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OPINION OF THE FIFTH CIRCUIT (MARCH 8, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE A. PEREZ,

Plaintiff-Appellant,

v.

PHYSICIAN ASSISTANT BOARD; MARGARET K. BENTLEY, in her Official and Personal Capacities,

Defendants-Appellees.

No. 18-50931

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CV-198

Before: JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM*

Jose Perez's license to practice as a physician assistant was revoked after years of state administrative proceedings. In the fall of 2011, Perez was notified that the Texas Physician Assistant Board

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

(PAB) filed a complaint against him alleging he violated the Texas Physician Assistant Act. Perez then acknowledged receipt by filing an answer. In. the spring of 2013, Perez was provided with a Notice of Adjudicative Hearing and a copy of the complaint. He failed to appear at his hearing and the administrative adjudicator dismissed the case and entered a default judgment against Perez. On March 7, 2014, the PAB issued a default order revoking Perez's license. Texas law requires judicial challenges to such administrative orders to be brought within thirty days. In 2015 and 2016, long after the deadline elapsed, Perez filed multiple state court suits that were dismissed as improperly filed and untimely.[1]

On March 5, 2018 Perez, proceeding pro se, filed this suit in federal court against the PAB and its presiding officer. Margaret K. Bentley, in her official and personal capacities. Proceeding under 28 U.S.C. § 1983, he alleged "class of one retaliation" and other due process violations. Additionally, he alleged that the PAB violated his rights under the Takings Clauses of the United States and Texas constitutions. The district court dismissed Perez's federal claims with prejudice under Federal Rule of Civil Procedure Rule 12(b)(6) as barred under Texas's two-year statute of limitations, which is borrowed in federal court for § 1983 actions. The district court proceeded to decline to exercise supplemental jurisdiction over Perez's state law takings claim. The court then denied Perez's Rule 59(e) motion for reconsideration.

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[1] Perez also filed a federal suit in 2013 that was dismissed under *Younger* abstention because his state administrative proceedings were still pending. *See Perez v. TX Med. Bd.*, 556 F. App'x 341 (5th Cir. 2014) (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

This court reviews dismissals under Rule 12(b)(6) de novo and decisions to abstain from exercising supplemental jurisdiction and denial of Rule 59(e) motions for abuse of discretion. *See Powers v. United States*, 783 F.3d 570, 576 (5th Cir. 2015) (supplemental jurisdiction); *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007) (Rule 12(b)(6)); *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004) (Rule 59(e)).

Federal courts considering claims under § 1983 borrow the relevant state's statute of limitations for general personal injury actions. *See Redburn v. City of Victoria*, 898 F.3d 486, 496 (5th Cir. 2018). In Texas, the limitations period is two years. *See id.* Federal law governs when the cause of action accrues and dictates that the limitations period begins when the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured. *See id.* Perez became aware of the injury on March 7, 2014 when his license was revoked, which means that the present suit filed on March 5, 2018 is time-barred.

Attempting to avoid this conclusion, on appeal, Perez argues, first, that the statute of limitations does not apply to claims brought under the Takings Clause and, second, that the statute of limitations should have been tolled because he diligently pursued his action in state court and he was prevented from filing the federal claims by extraordinary circumstances. He also argues that the district court committed a litany of procedural errors including: declining to exercise supplemental jurisdiction over his state law claim; failing to conduct de novo review of the magistrate judge's report and recommendation; dismissing with prejudice rather than allowing him to amend

his complaint to cure defects; denying his Rule 59(e) motion: and awarding costs to the defendants.

Perez's arguments are unavailing. As an initial matter, Perez's assertion that the statue of limitations does not apply to takings claims is foreclosed by our recent decision in *Redburn* where we held that the same Texas two-year statute of limitation applies to a federal Takings Clause claim brought under § 1983. *See* 898 F.3d at 496. Additionally, Perez does not make out a case for equitable tolling which requires that he show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 560 U.S. 631, 655 (2010). First, he did not diligently pursue his rights in state courts and administrative processes. He had thirty days under Texas law to seek judicial review of his license revocation and failed to do so until two years after the revocation. *See Perez v. Phys. Assistant Bd.*, No. 03-00732-cv, 2017 WL 5078003 (Tex. App. Oct. 31, 2017) ("The record conclusively established that Perez did not bring this suit against the Board until 2016, well after the thirty-day statutory deadline for bringing suit for review of the 2014 order."). Second, he has alleged no exceptional circumstances justifying tolling—he was aware of his injury and was in no way precluded from filing a federal action. Even allowing for his pro se status, Perez's failure to file was due solely to his erroneous view of the law and lack of diligence, which does not qualify as an exceptional circumstance. Therefore, the district court correctly dismissed his claims as barred by the statute of limitations. Furthermore, the district court did not abuse its wide discretion in declining to exercise supplemental jurisdiction over Perez's state law

takings claim because the suit was devoid of claims arising under federal law. *See Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) ("District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed.").

