42 U.S.C. § 1983, and the federal habeas corpus statute for state prisoners, 28 U.S.C. § 2254. 512 U.S. at 480, 114 S.Ct. 2364. In *Muhammad v. Close*, 540 U.S. 749, 124 S.Ct. 1303 (2004), the Supreme Court explained that *Heck's* favorable termination rule "served the practical objective of preserving limitations on the availability of habeas remedies. Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate . . . " *Id*. at 751, 124 S.Ct. 1303 (citations omitted). The Tenth Circuit has held that "the rule in *Heck* is not limited to claims challenging the validity of criminal

convictions." *Cohen v. Clemens*, 321 Fed.Appx 739, 742 (10th Cir. 2009). The *Heck* favorable termination rule was found applicable to civil commitments under California's Sexually Violent Predators Act in *Hutfile v. Miccio-Foneseca*, 410 F.3d 1136 (9th Cir. 2005).

[15] In this case, Mr. Turner was not "criminally" convicted. Rather, a statutorily imposed civil "sentence" was imposed against him, which bears sufficient similarity to apply the Supreme Court's reasoning in *Heck* to the facts of this case. As the New Mexico Court of Appeals recognized, the Board of Licensure ordered Turner to "cease and desist from any further unlicensed practice of engineering, pay a $2,500 civil penalty, and pay an additional administrative hearing cost in the amount of $2,670.93." *Board v. Turner*, (Aplt. App. 322). The Board of Licensure is the sole state agency with the power to certify the qualifications of professional engineers and professional surveyors, and to administer the provisions of the Engineering and Surveying Practice Act. NMSA 1978, § 61-23-10. The Board is empowered to investigate and initiate a hearing on a complaint against a person who does not have a license, hold hearings, and after hearing can impose a civil penalty and issue "any other sanction, action or remedy." NMSA 1978, § 61-23-23.1(A) & (B). "Failure to pay a fine levied by the board or to otherwise comply with an order issued by the board pursuant to the Engineering and Surveying Practice Act is a misdemeanor, and upon conviction the person shall be sentenced pursuant to Section 31-19-1 NMSA 1978. Conviction shall be grounds for further action against

the person by the board and for judicial sanctions or relief, including a petition for injunction." NMSA 1978, 61-23-23.1(C). The statutory scheme under which the Board operates demonstrates the action taken against Mr. Turner was [16] "quasi- judicial" in nature. "An administrative agency acts in its quasi-judicial role when it investigates or ascertains the existence of facts, holds hearings, and draws conclusions from them." *Southworth v. Santa Fe Servs., Inc.*, 1998-NMCA-109, ¶ 14, 125 N.M. 489. "Quasi-judicial action has been defined as involving a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question." *KOB-TV, LLC v. City of Albuquerque*, 2005-NMCA-049, ¶ 20, 137 N.M. 388.

Both an injunction and penalty were levied by the Board of Licensure against Mr. Turner, who timely appealed the Board's decision to the district court, as permitted under NMSA 1978, § 61-23-23.1(D). After the district court found the Board's actions to be unconstitutional, the Board appealed to the New Mexico Court of Appeals. The Board's "conviction and sentence" against Mr. Turner was ultimately invalidated on April 24, 2013. Under the Supreme Court's reasoning in *Heck*, it is from this date the statute of limitations should run.

C. State Law Demonstrates the Statute of Limitations Was Tolled Until The New Mexico Court of Appeals Issued Its Ruling on April 24, 2013.

Here, the initial basis of Appellant's claims as alleged in his First Amended Complaint was the filing of the April 24, 2007 complaint against Appellant with [17] the NM Board of Licensure by MRGCD employee Dennis Domrzalski, acting under the express direction of MRGCD Board member Subash Shah. The Board of Licensure's professional engineering committee, chaired by Appellee Shah, did not conduct an administrative hearing until December 16, 2009.

While the administrative complaint was pending for more than two years before the Board of Licensure, the statute of limitations was tolled. "Filing of the complaint is commencement of the action which generally tolls the applicable statute of limitations." *King v. Lujan*, 1982-NMSC-063, ¶ 5, 98 N.M. 179. See also *Gathman-Matotan Architects & Planners, Inc. v. State Dep't of Fin. & Admin*, 1990-NMSC-013, ¶ 10, 109 N.M. 492 ("The Court in *Bracken v. Yates Petroleum Corp*., 1988-NMSC-072, 107 N.M. 463 clearly applied the principle that the filing of an action later dismissed without prejudice for reasons such as improper venue or a federal court's discretionary refusal to entertain pendent jurisdiction tolls the statute of limitations applicable to the claim."). Here, Appellant's § 1983 claims, if brought during pendency of the State administrative action, would have been subject to dismissal under federal abstention principles, such as *Younger v.*

Harris, 401 U.S. 37 (1971) and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Younger* abstention principles have been expanded to include civil proceedings in which important state interests are involved and to administrative proceedings that are judicial in nature and involve important state [18] interests. See *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir.1999).

"Under NMSA 1978, § 37-1-12, "When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation." This statutory section was cited by the New Mexico Supreme Court in *United States Fire Ins Co. v. Aeronautics, Inc.*, 1988-NMSC-051, ¶ 5, 107 N.M. 320, in holding that "the statute [of limitations] does not run during the pendency of an appeal." See also *Otero v. Zouhar*, 1985-NMSC-021, ¶ 14, 102 N.M. 482 ("The submission of plaintiff's application to the commission before the statute expired would then have tolled the limitation period until after the commission had rendered its decision."). Similarly, while the administrative action was pending for nearly three years before the Board of Licensure, the statute of limitations was tolled until the Board issued its Decision against Mr. Turner on February 26, 2010, when the Board concluded that Mr. Turner had practiced engineering without a license.

As the New Mexico Court of Appeals recognized, Turner timely appealed the Board of Licensure's

decision to the district court, which acted in an appellate capacity. After the district court ruled in Turner's favor on January 3, 2011, the Board of Licensure appealed the district court's reversal of the Board's decision to the New Mexico Court of Appeals. Under New Mexico law, during the entire [19] appeal process – before both the district court and the Court of Appeals – the statute of limitations was tolled because "the statute [of limitations] does not run during the pendency of an appeal." *United States Fire Ins. Co.*, 1988-NMSC-051 at ¶ 5. The statute of limitations was tolled during the two appeals, and the facts also demonstrate the continuing wrong doctrine applies in determining the date of accrual of Appellant's § 1983 claims. The New Mexico Court of Appeals in *McNeill v. Rice Engineering & Operating, Inc*., 2006-NMCA-015, ¶ 25, 139 N.M. 48 held that "*Eli Lilly & Co.* [615 F. Supp. 811 (S.D. Ind. 1985)] stated that "[t]he continuing wrongful conduct of the Appellee toward the claimant which establishes a status quo of continuing injury may give rise to a continuing cause of action. Where the wrong is continuing, the statute of limitations does not begin to run until the wrong is over and done with." The Honorable Judge Browning recognized the application of this principle of New Mexico law in *Anderson Living Trust v. WPX Energy Prod., LLC*, 27 F.Supp.3d 1188, 1214 (D.N.M. 2014), in which he stated: "[u]nder the continuing wrong doctrine where a tort involves a continuing or repeated injury, the cause of action accrues at, and the limitations begin to run from, the date of the last injury. In other words, the statute of limitations does not begin to run until the wrong is over and done with."

The Tenth Circuit addressed this doctrine in *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011), in which it recognized "the doctrine is triggered 'by continual unlawful [20] acts, not by continual ill effects from the original violation,'" citing to *Parkhurst v. Lampert*, 264 F. App'x 748, 749 (10th Cir. 2008) (unpublished) (quoting *Bergman v. United States*, 751 F.2d 314, 317 (10th Cir. 1984)).

Here, the wrongful conduct of Appellees alleged in Appellant's First Amended Complaint continued beyond the initial filing of the administrative complaint in 2007 through the appeals to the district court and the New Mexico Court of Appeals. The wrong was not "over and done with" until the Court of Appeals issued its April 24, 2013 Decision. The statute of limitations runs from that date, and Appellant's April 23, 2015 Complaint was filed before the applicable three-year statute ran. The rational and logical reasoning the Supreme Court annunciated in *Heck*, which was followed by the Tenth Circuit in its pre- and post-*Heck* decisions, should apply. This reasoning is consistent with the tolling principle set forth in the New Mexico statutory scheme (NMSA 1978, § 37-1-12) as well as decisions of the New Mexico Supreme Court in *United States Fire Ins. Co. v. Aeronautics, Inc.*, 1988-NMSC-051, 107 N.M. 320, and *Otero v. Zouhar*, 1985-NMSC-021, 102 N.M. 482, as well as the rationale behind the "continuing wrong doctrine." The Court should determine that Appellant's Complaint was filed before the statute of limitations had run.

II. APPELLANT'S MALICIOUS PROSECUTION CLAIMS WAS NEITHER BARRED BY THE STATUTE OF LIMITATIONS, NOR BASED UPON A FOURTH AMENDMENT SEIZURE.

[21] In his First Amended Complaint, Appellant brought a claim for a violation of his First Amendment rights (Second Cause of Action) and for Malicious Prosecution/Abuse of Process (Sixth Cause of Action). Appellees argued that Appellant's malicious prosecution claim must fail because such a claim must be brought under the Fourth Amendment, which Appellant did not do, and the claim was not filed within the applicable three-year statute of limitations. As discussed *infra*., Appellant's Complaint was filed within the applicable statute of limitations. Appellant's Sixth Cause of Action should be recognized as a civil "vindictive prosecution," and not analyzed for what it is not – a malicious criminal prosecution.

A. Seizure Is an Element of A Fourth Amendment Malicious Prosecution Claim, Not A Claim Under the First Amendment.

As Appellees recognize, Appellant's malicious prosecution/abuse of process claim is not based upon the Fourth Amendment, but rather is based upon a civil action taken to chill his First Amendment free speech rights. As such, there was of course no "seizure" under the Fourth Amendment. Seizure is not a requirement for a First Amendment malicious prosecution claim. There is no question that "government action

which chills constitutionally protected speech or expression contravenes the First Amendment." *Beedle v. Wilson*, 422 F.3d 1059, 1066 (10th Cir. 2005). "A governmental lawsuit brought with the intent to retaliate against a citizen for the exercise of his First Amendment rights is itself a violation of the [22] First Amendment and provides grounds for a § 1983 suit." *Id.* "A First-Amendment retaliation claim does not pose the threat of a collateral attack on the wrongfulness of a criminal conviction; it guards against official reprisal for protected speech. *See Hartman v. Moore*, 547 U.S. at 256. Similarly, the gravamen of a malicious-abuse-of-process claim is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." *Mata v. Anderson*, 685 F.Supp.2d 1223, 1264 (D.N.M. 2010).

B. Appellant's Malicious Prosecution/ Abuse of Process Claim Is Recognized Under Federal Law As "Vindictive Prosecution."

"Our cases suggest a § 1983 malicious prosecution claim need not always rest on the right to be free from unreasonable searches and seizures under the Fourth Amendment. As we have previously noted, an Appellant's § 1983 malicious prosecution claim may also encompass procedural due process violations. Other explicit constitutional rights could also conceivably support a § 1983 malicious prosecution cause of action, although the Supreme Court specifically excluded substantive due process as the basis for a malicious

prosecution claim." *Wilkins v DeReyes*, 528 F.3d 790, 806 fn. 4. (10th Cir. 2008) (internal citations and quotations omitted). Appellant's malicious prosecution/ abuse of process claim is recognized under federal law, albeit under a different name – that of vindictive prosecution.

[23] In *Poole v. County of Otero*, 271 F.3d 955 (10th Cir. 2001), the Tenth Circuit addressed, among other matters, a claim made by plaintiff Mr. Poole for violation of his First Amendment right of access to the courts. At footnote 5, the Court pointed out that:

> A claim for vindictive prosecution ordinarily arises when, during the course of criminal proceedings, a Plaintiff exercises constitutional or statutory rights and the government seeks to punish him therefor by instituting additional or more severe charges, see, e.g., *United States v. Wall*, 37 F.3d 1443, 1448 (10th Cir. 1994). In this context, such a claim is governed by a two-part test, see *United States v. Lampley*, 127 F.3d 1231, 1245 (10th Cir. 1997). **Nonetheless, we recognize that this court has not limited the term to the criminal prosecution setting**, but has characterized First Amendment claims similar to Mr. Poole's as "vindictive prosecution." *See Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (comparing a First Amendment claim to a "vindictive prosecution action"); *Gehl Group*, 63 F.3d at 1534 (stating that a First Amendment claim alleging retaliatory prosecution "is essentially one of vindictive prosecution"); *United States v. P.H.E., Inc*.,

> 965 F.2d 848, 853 (10th Cir. 1992) (discussing vindictive prosecution claim in terms of prosecution motivated by "the improper purpose of interfering with the Appellee's constitutionally protected speech"); cf. *Phelps v. Hamilton*, 59 F.3d 1058, 1065 n.12 (10th Cir. 1995) (stating that prosecution brought for the purpose of hindering an exercise of constitutional rights may constitute "harassing and/or bad faith prosecution")." *Poole v. County of Otero*, 271 F.3d 955, fn. 5 (10th Cir. 2001) (emphasis added).

In *Wolford*, the Tenth Circuit examined whether an Appellant's constitutional [24] rights were violated by the government's prosecution of her, where she alleged the government's action was motivated in part to retaliate against her for exercising her First Amendment rights. The Court commented "[i]n the context of a government prosecution, the decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). The Court reasoned that a central question to be addressed in such an action was "whether retaliation for the exercise of First Amendment rights was the 'cause' of the prosecution and the accompanying injuries to plaintiff." *Id*. (citing *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988)). Likewise, in *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995), a controversy the Court characterized as a vindictive prosecution case brought in retaliation against the plaintiffs' exercise of their First

Amendment rights, 63 F.3d at 1534, the Tenth Circuit noted that "the ultimate inquiry is whether as a practical matter there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus towards the Appellee because he exercised his specific legal rights." *Id*. at n.6. The Court framed the § 1983 claim for First Amendment rights violations under the tort of "vindictive prosecution." *Id.* "These cases make clear that a governmental lawsuit brought with the intent to retaliate against a citizen for the exercise of his First Amendment rights is of itself a separate violation that [25] provides grounds for a § 1983 suit." *Beedle v. Wilson*, *Ibid*. at 1066.

"It is generally accepted that the common law of torts is the starting point for determining the contours of a malicious prosecution claim under § 1983." *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996). "The common law tort – while not entirely imported into § 1983 – provides a useful guidepost in making sense of alleged constitutional injuries. In some instances, a common law tort is sufficiently analogous to the alleged constitutional violation that its common law elements are grafted onto and themselves become elements of a § 1983 constitutional tort. But not all § 1983 actions have a common law analog, and no § 1983 action depends entirely on a common law analog to define its elements." *Becker v. Kroll*, 494 F.3d 904, 913-14 (10th Cir. 2007).

Here, Appellant's malicious prosecution/abuse of process claim can be analyzed, for § 1983 purposes,

under the common law tort of malicious prosecution, according to New Mexico law. In *DeVaney v. Thriftway Marketing Corp*., 1998-NMSC-001, ¶ 17, 124 N.M. 512, the New Mexico Supreme Court combined the torts of abuse of process and malicious prosecution and restated them as a single cause of action known as malicious abuse of process. The Court held that the elements of the tort of malicious abuse of process are as follows: (1) the initiation of judicial proceedings against the Appellant by the Appellee; (2) an act by the Appellee in the use of process other than such as would be proper in the regular [26] prosecution of the claim; (3) a primary motive by the Appellee in misusing the process to accomplish an illegitimate end; and (4) damages. *Id.* In order to survive a motion to dismiss for malicious abuse of process under New Mexico law, an Appellant must allege these same four elements. Appellant's First Amended Complaint meets this burden.

C. Appellant's "vindictive prosecution" is also be [sic] supported under the Fifth and Fourteenth Amendment [sic].

Appellant also brought a claim for Due Process violations under the Fifth Amendment (First Cause of Action) as well as Equal Protection and Discrimination (Third Cause of Action), which are actionable under the Fourteenth Amendment. As such, his malicious prosecution (vindictive prosecution) claim can be supported by these violations. "Section 1983 creates a species of tort liability that provides relief to persons deprived of rights secured to them by the

Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quotations omitted). "The analysis in a § 1983 case begins with the identification of the precise constitutional right allegedly infringed. *Graham v. Connor*, 490 U.S. 386, 394 (1989)." *McCarty v. Gilchrist*, 646 F.3d 1281, 1285 (10th Cir. 2011).

In *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007), the Tenth Circuit addressed claims of malicious prosecution under the Fourth and Fourteenth Amendment, due process under the Fourteenth Amendment and First Amendment [27] retaliation. In referring to Justice Kennedy's concurrence in *Albright v. Oliver*, 510 U.S. 266, 271 (1994), the Court at 921 noted:

> Justice Kennedy argued that in § 1983 malicious prosecution cases, a "state actor's random and unauthorized deprivation of [Fourteenth Amendment due process interests] cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate post deprivation remedy." 510 U.S. at 284 (Kennedy, J., concurring). As he explained, "In the ordinary case where an injury has been caused . . . by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment.'" *Id*. at 285 (quoting Parratt, 451 U.S. at 536); see also *Nieves*, 241 F.3d at 53 (rejecting procedural due process claim under § 1983 for malicious prosecution because state provides adequate tort remedy); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) (holding

> state tort remedy "knocks out any constitutional tort of malicious prosecution" based on due process). We agree with this analysis.

Here, Appellant has no state remedy as the New Mexico Tort Claims Act bars a malicious abuse of process claim as against the state actor MRGCD Appellees. Therefore, Appellant can pursue a "vindictive prosecution" claim based upon the due process violations alleged.

III. APPELLANT'S FIRST AMENDED COMPLAINT MEETS THE REQUISITE PLEADING STANDARD TO STATE A § 1985 CONSPIRACY CLAIM.

As set forth *infra*., Appellant's Complaint was filed before the statute of limitations ran; therefore Appellant's §1985 conspiracy claim is not barred by the statute of limitations. While Appellant's First Amended Complaint is not the best [28] exemplar of clarity in pleading, it does state a conspiracy claim. Appellant's First Amended Complaint expressly states the Fourth Cause of Action is brought under §1985(3), and at paragraph 99, Appellant alleges "Section 1985 provides a cause of action for conspiracies:. . . . (ii) for depriving a person of his rights and/or privileges." While this paragraph also alleges §1985 provides a cause of action "(i) aimed at preventing an officer and elected official from performing his duties," Appellant acknowledges a claim brought under 42 U.S.C. 1985(1) applies only to persons holding an office of the United States, and that

section 1985(1) is not applicable to Appellant's conspiracy claims.