Finally, this court can find no merit in any of Perez's remaining alleged procedural violations. First, the district court stated that it conducted de novo review of the magistrate's report before adopting its recommendations and Perez does not present a reason for doubt on this point. *See, e.g., Bannistor v. Ullman*, 287 F.3d 394. 399 (5th Cir. 2002) ([A] district court's statement that it conducted de novo review is presumptively valid, if not dispositive."). Second, the court did not err when it denied Perez the opportunity to cure the defects in his claims because the time-barred claims were incurable. Third, the district court did not abuse its discretion in denying Perez's Rule 59(e) motion, which he used as a vehicle to raise new arguments and rehash old ones rather than to bring to the court's attention any manifest error of law or fact or newly discovered evidence. *See Templet*, 367 F.3d at 479. Fourth, the PAB and Bentley are the prevailing parties making the award of costs appropriate. *See United States ex rel. Long v. GSDMIdea City, L.L.C.*, 807 F.3d 125, 128 (5th Cir. 2015) ("'[A] dismissal with prejudice is tantamount to a judgment on the merits' and renders a defendant the prevailing party for the purpose of allocating costs." (quoting *Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 2015))).

Accordingly, the judgment of the district court is AFFIRMED.

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (OCTOBER 15, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSE A. PEREZ,

Plaintiff,

v.

PHYSICIAN ASSISTANT BOARD; MARGARET K. BENTLEY, in her Official and Personal Capacities,

Defendants.

Cause No. 1:18-CV-198-LY

Before: Lee YEAKEL, United States District Judge.

Before the court in the above-styled cause of action are Defendants' Motion to Dismiss filed April 13, 2018 (Dkt. No. 9), Jose A. Perez' Opposition to the Defendants' Motion to Dismiss filed April 23, 2018 (Dkt. No. 11), and Reply Brief for Defendants' Motion to Dismiss filed April 26, 2018 (Dkt. No. 12).

The case was referred to United States Magistrate Judge Andrew W. Austin for findings and recommendations on June 6, 2018. *See* 28 U.S.C. § 636(b)

(1)(B); Fed. R. Civ. P. 72; Loc. R. W. D. Tex. Appx. C, R. 1(c). The magistrate judge signed a report and recommendation on September 7, 2018, recommending that the court grant the motion to dismiss and dismiss the case with prejudice.

A party may serve and file specific written objections to the proposed findings and recommendations of a magistrate judge within fourteen days after being served with a copy of the report and recommendation and thereby secure *de novo* review by the district court. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *See Douglass v. United Services Auto Assn*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Perez filed objections to the report and recommendation of the United States Magistrate Judge on September 20, 2018 (Dkt. No. 37).

In light of the objections, the court has undertaken a *de novo* review of the motions, responses, replies, objections, applicable law, and entire record in the cause. The court is of the opinion that the objections do not raise any issues that were not adequately addressed in the report and recommendation. Therefore, finding no plain error, the court will accept and adopt the report and recommendation as filed for substantially the reasons stated therein.

IT IS THEREFORE ORDERED that Perez's objections to the report and recommendation of the United States Magistrate Judge on September 20, 2018 (Dkt. No. 37) are OVERRULED.

IT IS FURTHER ORDERED that the report and recommendation of the magistrate judge filed September 7, 2018 (Dkt. No. 35) is ACCEPTED AND ADOPTED by the court.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss filed April 13, 2018 (Dkt. No. 9) is GRANTED.

IT IS FURTHER ORDERED that Perez's cause against the Physician Assistant Board and Margaret K. Bentley, in her official and personal capacities is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Jose A. Perez' Amended Opposed Motion to Strike and Opposed Motion for Sanctions filed June 4, 2018 (Dkt. No. 21) is DISMISSED.

SIGNED this 15th day of October, 2018.

/s/ Lee Yeakel
United States District Judge

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (OCTOBER 15, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSE A. PEREZ,

v.

PHYSICIAN ASSISTANT BOARD and MARGARET K. BENTLEY, in her Official and Personal Capacities,

Civil Action No. 1:18-CV-00198-LY

Before: Andrew W. AUSTIN, United States Magistrate Judge.

To: The Honorable Lee Yeakel
United States District Judge

Before the Court are Defendants' Motion to Dismiss (Dkt. No. 9); Plaintiff's Response in Opposition (Dkt. No. 11); and Defendant's Reply Brief (Dkt. No. 12). The District Court referred the above motion to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72. and Rule 1(c) of Appendix C of the Local Rules.

I. General Background

Plaintiff Jose A. Perez brings this suit *pro se* against the Texas Physician Assistant Board (PAB) and Margaret K. Bentley in her official and individual capacities (collectively "Bentley") seeking monetary and injunctive relief. Perez brings claims under 42 U.S.C. § 1983 for violations of his Fourteenth Amendment rights to substantive and procedural due process, and the Takings clause under both the Fifth Amendment of the United States Constitution and Texas Constitution Article I, section 17.[1]

Perez became a licensed physician's assistant in 1994. However, beginning in November 2011, the PAB began proceedings against Perez for alleged violations of the regulations governing physician's assistants. According to the PAB, Perez was allegedly rude to a patient and ended the visitation early, refusing to treat the patient. Perez claims that the disciplinary proceedings were solely to result in a $3,000 fine. On March 7, 2014, however, the PAB entered a default judgment against Perez for his failure to appear for a hearing and revoked his license. Perez maintains that he was not given notice of the hearing, and therefore that the default judgment is void. Perez further claims that the default judgment was entered as retaliation for his statements made to and about the PAB, as well as his lawsuits against them during the administrative

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[1] In his complaint, Perez also lists various anti-discrimination statutes, such as the Americans with Disabilities Act, Age Discrimination in Employment Act, and Title VII. However, none of these statutes were listed as claims. Instead, his three claims as listed include: class of one retaliation, ex post facto application of regulations, and takings. Accordingly, the Court will only consider the claims as identified by Perez.

proceedings. Finally, Perez claims that the regulations under which the PAB initiated the proceedings were ex post facto applications, and therefore violated his due process rights. As part of this claim, Perez claims (1) that the regulations that went into effect after he received his license in 1994 cannot be applied to him, and (2) that the regulations were not in effect at the time he saw the patient in question.

Perez has litigated this issue extensively. For example, Perez originally filed suit in state court against the Texas Medical Board and its director seeking to "quash" the order revoking his license and to be awarded compensatory and punitive damages under various provisions of the United States Constitution and Texas Constitution. *Perez v. Tex. Med. Rd.*, 2015 WL 8593555 (Tex. App.—Austin Dec. 10, 2015, pet. denied). The suit was dismissed because he should have brought suit against the Physician Assistant Board and not the Texas Medical Board. Much later, in March 2016, Perez brought suit against the PAB, but this was dismissed as untimely. *Perez v. Physician Assistant Rd.*, 2017 WL 5078003 (Tex. App.—Austin Oct. 31, 2017, no pet.) (Texas Supreme Court denied Perez's application for mandamus on January 12, 2018). Additionally, Perez filed a federal case in 2013. Judge Sparks dismissed Perez's case under the Younger abstention doctrine as the administrative proceedings had not yet been completed. *Perez v. Tex. Med. Bd.*, No. 1:13-cv-152-SS, Dkt. Nos. 24 & 25 (W.D. Tex. May 28, 2018), *aff'd* 556 F. App'x 341 (5th Cir. 2014).

The PAB and Bentley now move to dismiss his claims for lack of subject matter jurisdiction and failure to state a claim.

II. Legal Standard

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Federal district courts are courts of limited jurisdiction, and may only exercise such jurisdiction as is expressly conferred by the Constitution arid federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Assn. of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied,* 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

B. Rule 12(1)(6)

Rule 12(b)(6) allows for dismissal of an action for failure to state a claim upon which relief can be granted." While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above

the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also, Cavillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court recently expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Id.* In evaluating a motion to dismiss, the Court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2009). Finally, Although this Court construes the briefs of *pro se* litigants liberally, a *pro se* litigant must still comply with the court rules of procedural and substantive law. *Bird v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981). *See also Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) ("whether the plaintiff is proceeding pro se or is represented by counsel, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (internal quotation marks and citations omitted), *cert. denied*, 537 U.S. 1200 (2003).

III. Analysis

Bentley moves to dismiss all of Perez's claims. First, she argues that Perez's claims are barred by the Eleventh Amendment and the *Rooker-Feldman* doctrine. Second, Bentley asserts that the statute of

limitations has run on all of Perez's claims. Finally, she contends that Perez has failed to state a claim upon which relief may be granted. The Court will address each argument in turn.