"To state a claim under § 1985(3), an Appellant must show: (i) a conspiracy, motivated by racially-discriminatory animus; (ii) to deprive the Appellant of equal protection or equal protections of the laws; (iii) an act in furtherance of the conspiracy; and (iv) an injury or deprivation resulting therefrom." *Archuleta v. City of Roswell*, 898 F.Supp.2d 1240, 1248 (D.N.M. 2012). "The nature and specificity of the allegations required to state a plausible claim will vary based on context.'" *Kan. Penn Gaming, LLC v. Collin*s, 656 F.3d 1210, 1215 (10th Cir. 2011). "An alleged conspiracy to infringe [constitutional] rights is not a violation of § 1985(3) unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.'" *Brown v. Reardon*, 770 F.2d 896, 906 (10th Cir. 1985). In addition, for a § 1985 violation, [29] the Tenth Circuit has held "that infringement of some federally protected right independent of § 1985(3) is required for a violation of the conspiracy statute to be demonstrated." *Holmes v. Finney*, 631 F.2d 150, 154 (10th Cir. 1980).

In his First Amended Complaint, Appellant alleged that: The Middle Rio Grande Conservancy District (MRGCD) is a state entity managed by elected officials/Board Members. (Aplt. App. 015); The New Mexico Board of Licensure for Professional Engineers and Land Surveyors (BOL) is a state agency/entity. (Aplt. App. 015).; Executive Director Appellee Shah – in concert with the Board of Directors, General

Counsel and MRGCD employees and later Members of the BOL – engaged in a consistent and intentional effort to intimidate and chill Appellant's exercise of his constitutional right to free speech. (Aplt. App. 021); Appellees acted in concert to undermine Appellants credibility, damage his reputation, burden him with legal fees, and force his resignation, all in an effort to prevent his further disclosures of unlawful activity. (Aplt. App. 022); Appellant has been banned by Appellees' concerted efforts to violate his right to free speech, orchestrate his removal from his position on the MRGCD Board of Directors, violate his right to equal protection under the law, discriminate against him, and harass him. (Aplt. App. 022); Appellees Shah, Domrzalski, and John Does, by filing a retaliatory and malicious complaint against Appellant and subsequently finding against the Appellant and publishing a racially discriminatory article against Appellant and his [30] family, violated the Appellants right to freedom of speech guaranteed under the United States and New Mexico Constitutions. (Aplt. App. 024); Appellant is married to Regina Turner, who is Jewish and actively involved in the Albuquerque Jewish Community. (Aplt. App. 024); Appellant and his spouse have three sons, who are also Jewish and are prominent members of the Jewish Community in New Mexico. (Aplt. App. 025); Appellee Shah conspired with Appellee Domrzalski, Appellee Ytuarte and John Doe Appellees, to draft and file a Complaint against Appellant before the BOL, alleging that Appellant practiced 'engineering' without a License. (Aplt. App. 028); After conspiring in the drafting and filing of the BOL complaint, Appellees Shah and

Domrzalski engaged co-conspirators Appellees Romero and Ytuarte of the BOL to find that Appellant had practiced engineering without a license. (Aplt. App. 0285); Appellees Shah and Domrzalski conspired to chill and intimidate Appellant to prevent his further disclosures of violative activity and practices of the MRGCD, stymieing his right to free speech. (Aplt. App. 029); Appellees Shah and Domrzalski conspired to deprive Appellant of equal protection of the law by engaging in discriminatory animus, discriminating against Appellant in an effort to humiliate him, his spouse, and children so that he would step down from Board Membership and/or not run again for such position. (Aplt. App. 029); As a direct and proximate result of the Appellees' actions, Appellant suffered injuries. (Aplt. App. 029).

[31] Appellant's First Amended Complaint includes facts that address his affiliation with the Jewish community, which undisputedly is a protected class. "Several courts, including this one, have defined "class-based animus" to include discrimination based on religion. See, e.g., *Colombrito*, 764 F.2d 122, 130-31; *Taylor v. Gilmartin*, 686 F.2d 1346, 1357-58 (10th Cir.1982)." *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2nd Cir. 1992). Federal precedent recognizes that Section 1985(3) extends to any protected class, including supporters of a protected class.

"The statutory language does not require that the discrimination be based on race. Section 1985(3)'s protection reaches clearly defined classes, such as

supporters of a political candidate. If an Appellant can show that he was denied the protection of the law because of a class of which he was a member, he has an actionable claim under § 1985(3). *Glasson v. Louisville*, 518 F.2d 899, 911-12 (6th Cir. 1975). "The legislative history underscores the view that a § 1985(3) Appellant need not be a member of the class against which a conspiracy directs its invidiously discriminatory animus, even if in practice this is most often the case. We long ago held that this is so. *See Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir.1971) (finding that a nonminority victim of racially discriminatory animus can state a § 1985(3) claim). And, as we explained in *Novotny*, where we held that a *male* victim of sexually discriminatory animus directed at *women* could [32] state a § 1985(3) claim, the text provides a cause of action in any instance where "in furtherance of the object of" a proscribed conspiracy an act is done "whereby another is injured in his person or property." By its terms, the statute gives no hint of any requirement that the "other" must have any relationship to the "person or class of persons" which the conspiracy seeks to deprive of equal protection, privileges or immunities. 584 F.2d at 1244." *Farber v. City of Paterson*, 440 F.3d 131, 141 (3rd Cir. 2006).

Appellant's First Amended Complaint includes all required allegations stating a §1985(3) conspiracy. Appellant has pled the conspiracy was motivated by discriminatory animus; with intent to deprive the Appellant of equal protection or equal protections of the laws; that Appellees took acts in furtherance of the

conspiracy; and Appellant suffered injury and deprivations resulting therefrom. Therefore, Appellant's § 1985 conspiracy claim is not subject to 12(b)(6) dismissal. Appellees did address in their Motion, Appellant's Civil Conspiracy claim (Fifth Cause of Action), which is a § 1983 – not a § 1985 – conspiracy claim. "A §1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law." *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). The MRGCD Appellees did not expressly address any aspect of this claim in their motion, other than stating that "all of the claims asserted against MRGCD Appellees under federal and state law are [33] untimely under the applicable statute of limitations." (Aplt. App. 038). As such, Appellant only responds to state that his § 1983 civil conspiracy claim was brought within the applicable statute of limitations as argued in Section I above.

IV. THE MRGCD IS A PROPERLY NAMED PARTY.

A § 1983 official-capacity claim "represent[s] only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dep't of Soc. Serv*s., 436 U.S. 658, 690 n.55 (1978). Under *Monell*, a local governmental entity cannot be made liable under § 1983 by application of the doctrine of respondeat superior. See *Monell*, 436 U.S., at 691.

Citing to *Monell* and *Graves v. Thoma*s, Appellees argue the MRGCD cannot be liable based upon an employer-employee relationship or "because its officers inflicted injury." These arguments are inapplicable to the facts of this case. The "officers" referred to in *Graves* were police officers, not elected officials of the decision-making body. In this instance, the doctrine of respondeat superior is not applicable as the named MRGCD Appellees were not all employees. Appellee Subash Shah was a decision-making member of the MRGCD Board of Directors; his actions as alleged in Appellant's First Amended Complaint were no different from actions of the MRGCD itself.

"It is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, [34] for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body-whether or not that body had taken similar action in the past or intended to do so in the future-because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati, et al*, 475 U.S. 469 (1986). See also *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1212 (10th Cir. 2007) ("Under appropriate circumstances, a single decision by policymakers can be sufficient to create liability under § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).").

Appropriate circumstances exist in this case, which demonstrate that decisions were made by the

municipal policymakers. As such, the Appellee MRGCD is a properly named party in this matter.

CONCLUSION

Appellant's claims are not barred by the applicable three-year statute of limitations. Under federal and state law, the statute began to run from the April 24, 2013 date the New Mexico Court of Appeals issued its decision in *NM Board of Licensure v. William Turner*, 2013-NMCA-067. Appellant's conspiracy claim sufficiently meets the pleading standard to withstand dismissal under a 12(b)(6) standard. Appellant's malicious prosecution/abuse of process claims are adequately pled to demonstrate a "vindictive prosecution" claim under [35] federal law, and no "seizure" of Appellant is required as the claims are not predicated upon the Fourth Amendment. The MRGCD is a properly named party; the actions of Appellee Subash Shah as pled in the First Amended Complaint are no different than the actions of the MRGCD itself.

There is no waiver of immunity under the New Mexico Tort Claims Act for Appellant's state law claims as against the MRCGD Appellees (Seventh Cause of Action). Wherefore, Appellant requests the Court DENY all relief requested in Appellees' Motion, excepting dismissal of Appellant's state-law based Seventh Cause of Action.

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(4), Appellant requests oral argument in this matter. Such argument is necessary because the issues involve important questions of procedural law. Appellant respectfully suggests that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 13th day of September 2017.

/s/ Dori E. Richards
Dori E. Richards, Esq.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

[36] WESTERN AGRICULTURE, RESOSOURCE [sic], AND BUSINESS ADVOCATES, LLP
Attorneys for Appellant
1005 Marquette Ave NW
Albuquerque, NM 87102
(505) 750-3060
Warba.llp@gmail.com

[37] **CERTIFICATE OF COMPLAINCE** [sic]

Undersigned counsel certifies that Appellees' brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing response submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk.

I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Avast Premier version 11.1.2245 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

CERTIFICATE OF SERVICE

I certify that on September 13, 2017, I filed Appellant's Opening Brief through the United States Court of Appeals for the Tenth Circuit's ECF System, [38] causing each counsel of record to be served; and served seven (7) hardcopies of Appellant's Opening Brief with the Clerk of the Court.

September 13, 2017

/s/ Dori E. Richards
Dori E. Richards, Esq.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

[Attachments are reproduced elsewhere in the appendix to the petition.]

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 17-2105

WILLIAM M. TURNER,

Plaintiff-Appellant,

v.

MIDDLE RIO GRANDE CONSERVANCY DISTRICT, *et al.*,

Defendants-Appellees.

On appeal from the United States District Court

for the District of New Mexico (Hon. Robert C. Brack)

District Court Case No. 1:15-00339

APPELLEES' MIDDLE RIO GRANDE CONSERVANCY DISTRICT, SUBHAS [sic] SHAH, AND DENNIS DOMRZALSKI'S RESPONSE TO APPELLANT'S OPENING BRIEF

Jeffrey L. Baker
Renni Zifferblatt
THE BAKER LAW GROUP
20 First Plaza Suite 402 NW
(505) 247-1855
Attorneys for Defendants-Appellees Middle Rio Grande Conservancy District, Subhas [sic] *Shah, Dennis Domrzalski, and John Does members of Middle Rio Grande Conservancy District*

ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

[i] **TABLE OF AUTHORITIES**

PAGE

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

[ii] **CASES**

Secondary authorities

[ix] GLOSSARY

BOL: Board of Licensure

MRGCD: Middle Rio Grande Conservancy District

SOL: Statute of limitations

ULA: Uniform Licensing Act

[1] STATEMENT OF PRIOR OR RELATED APPEALS

There have been no prior or related appeals in this case.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant William Turner ("Turner") filed suit in the United States District Court for the District of New Mexico on April 23, 2015. [MRGCD App. 001-024]. Turner filed an Amended Complaint within thirty days of filing his original complaint. [Aplt. App. 013-037]. The District Court's jurisdiction is found in 28 USC §1331 & §1367. The District Court entered its final judgment on February 24, 2017,

dismissing Plaintiff's case with prejudice. [Aplt. App. 307]. The United States District Court entered its Memorandum Order denying Plaintiff's Motion to Alter or Amend the Judgment on June 1, 2017. [Aplt. App. 308-317]. This Court has jurisdiction over final decisions of the federal district courts pursuant to 28 USC § 1291; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

STATEMENT OF THE ISSUES

Turner lists eight (8) separate issues in his "Statement of the Issues" section. However, his opening brief arguments do not address or argue all listed issues. An appellant's opening brief must identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(9)(a). Pursuant to that rule, this Circuit consistently "decline[s] to consider arguments that are not raised, or are inadequately presented, [2] in an appellant's opening brief." *Bronson v. Swensen,* 500 F.3d 1099, 1104 (10th Cir. 2007) (citation omitted); *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir.1998) ("Arguments inadequately briefed in the opening brief are waived. . . ."); *Gaither v. Aetna Life Ins. Co.*, 394 F.3d 792, 810 (10th Cir.2004) ("It is well-settled in this Circuit that an issue listed, but not argued in the opening brief is waived."); *Xeta Corp. v. Canton Indus. Corp.,* 132 F.3d 44 (10th Cir. 1997) (issues stated in statement of issues but not discussed until reply brief are waived) (*citing in part Johnson by Johnson v. Thompson*, 971 F.2d

1487, 1499 (10th Cir.1992) ("this court generally does not address issues merely listed in the brief's "Statement of the Issues" and not argued in the brief"). Accordingly, only the issues Turner briefed are encompassed in this Answer brief.

STATEMENT OF THE CASE

This appeal arises from activities that occurred while Turner was serving on the Board of the Middle Rio Grande Conservancy District ("MRGCD"). Turner was elected to the MRGCD in June of 2005 and served on the Board from 2005 to 2009. [Aplt. App. 016 ¶16; 038§I ¶1]. The MRGCD is a municipal corporation. *See* NMSA (1978) §73-14-13; [Aplt. App. 015 ¶2]. Defendant-Appellee Subhas Shah ("Shah") was both the Executive Director of the MRGCD and a Director of the BOL during the relevant time period. [Aplt. App. 015 ¶4]. Dennis Domrzalski ("Domrzalski") was the MRGCD's Public Information Officer during this same time period. [*Id.*¶5].

[3] Shortly after his election to the MRGCD Board, Turner contends that he observed and reported various wrongdoing by MRGCD Defendants. [*Id.* ¶18]. During this timeframe, Turner filed a lawsuit against the MRGCD alleging that it had violated the Open Meetings Act. [*Id.* 017 ¶22]. Turner also filed a complaint with the BOL after the MRGCD refused to rescind a contract it made with an-out-of-state engineer, Dr. Ramchand Oad, who Turner alleged did not have a New Mexico engineering license. [*Id.* ¶23-27].

The basis of Turner's suit arises from a report he submitted to the MRGCD board in which he asserted that Shah and another MRGCD board member dumped construction waste, otherwise known as "un-engineered rip rap," from a demolition project into various ditch roads located in the District. [Aplt. App. 016, ¶18(E); 019 ¶38]. Turner's report contained mathematical formulas, and a description of the alleged dumping activity which he presented to the MRGCD on February 27, 2007,[1] recommending that the matter be further investigated. [Aplt. App. 019 ¶39; 299 ¶2].

[4] Domrzalski filed a complaint with the BOL on April 24, 2007, alleging that Turner engaged in practicing engineering without a license in drafting and submitting the report. [Aplt. App. 020 ¶43; 299 ¶3]. Turner contended that the BOL Complaint was

---

[1] Because Turner's Amended Complaint did not provide dates for many of the events alleged below, MRGCD Defendants requested that the District Court take judicial notice of the New Mexico Court of Appeals decision in 2013-NMCA-067 No. 31,041 which provided dates relevant to the statute of limitations and accrual of Turner's claims asserted below. [See Aplt. App. 041-042 ¶B]. This Court may also take judicial notice of public documents filed in above-cited case because the time line of events were germane to the District Court's decision that Turner's claims were not timely filed. *See e.g. United States v. Ahidley*, 486 F.3d 1184, 1192 n. 5 (10th Cir.2007) (noting "discretion to take judicial notice of publicly-filed records in our court and certain other courts concerning matters that bear directly upon the disposition of the case at hand"); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir.1979) (taking judicial notice of documents in separate federal district court action because they had a "direct relation to the matter at issue"). Turner relies on many of those dates in his Opening Brief. (Brief at 4).

dictated by Shah. [*Id.* ¶46]. Turner also contended that Shah pressured BOL member Eduard Ytuarte ("Ytuarte") to initiate the proceeding and disparage Turner's name. [*Id.* ¶50]. The BOL held an administrative hearing on the complaint on December 16, 2009. [Aplt. App. 152 ¶3 "6"). The BOL concluded on February 26, 2010 that Turner had violated NMSA (1978) §61-23-24 (practicing engineering without a license) when he submitted a report which evaluated the planning and design of engineering works and systems. (Aplt. App. at *Id.*, 300¶1). The BOL ordered Turner to stop any further engineering activities, pay a $2,500.00 civil penalty, and pay $2,670.93 in administrative hearing costs. (*Id.* at 152¶4 "7").

Turner timely appealed the BOL decision to the Second Judicial District Court of the State of New Mexico. (Aplt. App. 318-319). The District Court reversed the BOL decision on January 3, 2011[2], finding that Turner had not engaged in the actions alleged, and that his first amendment rights were violated. (Aplt. App. 300 ¶2). [*Id.*]. The New Mexico Attorney General's Office appealed the District Court's decision [5] to the New Mexico Court of Appeals. [*Id.* 052 ¶1]. The New Mexico Court of Appeals affirmed the District Court's decision on April 24, 2013. [*Id.*].

Turner filed suit against the MRGCD Defendants and others in April of 2015, (see *infra* jurisdictional statement), and filed his First Amended Complaint on

---

[2] Turner incorrectly cited this date as September 29, 2011. (Aplt. App. 033 §¶139).

May 6, 2015. [Aplt. App. 013-037]. In his First Amended Complaint, Turner alleged that MRGCD Defendants violated his due process, equal protection and first amendment rights, conspired to violate his constitutional rights in violation of 42 USC §1985(1) and (3), conspired to violate his rights (under §1983), and committed defamation and slander under state law. [*Id.* 022-035]. The filing of the BOL complaint, prosecution of the complaint, alleged drafting of a discriminatory press release which Turner alleged was distributed to KOB-TV, (which aired a story about Turner), and the BOL's decision occurred between 2007 and January 26, of 2010. [*Id.*; *see also* 299-300]. MRGCD Defendants filed a Motion to Dismiss, arguing that all of the claims were untimely, Turner did not state a viable municipal liability, §1985, or malicious prosecution claim, and his state law claim was both time-barred and non-actionable under state law. [Aplt. App. 038-068]. Turner argued that: 1) accrual of his claims was tolled until the Court of Appeals issued its decision pursuant to *Heck v. Humphrey,* equitable tolling, and the continuing violations doctrine; 2) his affiliation with the Jewish community was sufficient to state a §1985(3) claim; 3) he stated a municipal liability claim because Shah was a final [6] decision maker whose actions were those of the municipality; and, 4) his malicious prosecution claim was brought under the First rather than the Fourth Amendment as a "vindictive prosecution" claim and was otherwise supportable under the Fifth and Fourteenth Amendment claims he brought. [Aplt. App. 124-149].