A. Eleventh Amendment Immunity

First, Bentley argues that the suit is barred under the Eleventh Amendment. The Eleventh Amendment precludes suits in which a state agency is named as a defendant. *Pennhurst State Sch. & Hosp. v. Haldeman*, 465 U.S. 89, 100 (1984). The PAB is a state agency governed by state statute. *See* Tex. Occ. Code § 204.101. Perez also admits that the PAB is a state agency in his pleadings. Dkt. No. 1 at 3. Thus, all claims against the PAB are barred. Eleventh Amendment immunity also includes suits against state officials when "the state is a real, substantial party in interest." *Id.* at 101-02. Here, Perez has brought suit against Bentley in both her official and individual capacity. Eleventh Amendment immunity, however, only applies to state officials when acting in their official, rather than individual, capacity. Thus, the Eleventh Amendment bar does not apply to Perez's individual capacity claims, and these may proceed.[2]

Additionally, there is a narrow exception to Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1908), allowing a plaintiff to bring a

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[2] Though Perez nominally brings suit against Bentley in her individual capacity, it is not clear that Perez is actually seeking any relief against her personally. Rather, Bentley is named solely as the head of the PAB and not for any actions taken personally. Regardless, because the Court is recommending that the claims be dismissed under the statute of limitations, it need not address this point.

suit for a violation of the Constitution or federal law when it is "brought against individual persons in their official capacities as agents of the state, and the relief sought [is] declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Crim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998). To decide if the *Ex Parte Young* exception applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Here, Perez brings suit against Bentley for claims of retaliation, equal protection, due process (procedural notice requirements and ex post facto), and takings under the Fourteenth Amendment and Texas Constitution. The Texas takings claim, as it does not arise under federal law, does not fall within the *Ex Parte Young* exception to the Eleventh Amendment. However, the remaining claims allege an ongoing violation of federal law.

Thus, the last question is whether the relief sought can be characterized as prospective. Perez asks the Court to enjoin Bentley "from preventing Mr. Perez from working as a physician assistant." Dkt. No. 1 at 11. Reading the complaint liberally, and taking into account the various claims alleged against Bentely, Perez appears to be requesting injunctive relief restraining Bentley from enforcing the allegedly unconstitutional revocation of his license. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S 635, 645 (2002) ("The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly

satisfies our 'straightforward inquiry."). These claims clearly request relief that is prospective in nature, and therefore fit squarely into the *Ex Parte Young* exception. Accordingly, Perez's federal claims against Bentley in her official and individual capacities are not barred under the Eleventh Amendment.

B. *Rooker-Feldman* Doctrine

Next, Bentley argues that the *Rooker-Feldman* doctrine mandates dismissal of Perez's claims. This doctrine prevents state-court losers complaining of injuries caused by state-court judgments from inviting a district court's review and rejection of those judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). However, the *Rooker-Feldman* doctrine has no application to decisions by an administrative agency. *See Verizon Md.*, 535 U.S. at 644 n.3 ("The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency."). Here, Perez is not complaining of injuries caused by the state court judgments. Indeed, each of those judgments were collateral attacks on the decision on which he seeks review in this case, and were dismissed for lack of jurisdiction. He, therefore, does not seek review of these decisions, but rather solely the administrative decision to revoke his license. Accordingly, the *Rooker-Feldman* doctrine does not apply in this case.

C. Statute of Limitations

Finally, Bentley asserts that Perez's claims are barred by the statute of limitations. Perez brings this suit under 42 U.S.C. § 1983. There is no federal statute of limitations for § 1983 actions. *Piotrowski v. City of*

Houston, 51 F.3d 512, 514 n.5 (5th Cir. 1995); *Henson-El v. Rogers*, 923 F.2d 51, 52 (5th Cir. 1991), *cert. denied*, 501 U.S. 1235 (1991). Therefore, the Supreme Court has directed federal courts to borrow the forum state's general personal injury limitations period. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989), In Texas, the applicable limitations period is two years. *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994) (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986)). Nevertheless, federal law determines when a § 1983 cause of action accrues. *Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir. 1993). A cause of action under § 1.983 accrues when the aggrieved party knows, or has reason to know of, the injury or damages which form the basis of the action. *Piotrowski*, 51 F.3d at 516.

Here, Perez has stated that his license was revoked on March 7, 2014. Each of his claims relate to events that occurred up to and including the revocation, but nothing after. Thus, the statute of limitations would have run on his claims on March 7, 2016, nearly two years before he filed this suit. However, Perez appears to also argue that the statute of limitations should be tolled.[3] In support, Perez argues that there are two circumstances that allow for equitable tolling: (1) "if he shows . . . that he has been pursuing his rights diligently, and . . . that some extraordinary circumstance stood in his way," and (2) "the administrative agency decision is void because . . . the administrative agency lacked subject matter or personal jurisdiction over the case and . . . the administrative agency acted in a matter contrary to due process." Dkt. No. 11 at 2.

[3] Equitable tolling, like the limitations period, is governed by state law. *Moore v. El Paso Cty., Tex.*, 660 F.2d 586, 590 (5th Cir. 1981). Thus, Texas law applies in this case.