The District Court granted MRGCD Defendants motion.[3] In its holding the District Court found[4]:

> 1. Turner's federal claims accrued when the BOL issued its decision on February 26, 2010. Under federal law, the accrual period begins to run " . . . when the plaintiff knows or has reason to know of the injury which is the basis of the action." [Aplt. App. 303 ¶1,2] (citation omitted). The Court held that Turner filed his suit more than three years after the federal claims accrued and as such, his federal claims were time barred. [*Id.*].
>
> 2. Turner failed to state a viable municipal liability claim against the MRGCD because Turner failed to identify a custom or policy that led to any injury. [Aplt. App. 304§C-305¶1].
>
> [7] 3. Turner failed to state a viable §1985(3) claim because he did not demonstrate racial or class-based discriminatory animus by MRGCD Defendants or a meeting of the minds. Turner's assertion that MRGCD Defendants conspired against him based on his wife's and children's Jewish religion was not sufficient.

---

[3] BOL Defendants and Smith also filed dispositive motions which were granted by the District Court. The Court's Orders on those motions are not included in Appellant's Appendix. Upon information and belief, those Appellees will separately supplement the appendix to include the relevant Orders.

[4] Turner conceded that his state law claims and §1985(1) claim were not actionable, and Turner did not brief those issues in this appeal. Accordingly, they are omitted from discussion. [Aplt. App. 278-279 §I; 303§B-304¶1,2]; (*see also* Brief at 28¶1).

> Turner did not provide any factual details of an alleged conspiracy or alleged discriminatory animus grounded in Turner's status as a member of a protected class. [Aplt. App. 305-306§D].

Turner timely filed a Motion to Amend or Modify the Judgment pursuant to NMRA 1-059, asserting that the District Court misapprehended the law. [MRGCD App. 025-043]. The District Court denied the Motion. [Aplt. App. 308-317]. The District Court found in relevant part:

> 1. *Heck v. Humphrey* only applies to claims involving the potential invalidity of a criminal conviction or sentence. [Aplt. App. 312§1];
>
> 2. NMSA (1978) §37-1-12 did not toll the statute of limitations. ("SOL"). Turner did not provide any case law supporting the proposition that he was unable to file his federal complaint while either appeal was pending. [*Id.* at 315-16¶2].
>
> 3. Turner's arguments regarding the Court's determination that he did not properly plead sufficient facts to state his claims is moot since the Court [8] has determined that he did not file his claims within the requisite SOL. [316§B¶1];

Turner timely filed his notice of appeal in this case on June 21, 2017. [Aplt. App. 318-319].

SUMMARY OF THE ARGUMENT

The District Court correctly held that Turner's claims are time-barred under the applicable three year SOL, which began to accrue when the BOL issued its decision on January 26, 2010. Turner was aware of this alleged injury at that time but elected to sit on his rights. Turner was not criminally prosecuted and as such, his reliance on *Heck v. Humphrey* is misplaced. There is no legal or factual basis that would provide either equitable or statutory tolling in this case. Furthermore, the District Court correctly dismissed Turner's municipal liability, malicious prosecution, and §1985(3) claims because Turner failed to allege viable claims under existing precedent. Aside from naming the MRGCD as a Defendant, Turner did not name it in any count of his complaint or amended complaint, nor did he allege that the MRGCD engaged in an unconstitutional custom or policy that was the moving force behind the alleged constitutional violations. Turner's malicious prosecution claim is not actionable because it falls under Fourth Amendment analysis and Turner was never seized. Turner conceded as much in his response to the MRGCD's Motion to Dismiss and in his Brief. [Aplt. App. 142 §III]; (see also Brief at 21§A). Turner's [9] attempt to re-state the claim as a vindictive or retaliatory prosecution claim fails. First, Turner did not plead this claim in his complaint or amended complaint and did not seek to amend the complaint to add it. Aside from the fact that MRGCD Defendants were not provided with proper notice of this claim, his allegations do not meet the applicable plausibility test.

Second, the SOL begins to accrue for First Amendment retaliatory prosecution claims when the action occurs – rather than when the plaintiff receives a favorable termination of the proceeding. If this Court were to evaluate Turner's malicious prosecution claim under state law as he suggests, the claim would fail because Turner failed to allege a procedural impropriety in the filing or prosecution of the BOL complaint. Finally, Turner's §1985(3) claim was properly dismissed because Turner did not allege that he is a member of a protected class who was targeted based on discriminatory animus. Accordingly, this claim was properly dismissed.

I. ARGUMENT

A. The District Court correctly found that Turner's federal claims are time-barred under governing accrual standards.

The District Court correctly found that Turner's claims began to accrue when the BOL issued its decision on February 26, 2010, and that Turner's claims were time-barred because he did not file suit within three years of the date of accrual. [Aplt. App. 303 ¶2, 316§B¶2]. The standard of review for NMRA 1-012(b)(6) [10] dismissals[5] is *de novo. Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 967 (10th Cir.1994). The standard of review in determining

[5] MRGCD Defendants have not omitted the 12(B)(6) standard because they are confident that this Court is well aware of the standard and seek to avoid unnecessary argument.

the requisite statute of limitations is also *de novo*. *Braxton v. Zavaras,* 614 F.3d 1156, 1159 (10th Cir. 2010) ("We review de novo the dismissal of an action under Rule 12(b)(6) based on the statute of limitations.").

Turner contends that the District Court failed to evaluate his statute of limitations arguments. (Brief at 7 Summary of the Argument). The District Court's Order indicates otherwise. [Aplt. App. 298-317]. Turner correctly notes, however, that the events allegedly occurred between 2007 and 2010, and the statute of limitations for his federal claims are based on New Mexico's three (3) year personal injury statute of limitations. (Brief at 7§I); *see also Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir.1999) ("State statutes of limitations applicable to general personal injury claims supply the limitations periods for §1983 claims. . . .").

The crux of this Appeal rests on when Turner's claims accrued. (Brief at *Id*.). Turner contends that accrual did not begin to run on his federal claims until the state Court of Appeals issued its decision on April 24, 2013. (Brief at 8¶1). The flaw in this argument is two-fold. First, he seeks to expand the scope of the *Heck v.* [11] *Humphrey*[6] standard, which applies solely to criminal convictions and/or detentions. See *infra* §2. Second, Turner cites *Robinson v. Maruffi* and *Hunt v.*

---

[6] Turner raises *Heck* and the continuing violations doctrine in two sections of his Brief. (Brief at §A10-13 §B13-16, 19). To avoid repetition, this brief covers those arguments in one section.

Bennett, 17 F.3d 1263, 1266 (19th [sic] Cir. 1994), asserting that under the continuing violations doctrine his claims accrued when the Court of Appeals issued its decision. (Brief at 10¶2, 11-13).

Federal law "determines the date on which the claim accrues and the limitations period starts to run." *Mondragon v. Thompson,* 519 F.3d 1078, 1082 (10th Cir. 2008) (citation omitted). A civil rights claim accrues when "facts that would support a cause of action are or should be apparent." *Fratus v. Deland,* 49 F.3d 673, 675 (10th Cir. 1995) (citations and internal quotation marks omitted); accord *Alexander v. Okla.*, 382 F.3d 1206, 1215 (10th Cir. 2004) ("In general, under the federal discovery rule, claims accrue and the statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action") ((citation and internal quotation marks omitted)). It is well-established that a plaintiff's failure to appreciate the extent of the injury is not relevant to this analysis. *Varnell v. Dora Consol. Sch. Dist.,* 756 F.3d 1208, 1216 (10th Cir. 2014) (Plaintiff's failure to realize the extent of her psychological injury did not extend the statute of limitations); *Wallace v. Kato,* 549 U.S. 384, 391 (2000) [12] (a "cause of action accrues even though the full extent of the injury is not then known or predictable").

In this case, Turner's federal civil rights claims are premised on events that he was well aware of as they occurred, and that occurred five (5) or more years before he filed his suit. Turner does not provide any rationale for this failure to file this suit within three

years of the BOL decision.[7] Because the District Court's determination that Turner's federal claims are time-barred is consistent with governing law and these facts, its decision should be affirmed.

B. *Heck v. Humphrey* is not applicable to these facts

The District Court correctly determined that: 1) tolling under *Heck v. Humphrey* " . . . applies to claims that would imply the invalidity of a criminal conviction or sentence"; 2) Turner was not criminally prosecuted or sentenced; 3) accrual began when the BOL issued its decision on February 26, 2010; and, 4) the common thread running through all of the cases Turner cites was criminal detention. [Aplt. App. 303¶1,2; 312-315¶1].

In this appeal, Turner misconstrues the application of *Heck.* As this Circuit has expressly held, *Heck's* holding is limited to cases involving an underlying criminal [13] conviction. See *Vasquez Arroyo v. Starks,* 589 F.3d 1091, 1093–94 (10th Cir. 2009) (citing *Wallace v. Kato*, *supra*, at 393 ("noting the *Heck* bar is called into play only when there exists a criminal conviction that the § 1983 cause of action would impugn"). This rationale is based on *Heck's* analysis based on §1983

[7] It is notable that Turner did two things after the BOL issued its decision: he timely filed an appeal of the BOL decision to the Second Judicial District Court and he obtained a stay of the BOL decision, i.e. he was fully aware of timing and legal procedures. [Aplt. App. 017 ¶27; 281 ¶1].

claims brought "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* (*quoting Heck*, *supra* 512 U.S. at 486). *Heck* held in relevant part:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Id.* at 486–87.

Turner cites *Cohen v. Clemens,* 321 Fed. App 739,742 (10th Cir. 2009) to assert that *Heck* extends beyond criminal convictions. (See Brief at 13-16§B). The plaintiff in Cohen argued that the District Court was incorrect in applying *Heck* to *bar recovery of damages* he sought, arguing that *Heck* applied solely to criminal cases, rather than immigration cases and detentions. *Id.* at 741. (emphasis added). The Court of Appeals, in affirming the District Court, held "[b]ecause Cohen would need to prove that his detention was unlawful in order to receive an award of damages for that [14] detention, the district court correctly concluded that *Heck* applied to bar Cohen's *Bivens* action." *Id.* at 741-42.

Given the facts of these cases, Turner's reliance on *Cohen* and/or *Hutfile v. Miccio-Fonseca,* 410 F.3d 1136 (9th Cir. 2005) is curious, since both of these cases involve detentions and damages claims sought by detainees for those detentions. Turner was never detained.

Instead, Turner tries to rely on *Heck* and the continuing violations doctrine to excuse his fatal delay. (Brief at 10-13). Turner argues that because the Uniform Licensing Act ("ULA"), NMSA 1978 §61-23-27.11(C), makes it a misdemeanor to fail to comply with an order issued under this Act, the BOL's decision that he was practicing engineering without a license was criminal in nature, thereby invoking *Heck* to toll accrual of his claims. First, the ULA is a civil statute governing licensure of engineering and surveyor professionals operating within the State. The thrust of the ULA §61-23-1 *et. seq*. is to regulate and require licensure of people providing engineering and surveying services. See NMSA §61-23-2 (2003). Notably, Turner was found civilly liable under NMSA (1978) §61-23-23.1, entitled "Authority to investigate; *civil penalties* for unlicensed persons; engineering." (emphasis added). A person found liable under subsection B of this provision may be required to pay a " . . . fine up to seven thousand five hundred dollars ($7,500) per violation." The express language of this provision indicates that it is civil in nature. Second, as [15] Turner acknowledges, his liability under the civil statute resulted *solely* in payment of civil fines and a cease and desist order. (Brief at 6¶6). Third, Turner sought and obtained a stay of enforcement of the BOL's order from

the District Court in 2010, during the pendency of the appeal. [Aplt. App. 281 ¶1). In so doing, Turner removed the prospect that he could be prosecuted for failure to comply with BOL's order during the pendency of his appeal. Fourth and most importantly, the prospect of a speculative future criminal conviction is not sufficient to invoke *Heck* to postpone accrual of the requisite SOL period for §1983 claims. *See e.g*. *Wallace*, *supra* at 393 (determining that *Heck* can only be invoked when there is an actual conviction, not an anticipated or potential one).

With respect to Turner's continuing violations argument, he relies in part on *Robinson v. Maruffi,* 895 F.2d 649 (10th Cir. 1990). Turner contends that because he alleged a conspiracy to maliciously prosecute him, Robinson supports his proposition that his claims did not accrue until the Court of Appeals issued its decision under the continuing wrong doctrine. (Brief 11 at ¶1-2). *Robinson*, is distinguishable on its facts. The District Court correctly observed: "As Plaintiff's claims follow civil proceedings that did not result in conviction, detention, commitment, or any criminal proceedings neither *Heck, Cohen*, or *Robinson* apply." [Aplt. App. 312-315§1]; see also *Robinson*, *supra* at 655 (all of the plaintiff's claims were directed at criminal proceedings; the Court found that the malicious [16] prosecution claim accrued after his second criminal trial because after the first trial he was still subject to be retried). Turner's citation to *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991) is similarly flawed. The defendants in *Brummet* argued that accrual of the

plaintiff's malicious prosecution claim began when he was criminally indicted – not when the case terminated in the plaintiff's favor. *Id*. The Court held that requiring a plaintiff to file suit before s/he knows that she has a claim – i.e. before the criminal proceeding resolves in his or her favor, would be an unworkable rule. *Id*.[8] In the one case Turner cites that did not involve a criminal proceeding, the plaintiff brought a malicious prosecution claim based on his eviction from a property. *Sullivan v. Choquette,* 420 F.2d 674, 675 (1st Cir. 1969). That court observed that because the judgment of eviction had not been set aside, the district court correctly dismissed the complaint because there had not been a favorable [17] termination in the plaintiff's favor which is a necessary element of a malicious prosecution claim under Massachusetts law. *Id.* at 675.

---

[8] Turner's citation to a number of other criminal cases are equally misplaced since he was never detained or criminally prosecuted. (See Brief at 12 ¶2-13¶1) (*citing Rose v. Bartle,* 871 F.2d 331, 349 (3d Cir. 1989) (district court erred in dismissing malicious prosecution as untimely because plaintiffs could not know of the injuries sustained until their criminal proceedings terminated in their favor and accrual did not start until criminal proceedings resolved in their favor); *McCune v. City of Grand Rapids,* 842 F.2d 903, 907 (6th Cir. 1988) (accrual began when criminal charges were dropped); *Venegas v. Wagner,* 704 F.2d 1144, 1146 (9th Cir. 1983) (SOL began when plaintiff's conviction was reversed (citation omitted); *Singleton v. City of New York,* 632 F.2d 185 (2nd Cir. 1980) (Plaintiff's false arrest claim began to accrue when he was arraigned on criminal charges – not when the trial resulted in a hung jury, because that is when plaintiff " . . . knew of his injury arising from the alleged assault and false arrest"); *Morrison v. Jones,* 551 F.2d 939, 940–41 (4th Cir. 1977) (malicious prosecution claim accrued when criminal proceedings ended favorably for plaintiff) (citation omitted).

Sullivan is not persuasive because it applies the law of that jurisdiction, not New Mexico's (see *infra* §D2 at 33), and it otherwise provides no support for his accrual position.

As the District Court observed, Turner was not criminally charged or detained, therefore these cases do not support his proposition. Turner's citation to *Tiberi v. Cigna Corp.,* 89 F.3d 1423, 1430 (10th Cir. 1996) also does not support his tolling argument under the continuous violations doctrine. Although *Tiberi* involved a civil contract matter, the Court determined that material issues of fact existed as to whether the SOL was tolled for the fraud claim because the plaintiff presented sufficient facts demonstrating that he properly relied on defendant's representations and conduct regarding a contract between the parties and was not aware that defendant had intended to end the contract until it abruptly terminated the contract without warning. *Id.* In contrast, Turner's knowledge of the alleged injuries when they occurred distinguishes his case from *Tiberi.*

The final miscalculation in Turner's argument rests on the fact that this Circuit does not apply the continuing violations doctrine in §1983 or §1985 cases. See e.g. *Mercer-Smith v. New Mexico Children, Youth & Families Dept.,* 416 Fed. Appx. 704, 712 (10th Cir. 2011) (rejecting continuing violations under §1983 and §1985, reasoning that the doctrine of continuing violations does not apply) (*citing Hunt v.* [18] *Bennett*, 17 F.3d 1263, 1265 (10th Cir.1994) (holding that the doctrine of continuing violations does not "extend[ ] . . . to

a § 1983 claim"); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir.1997) (The doctrine of continuing violations applies to Title VII claims because "of the need to file administrative charges," but does not apply to claims that do "not require [the] filing of such charges before a judicial action may be brought."). Turner's reliance on this doctrine is, therefore, misguided. Ultimately, Turner has not provided any case law that would support his arguments. The District Court correctly construed *Heck* and determined that it did not provide a legal basis to toll the accrual period.

C. Turner does not have a viable tolling argument under state law

In a patchwork of arguments, Turner asserts that the SOL was tolled pending the outcome of the Court of Appeals decision because: 1) equitable tolling principles tolled claims until the Court of Appeals issued its decision; 2) federal abstention principles would have precluded him from filing the underlying suit during the pendency of the BOL proceeding; 3) statutory tolling applies under NMSA (1978) §37-1-12; and, 4) the continuing violations doctrine applies in determining when his §1983 claims accrued. (Brief at 16-20). Each assertion is addressed in turn.

1. Equitable tolling does not apply to this case.

The standard of review for a district court's refusal to apply equitable tolling is an abuse of discretion.

Alexander v. Oklahoma, 382 F.3d 1206, 1215 (10th Cir. 2004) (quoting *Garrett v. Fleming*, 362 F.3d 692, 695 [19] (10th Cir. 2004)); accord *Barnes v. United States*, 776 F.3d 1134, 1148–49 (10th Cir. 2015). Under the abuse-of-discretion standard, a district court's decision will not be disturbed unless a reviewing court has "a definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1213 (10th Cir.2010) (quotation omitted); *see also Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir.2002) ("A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling.") (citation omitted)).

" . . . [S]tate law governs the application of tolling in a civil rights action. *Alexander supra* at *Id*.[9] *citing Board of Regents v. Tomanio,* 446 U.S. 478, 484-87 (1980); *see also Wilson v. Garcia*, 471 U.S. 261, 269 (1985) ("[T]he length of the limitations period, and closely related questions of tolling and application, are

[9] *Alexander,* 382 F.3d at 1220 fn. 5 cautions that federal courts may use equitable principles to create their own tolling provisions only in exceptional circumstances where state statutes of limitations eradicate rights or frustrate policies created by federal law (*citing Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir.1992); *see also Tomanio*, *supra* at 485 (1980) (holding that federal courts should not apply state statute of limitations and tolling rules that are "inconsistent with the federal policy underlying the cause of action under consideration . . . "). Turner does not contend that exceptional circumstances exist or that the State's tolling law is inconsistent with federal law.

to be [20] governed by state law.") (*superseded by statute on other grounds*). Under New Mexico law, "the party claiming that the statute of limitations should be tolled has the burden of setting forth sufficient facts to support its position." *Roberts v. Barreras,* 484 F.3d 1236, 1240 (10th Cir. 2007) (citation omitted); *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n. 4 (10th Cir.1980) (" . . . when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute."). "Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Ocana v. Am. Furniture Co.,* 2004-NMSC-018, ¶15, 135 N.M. 539 *as corrected* (June 9, 2004). Such "extraordinary event[s]" include conduct by a defendant that caused the plaintiff to refrain from filing an action during the applicable period. *Roberts*, *supra* at 1241 (citation omitted). Put another way, equitable tolling – sometimes referred to as fraudulent concealment – only applies when the party is prevented from filing throughout the entire length of the statutory period: "[I]f a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant's actions *have* not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary." *Tomlinson v. George,* 2005-NMSC-020, ¶ 14, 138 N.M. 34. "This means that 'the statute of limitations is not tolled because a claimant does not have [21] knowledge of the full extent of injury, but that the time period begins to run when the claimant

has knowledge of sufficient facts to constitute a cause of action.'" *Sweesy v. Sun Life Assurance Co. of Canada (USA),* 643 Fed. Appx. 785, 790–91 (10th Cir. 2016) (quotation omitted). "The discovery rule provides that 'the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists.'" *Williams v. Stewart*, 2005–NMCA–061, ¶ 12, 137 N.M. 420 (quotation omitted). Absent an allegation that the defendant fraudulently concealed facts that prevented a plaintiff from discovering an injury, equitable estoppel does not apply. *See Mercer-Smith*, *supra* at 711–12 ("In the absence of an assertion that the defendants fraudulently concealed information [ ] equitable tolling does not apply . . . " (*citing Tomlinson supra* ¶14). These principles are based on New Mexico's equitable tolling aim: "[t]he purpose of equitable tolling is to give 'the plaintiff extra time if [s]he needs it. If [s]he doesn't need it[,] there is no basis for depriving the defendant of the protection of the statute of limitations.'" *Sweesy*, *supra*, at 798 (quotation omitted). "The court undertakes a "case-by-case" inquiry as to whether the plaintiff has established "(1) that [s]he has been pursuing h[er] rights diligently, and (2) that some extraordinary circumstance stood in h[er] way." *Id.* (citation omitted).

In this case, as the District Court properly noted, Turner " . . . had reason to know of his alleged injury no later than" February 26, 2010, the date that the BOL [22] issued its decision against him. [Aplt. App. 303 ¶2, 312§A]. Furthermore, nowhere does Turner argue that MRGCD Defendants fraudulently concealed

facts that prevented him from timely filing his suit. Nor could there be, since Turner was aware of the injuries when they occurred. Furthermore, Turner's odd statement that his suit was tolled while the BOL proceeding was pending makes no sense, since there is no suggestion that accrual began until the BOL issued its decision. (Brief at 17¶2); [Aplt. App. 303 ¶2]. Moreover, neither case Turner cites in his brief supports this contention. For example, in *King v. Lujan,* 1982-NMSC-063 ¶10, 109 N.M. 492, the Court held that the District Court's reinstatement of a case that was dismissed without prejudice based on a failure to prosecute was improperly reinstated because dismissing the suit without prejudice did not toll the statute of limitations and the second suit filed on the same claim was, therefore, time-barred. In reaching this holding the Court stated in relevant part:

> A party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable time. Rule 41(e) specifically addresses this concern . . . A plaintiff who files near the end of the limitations period benefits from being able to prosecute his claim after the period has expired, but if he fails to take advantage of that opportunity, and suffers dismissal for failure to prosecute, there is no reason to let him have an extended period in which to sue. . . . *Id.* at ¶7-8.

If anything, *King's* rationale only serves to support the District Court's determination that Turner's claims are time-barred. While Turner seeks to benefit from his

own inaction, *King* demonstrates this is not legally permissible. Equally, [23] Turner's reliance on *Gathman-Matotan Architects & Pallerns Inc.* 1990-NMSC-013 ¶10,109 N.M. 492 [Aplt. App. at *Id.*], is unavailing. In *Gathman,* the plaintiff brought suit several days before the SOL ran, but due to a failure to prosecute, the claim was dismissed without prejudice. *Id.* at ¶1. While the case was pending, the plaintiff filed a second complaint identical to the first. *Id.* at ¶2. The District Court dismissed the case as untimely. *Id.* On appeal, *Gatham* affirmed the decision, holding that under *King v. Lujan*:

> the "nonstatutory tolling doctrine, [] should be subject to the same exception or limitation as applies in the statutory situations: Where an action is dismissed for failure to prosecute (negligence in its prosecution), the limitations period will not be interrupted. *Id.* at ¶13 (*citing King*, *supra* at 181).

Equally problematic, Turner relies on a number of cases all of which state that tolling only applies when a plaintiff *has* timely filed suit within the requisite statute of limitations. (Brief at 12¶3, 13 ¶1); *citing United States Fire Ins. Co. v. Aeronautics, Inc.*, 1988-NMSC-051 ¶5, 107 N.M. 320 (defendants timely filed a third party complaint after it had been sued, thus, statute of limitations was tolled during the pendency of the appeal from the District Court's decision dismissing the third party complaint for improper joinder); *Otero v. Zouhar,* 1985-NMSC-021 ¶5,14, 102 N.M. 482 ("[t]he submission of plaintiff's application to the commission

before the statute expired would then have tolled the limitation period until after the commission had rendered its decision several months later, and suit then could have [24] been re-filed within 30 days following the decision."). Turner, on the other hand, did not timely file suit. Turner cannot claim the benefits of the equitable tolling doctrine since he was aware of the alleged injuries but waited until after the SOL ran to file suit. The thrust of these cases demonstrates that Turner's claims are time-barred because he did not seize the opportunity to preserve his claims by filing suit within the requisite three year statute of limitations, and extraordinary circumstances do not excuse this failure to timely file his suit.

2. The federal abstention doctrine has no place in evaluating tolling provisions

Turner asserts that the federal abstention doctrine would have prevented him from filing this suit while the "State administrative action" was pending. (Brief at 17¶2). In support, Turner states that Courts have expanded this doctrine to include judicial administrative proceedings, citing to *Younger v. Harris,* 401 U.S. 37 (1971) and *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976). (*Id.*). "The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore v.*

Sims, 442 U.S. 415, 423 (1979) (citation omitted). Thus, IF Turner had filed his federal suit during the pendency of either appeal, AND an abstention argument was raised, the federal court could simply have granted a stay of the case pending the outcome of the state appellate [25] process, which would have nullified an accrual issue. Consequently, the very argument Turner makes has been previously and expressly rejected. *See e.g. Betts v. Yount,* 2011 WL 294509, at *2 (N.D. Ga. Jan. 26, 2011) (rejecting plaintiff's argument that he timely filed his suit because he could not have filed it while the state criminal prosecution was pending, holding that "[e]ven if abstention would have been warranted had [p]laintiff filed this action while his criminal prosecution was pending, the abstention doctrine does not toll the statute of limitations or excuse a § 1983 plaintiff from timely filing his civil action.") (*citing Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir.1980) ((holding that possibility of abstention did not toll the limitations period and observing that a district court may stay a timely filed § 1983 action until state criminal proceedings are completed); *Eidson v. State of Tennessee Dept. of Children's Services,* 510 F.3d 631, 641 (6th Cir. 2007) (" . . . prerequisite to obtaining any such tolling relief, of course, is the timely filing of the § 1983 action that will prompt abstention during the pendency of related state court proceedings. Because plaintiff did not timely file his § 1983 action, he forfeited any hope of such relief."); *see also Buxton v. Hill,* 2016 WL 3982874, at *3-*4 (W.D. Pa. June 23, 2016), *report and recommendation adopted, Buxton v. Hill,* 2016 WL 3977270 (W.D. Pa. July 22, 2016), *reconsideration*

denied, Buxton v. Hill, 2016 WL 4269870 (W.D. Pa. Aug. 15, 2016) (" . . . Younger does not toll the statute of limitations for civil rights claims, [26] but "established a principal of abstention when federal adjudication would disrupt an ongoing state criminal proceeding") (citation omitted). Turner did *not* file his federal suit while either appeal of the BOL decision was pending, so the issue of abstention is, at best, illusory.

Turner's citation to *Colorado River Water Conservation District* is also not supportive of his position. Under *Colorado River*, *supra* at 814-17, abstention is appropriate to avoid duplicative litigation based on considerations of wise judicial administration. However, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813. "The principles of *Colorado River* are to be applied only in situations 'involving the contemporaneous exercise of concurrent jurisdictions.' " *Dittmer v. County of Suffolk*, 146 F.3d 113, 117–18 (2d Cir.1998) ("a finding that the concurrent proceedings are 'parallel' is a necessary prerequisite to abstention under *Colorado River.*") (quotation omitted). "Federal and state proceedings are 'concurrent' or 'parallel' for purposes of abstention when the two proceedings *are essentially the same*; that is, there is an identity of parties, and the issues and relief sought are the same." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Karp,* 108 F.3d 17, 22 (2d Cir.1997) (emphasis added).

In this case, no parallel proceedings were brought. Second, even if Turner had filed his federal suit while the underlying District Court appeal was pending,

Turner's appeal to the District Court requested a reversal of the BOL's decision, [27] whereas Turner requested compensation for alleged civil rights and state tort violations in the federal suit. These proceedings are not parallel and would not have invoked the abstention doctrine as a result. In the end, however, " . . . state statute of limitations and the coordinate tolling rules are binding rules of law in most cases. This 'borrowing' of the state statute of limitations includes rules of tolling unless they are 'inconsistent' with federal law." *Bd. of Regents of Univ. of State of N. Y. v. Tomanio,* 446 U.S. at 479 (citation omitted). Turner's attempt to distract from that rule by citing the federal abstention doctrine under a hypothetical scenario is fruitless.

3. The continuing violations doctrine does not apply to §1983 actions or these facts

Turner alleges that under the continuing violations doctrine, the statute of limitations was tolled until the Court of Appeals issued its decision. (Brief at 19-20¶1, 2). His assertion fails for two reasons. First, Turner's reliance on *McNeill v. Rice Engineering & Operating, Inc.*, 2006-NMSC-015 ¶25, 139 N.M 48 and *Anderson Living Trust v. WPX Energy Prod., LLC.*, 27 F.Supp.3d 1188, 1214 (D.N.M. 2014) is misplaced. *McNeill* involved discussion of when an underground trespass, which allegedly occurred for a number of years, accrued. *Id.* The Court did not decide the issue, determining instead that under the state's discovery

rule, issues of genuine material fact as to whether the plaintiffs knew or should have discovered the trespass earlier had to be determined. *Id.* ¶40. In short, under New Mexico's [28] tolling rules, the quintessential issue a reviewing court must determine is when the plaintiff knew or should have known that s/he had an injury. This same reasoning was applied in *Anderson Living Trust*, *supra* at 1233, whereby the Court in evaluating New Mexico's discovery rule stated " . . . it is plausible that: (i) the Plaintiffs did not discover the causes of action until October 20, 2007, or later; and (ii) reasonable diligence and investigation – whether or not it was actually carried out – would not have uncovered the causes of action sooner than that date." citing *Elm Ridge Exploration Co., LLC v. Engle*, 721 F.3d 1199, 1210–11 (10th Cir.2013).

In contrast, the District Court in the underlying case determined that Turner was aware of his injuries when the BOL issued its decision. [Aplt. App. 303]. Therefore, the continuing violations doctrine has no legal bearing on this case. Each specific act which Turner alleges was actionable at the time it happened. Furthermore, "the doctrine is triggered by continual unlawful acts, not continual ill effects from the original violation." *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011) (internal quotation marks omitted). Turner's contention that "wrong continued" after the BOL issued its decision is an odd statement indeed, since it was Turner who appealed the BOL's decision. Finally, while the BOL appealed the District Court's decision, this action is not a continuing wrong under federal law,

but rather an action that connects back to the original action, namely filing the BOL [29] complaint. *See e.g. Anderson supra*, at 1214 (noting that "[t]he treatise cited by the Tenth Circuit explicates the doctrine further:

> . . . where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. 54 C.J.S. *Limitations of Actions* § 223 (2014) (footnotes omitted).

More critical, however, as noted previously, while the doctrine of continuing violations may be utilized in some circumstances to toll a statute of limitations under New Mexico law, the doctrine of continuing violations does *not* apply to §1983 claims. *Hunt v. Bennett*, 17 F.3d 1263, 1265 (10th Cir.1994) (holding that the doctrine of continuing violations does not "extend[ ] . . . to a §1983 claim") (emphasis added); *Wood v. Milyard*, No. 09-cv-00806, 2010 WL 1235653, at *6 (D. Colo. Jan. 6, 2010) (noting that Tenth Circuit has not specifically applied the doctrine to §1983 cases). Viewed in this light, the doctrine is clearly inapplicable to Turner's claims.

4. Statutory tolling is not available in this case

Plaintiff contends that his tolling argument "is consistent with the tolling principle" set forth under

NMSA (1978) §37-1-12. (Brief at 20 §2). Section 37-1-12 states: "When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation." As the District Court properly noted, Turner did not provide any [30] authority for this position nor did he indicate how the appellate proceedings precluded him from timely filing suit. [Aplt. App. 315-16 §2]. In fact, as the District Court correctly noted, the statute " 'refers only to injunctions or other orders that preclude 'the commencement' of action.' " [*Id. citing Butler v. Deutsche Morgan Grenfell Inc.*, 140 P 3d 532, 537 (N.M. App. 2006).] *Butler* reasoned:

> "Butler argues that the order prevented him from commencing separate actions against Defendants in this case. However, Butler provides no support for this assertion, and we have noted that the order refers only to an extension of time in which to file certain documents. But even if the order could be said to have completely stayed the class action proceedings, it would not have precluded Butler from filing a separate lawsuit naming the present Defendants, which is the only situation to which Section 37–1–12 would apply. *Id.*

Because no injunction or stay was issued in the underlying BOL proceeding, the only part of the statute that could be potentially relevant to Turner's tolling argument is if he had somehow faced some insurmountable obstacle in timely filing his suit that

the law recognizes and shields against. Turner made no such allegation. Under these circumstances, Turner's vague reference to this statute does not provide a legal basis to excuse his delay under the tolling doctrine and the District Court correctly found as much.

D. Turner's malicious prosecution claim was properly dismissed

1. Turner's malicious prosecution claim was untimely

The Tenth Circuit has recognized the viability of malicious prosecution claims under §1983. *See Wolford v. Lasater*, 78 F.3d 484 (10th Cir.1996). A malicious [31] prosecution claim accrues when the plaintiff obtains a favorable decision. *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir.2008) (§1983 malicious prosecution claim does not accrue until the termination of criminal proceedings in favor of the plaintiff). Put another way, a claim for wrongful use of civil proceedings is not ripe until the underlying proceedings are "terminated in favor of the person against whom they are brought." *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1265 (10th Cir. 2003).

In this case, Turner received a favorable result when the Second Judicial District Court reversed the decision of the BOL on January 3, 2011. [Aplt. App. 300 ¶2]. Under the three year statute of limitations applicable to §1983 claims, Turner's claim expired on January 3, 2014. The fact that the Attorney General's office appealed the District Court's decision does not alter

the fact that under §1983 analysis, this claim began to accrue when Plaintiff received a favorable ruling from the District Court. *See e.g. Miller v. Spiers*, 339 Fed.Appx. 862, 869 (10th Cir.2009) (favorable termination of the plaintiff's claim occurred when the prosecutor filed a *nolle prosequi* as to the criminal charges brought against the plaintiff) ((citing *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir.2008)). Plaintiff did not file his lawsuit until April, 2015, and is therefore barred from proceeding with this claim under the three year statute of limitations applicable to this claim. The analysis *infra*, regarding the *Heck* standard, accrual rules, and inapplicability of tolling to [32] these facts, supports the District Court's decision that Turner's malicious prosecution claim is time-barred.

2. Turner did not allege an actionable malicious prosecution claim under these facts

Despite the untimeliness of this claim, Turner alleges that his claim is viable under a "vindictive prosecution" claim. (Brief at 21). In his Amended Complaint Turner alleged that MRGCD Defendants, among others, engaged in a malicious prosecution by filing and prosecuting the BOL complaint, civilly convicting him, and appealing the District Court's reversal of the BOL decision. [Aplt. App. 032-034 Count VI]. MRGCD Defendants asserted in their Motion to Dismiss that Turner could not proceed with his malicious prosecution claim because malicious prosecution only applies to fourth

amendment violations, and Turner was never seized. [See Aplt. App. 056-059 §H]. Plaintiff conceded this point in his underlying response to the Motion to Dismiss. [Aplt. App. 142 §A]. Although Turner did not assert a vindictive or retaliatory prosecution cause of action and the time to amend the complaint had expired, he raised this argument in his response to the Motion to Dismiss [Aplt. App. 142-147, 293]. Akin to the argument asserted in his Brief at 22-26, Turner argued that he had brought a vindictive prosecution claim under the First, Fifth, and Fourteenth Amendments. [Aplt. App. 142-147 §A-C]. Even if Turner had properly pled a retaliatory prosecution claim under the First Amendment (which he [33] did not do), his claim would be time-barred. As this Circuit recognized in *Mata v. Anderson*, 635 F.3d 1250, 1252–53 (10th Cir. 2011):

> Unlike a malicious prosecution claim, however, a First Amendment retaliatory-prosecution claim ***does not*** require a favorable termination of the underlying action. *See Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir.2007). Under *Workman*, Mr. Mata's First Amendment retaliatory-prosecution claims accrued when he knew or had reason to know of the alleged retaliatory prosecution; thus, they accrued at the latest in February 2005, when he learned that Sergeant Anderson filed the amended criminal complaint against him. (citation to the record omitted). (emphasis added).

Under this analysis, the District Court correctly held that Turner's claims accrued when the BOL issued its decision on February 26, 2010. [Aplt. App. 303 ¶2].

Additionally, while the District Court did not address Turner's argument on the merits since the claim was deemed untimely, this claim was not properly pled and is not viable. Turner alleged in his Amended Complaint that MRGCD Defendants filed the BOL complaint with malice and had the complaint prosecuted by the Attorney General's Office, in an alleged attempt to "retaliate and/or intimidate Turner, and to stop Turner from reporting various alleged acts of malfeasance." [Aplt. App. 032 ¶130, 131]. Turner also asserts that his constitutionally protected rights were violated and that the actions were taken " . . . in an effort to chill his activities and retaliate against him for disclosing their malfeasance." [*Id.* ¶140]. Vindictive prosecution and retaliatory prosecution have been deemed the same claim by the Tenth Circuit. See e.g. *Gehl Grp. v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995) (stating that a First Amendment claim alleging retaliatory prosecution "is [34] essentially one of vindictive prosecution"). Retaliatory prosecution is a distinct cause of action that must be pled and proven. See *Wolford v. Lasater*, 78 F.3d at 488-89 (separately analyzing malicious prosecution and retaliatory prosecution claims).