Perez appears to argue that because (1) he "diligently pursued" this matter in state court, or (2) he is alleging due process violations, that his suit should be equitably tolled. These arguments fail for several reasons.

First, in support of his second issue, Perez incorrectly cites to two Fifth Circuit eases. *Jackson v. FIE Corp.*, 302 F.3d 515 (5th Cir. 2002): *Carter v. Fenner*, 136 F.3d 1000 (5th Cir. 1998). Each of these cases addressed when a judgment may be set aside under Fed. R. Civ. P. 60. Neither addressed when equitable tolling should be permitted for a § 1983 claim. Nor could the Court find any cases suggesting that because a plaintiff alleged a claim for procedural due process that the suit should be tolled. Thus, this argument fails.

Similarly, Perez's first point fails. Once again, Perez cites to a case that is not directly on point. In *Holland v. Florida*, 560 U.S. 631 (2010), the Supreme Court was actually addressing tolling of the Antiterrorism and Effective Death Penalty Act (AEDPA), not § 1983. Even assuming that the same principle applied in this context, Perez has failed to allege any "exceptional circumstances." In fact, the only circumstances he has asserted to explain his delay in filing this suit is that he was pursuing state remedies. Pendency of related state court cases—that Perez filed incorrectly, no less—are clearly not exceptional circumstances. *See, e.g., Perez v. Tex. Med. Bd.*, 2015 WL 8593555 (holding that Perez sued the wrong defendant); *Perez v. Physician Assistant Bd.*, 2017 WL 5078003 (finding Perez's appeal of the administrative decision untimely). It is more likely that Perez is arguing that because he was pursuing his

remedies in state court, he was unable to file a federal law suit. While this might have been true while an appeal of the state administrative decision was pending,[4] it is not true for any later-filed lawsuits. *See McClellan v. Carland*, 217 U.S. 268, 282 (1910) ("The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ."). Here, Perez failed to file an appeal of the administrative decision, instead filing multiple separate lawsuits. *See, e.g., Perez v. Tex. Medical Bd.*, 2015 WL 8593555 (noting that although Perez would have had the opportunity for judicial review of the administrative decision, he filed suit against the wrong entity); *Perez v. Phys. Assistant Bd.*, 2017 WL 5078003 (dismissing the suit as untimely, stating that "[t]he record conclusively established that Perez did not bring this suit against the Board until 2016, well after the thirty-day statutory deadline for bringing suit for review of the 2014 order"). These separate lawsuits, though allegedly bringing the same claims, cannot be the basis for equitable tolling. Accordingly, Perez's claims under § 1983 are barred by the statute of limitations.

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[4] *See Younger v. Harris*, 401 U.S. 37 (1971) (federal court should not enjoin state criminal prosecution when party has an adequate remedy at law and will not suffer irreparable injury); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (extending application of the *Younger* abstention doctrine to state bar disciplinary proceedings); *see also Perez v. Tex. Medical Bd.*, 5566 F. App'x 341 (5th Cir. 2014) (dismissing suit under the *Younger* abstention doctrine during pendency of the administrative proceeding).

D. Texas Takings Claim

Lastly, because this Court is recommending dismissal of Perez's federal constitutional claims, this Court does not have jurisdiction over his remaining state law takings claim, and need not address the merits.

IV. Recommendation

Based on the foregoing, the undersigned Magistrate fudge RECOMMENDS that the District Court GRANT Defendants' Motion to Dismiss Under Rule 12(b)(1) and (b)(6) (Dkt. No. 9). The undersigned FURTHER RECOMMENDS that the District Court DENY all other pending motions as MOOT.

V. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(c);

Thomas v. Arn, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985): *Douglass v. United Servs. Auto. Ass*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED this 7th day of September, 2018.

/s/ Andrew W. Austin
United States Magistrate Judge

ORDER OF THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (APRIL 18, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE A. PEREZ,

Plaintiff-Appellant,

v.

PHYSICIAN ASSISTANT BOARD; MARGARET K. BENTLEY, in her Official and Personal Capacities,

Defendants-Appellees.

No. 18-50931

Before: JOLLY, COSTA, and HO, Circuit Judges.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing. the Petition for Panel Rehearing is DENIED. No member of the panel nor judge. in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

AMENDED MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT PURSUANT TO 28 U.S.C. § 1653 AND PROPOSED AMENDED COMPLAINT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE A. PEREZ,

Plaintiff-Appellant,

v.

PHYSICIAN ASSISTANT BOARD and MARGARET K. BENTLEY, in her Official and Personal Capacities,

Defendants-Appellees.

Case No. 18-5093

Appeal from the United States District Court
for the Western District of Texas
Civil Action 1:18-CV-198
District Judge Lee Yeakel

Jose A. Perez
2201 Montgomery Park Boulevard # 1003
Conroe, TX 77304
281-979-8356

Mr. Perez respectfully moves the Court to allow him to Amend his complaint in order to correct defective

jurisdictional allegations.[1] 28 U.S.C. 1653 also applies during Rule 60(b)(4) proceedings[2].

(A) THE COURT ERRED IN NOT GRANTING A PRO SE LITIGANT LEAVE TO AMEND HIS COMPLAINT IN ORDER TO CORRECT DEFECTIVE JURISDICTIONAL ALLEGATIONS

The Fifth Circuit[3], other Federal Appeal Courts[4], and the U.S. Supreme Court[5], have ruled, that in the case of a pro se litigant, the court must sua sponte grant leave to amend the complaint to, inter alia, correct curable defects.

Rule 54(c) of the Federal Rules of Civil Procedure directs trial courts to "grant the relief to which each party is entitled, even if the party has not demanded

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[1] *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 233 (5th Cir. 2016) *citing Nadler v. American Motors Sales Corp.*, 764 F.2d 409 (5th Cir. 07/01/1985) and 28 U.S.C. § 1653

[2] *New Gen, LLC v. Safe Cig, LLC*, Nos. 13-56157, 14-57015, 13-56225 (Ninth Circuit-September 7, 2016) citing *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) citing, *inter alia, Vander Zee v. Karabatsos*, 683 F.2d 832 (4th Cir. 1982)

[3] *Sarter v. Mays*, 491 F.2d 675 (5th Cir. 03/25/1974)

[4] *Wagner v. Daewoo Heavy Industries America Corporation*, 314 F.3d 541 (11th Cir. 12/10/2002) *District Council 47 v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986); *Criales v. American Airlines Inc.*, 105 F.3d 93, 72 Fair Empl.Prac.Cas. (Bna) 1690 (2d Cir. 01/21/1997)

[5] *Scarborough v. Principi*, 124 S. Ct. 1856, 541 U.S. 401, 158 L.Ed. 2d 674 (U.S. 05/03/2004) citing *Becker v. Montgomery*, 532 U.S. 757, (2001).

that relief in its pleadings[6]. The Fifth Circuit has held that district courts have a duty to grant whatever relief is appropriate in the case on the basis of the facts proved[7].

Furthermore,_Rule 15(b)(2), FRCP[8] provides, in substance, that if issues are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings even though they were not no raised, and that such an amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issue may be made upon motion of either party at any time, even after judgment, but that the failure so to amend shall not affect the result of the trial of such an issue.

Mr. Perez raised the following federal claims and the Defendants failed or refused to object because they were not properly pled: (a) Takings[9], (b) denial of trial by jury[10], (c) the Defendant's failure to try Mr. Perez in quasi-criminal proceedings[11], (d) failure to try Mr. Perez in an impartial tribunal[12], (e) failure

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6 *Engel v. Teleprompter Corp.*, 732 F.2d 1238 (5th Cir. 05/25/1984); *In re Railworks Corporation*, Debtor 760 F.3d 398 (4th Cir. 2014); Rule 54(c) of the Federal Rules of Civil Procedure

7 *Id.*

8 *Weil Clothing Co. v. Glasser*, 213 F.2d 296 (5th Cir. 05/20/1954) citing *Pearl Assur Co. v. First Liberty Nat. Bank.*, 140 F.2d 200 (5th Cir. 01/27/1944)

9 CM/ECF 25 p 3-5

10 *Id.* p 13-14

11 *Id.* p 14

12 *Id.* pp 14-15

to provide Mr. Perez fair notice of the charges against him[13], Accordingly the District Court ought to have considered the references issues as tried by express or implied consent of the parties[14].

The Due Process Clause requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[15]. The Defendants have not and cannot, claim that they did not receive a copy of Mr. Perez' Motions wherein he submitted the federal claims referenced above.

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13 *Id.* pp 15-16

14 *Weil Clothing Co. v. Glasser*, 213 F.2d 296 (5th Cir. 05/20/1954) citing *Pearl Assur Co. v. First Liberty Nat. Bank.*, 140 F.2d 200 (5th Cir. 01/27/1944)

15 *In the Matter of: Placid Oil Co.*, No. 12-11120 (Fifth Circuit, 2014) citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 US 306 314 (1950).

(B) PROPOSED AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSE A. PEREZ,

Plaintiff,

v.

PHYSICIAN ASSISTANT BOARD and MARGARET K. BENTLEY, in her Official and Personal Capacities,

Defendants.