This Circuit has recognized two types of First Amendment retaliation claims. The first occurs in the context of public employment, and the second involves retaliatory prosecution whether by a named individual or directed by a named individual. In *Mata v.*

Anderson, 760 F. Supp. 2d 1068, 1087 (D.N.M. 2009) the Court stated:

> In light of *Hartman v. Moore*, the Tenth Circuit has held that, [t]o establish a § 1983 retaliation claim against non-immune officials, [a plaintiff] must plead and prove (1) that she was engaged in a constitutionally protected activity; (2) that a defendant's action caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that a defendant's action was substantially motivated as a response to her exercise of her First Amendment speech rights. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir.2000). She also must plead and prove the absence of probable cause for the prosecution. *Hartman* [*v. Moore*], 126 S.Ct. at 1707. *Id. at* 1088 (punctuation in the original) *Id.* (*citing Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007).

Turner did not plead elements 2, 3, or 4 in his Amended Complaint. Under the plausibility test, courts are required to consider: "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Tenth Circuit articulated this standard of review on Rule 12(b)(6) motions to dismiss as follows:

> [35] a plaintiff must "nudge [] [his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. Thus, the mere metaphysical possibility that *some*

> plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (internal citation omitted) (alterations in original).

While a plaintiff does not necessarily have to plead every fact available to establish a viable claim, Turner did not assert a viable vindictive or retaliatory prosecution claim under the *Twombly* threshold. "The purpose of this "plausibility" requirement is "to weed out claims that do not in the absence of additional allegations have a reasonable prospect of success [*and*] inform the defendants of the actual grounds of the claim against them." *Glover v. Mabrey*, 384 Fed. Appx. 763, 768 (10th Cir. 2010) (quotation omitted) (emphasis in the original). "Applied to all civil actions, the *Twombly* standard 'demands more than an unadorned the-defendant-unlawfully-harmed-me accusation' and requires more than 'naked assertions devoid of factual development . . . more than a sheer possibility that a defendant has acted unlawfully.' *Id. quoting Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quotations omitted). "The complaint 'must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Id.* "While a complaint must be 'short and plain,' it must also 'show[ ]" (not merely assert) that relief is appropriate if it is true. Fed.R.Civ.P. 8(a)(2).' *Id.*

"Thus, '[d]espite the liberality of modern rules of pleading, a complaint still must contain [36] either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Id. quoting Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) (quotation omitted).

Turner did not allege the elements necessary to either state a viable claim or to provide adequate notice to MRGCD Defendants that he was stating a retaliatory prosecution claim. *See e.g. Robinson*, *supra* at 1248 (stating that one of the purposes of the well pleaded complaint rule is to provide defendants with "the actual grounds of the claim against them," so that they can prepare a defense); *see also McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010) ("If the new theory prejudices the other party in maintaining its defense, [ ]courts will not permit the plaintiff to change her theory.") (*citing Ahmad v. Furlong*, 435 F.3d 1196, 1202 (10th Cir.2006) ("A plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint a theory on which the plaintiff could recover, provided that a late shift in the thrust of the case will not prejudice the other party in maintaining its defense.") (quotation omitted). At a minimum, Turner's eleventh hour attempt to change one of his legal theories based on his failure to state a viable claim was prejudicial to MRGCD Defendants, who had briefed the issues based on Turner's existing allegations.

Turner also asserts that his malicious prosecution claim should be analyzed under New Mexico's malicious

abuse of process tort. (Brief at 25-26). Even if this [37] Court were to adopt this standard, however, Turner's claim would fail. Under state law, the tort of malicious abuse of process is " . . . construed narrowly in order to protect the right of access to the courts," *Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 701 and as such it "is disfavored in the law" *Wolford*, *supra* at 489–90 (10th Cir. 1996) (citing *Fleetwood Retail Corp. v. LeDoux*, 142 N.M. 150, 164 P.3d 31, 37 (2007). There are two ways to demonstrate improper use of process in judicial proceedings, namely filing a complaint without probable cause (not applicable here), or demonstrating a "procedural impropriety" by showing "an irregularity or impropriety suggesting extortion, delay, or harassment, or other conduct formerly actionable under the tort of abuse of process," *Durham*, *supra* at 26 (brackets and internal quotation marks omitted); *Fleetwood*, *supra* at 36. However, "improper motive by itself cannot sustain a malicious abuse of process claim." *Mocek v. City of Albuquerque*, 813 F.3d 912, 936 (10th Cir. 2015) (*quoting LensCrafters, Inc. v. Kehoe*, 282 P.3d 758, 766 (N.M.2012)). "A plaintiff must also show "the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge." *Id. quoting id.* at 767 (internal quotation marks omitted). "A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of procedural devices such as discovery, subpoenas, and attachments, or (2) indicates the wrongful use of proceedings, such as an extortion attempt." *Id. citing Durham*, 204 P.3d at 26. [38] Where, as here, a plaintiff does nothing more than

assert an alleged illicit motive for the actions alleged, this is insufficient to establish an abuse of process claim.

Finally, Turner's contention that he should be permitted to pursue his retaliatory prosecution claims under his Fifth and Fourteenth amendment claims because he has no state remedy is not a legal excuse to fail to timely file properly asserted claims. (Brief at 26-27). In the end, the District Court correctly dismissed this claim because it was not timely filed and that decision should be affirmed.

E. The District Court properly dismissed Turner's §1985(3) claim

1. Turner's conspiracy claim was time-barred

The District Court properly held that Turner's §1985(3) claim was time-barred for the same reason that his other claims were time-barred; he failed to file his federal lawsuit within three years of the BOL issuing its decision on February 26, 2010. [Aplt. App. 302-303¶1-2]. The applicable statute of limitations governing §1985 claims is the same period that governs Plaintiff's §1983 claims. *See Robinson v. Maruffi*, 895 F.2d at 653-54; see also *Lyons v. Kyner*, 367 F. App'x 878, 881-82 (10th Cir. 2010) (applying Kansas' two year statute of limitations for personal injury to the plaintiff's §1983 and §1985 claims) (citing cases from the Third, Eighth, and Ninth Circuits, also applying the forum state's personal-injury statute of limitations

to §1985 claims); *Crosswhite v. Brown*, 424 F.2d 495, 496 & n. 2 (10th Cir.1970) (applying same statute of limitations period to plaintiff's §1983 and §1985 claims). [39] The statute of limitations runs separately from each overt act of the conspiracy that allegedly caused injury. *See O'Connor v. St. John's Coll.*, 290 F. App'x 137, 141 (10th Cir. 2008) (citation omitted); *Bell v. Fowler*, 99 F.3d 262, 270 (8th Cir.1996) (citation and quotation omitted) ("The limitations period for a §1985 action "runs from the occurrence of the last overt act resulting in damage to the plaintiff."). Each conspiracy claim begins to run when the plaintiff is injured, and is *not* contemplated as a continuous wrong tolling the statute of limitations. *See* e.g *Robinson*, *supra* at 655 (indicating that conspiracies involving "discrete claims of [constitutional] wrongs, despite their being averred as a continuing wrong," accrue when the plaintiff is injured). (Emphasis added). Consequently, a plaintiff "may recover only for the overt acts that [he] specifically alleged to have occurred within the limitations period." *O'Connor supra* at *Id.* (quotation omitted).

In this case, Turner asserted that MRGCD Defendants conspired with BOL members to draft and submit a complaint to the BOL on April 24, 2007, which accused Turner of practicing engineering without a license. [Aplt. App. 028 ¶¶102-103). Turner also asserted that: 1) MRGCD Defendants allegedly influenced and conspired with BOL members to issue a notice of violation for said activities and conspired to chill his First Amendment rights; 2) MRGCD Defendants subsequently conspired to solicit the Attorney

General's Office to prosecute an administrative proceeding against him, accusing him of practicing engineering without a license; [40] 3) conspired to influence the Attorney General's Office to represent the BOL in Turner's subsequent appeal to the state District Court and in the New Mexico Court of Appeals; and, 4) issued a defamatory and discriminatory press release to chill Turner's First Amendment rights, to prevent him from disclosing malfeasance by MRGCD members, and conspired to violate his equal protection rights, all in an effort to allegedly force him to resign from his seat and abandon any re-election goals. [*Id.* at 028-29 ¶104-109]. The press release was published on May 15, 2007. Any claim for conspiracy involving the press release expired on May 15, 2010. The BOL complaint was filed on April 24, 2007. Any conspiracy claim related to the filing of the complaint expired on April 24, 2010. The BOL administrative proceeding occurred on December 16, 2009. Any conspiracy claim related to this proceeding expired on December 16, 2012. The BOL issued its decision against Turner on February 26, 2010. Any conspiracy claim related to this decision expired on February 6, 2013. Turner appealed the BOL decision on March 26, 2010 and the District Court issued its decision reversing the BOL finding on January 3, 2011. The Attorney General filed an appeal on behalf of the BOL. Even if Turner's reasoning was adopted, the last injury Plaintiff sustained as a result of the purported conspiracy was the filing of the appeal by the Attorney General. The statute of limitations on Plaintiff's conspiracy claims would have expired three years later. Plaintiff did not file this lawsuit until April 3, 2015,

well after the deadline. However, tolling is not [41] applicable to the conspiracy claims any more than it is regarding Plaintiff's §1983 claims, particularly given that Turner timely filed an appeal of the BOL decision, indicating that he was well aware of the perceived injury when it occurred. The District Court was correct in dismissing Turner's §1985 claim because it was time-barred.

2. Turner did not state a viable 1985(3) claim

The District Court determined that Turner did not state a viable §1985(3) claim because he is not a member of a protected class and he did not state any facts that demonstrated that he was discriminated against based on *his* race, sex, religion, or national origin. [Aplt. App. 305¶4, 306 ¶1-2]. Turner asserts that his "affiliation" with the Jewish community (via his wife and children who are Jewish), is sufficient for him to state a viable conspiracy claim under this statute for the alleged publishing of a racially discriminatory article" . . . in an effort to humiliate him, his spouse, and children . . . " (Brief at 30-32).

Turner's §1985(3) claim fails to state a claim because he has not alleged that he was subject to racial discrimination, and he has no standing to pursue claims on behalf of others. "The language [of 1985] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously

discriminatory animus behind the conspirators' action." *Yaklich v. Grand County*, 278 Fed. Appx. 797, 801-02 (10th [42] Cir. 2008) (quotation omitted) ("Outside the context of racial discrimination, the Supreme Court has not defined what 'otherwise class-based' discrimination may be protected under §1985(3)"). In other words, "[i]n order to support a Section 1985(3) claim, the plaintiff must be a member of a statutorily protected class, and the actions taken by defendant must stem from *plaintiff's membership* in the [protected] class." *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 746 (10th Cir. 1980) (emphasis added). The United States Supreme Court has expressly limited the scope of §1985 in stating that "it is doubtful whether any plaintiff can state a viable §1985(3) claim without alleging that the conspiracy was racially motivated." *Griffin v. Breckenridge*, 403 U.S.88, 102 (1971) (noting the discriminatory animus behind a §1985(3) conspiracy must be "racial, or perhaps otherwise class-based").

Turner contends that he stated a viable §1985(3) claim because he has alleged facts establishing: 1) he is affiliated with the Jewish community – a protected class; 2) §1985(3) includes "supporters" of protected class members; 3) the law does not require that he demonstrate that the alleged discrimination was based on race; and, 4) he has a relationship to the protected class which the conspiracy intends to deprive of equal protection. (Brief at 31, 32 ¶1). Plaintiff cannot establish that he is a member of the Jewish religion – the protected class he bases his §1985(3) claim upon. Turner acknowledges in his Brief that his spouse, *NOT*

he, " . . . is Jewish and actively involved in the Albuquerque Jewish Community . . . " [and that he and his spouse] [43] " . . . have three sons who are also Jewish and are prominent members of the Jewish Community in New Mexico." (Brief at 30). Turner cites *Richardson v. Miller*, 446 F.2d 1247, 1248-49 (3rd Cir. 1971), to support his position that he need not be a member of the protected class that the alleged discriminatory animus is aimed at. (Brief at 31 ¶2). *Richardson* held that a plaintiff, who asserted that he was fired due to his advocacy against racially discriminatory employment practices, had stated a viable §1985(3) claim although he was not a member of the protected class for which he was advocating. However, this case has no persuasive effect when viewed in the context of Tenth Circuit precedent which establishes that a plaintiff must be a member of a protected class to state a viable §1985(3) claim. See e.g. *Silkwood supra* at 746–47 ("[i]n order to support a section 1985(3) claim, the plaintiff must be a member of a statutorily protected class, and the actions taken by defendant must stem from plaintiff's membership in the class") (citation omitted). This rationale is in line with the Supreme Court's decision in *Griffin*, *supra* at 102, which establishes that " . . . the gravamen of a claim under §1985(3) is denial of equal protection or equal privileges and immunities; a conspiracy to deny everyone a given right is not actionable."). Other circuits have similarly held that membership in a protected class is necessary to state a §1985(3) claim. *See e.g. Murphy v. Mount Carmel High Sch.,* 543 F.2d 1189, 1192 (7th Cir. 1976) ("Even if the complaint did charge a conspiracy to deprive members

of [protected] classes of equal protection or of equal privileges [44] and immunities under the laws . . . the question would remain whether a plaintiff who is an advocate for but not a member of the class can recover under § 1985(3) . . . "; *Harrison v. Brooks*, 519 F.2d 1358, 1359 (1st Cir.1975) ("[T]he complaint must allege facts showing that the defendants conspired against plaintiffs because of their membership in a class. . . ."); *Robinson v. Sabis Educ. Sys., Inc.*, No. 98 C 4251, 1999 WL 414262, at *14 (N.D. Ill. June 4, 1999) (the Seventh Circuit and other circuits have rejected §1985(3) claims brought by whistleblowers advocating against racial discrimination on behalf of members of protected class); *Puglisi v. Underhill Park Taxpayer Ass'n*, 947 F. Supp. 673, 692 (S.D.N.Y. 1996), *aff'd sub nom. Puglisi v. Underhill Park Taxpayers Assoc.*, 125 F.3d 844 (2d Cir. 1997) ("plaintiff is not a member of the class protected by the statute nor a member of the race triggering the alleged racial discrimination . . . [Plaintiff] . . . does not have standing to bring such a claim under § 1985(3); "*Phillips v. Mabe*, 367 F. Supp. 2d 861 (M.D.N.C. 2005) ("[t]o the extent that Plaintiff is arguing that he is vindicating the rights of black students and their parents, [p]laintiff has not shown that he is a member of that class with standing to argue for their rights") (citing *United States v. Hays*, 515 U.S. 737, 743–44 ("[E]ven if a governmental actor is discriminating on the basis of race, the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.") (internal quotation marks omitted)).

[45] Turner's reliance on *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1244 (3d Cir. 1978), *vacated*, on other grounds 442 U.S. 366 (1979) (Brief at 31¶2, 32¶1), is equally inapplicable, since it involved a claim by a male victim (class member) of prohibitive sexually discriminatory conduct. Here, Turner's §1985(3) claim is based on alleged injuries to his family, which is not actionable in this Circuit absent a showing that he is a member of a protected class.

Furthermore, the class-based animus language has been narrowly construed in this Circuit. *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). Turner's §1985(3) conspiracy claim failed to allege facts to show a conspiracy or a class-based invidiously discriminatory animus. "The Tenth Circuit has held that mere conclusory allegations of a conspiracy with no supporting factual averments are insufficient to state a claim under section 1985(3)." *Barger v. Kansas*, 620 F.Supp. 1432, 1436 (D. Kan. 1985) (citation omitted). Turner failed to allege sufficient facts tending to show any agreement or concerted action on the part of MRGCD Defendants to conspire with others to deprive Turner of his civil rights and he did not allege facts sufficient to demonstrate the alleged actions were based on a discriminatory *animus*. Accepting Turner's facts as true, they are insufficiently pled to meet the requirements of a viable §1985(3) claim. See e.g. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-72 (1993) (internal quotations omitted) (Intent to commit the underlying act is alone insufficient; the conspirators must have [46] acted "because of and not merely in spite of

[the act's] adverse effects upon an identifiable group . . . " and holding that conspiracy based on retaliation not sufficient to meet 1985(3) threshold); *Collins v. Taos Bd. of Educ.*, No. CIV 10-407 JCH/LFG, 2011 WL 13085935, at *8 (D.N.M. Jan. 11, 2011). (Section 1985(3) "does not apply to all tortious, conspiratorial interferences with the rights of others, but rather, only to conspiracies motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus") (*quoting Griffin* at 101-02 " and holding that retaliatory animus insufficient to state 1985(3) claim)).

Turner's final assertion in this section of his brief related to his civil conspiracy claim (Brief at 32¶2, 33¶1) requires no response, given that this is a §1983 claim that is time-barred, as discussed *supra*.

F. Turner failed to state a claim against the MRGCD

The District Court held that Turner failed to state a claim against the MRGCD because Turner failed to identify an unconstitutional custom or policy by the MRGCD that led to an injury. [Aplt. App. 305 ¶1]. Turner contends that: 1) Shah is a decision-maker, whose actions did not differ from the MRGCD itself; 2) a single decision by such an individual is sufficient to establish liability under some circumstances; and, 3) Shah's decisions are sufficient to attach liability to the MRGCD. (Brief at 33-34 §IV). The District Court correctly determined that Turner failed to state a claim against the MRGCD.

[47] The Tenth Circuit has held that that [sic] there is no *respondeat superior* liability under 42 U.S.C. §1983. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). " . . . [T]o establish municipal liability under § 1983, a plaintiff must demonstrate: (i) that an officer committed an underlying constitutional violation; (ii) that a municipal policy or custom exists; and (iii) that there is a direct causal link between the policy or custom and the injury alleged. *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (*citing City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

Turner's First Amended Complaint omits any reference to the MRGCD, except to name it as a Defendant in the caption. [See *generally* Aplt. App. 013-037]. Moreover, *Monell v. Dept. of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 661 (1978) establishes that local government officials sued under §1983 in their official capacities are the same as the governmental entity they represent only if the local government would be sueable in its own name. Turner fails to recognize the critical omissions in his Amended Complaint. Aside from the fact that Turner did not timely file his Complaint, to establish municipal liability under §1983, Turner did not plead elements two and three above. "[I]n order to hold a municipality liable for an employee's constitutional violations, a plaintiff must show not only that a [48] constitutional violation occurred, but also that

some municipal policy or custom was the moving force behind the violation." *Myers v. Oklahoma Cty. Bd. of Cty. Comm'rs*, 151 F.3d 1313, 1320 (10th Cir. 1998) (citing *City of Canton*, *supra* at 385). Turner had to allege and show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and deprivation of federal rights." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (citation omitted); *see also Norton v. The City Of Marietta, OK*, 432 F.3d 1145, 1155 (10th Cir. 2005) (granting City Defendant's motion for summary judgment based on fact that Plaintiff's conclusory allegations without proof of an unconstitutional custom or policy by City in jail operations, was not sufficient under 1983 analysis to survive); *Berry v. City of Muskogee*, 900 F.2d 1489, 1499 (10th Cir.1990) (holding that "[A] municipality is liable under 1983 if there is a direct causal connection between the municipal policies in question and the constitutional deprivation)." This affirmative link requires proof that the municipality made a decision or took action through a municipal policymaker, who possesses "final authority" to establish municipal policy with respect to the action ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-80 (1986) (holding that "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' – that is, acts which the municipality has officially sanctioned or ordered)."