Case No. 1:18-CV-00198-LY

I Initial Complaint to Vacate a Void Administrative Judgment and Memorandum of Law in Support

This is an action seeking to vacate a void administrative judgment. As grounds therefore Mr. Perez shows:

1 Jurisdiction

This is an action to declare an administrative judgment void pursuant to 28 U.S.C. §§ 1331, 1343 and Rule 60(b)(4), F.R.C.P. Mr. Perez also seeks back pay from March 2014 or compensation for the Taking of his property pursuant to 42 U.S.C. 1983. Plaintiff

also invokes the court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over any and all claims that are so related to the claims within the original jurisdiction of this court that they form part of the same controversy.

2 Parties

Plaintiff Jose A. Perez, is a natural person and a Physician Assistant since 1994.

Defendant Physician Assistant Board is the state agency responsible for regulating physician assistants

Margaret K. Bentley is the presiding officer of the Physician Assistant Board who on March 7th, 2014 issued an administrative Order revoking Mr. Perez' right to work as a physician assistant.

3 Venue

Venue is proper because the events and conduct complained of herein all occurred in the Austin Division.

4 Jury Demand

The Plaintiff demands a trial by jury in this action on each and every one of her claims.

5 Factual Background

Mr. Perez became a physician assistant on September 22nd, 1994. Mr. Perez never committed medical malpractice or any act injurious to any patient or a member of the public. Nevertheless, his right to work as a physician Assistant was arbitrarily, capriciously and whimsically revoked on March 7th, 2014[16].

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16 CM/ECF 11—Attachment 1

In so doing the Defendants transgressed upon the following rights, to wit: (a) his right to a jury trial; (b) his right to have his license revoked in a quasi-criminal proceeding; his license was revoked pursuant to administrative default proceedings (c) his right to a neutral adjudicator; (d) his right to fair notice of the precise charges against him; (e) his right to access the courts to oppose the administrative actions without subjecting himself to have his license revoked in retaliation thereof; (f) his right to have his license revoked pursuant to the clear and convincing standard of proof.

Mr. Perez has been diligently asserting his rights: first at the State Office of Administrative Hearings from November 1st, 2011 until May 16th, 2013, case Number 503-12-1940, Mr. Perez also sought relief in the state courts until the Texas Supreme Court recently dismissed his case on January 12th, 2018—Case # 17-0952. Mr. Perez appeared before the State Office of Administrative Hearings and the Physician Assistant Board via written submissions and presented factual and Constitutional objections,

Mr. Perez submitted his Takings claim to the State Courts as he thought was required by *Williamson County Regional Hospital v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Wherefore, Mr. Perez respectfully submits that the Physician Assistant Board March 7th, 2014 Order ought to be declared void and vacated. Mr. Perez also seeks back pay or that he be compensated for the Taking of his property since March 2014. And such other relief as the court deems just and proper.

/s/ Jose A. Perez

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(C) MEMORANDUM OF LAW IN SUPPORT OF THE PROPOSED AMENDED COMPLAINT

I The District Court Has Authority to Review and Reverse a State Agency

The federal district court has the authority to review and reverse a state agency such as the Physician Assistant Board[17]. The Fifth Circuit has ruled that a plaintiff may present claims, albeit one that denies a legal conclusion that an agency has reached, in a case to which the plaintiff was a party[18]. Mr. Perez has the right to challenge a rule on which a administrative decision was based if the rule was promulgated, as here, by an administrative agency[19]. Mr. Perez may challenge void state agency judgments[20].

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17 *Truong v. Bank of Am., NA.*, 717 F.3d 377, 382 (5th Cir. 2013) citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n. 3, (2002)

18 *Burciaga, et al v. Deutsche National Trust Company*, No. 16-40826 (5th Cir-September 18, 2017) citing *Truong v. Bank of Am., N.A.*, 717 F.3d 377. 382 (5th Cir. 2013).

19 *Truong v. Bank of Am., N.A.*, 717 F.3d 377. 382 (5th Cir. 2013 citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) *and Skinner v. Switzer*, 562 U.S. 521, 530-532 (2011) *(Rooker-Feldman* does not bar a federal plaintiff's constitutional challenge to a state statute after a state court has construed the statute adversely to the plaintiff).

20 *Burciaga, et al v. Deutsche National Trust Company*, No. 16-40826 (5th Cir-September 18, 2017) citing *United States v. Shepherd*, 23 F. 3d 923, 925 (5th Cir. 1994)

Mr. Perez shows hereinbelow that the Defendants have no authority to act therefore its judgment is void. An administrative agency has no inherent authority, and instead has only the authority that the Legislature confers upon it[21].