[49] Turner failed to allege that any actor was the "moving force" behind the alleged violations, has not pled an unconstitutional custom or policy, and has not properly identified the alleged final decision maker. Aside from naming the MRGCD in the caption, the Amended Complaint lacked any of the pleading allegations necessary to state a municipal liability claim. A municipality may not be held liable under § 1983 merely on the basis of its status as an employer. *Monell*, *supra* at 689. The District Court's dismissal of Turner's municipal liability claim based on his failure to properly plead it was legally sound and appropriate under current law and should, therefore, be affirmed.

II. CONCLUSION

The District Court should be affirmed in all aspects of its Order dismissing Turner's suit. The District Court did not commit legal error or abuse its discretion in dismissing Turner's case. Turner did not timely file his suit and provided no information that would invoke either equitable or statutory tolling principles. Turner sat on his rights and is not legally excused for doing so. Turner's reference to standards applicable to underlying criminal proceedings, and/or law that has no application to the facts involved in this case do not provide any legal basis to excuse him from the statute of limitations mandate. The statute of limitations is not a mere trifle or technicality. Rather, it is in place to prevent a plaintiff who delays in bringing suit from impairing the orderly administration of justice and

compromising the fact-[50]finding process. The consequence of failing to timely file within the requisite statute of limitations is unequivocal. " . . . [O]nce a legislative body has determined the sufficiency of the time period for bringing a claim, the courts should refuse to hear the claim after that time has passed." See *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938); *United States v. Hurst*, 322 F.3d 1256, 1260 (10th Cir. 2003) (internal quotation marks omitted) ("[W]hen a statute of limitations is measured in years, the last day for instituting the action is the anniversary date of the relevant act . . . even when the intervening period includes the extra leap-year day.").

That bedrock principle is even more magnified in this case because Turner was well aware of potential constitutional injuries and yet inexplicably seeks to excuse his lassitude. Turner's reliance on indistinct and/or irrelevant case law in an attempt to obscure his error in filing the underlying suit after the statute of limitations expired is not justified. Moreover, Turner's interpretation of §1985(3) and municipal liability under §1983 is untenable under governing law. The law that Turner relies upon neither supports his contentions nor provides a legally sound basis to reverse the District Court. For all of these compelling reasons, MRGCD Defendants respectfully request and move

this Court to affirm the District Court's decision dismissing Turner's case.

[51] Respectfully submitted,

THE BAKER LAW GROUP

By: */s/ Renni Zifferblatt*

Jeffrey L. Baker
Rennie Zifferblatt
Attorneys for Defendants-Appellees MRGCD, Subhash [sic] *Shah, and Dennis Domrzalski*
20 First Plaza, Suite 402
Albuquerque, NM 87102
(505) 247-1855
jeff@thebakerlawgroup.com
renni@thebakerlawgroup.com

[52] CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[**X**] this brief contains 12878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[**X**] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point font, Times New Roman, or

[ ] this brief has been prepared in a monospaced typeface using state name and version of word processing program with state number of characters per inch and name of type style.

Dated: October 11, 2017

THE BAKER LAW GROUP

By: */s/ Renni Zifferblatt*

Jeffrey L. Baker
Rennie Zifferblatt
Attorneys for Defendants-Appellees MRGCD, Subhash [sic] *Shah, and Dennis Domrzalski*
20 First Plaza, Suite 402
Albuquerque, NM 87102
(505) 247-1855
jeff@thebakerlawgroup.com
renni@thebakerlawgroup.com

[53] **CERTIFICATE OF COMPLIANCE WITH RULE 31.3(D)**

MRGCD Defendants-Appellees, pursuant to 10th Cir. R. 31.3(D) have filed their Answer Brief separate and apart from the BOL Defendants and Mary Smith because they are a governmental entity.

Dated: October 11, 2017

THE BAKER LAW GROUP

By: */s/ Renni Zifferblatt*

Jeffrey L. Baker
Rennie Zifferblatt
Attorneys for Defendants-Appellees MRGCD, Subhash [sic] *Shah, and Dennis Domrzalski*
20 First Plaza, Suite 402
Albuquerque, NM 87102
(505) 247-1855
jeff@thebakerlawgroup.com
renni@thebakerlawgroup.com

[54] **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

DEFENDANT-APPELLEES' MIDDLE RIO GRANDE CONSERVANCY DISTRICT, SUBHAS SHAH and DENNIS DOMRZALSKI'S ANSWER BRIEF:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of McAfee Security Scanner, and according to the program are free of viruses.

Dated: October 11, 2017

By: */s/ Renni Zifferblatt*

THE BAKER LAW GROUP
Jeffrey L. Baker
Rennie Zifferblatt
Attorneys for Defendants-Appellees MRGCD, Subhash [sic] *Shah, and Dennis Domrzalski*
20 First Plaza, Suite 402
Albuquerque, NM 87102
(505) 247-1855
jeff@thebakerlawgroup.com
renni@thebakerlawgroup.com

[55] **CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of October, 2017, I filed Appellees' Middle Rio Grande Conservancy District, Subhas Shas [sic], and Dennis Domrzalski's Response to Appellant's Opening Brief through the United States Court of Appeals for the Tenth Circuit's CM/ECF filing system, causing the following counsel of record to be served; and served seven (7) hardcopies of

Defendants-Appellees' Response Brief with the Clerk of the Court.

Plaintiff-Appellant:
A Blair Dunn abdunn@ablairdunn-esq.com; ablairdunn@gmail.com
doririchards@gmail.com
warba.llp.tammy@gmail.com

Defendant-Appellees' Eduard Ytuarte, John Romero, and Mary Smith:

lmarcus@parklawnm.com
apark@parklawnm.com
jertsgaard@parklawnm.com

/s/ Renni Zifferblatt
Renni Zifferblatt

CASE NO. 17-2105

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. WILLIAM M. TURNER,	)	
Plaintiff-Appellant,	)	**District of New Mexico**
vs.	)	**No. CIV 15-00339 RB/SCY**
MIDDLE RIO GRANDE CONSERVANCY DISTRICT, ET AL,	)	**The Hon. Robert C. Brack**
Defendants-Appellees.	)	

DEFENDANTS-APPELLEES MARY SMITH, EDUARD YTUARTE, AND JOHN T. ROMERO'S ANSWER BRIEF

Alfred A. Park
Lawrence M. Marcus
Park & Associates, L.L.C.
Attorneys for the Defendants-Appellees Mary Smith, Eduard Ytuarte, and John T. Romero
6100 Uptown Blvd., Ste. 350
Albuquerque, NM 87110

ORAL ARGUMENT REQUESTED

[ii] **TABLE OF CONTENTS**

[iv] **TABLE OF AUTHORITIES**

CASES **PAGE(S)**

STATUTES **PAGE(S)**

COURT RULES **PAGE(S)**

PRIOR/RELATED CASES

N.M. Bd. of Licensure for Professional Engineers & Professional Surveyors v. Turner, 2013-NMCA-067

[1] **COMES NOW** Defendants/Appellees Mary Smith, Eduard Ytuarte, and John T. Romero ("State Appellees"), by and through its counsel of record, Park & Associates, L.L.C. (Alfred A. Park and Lawrence M. Marcus) and hereby files this Answer Brief pursuant to Fed. R. App. P. Rule 28. For their Answer Brief, State Appellees **STATE**:

I. RULE 31.3 CERTIFICATE OF COUNSEL

Pursuant to Tenth Circuit Local Rule 31.3, Counsel for Appellee UNM certifies that a separate brief is necessary because State Appellees' arguments are substantially different from those raised by co-Defendants/Appellees Middle Rio Grande Conservancy District, Subash Shah, and Dennis Domrzalski. While all Appellees argue that Plaintiff/Appellant's claims are barred by the applicable statutes of limitations, and that Plaintiff/Appellant's claims under 42 U.S.C.

§ 1985(3) are also barred by a failure to state facts supporting a claim of discriminatory animus, State Appellees also base their defenses on judicial and prosecutorial immunity, and require a substantial amount of their brief to discuss these defenses.

[2] II. STATEMENT OF THE ISSUES

A. The District Of New Mexico Was Correct In Denying Appellant's Motion To Alter Or Amend The Judgment Because Plaintiff's Claims Are Barred By the Statute Of Limitations

B. Even If Plaintiff's Claims Are Not Time Barred, All State Appellees Are Entitled To Absolute Immunity

C. Plaintiff Has Not Stated A Claim For Malicious Prosecution

D. Plaintiff Did Not State a Claim for a Conspiracy in Violation of 42 U.S.C. § 1985(3)

III. STATEMENT OF THE CASE

Plaintiff brought the case on appeal on April 23, 2015 against the Middle Rio Grande Conservancy District ("MRGCD"), several MRGCD employees, several members of the Board of Licensure for Professional Engineers and Professional Land Surveyors ("BOL"), including Appellees John T. Romero and Eduard Ytuarte, and Assistant New Mexico Attorney General Mary Smith. Plaintiff filed an Amended Complaint on May 6, 2015. Aplt. App. at 013-037 Plaintiff alleges

that he is a hydrologist, and that he was elected to a position on the MRGCD in 2005. Aplt. App. at 016. Plaintiff further alleges that in 2006, he delivered a presentation to MRGCD, claiming that it was inappropriate to line irrigation channels with unengineered debris, or "rip rap." Aplt. App. at 019. As a [3] consequence of this presentation, Plaintiff alleges that MRGCD Public Information Officer Dennis Domrzalski filed a complaint with BOL on the grounds that the presentation and report constituted the unlicensed practice of engineering. Aplt. App. at 020. Significantly, Plaintiff does not dispute that he lacks an engineering license. At the time, Plaintiff alleges that Defendant Subash Shah was the executive director of the MRGCD, as well as the Chairman of the BOL. *Id.* However, Appellant admits that Shah advised members of the BOL at open meetings that he was conflicted from involvement in the disciplinary proceedings involving Appellant. Aplt. App. at 021.

Plaintiff then alleges that Defendant Eduard Ytuarte, who Plaintiff claims was serving as the Executive Director of the BOL, issued a Notice of Violation. Aplt. App. at 023. Subsequent to that Notice, "the Board's professional engineering committee conducted an administrative hearing on December 16, 2009, nearly three years after Turner's February 2007 presentation to the MRGCD Board of Directors. At the proceeding, the Board was presented with testimony and documentary evidence from the Board's prosecutor and Turner. On February 26, 2010, the Board issued its Decision and Order containing its findings of

fact and conclusions of law, stating that Plaintiff had been practicing engineering without a license." *New Mexico Bd. of Licensure for Professional Engineers and Professional Surveyors v. Turner*, 2013-NMCA-067, ¶ 6, 303 P.3d 875, 878. [4] Plaintiff alleges that John T. Romero was the chair of the Engineering Committee of the BOL, and asserts his claim against Mr. Romero on that basis. Aplt. App. at 015.

Appellant appealed the BOL decision to the Second Judicial District Court of New Mexico, which overturned the decision of the BOL on the grounds that, in its opinion, the BOL's decision violated Plaintiff's First Amendment rights to free speech. Aplt. App. at 021 Then, Appellant alleges, the New Mexico Attorney General's Office, though [sic] Mary Smith, appealed the District Court decision to the New Mexico Court of Appeals. *Id.* Significantly, Appellant's allegation that Ms. Smith appealed the decision of the Second Judicial District Court was the only allegation made by Plaintiff against Ms. Smith, and Plaintiff's entire claim against her rests on this appeal. Finally, on April 15, 2013, the New Mexico Court of Appeals upheld the District Court's decision. *Id*.

Appellant's Amended Complaint contained seven causes of action:

1. Violation of Due Process and Fifth Amendment against Defendants Shah, Domrzalski, Romero, and Ytuarte. Aplt App. at 022-024

2. Violation of First Amendment Rights by Defendants Shah, Domrzalski, John Does of MRGCD and John Does of BOL. Aplt. App. at 024

3. Violation of Equal Protection and Discrimination by Defendants Shah, Domrzalski, and John Does of KOB Channel 4. Aplt. App. at 024-027

[5] 4. 42 U.S.C. 1985(3), Conspiracy to Violate Plaintiff's Constitutional Rights by Defendants Shah, Domrzalski, Ytuarte, and John Does of BOL. Aplt. App. at 027-029

5. Civil Conspiracy by Defendants Shah, Domrzalski, Romero, Ytuarte, Smith, and John Does of MRGCD, to Deprive Plaintiff of his Rights. Aplt. App. at 029-032

6. Malicious Prosecution, Abuse of Process by Defendants Shah, Domrzalski, John Does of the MRGCD, Ytuarte, Romero, John Does of the BOL and Smith. Aplt. App. at 032-034.

7. New Mexico Tort Claims Act and Comon [sic] Law Torts of Defamation and Slander by Defendants Shah, Domrzalski, and John Doe of KOAT. Aplt. App. at 035.

Each of the State Defendants filed a Motion for Judgment on the Pleadings. Smith, Romero, and Ytuarte filed their Motions on July 26, 2016, August 8, 2016, and August 18, 2016, respectively. Aplt. App. at 069-123. The U.S. District Court for the District of New Mexico granted each Motion in its entirety, in favor of Smith, Romero, and Ytuarte, on January 30, 2017,

February 7, 2017, and February 10, 2017, respectively. State Aplee. Supp. App. at 001-035. The Court then granted a similar Motion filed by Shah, Domrzalski, and MRGCD ("MRGCD Defendants"). Aplt. App. at 298-306. The Court entered a final judgment on [6] February 24, 2017. Aplt. App. at 307. The Court entered judgment on the pleadings in favor of State Appellees largely on three grounds: that the cause of action was barred by the applicable statute of limitations, that each of the State Appellees was protected by immunity, and that the facts pleaded in Appellant's Complaint did not state a cause of action under the New Mexico Tort Claims Act. State Aplee. Supp. App. at 001-035.

Plaintiff-Appellant then filed a Motion to Alter or Amend the Judgment on March 24, 2017. MRGCD Aplee. Supp. App. at 025-043. This Motion sought to overturn the orders that collectively dismissed the case against all Defendants. Plaintiff-Appellant's Motion, as it pertained to State Defendants, was based on an argument that his malicious prosecution claim did not accrue until the state proceedings terminated favorably to him, on April 15, 2013, when the New Mexico Court of Appeals issued its opinion. MRGCD Aplee. Supp. App. at 029-039. Plaintiff-Appellant also argued that the District Court erred in dismissing his claim under 42 U.S.C. § 1985(3) claim, on that grounds that his wife is Jewish, and is therefore a member of a protected class. MRGCD Aplee. Supp. App. at 034-035. Significantly, Plaintiff's Motion to Alter or Amend the Judgment appeared to abandon all of Plaintiff's other

causes of action, subsuming his direct constitutional claims into his claim for malicious prosecution. However, the Motion to Reconsider did not attempt to refute the District Court's holding that State [7] Appellees were protected by various immunities or that Appellant failed to state a claim. On June 1, 2017, the New Mexico District Court denied Plaintiff's motion to Alter or Amend the Judgment. Aplt. App. at 308-317.

Plaintiff then brought the instant appeal. Aplt. App. at 318. Notably, Plaintiff's Notice of Appeal stated only that Plaintiff was appealing the decision granting dismissal to MRGCD Appellees, the Order denying Plaintiff's Motion to Alter or Amend the Judgment, and the Final Order. The Notice said nothing about the Orders dismissing the claims against each of the State Appellees. Moreover, Plaintiff's Opening Brief does not address those Orders, either. Accordingly, Appellant is barred from arguing that State Appellees are not protected by immunity, or that Appellant failed to state claims under the New Mexico Tort Claims Act.

IV. SUMMARY OF THE ARGUMENT

Plaintiff-Appellant's cause of action is barred by the applicable statute of limitations. Plaintiff-Appellant's cause of action against each Appellee accrued when the last relevant action was taken by the Appellee; this was more than three years before Plaintiff-Appellant brought the original complaint in the case on appeal. Moreover, each of the arguments made by Plaintiff that the cause of action should be tolled, including the

continuing wrong doctrine and various New Mexico state tolling statutes, are inapplicable to the instant case. Further, even if the cause [8] of action did not accrue until the final decision of the New Mexico Court of Appeals, Plaintiff-Appellant's cause of action is still time-barred, because Plaintiff has not asserted a federal constitutional cause of action, so the two year statute of limitations provided by the New Mexico Tort Claims Act is applicable. Further, each of the State Appellees is protected by absolute judicial or prosecutorial immunity. Finally, Plaintiff-Appellant has not stated a claim for malicious abuse of process or conspiracy pursuant to 42 U.S.C. § 1985(3).

V. ARGUMENT

A. THE DISTRICT OF NEW MEXICO WAS CORRECT IN DENYING APPELLANT'S MOTION TO ALTER OR AMEND THE JUDGMENT BECAUSE PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiff-Appellee [sic] is appealing the denial, by the New Mexico District Court, of his Motion to Alter of [sic] Amend its earlier judgments on the pleadings. Because Plaintiff-Appellant has not appealed any of the Orders granting State Appellees Judgment on the Pleadings, Plaintiff-Appellant is limited to review of the Order denying the Motion to Alter or Amend, based on an abuse of discretion standard. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992); Aplt. App. at 318. In the instant case, the District of New Mexico clearly did not abuse its discretion

by denying Plaintiff's Motion. As set forth below, the law is clear, and the District Court Order properly survives even *de novo* review. The district court properly denied the Motion to Alter or Amend [9] because Plaintiff-Appellant's claims against State Defendants are barred by the Statute of Limitations. Plaintiff-Appellant's claims accrued more than three years before he brought his original Complaint, the statute of limitations was not tolled, and the continuing violation doctrine is not applicable in the instant case. Moreover, even assuming, *ad arguendo*, that Plaintiff-Appellant's cause of action did not accrue until the New Mexico Court of Appeals issued its decision, his claims are still time-barred because he has not stated a federal constitutional claim, as is required to obtain the benefits of the three year statute of limitations for claims under 42 U.S.C. §§ 1983 and 1985(3).

1. Plaintiff's Claims Accrued More than Three Years Prior to his Original Complaint, so his Claims are Barred by the Statute of Limitations

Plaintiff-Appellant's claims are clearly barred by the statute of limitations. Plaintiff-Appellant bases his claims on 42 U.S.C. § 1983. "[T]he statute of limitations period for a § 1983 claim is dictated by the personal injury statute of limitations in the state in which the claim arose." *McCarty v. Gilchrist*, 646 F.3d 1281, 1289 (10th Cir. 2011) However, "federal law governs when the action accrues." *Id.* As such, "Section 1983 claims accrue, for the purposes of the statute of limitations, when the plaintiff knows or has reason to know of the

injury which is the basis of his action." *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299 (10th Cir. 1991). In New Mexico, the limitations period for a personal injury action [10] is three years. N.M.S.A. § 37-1-8. Accordingly, the limitations period for a claim under 42 U.S.C. § 1983 is also three years.

While Plaintiff-Appellant's Complaint does not state the date on which Plaintiff knew of his alleged injuries, documents that are properly considered regarding the instant Motion demonstrate that Plaintiff's Due Process claim is time barred as to Romero and Ytuarte. In evaluating a Motion to Dismiss or a Motion for Judgment on the Pleadings it is proper for the Court to consider documents to which the Complaint refers, as well as state court pleadings and other matters of which the Court may take judicial notice. *Aragon v. De Baca County Sheriff's Dept.*, 93 F. Supp. 3d 1283, 1287 (D.N.M. 2015). *See also St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (noting that federal courts can take judicial notice of decisions from outside of the federal system if they are directly related to the matter as [sic] issue).

In the present case, Plaintiff referred to the New Mexico Court of Appeals decision, which upheld the decision of the district court that reversed the BOL Order. It is certainly appropriate for the Court to consider that decision, published as *N.M. Bd. of Licensure for Professional Engineers & Surveyors v. Turner*, 2013 NMCA-067. The Court of Appeals determined that the BOL conducted an administrative hearing on December 16, 2009, and that it reached a decision on

February 26, 2010, which Plaintiff then appealed to the District Court. *Turner*, [11] 2013-NMCA-067, ¶¶ 6-8. Plaintiff based his claims against Romero and Ytuarte on the decision of the BOL. Because the last action of the BOL that could potentially support Plaintiff's Complaint against Romero and Ytuarte took place on February 26, 2010, Plaintiff-Appellant's Complaint accrued on that date.

Similarly, the only allegation made by Plaintiff about Mary Smith was that she appealed the state district court decision that reversed the BOL order. Aplt. App. at 021. Consequently, Plaintiff-Appellee's [sic] claim against her accrued no later than September 24, 2011, when she filed her Reply Brief in that case. Aplt. App. at 240. Because the limitations period for claims under both 42 U.S.C. § 1983 and 42 U.S.C. 1985 is three years, and Plaintiff-Appellee [sic] did not bring his claim until April 23, 2015, all of Plaintiff-Appellee's [sic] claims are time-barred

Plaintiff-Appellee [sic] has made numerous arguments in support of a theory that that cause of action did not accrue until April 15, 2013, when the New Mexico Court of Appeals upheld the district court decision overturning the BOL. However, all of these arguments are without merit.

In his Opening Brief, Plaintiff-Appellee [sic] focuses on an amalgam of his claims for malicious prosecution and conspiracy, arguing that the alleged conspiracy was part of the alleged malicious prosecution. In so doing, he abandons his other claims, such as violation of

Due Process, and subsumes them into his claim for malicious prosecution. Plaintiff-Appellant merely uses these allegations [12] of constitutional violations to support a claim for malicious abuse of process under 42 U.S.C. § 1983, rather than common law malicious abuse of process. Plaintiff argues, based on *Robinson v. Moruffi*, 895 F.2d 649 (10th Cir. 1990), that his cause of action did not accrue until the "favorable termination" of the proceedings, in the form of the Court of Appeals decision on April 15, 2013. It is true that, in *Robinson*, this Circuit held that favorable termination was a requirement for a malicious prosecution claim. However, since *Robinson* was decided, changes in New Mexico state law concerning malicious prosecution have excluded favorable termination as an element. Therefore, *Robinson* must be distinguished for recent cases, at least for claims made in the District of New Mexico.

In the Tenth Circuit, "state law provides the starting point" for the analysis of a malicious prosecution under 42 U.S.C. § 1983. *Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001), citing *Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996). Robinson concerned a claim for a malicious prosecution conspiracy in New Mexico. At the time that *Robinson* was decided, New Mexico law recognized an action for malicious prosecution that included favorable termination as an element of the cause of action. *DeVaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, ¶ 11, 124 N.M. 512, 517, *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 701. However, in *DeVaney*, the New

Mexico Supreme Court eliminated the tort of [13] malicious prosecution, by merging it with that of abuse of process, and created a new cause of action called malicious abuse of process. *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047. ¶ 12, 142 N.M. 150, 154. This new cause of action eliminated the favorable termination requirement. *Le Doux*, 2007-NMSC-047, ¶ 14, 142 N.M. at 154; *DeVaney*, 1998-NMSC-001, ¶ 23. 124 N.M. at 521.

Based on the Tenth Circuit precedent described in *Erikson*, in which Section 1983 claims for malicious prosecution are analyzed based on state law, this Court should consider Plaintiff's claim as one for malicious abuse of process, rather than malicious prosecution, as the latter no longer exists in New Mexico. This new cause of action does not contain a favorable termination requirement. Accordingly, the District Court's rulings were correct. The causes of action for malicious prosecution accrued, as against each defendant, on the date of the last relevant action by that defendant. As noted above, these last relevant actions occurred more than three years before Plaintiff brought his original Complaint. Accordingly, all of the claims are time barred.

Similarly, Plaintiff's reliance on *Heck v. Humphrey*, 512 U.S. 477 (1994), is misplaced. In his Opening Brief, Plaintiff appears to argue that, because he could conceivably have faced criminal sanctions if he had violated the ruling of the BOL, the licensing regulations were the equivalent of a criminal statute. Op. Brief at 9. However, this argument is entirely immaterial to the

issues raised in *Heck*. *Heck* [14] merely stands for the proposition that a confined individual cannot bypass the administrative exhaustion requirements for a petition for writ of habeas corpus by filing a claim under 42 U.S.C. § 1983: "a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 489-90.

Plaintiff-Appellant argues that, in certain cases, *Heck* has been applied in the civil context. However, even the civil cases cited by Appellant concern issues of confinement. *See*, *e.g.*, *Huftile v. Miccio-Fonseca*, 410 F.3d 1136 (9th Cir. 2005) (applying Heck to civil commitment under a sexual predator statute). Quite simply, "*Heck's* favorable termination rule was intended to prevent a person in custody from using §1983 to circumvent the more stringent requirements for *habeas corpus*." *Huftile*, 410 F.3d at 1139. Accordingly, it is inapplicable in the instant case. Plaintiff-Appellant argues that he could theoretically have been incarcerated as a consequence of the BOL decision, that he could have been charged with a misdemeanor had he failed to pay the fine that the BOL attempted to levy. However, this argument is immaterial: Plaintiff never was actually incarcerated, so his cause of action was not an attempt to bypass the *habeas* requirements. Plaintiff's Complaint did not challenge a criminal sentence or a civil confinement. Therefore, *Heck* is inapplicable. Again his cause of action accrued on at the time of the last relevant action, rather than at the point where he obtained a favorable [15] termination of the

claims against him. Accordingly, Plaintiff's cause of action is time-barred, so the District Court's Order must be affirmed.

2. The "Continuing Wrong" Doctrine is Not Applicable to this Case

Further, the "continuing wrong" doctrine is inapplicable to this case. Plaintiff argues that the cause of action did not accrue until the alleged wrong was "over and done with," which Plaintiff argues occurred when the Court of Appeals issued its order upholding the district court decision reversing the BOL order. However, this continuing wrong theory has no support in the case law. The Tenth Circuit has never held that the continuing violation doctrine applies to Section 1983 cases. *Canfield v. Douglas Cnty.*, 619 Fed. Appx. 774, 778 (10th Cir. 2015). Moreover, as Plaintiff admits in his Brief in Chief, even if the continuing violation doctrine did apply, "the doctrine is triggered by continual unlawful acts, not by continual ill effects from the original violation." *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011) (holding that retaliation claim accrued when criminal complaint was filed, despite the fact that the defendant had testified and maintained the action after that date). Plaintiff does not allege that Mr. Romero or Mr. Ytuarte committed *any* material acts after February 26, 2010, or that Ms. Smith committed *any* material acts after September 24, 2011. Further, any ill effects that Plaintiff-Appellant supposedly suffered as a consequence of the allegedly illegal order were merely continual ill effects, which would

not allow the tolling of his claim under a [16] continuing violation theory.

3. Tolling Based on New Mexico State Law is Inappropriate

Finally, Plaintiff-Appellant [sic] reliance on state tolling law is misplaced, as well. Plaintiff essentially bases his claim for state law tolling on N.M.S.A. § 37-1-12. Under this section, "[w]hen the *commencement of any action* shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation" (emphasis added). However, this section is not applicable to the instant case. Contrary to Plaintiff-Appellant's contentions, the pendency of the state court appeal did not serve to bar the commencement of the instant suit.

It is true that the abstention doctrine in *Younger v. Harris*, 401 U.S. 37 (1971), may have been applicable to the Plaintiff-Appellant's claim for monetary relief. "The rationale for *Younger* abstention can be satisfied, however, by just staying proceedings on the federal damages claim until the state proceeding is final." *D.L. v. Unified Sch. Dist No. 497*, 392 F.3d at 1223, 1228 (10th Cir. 2004). In fact, the U.S. Supreme Court has "permitted federal courts applying abstention principles in damages actions to enter a stay, but [the Supreme Court has] not permitted them to dismiss the action altogether." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 730 (1996) Accordingly, while the District

of New Mexico may have found it necessary to stay the instant claim pending the results of the state [17] court action, it would not have been permitted to dismiss the case, altogether. Thus, the commencement of the instant case would not have been barred, and N.M.S.A. § 37-1-12 would not have been triggered.

Moreover, contrary to Plaintiff's contention, *U.S. Fire Ins. Co. v. Aeronautics, Inc.*, 107 N.M. 320 (1988), and *Otero v. Zouhar*, 102 N.M. 482 (1985), *overruled on other grounds by Grantland v. Lea Regional Hosp.*, 110 N.M. 378 (1990) are immaterial to Plaintiff-Appellant's case. In *U.S. Fire Ins. Co.*, a defendant brought an improper third party claim, in which the third party defendants were not secondarily liable to the plaintiff. 107 N.M. at 321. The New Mexico Supreme Court affirmed the outright dismissal, without prejudice, of the third party claims. *Id.* In so doing, the Court held that the third party plaintiff would not be prejudiced by the decision, on the grounds that under N.M.S.A. § 37-1-14, "after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." *Id.* at 322. Accordingly, because the third party complaint failed to meet a procedural technically [sic], the statute of limitations was tolled during the pendency of the appeal, provided that the third party plaintiff brought a separate complaint within the next six months. *Id.*

[18] The procedural history of the instant case is substantially different from that in *U.S. Fire Ins.* Plaintiff-Appellant's complaint in state court did not fail. Rather, Plaintiff-Appellant prevailed at both the district court and the state Court of Appeals. Secondly, Plaintiff-Appellant did not bring his original federal Complaint within six months after the Court of Appeals' ruling. Instead, Plaintiff-Appellant waited over two years to bring the Complaint. Accordingly, *U.S. Fire Ins*. is not helpful to Plaintiff.

Similarly, *Otero* concerned the New Mexico Medical Malpractice Act, and should be considered irrelevant to the instant case. 102 N.M. at 483-84. In *Otero*, the Court considered a requirement that a potential medical malpractice plaintiff bring an administrative complaint to a review commission as a prerequisite to filing suit in court. *Id.* at 484. The Act also tolls the statute of limitations until thirty days had passed since the commission decision. *Id.* The *Otero* decision concerned a Plaintiff who had prematurely brought suit, prior to a decision by the review commission. *Id.* at 485. The court reversed the dismissal of the decision, on the grounds that the thirty day period had expired and the statute of limitations had already run. *Id.* Accordingly, dismissal would have been prejudicial to the plaintiff. In so doing, the Court stated that it was attempting to avoid a Catch-22 situation that would block the plaintiff's access to the courts. *Id.* In the instant case, no Catch-22 exists. As noted above, the Plaintiff could have brought a federal action [19] for damages prior to the decision of the New Mexico court

of appeals, and this action would simply have been stayed, rather than dismissed. Accordingly, tolling of the action based on New Mexico law is inappropriate in this case.

4. Even if Plaintiff-Appellant's Claim Accrued on April 15, 2013, his Claims are Still Time-Barred, Due to Failure to State a Claim for Federal Malicious Abuse of Process

Finally, even assuming, *ad arguendo*, that Plaintiff's claims accrued in [sic] on April 15, 2013, his claims are still time-barred. Plaintiff brought the instant Complaint on April 22, 2015, more than two years after the date on which Plaintiff claims that his cause of action accrued. Therefore, any state law claim that Plaintiff may have for malicious abuse of process is time-barred under the two year limitations period of the New Mexico Tort Claims Act. N.M.S.A. § 41-4-15.

While 42 U.S.C. § 1983 provides for a three year limitations period, Plaintiff can only bring a malicious abuse of process claim under the federal statute if he can state facts that, if true, would indicate a constitutional violation. As this Circuit has noted, "we conclude that our circuit takes the common law elements of malicious prosecution as the 'starting point' for an analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation." *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (emphasis in original). In the context of a Section 1983 claim for malicious prosecution, the

constitutional violation that [20] needs to be proven is that of the Fourth Amendment's right to be free from unreasonable seizures. *Id.*

Plaintiff-Appellant admits that he had not been subjected to a seizure. Rather, Plaintiff-Appellant attempts to base his cause of action on claimed violations of other constitutional provisions, namely the First and Fifth Amendments. However**,** even assuming, *ad arguendo*, that Plaintiff can base a federal malicious prosecution claim on a constitutional provision other than the Fourth Amendment, Plaintiff has not alleged sufficient facts in support of a claim for a violation of any constitutional provision.

Plaintiff has not stated a claim for a First Amendment violation. It is true that the New Mexico Court of Appeals held that the BOL sanction violated Plaintiff's First Amendment rights. However, this Court "owes no deference to state-court interpretation of the United States Constitution." *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007). As set forth below, federal jurisprudence strongly suggests that the New Mexico Court of Appeals decision in *Turner* was incorrectly decided. State Appellees are not collaterally estopped from arguing that the BOL's actions were consistent with the First Amendment: the state Court of Appeals action was an appeal from the decision of the BOL, but neither the BOL Appellees nor Ms. Smith were actually parties to the action. *See*, *e.g.*, *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000) (a requirement for [21] collateral estoppel is that "the party against whom the doctrine is invoked was a

party, or in privity with a party, to the prior adjudication."). State Appellees certainly did not have a "full and fair opportunity for judicial resolution of the issue," as is required for collateral estoppel to apply. *Brown. v. DeLayo*, 498 F. 2d 1173, 1175-76 (10th Cir. 1974). Accordingly, it is appropriate for this Court to revisit the First Amendment issue in the case on appeal.

Moreover, even assuming, *ad arguendo*, that State Appellees are subject to collateral estoppel regarding whether the BOL order violated Plaintiff-Appellant's First Amendment rights, the issue of qualified immunity was not considered in the state court action, as it did not contain a Complaint for damages. State Appellees are certainly entitled to qualified immunity as to the First Amendment issues; this qualified immunity eliminates the possibility of a constitutional claim.

A public official sued for supposed violation of the plaintiff's constitutional rights may "challenge the complaint under Fed. R. Civ. P. Rule 12(b)(6) on the ground that he or she is entitled to qualified immunity because the pleaded facts failed to show that his or her conduct violated clearly established law of which a reasonable person would have known." *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). Moreover, "the plaintiff carries the burden of convincing the court that the law was clearly established." *Id.* at 645. For this purpose, a law is only "clearly established when a Supreme Court or Tenth [22] Circuit decision is on point, or if the clearly established weight of authority from other courts shows that

the right must be as plaintiff maintains." As set forth below, State Appellees did not violate Plaintiff-Appellant's First Amendment rights, and certainly did not violate any of his clearly established rights.

The *Turner* decision rested almost completely on New Mexico precedent, rather than any federal First Amendment jurisprudence. The only federal case cited in the *Turner* decision was *U.S. v. O'Brien*, 391 U.S. 367 (1968), in which a federal ban on burning draft cards was upheld. Thus, *O'Brien* cannot stand for the clear establishment of any constitutional rights. In fact, the *O'Brien* analysis has been used to uphold licensure requirements that, like the engineering licensure requirement at issue in the instant case, create incidental restrictions on speech. *See*, *e.g.*, *The Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir. 2004) (upholding the denial of a permit to a nude dancing club); *Kagan v. City of New Orleans*, 957 F. Supp. 2d 774 (E.D. La. 2013) (upholding a licensure requirement for tour guides); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013) (upholding a ban on mental health professionals providing "gay conversion therapy"). Moreover, in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the U.S. Supreme Court upheld Ohio's ban on in-person solicitation of business by licensed attorneys. In so doing, the Court held that "the State bears a special responsibility for maintaining standards among members of the licensed professions." 436 U.S. [23] at 460.

The prevention of unlicensed individuals from practicing in a given profession is surely vital for

maintaining professional standards. Quite simply, there is no federal precedent, let alone Tenth Circuit or Supreme Court precedent, that would indicate that the BOL decision violated Plaintiff's First Amendment rights. Accordingly, State Appellees did not violate Plaintiff's clearly established right under the First Amendment, and they are thus protected by qualified immunity.

Plaintiff-Appellant has not stated a claim for malicious prosecution under the Fifth Amendment, either. As the District of New Mexico noted in its Order granting Mr. Romero's Motion for Judgment on the Pleadings, "there is no Tenth Circuit or Supreme Court case that would indicate that the process received by Plaintiff in connection with the BOL decision was inadequate." This Opinion is well-supported by the controlling law and the facts of the case.

"Due process requirements in administrative hearings are not as stringent as in normal judicial proceedings. Procedural due process in an administrative action simply requires notice and the opportunity to be heard." *Rios v. Aquirre*, 276 F. Supp. 2d 1195, 1200 (D. Kan. 2003) (citations omitted). This is consistent with well-settled precedent concerning due process. For instance, in *Mathews v. Eldrige*, 424 U.S. 319, 348-49 (1976), the United States Supreme Court held that [24] "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.' "

It is clear that Plaintiff-Appellant's Due Process rights were not violated. In its decision to uphold the reversal of the BOL decision, the New Mexico Court of Appeals stated that the BOL conducted a hearing on December 16, 2009, and that "[a]t the proceeding, the [BOL] was presented with testimony and documentary evidence from the [BOL's] prosecutor *and Turner*. On February 26, 2010, the Board issued its Decision and Order containing its findings of fact and conclusions of law." *Turner*, 2013-NMCA-067, ¶ 6 (emphasis added). Plaintiff-Appellant admits, elsewhere in his Complaint, that this hearing occurred. Aplt. App. at 021, ¶ 50. (stating that an administrative hearing was commenced). Moreover, Plaintiff had the opportunity to appeal the decision to the District Court. Quite simply, State Defendants provided Plaintiff with more than enough process to satisfy Plaintiff's constitutional rights, so he cannot base a claim for malicious abuse of process on allegations of a due process violation.

Quite simply, even if Plaintiff's claim for malicious prosecution were deemed to have accrued on April 15, 2013, and even if it were appropriate to base a federal claim for malicious abuse of process on a constitutional violation other than the Fourth Amendment, Plaintiff's claim would still be time-barred. Plaintiff has not properly alleged any constitutional violation that would support a federal [25] claim for malicious abuse of process, and any state law malicious abuse of process claim would be time-barred by the New Mexico Tort Claims Act. Accordingly, the decision of the District of New Mexico Court denying

Plaintiff-Appellant's Motion to Alter or Amend was correct, and it must be upheld.

B. EVEN IF PLAINTIFF'S CLAIMS ARE NOT TIME BARRED, ALL STATE APPELLEES ARE ENTITLED TO ABSOLUTE IMMUNITY

Further, even assuming, *ad arguendo*, that Plaintiff's claims are not time-barred, they are still barred by absolute immunity. In its Orders granting each State Appellee judgment on the pleadings, the District of New Mexico held that Romero, Ytuarte, and Smith were all protected by absolute immunity. Significantly, Plaintiff-Appellant did not dispute these holdings, either in his Motion to Alter or Amend the Judgment, or in his Opening Brief. Further, Plaintiff-Appellant's Notice of Appeal did not state an intent to appeal the Orders granting State Appellees judgment on the pleadings. Aplt. App. at 318. Ordinarily, an Order granting judgment on the pleadings is subject to *de novo* review. *Soc. of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240-41 (10th Cir. 2005). However, Plaintiff-Appellant's failure to raise these issues at an earlier stage of the appeal indicates an abandonment of the issues, and he is barred from contesting State Appellees' absolute immunity. *See*, *e.g.*, *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1449, n. 7 (10th Cir. 1990).

[26] Moreover, even assuming, *ad arguendo*, that Plaintiff-Appellant is not barred from contesting State Appellee's absolute immunity, relevant precedent demonstrates that this immunity is beyond question.

Regarding Romero and Ytuarte's judicial immunity, the District Court noted that "[t]he Tenth Circuit has recognized that 'officials in administrative hearings can claim the absolute immunity that flows to judicial officers if they are acting in a quasi-judicial fashion.'" State Aplee. Supp. App. at 017, citing *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (citing *Butz v. Economou*, 438 U.S. 478, 514 (1978)). The Court also cited this Circuit's holding that "A judge is immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Moss v. Kopp*, 559 F.3d 1155, 1163–64 (10th Cir. 2009) (internal quotations marks and citations omitted). Quite simply, a judge lacks immunity only when he acts in the "clear absence of *all* jurisdiction," *Bradley v. Fisher*, 80 U.S. at 335, 351 (1871) (emphasis added). Significantly, this immunity even applies when the court acts in excess of its jurisdiction. *Id.*

More recently, in *Guttman*, the plaintiff, Stuart Guttman, filed suit on the grounds that his medical license had been revoked by the New Mexico Board of Medical Examiners. Guttman filed suit against several parties, including Livingston Parsons, who was the hearing officer, and G.T.S. Khalsa, the administrative prosecutor. 446 F.3d at 1030. Thus, *Guttman* concerned a plaintiff [27] who sued several members of a state licensing board in federal court, as a result of a board decision that was adverse to the plaintiff. It thus closely resembles the instant case. In *Guttman*, the New Mexico District Court dismissed the case on the

grounds that, *inter alia*, Parsons and Khalsa were entitled to absolute immunity. *Id.* In the instant case, based on the allegations in Plaintiff's Complaint, Parsons and Khalsa are equivalent to Romero and Ytuarte, both were individuals who participated in a quasi-judicial action. The District of New Mexico's grant of absolute immunity to these individuals must be upheld.

The District of New Mexico correctly held that the BOL is the agency tasked with the regulation of the licensure of engineers and surveyors in New Mexico. *See* N.M.S.A. § 61-23-24. Even assuming that Defendant Romero reached the decision during meetings without a formal hearing and drafted the decision in consultation with Defendant Ytuarte, Defendant Romero acted within the jurisdiction of the BOL to "investigate and initiate a hearing on a complaint against a person who does not have a license, who is not exempt from the Engineering and Surveying Practice Act [N.M.S.A. § 61-23-1] and who acts in the capacity of a professional engineer within the meaning of Engineering and Surveying Practices Act." N.M.S.A. § 61-23-23.1 (A). The District Court thus correctly held that both Romero and Ytuarte "acted within the jurisdiction of the BOL when the decision issued that determined Plaintiff had practiced engineering without a license." State. [28] Aplee. Supp. App. at 017. As described above, this decision is well supported by the applicable law.

Moreover, the District of New Mexico also held that Ms. Smith was entitled to prosecutorial immunity.

Like the finding of absolute judicial immunity in favor of Mr. Romero and Mr. Ytuarte, this finding of absolute prosecutorial immunity has not been challenged, either in the Motion to Alter or Amend the Judgment or in the Appellate Opening Brief. According, [sic] Plaintiff-Appellant is barred from challenging the finding in its Reply. In holding that Ms. Smith is entitled to absolute prosecutorial immunity, the Court noted that "the Supreme Court has stated that activities involving professional judgment are in the nature of advocacy, and are therefore protected by absolute immunity." State Aplee. Supp. App. at 009, *citing Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 274.

In *Imbler v. Pachtman*, 424 U.S. 409, 423-427 (1976), the United States Supreme Court held that prosecuting attorneys who initiate and pursue criminal charges against an individual are protected by absolute immunity to both common law tort claims and federal claims brought under Section 1983. Moreover, "[i]t is also well-established that this absolute prosecutorial immunity extends to state attorneys and agency individuals who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement [29] proceedings." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991).

Contrary to Plaintiff's contention, all of his allegations against Ms. Smith are encompassed by prosecutorial immunity. According to the closely analogous *Pfeiffer* decision, any actions that could be considered

to be part of the judicial process are protected by absolute prosecutorial immunity. The only specific allegations raised by Plaintiff were that Ms. Smith, as an assistant attorney general, filed an appeal of the New Mexico District Court's determination that BOL's interpretation of the engineering licensing statute violated the First Amendment. This is clearly an act that is intimately associated with the judicial process, and is therefore protected by the doctrine of prosecutorial immunity, pursuant to *Pfeiffer*. Significantly, even assuming, *ad arguendo*, that the appeal was entirely without merit, and even that Ms. Smith knew it was without merit – a claim Plaintiff does not even allege – she would *still* be protected by prosecutorial immunity. *See*, *e.g.*, *Pfeiffer*, 929 F.2d at 1490-92.

Further, even assuming, *ad arguendo*, that Ms. Smith is not protected by absolute immunity, Plaintiff utterly failed to argue that he meets the substantial burden required to state a claim against his adversary's attorney. In general,

> An attorney acting within the scope of his employment as an attorney is immune from liability to third persons for actions arising out of that professional relationship. Further, attorneys are generally not liable to the client's [30] adversary, absent evidence of an affirmative misrepresentation.

Gerhardt v. Mares, 179 F. Supp. 3d 1006, 1050 (D.N.M. 2016) (citing *Karnatcheva v. J.P. Morgan Chase Bank, N.A.*, 871 F. Supp. 2d 834, 839 (D. Minn. 2012) (*internal quotation marks and citation omitted*). Based on the

allegations of the Amended Complaint, Ms. Smith was acting in her capacity as an assistant attorney general, and was thus acting within the scope of her employment. Further, Plaintiff-Appellant's Amended Complaint contains no allegations that would indicate that Ms. Smith made any affirmative misrepresentations to Plaintiff-Appellant. Accordingly, he has failed to state a claim that Ms. Smith, an attorney for Plaintiff-Appellant's adversary in prior litigation, owed any duty or bears any liability to him. Quite simply, even assuming, *ad arguendo*, that Plaintiff-Appellant has not abandoned the issue, the District of New Mexico ruling that Ms. Smith was protected by prosecutorial immunity was well supported by applicable law.

Plaintiff-Appellant has not disputed the portions of the Orders granting State Defendants absolute immunity in his Motion; moreover, this absolute immunity is based on well-settled law in this Circuit. Accordingly, even assuming, *ad arguendo*, that his cause of action is not time-barred, the dismissal of his Complaint must still be affirmed, as against all State Defendants, on the grounds of absolute immunity.

[31] **C. PLAINTIFF HAS NOT STATED A CLAIM FOR MALICIOUS PROSECUTION**

Finally, even assuming, *ad arguendo*, that Plaintiff-Appellant's malicious prosecution claims are not time-barred, and that State Appellants [sic] are not protected by absolute immunity, the District Court

Orders must still be upheld. As noted above, Plaintiff-Appellant based his claims on his contention that a claim for the federal equivalent of a malicious prosecution claim does not accrue until the favorable termination of the allegedly malicious prosecution. As noted above, this contention has been refuted on several grounds. However, even assuming that Plaintiff-Appellant's contention is correct, Plaintiff-Appellant's claims still depend on his ability to state a claim for malicious prosecution or malicious abuse of process. Plaintiff has not stated such a claim against any of the State Appellees, so his causes of action were properly dismissed. State Appellees raised this issue in their Motions for Judgment on the Pleadings. However, the District Court did not reach the issue, having granted the Motions on other grounds.

As noted above, Plaintiff has not stated a federal claim for malicious prosecution or malicious abuse of process, because he has not alleged a constitutional violation. Moreover, even when evaluating a federal malicious abuse of process claim, the starting point in the analysis is the elements of the equivalent state tort claim. In order to state a claim for malicious abuse of process, Plaintiff must allege facts that, if true, would demonstrate the following: "(1) the initiation [32] of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages." *Fleetwood Retail*

Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶ 12, 164 P.3d 31, 35.

Based on this standard, Plaintiff-Appellee [sic] has not stated a claim for malicious abuse of process against Ms. Smith. When the malicious abuse of process claim is asserted against an attorney, the claimed merits of the case must be balanced against the risk that such a claim will "chill an attorneys' vigorous representation of the client; *accordingly, except in unusual circumstances, an attorney should not have to worry about asserted duties to non-clients.*" *Mosley v. Titus*, 762 F. Supp. 2d 1298, 1316 (citing *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 19, 145 N.M. 186, 192 (2008)) (emphasis added). Quite simply, "[o]nly those actions that any reasonable attorney would agree are totally and completely without merit would form the basis for a malicious prosecution suit." *Id*. at 1316 (citing *Zamos v. Stroud*, 87 P.3d 802, 810 (Cal. 2004)).

In the instant case, Plaintiff has not alleged any facts that would show that the "unusual circumstances" required for a malicious abuse of process suit apply to his case against Ms. Smith. In his Amended Complaint, Plaintiff merely notes that Ms. Smith filed an appeal, in the course of her duties as an assistant attorney [33] general, and that this appeal was unsuccessful, because the New Mexico Court of Appeals upheld the District Court's decision. Aplt. App. at 021. There are no allegations that Ms. Smith's primary motive was illegitimate. It is certainly not unusual for an attorney to file an appeal; it is also not unusual for an

appellate court to uphold the decision of a district court.

There are no well-pleaded facts in Plaintiff's Amended Complaint that would show that the appeal in question was "totally and completely without merit"; all that can be gleaned from the allegations of the Amended Complaint is that the appeal was unsuccessful. If an unsuccessful appeal were all that is necessary for a malicious abuse of process claim, it would chill any attorney's vigorous representation of his or her client, as the New Mexico Court of Appeals feared in *Berardinelli*; such a holding could result in a flood of collateral litigation against adversaries' attorneys. Accordingly, Plaintiff would have to allege facts that would demonstrate that the appeal was not only unsuccessful, but was improper. Plaintiff has not alleged such facts. Thus, Plaintiff did not state a claim for malicious abuse of process against Ms. Smith, so that cause of action was appropriate [sic] dismissed.

Similarly, Plaintiff did not state a claim for malicious prosecution or malicious abuse of process against Mr. Romero or Mr. Ytuarte. In order to state such a claim, a plaintiff must allege that the defendant initiated a judicial process. [34] *LeDoux*, 2007-NMSC-047, ¶ 12. Plaintiff does not allege that Romero initiated the BOL action. Rather, Plaintiff alleges that MRGCD officials initiated the action, and that that [sic] Romero drafted the BOL decision. Aplt. App. at 021-033. Quite simply, Plaintiff alleges that Romero acted as the judge, rather than as the initiating party. Secondly, Plaintiff has not stated facts that would show that

Romero's actions or motives were improper. Instead, Plaintiff contends that Romero drafted an order, which is the normal result of a BOL proceeding, and that Romero was acting in his role as the Chair of the BOL Engineering Committee. Aplt. App. at 015. Because it is the role of the engineering committee to prepare such orders, Plaintiff's allegations suggest that Romero was doing his job, and acting properly. Plaintiff's Complaint contains no allegation that would suggest that Romero had an improper motive in drafting the BOL order.

Similarly, Plaintiff does not allege that Ytuarte initiated an action. Rather, Plaintiff alleges that MRGCD officials initiated the action at the BOL, and that that [sic] Ytuarte issued a Notice of Violation, as part of an investigation of Plaintiff. Aplt. App. at 023. Secondly, Plaintiff has not stated facts that would show that Ytuarte's actions or motives were improper. Instead, Plaintiff contends that Ytuarte issued a notice, which is the normal result of a BOL proceeding, and that Ytuarte was acting in his role as the executive director of the BOL. Aplt. App. at 015-023. Because it is the role of the BOL to issue such notices, Plaintiff's allegations [35] suggest that Ytuarte was doing his job, and acting properly. Plaintiff's Complaint contains no allegation that would suggest that Ytuarte had an improper motive in drafting the BOL order.

Quite simply, Plaintiff-Appellee [sic] did not state a claim for malicious abuse of process against any of the State Appellees. Accordingly, even assuming, *ad arguendo*, that his claim for malicious abuse of process is

not time-barred, Plaintiff-Appellant's cause of action was properly dismissed, and this dismissal must be upheld.

D. PLAINTIFF DID NOT STATE A CLAIM FOR A CONSPIRACY IN VIOLATION OF 42 U.S.C. § 1985(3)

Finally, Plaintiff-Appellant did not state facts that support his claim for a conspiracy in violation of 42 U.S.C. § 1985(3). Plaintiff-Appellant raised the issue of the dismissal of the 42 U.S.C. § 1985(3) in his Motion to Amend or Alter the Judgment, but the District Court chose not to reconsider the issue. Because Plaintiff-Appellant has not appealed any of the Orders granting State Appellees Judgment on the Pleadings, Plaintiff-Appellant is limited to review of the Order denying the Motion to Alter or Amend, based on an abuse of discretion standard. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992). Plaintiff-Appellant's claim under this section must allege, *inter alia* discriminatory animus on the part of the defendant, which "implies more than intent as volition or intent as awareness of consequences. It implied that the [36] decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely in spite of,' its adverse effects upon an identifiable group." *Bray v. Alexandra Women's Health Clinic*, 506 U.S. 263, 271-72 (1993). Plaintiff has utterly failed to allege such a purpose. While Plaintiff alleges that his wife is Jewish, and argues that religious discrimination is a type of animus

that can support a claim under 42 U.S.C. § 1985(3), Plaintiff-Appellant's Complaint merely indicated that a Jewish person may have suffered some incidental, indirect adverse effects as a result of State Appellees' actions. However, Plaintiff-Appellant has not alleged any facts that would indicate that any of the State Appellees had any anti-Semitic feelings regarding Plaintiff-Appellant's wife, much less that State Appellees were motivated by this non-existent anti-Semitism. Quite simply, Plaintiff has not alleged facts that would indicate that any defendant took an action because of its alleged adverse effects upon an identifiable group. Accordingly, Plaintiff has not stated a claim for violation of 42 U.S.C. § 1985(3).

VI. CONCLUSION

The District Court for the District of New Mexico was correct in granting UNM's Motion to Dismiss Plaintiff-Appellant's causes of action under 42 U.S.C. § 1983. Assuming the well-pled facts of Plaintiff-Appellant's Complaint to be true, Plaintiff-Appellant's claims are barred by the statute of limitations, and there is no tolling principle that could revive these claims. Moreover, State Appellees are [37] protected by absolute immunity. Finally, Plaintiff-Appellant's Complaint failed to state a claim for malicious prosecution or for a conspiracy under 42 U.S.C. § 1985(3). Accordingly, Appellees Mary Smith, Eduard Ytuarte, and John T. Romero respectfully request that this Honorable Court affirm the decision of the New Mexico

District Court granting its Motion to Dismiss Plaintiff-Appellant William Turner's Complaint in its entirety.

VII. STATEMENT OF WHY ORAL ARGUMENT IS NECESSARY

State Appellees believe that oral argument would be useful to clarify a number of issues about which there is currently some confusion, and aid the Court in rendering its decision. The present case raises several issues regarding nuances of statutes of limitations under 42 U.S.C. §1983, and when causes of action under that statute accrue. Oral argument will be useful in clarifying these issues.

Respectfully submitted,

PARK & ASSOCIATES, LLC

/s/Lawrence M. Marcus
Lawrence M. Marcus
Attorneys for Defendants-Appellees
Mary Smith, Eduard Ytuarte, and
John T. Romero
6100 Uptown Blvd., Suite 350
Albuquerque, NM 87110
(505) 246-2805

[38] VIII. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief

contains 8,589 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, in Compatibility Mode for compatibility with Microsoft Word 2003, in 14 point Times New Roman.

/s/ Lawrence M. Marcus

Attorney for Defendans[sic]-Appellees
Mary Smith, Eduard Ytuarte,
and John T. Romero
On this **13th** day of October 2017

[39] **IX. CERTIFICATE OF REDACTION**

I hereby certify, regarding Defendant-Appellees Mary Smith, Eduard Ytuarte, and John T. Romero's Answer Brief, that all required privacy redactions were made (no such redactions were required)

/s/ Lawrence M. Marcus
Lawrence M. Marcus

X. CERTIFICATE OF IDENTITY

I hereby certify, regarding Defendant-Appellees Mary Smith, Eduard Ytuarte, and John T. Romero's

Answer Brief, that the ECF submission was an exact copy of the required hard copies of the brief

/s/ Lawrence M. Marcus
Lawrence M. Marcus

XI. CERTIFICATE OF VIRUS SCAN

I hereby certify, regarding Defendant-Appellees Mary Smith, Eduard Ytuarte, and John T. Romero's Answer Brief, that the brief was scanned using Windows Defender Antivirus Version 1.253.674.0 and found to be virus free. As of the date of the submission of the brief, the program had been last updated on October 13, 2017.

/s/ Lawrence M. Marcus
Lawrence M. Marcus

[40] CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via CM/ECF filing system to all counsel of record on this 13th day of October, 2017.

/s/Lawrence M. Marcus
Lawrence M. Marcus

[Attachments are reproduced elsewhere in the appendix to the petition.]