II Mr. Perez' Right to a Jury Trial Is Ministerial

Federal Courts have ruled that defendants in quasi criminal and civil proceedings which (a) impose penalties and (b) wherein legal rights are to be ascertained and determined, have a right to a jury trial[22]. The ruling applies to the states through the Fourteenth Amendment due process clause[23]. The Defendants failed or refused to grant Mr. Perez a jury trial, his license was revoked pursuant to an administrative

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21 *Texas Coast Utilities Coalition v. Railroad Commission of Texas, et al.*, No. 12-0102 (Texas 2014) citing *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 SW.3d 310, 315 (Tex. 2001). Cf A*costa v. Hensel Phelps Construction Company*, No. 17-60543 (Fifth Circuit, 2018) citing *BNSF Ry. Co. v. United States*, 775 F.3d 743, 751 (5th Cir. 2015)

22 *Nimrod Marketing Ltd. and T. Anderson-Slight v. Texas Energy Investment Corp.*, 769 F.2d 1076 (5th Cir. 08/30/1985); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 119 S. Ct. 1624, 143 L.Ed.2d 882 (U.S. 05/24/1999); *Chaffeurs v. Terry*, 494 U.S. 558 (U.S. 03/2011990) (the phrase "Suits at common law" refers to "suits in which legal rights [are] to be ascertained and determined) citing *Parsons v. Bedford*, 3 Pet. 433, 447 (1830)

23 *Duncan v. Louisiana*, 391 U.S. 145, 157-158 (1968). (Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.)

default proceeding . The Defendants have no jurisdiction to revoke his license without a jury trial.

III Mr. Perez' Right to Have His License Revoked in a Quasi-Criminal Proceeding Is Ministerial

The U.S. Supreme Court has ruled that once a professional license is granted its revocation must conform with federal law[24]. The U.S.[25] and the Texas[26] Supreme Courts have ruled that statutes which revoke professional licenses are quasi criminal proceedings[27]. Mr. Perez; right to earn a living was revoked pursuant to an administrative default proceeding. Federal courts have consistently concluded that the "clear and convincing" standard of proof is required by the due process clause in quasi-criminal proceedings[28]. A

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[24] *Logan v. Zimmerman Co. et al.*, 455 15.5. 422, 432 (U.S. 1982) citing *Vitek v. Jones*, 445 U.S. 480. 491 (1980)

[25] *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982)) (revocation of professional licenses) quoted by *Sprint Communications v. Jacobs. et al.*, No. 12-815 (U.S. 2013); *In re Ruffalo*, 390 U.S. 544, 551 (1968): *Huffman v. Pursue. Ltd.*, 420 U.S. 592, 604 (1975); *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 1 L.Ed.2d 796, 77 S. Ct. 752 (1957); *Cummings v. The State of Missouri*, 4 Wall, [71] U.S. 277, 320 (U.S. 12/01/1866); *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988); *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 10/29/1984)

[26] *Scott v. State*, 24 S.W. 789 (Tex. 1894)

[27] FN 34

[28] *In re Briscoe Enterprises*, 994 F.2d 1.160 (5th Cir. 07/13/1993) citing *Addington v Texas*, 441 U.S. 418 (1979) (The Chief Justice noted that this standard had typically been employed in civil cases when "the interests at stake are deemed to be more substantial than mere loss of money". He proceeded to cite several cases in which the Supreme Court had used the clear and

violation of a defendant's right to the correct standard of proof and to a jury trial is a structural error.[29] Structural errors require automatic reversal[30] and they may be raise for the first time on appeal[31].

IV Due Process of Law Considerations Should Have Precluded the Physician Assistant Board from Acting as Both the Accuser and Adjudicator in the Administrative Case

The U.S. Supreme Court has ruled that a constitutionally intolerable probability of bias exists when the same person or entity serves as both accuser and adjudicator in a case[32]. The ruling also applies to those administrative procedures where, as here, the agency has staked out a position[33], the relationship is adversarial and the agency is represented by Counsel[34]. The Due Process Clause establishes a

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convincing standard "to protect particularly important individual interests".) *In re Thalheim*, 835 F.2d 383, 388 FN9 (5th Cir. 1988); *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 1994)

29 *Tyler v. Cain*, 533 US 656, (2001) *Sullivan v. Louisiana*, 508 US 275 1993)

30 *Neder v. U.S.*, 527 U.S. 1, 8-9 (1999)

31 *Proenza v. The State of Texas*, 471 SW 3d 35 (TX App-2015)

32 *Williams v. Pennsylvania*,136 S. Ct 1899, 1905-1907 (2016) No. 15-5040 citing *In re Murchison*, 349 U.S. 133, 136-137 (1955)

33 Prior to the so-called "default", The PAB had somehow concluded that Mr. Perez was guilty as charged and had to pay a $3000.00 administrative penalty, CM.ECF 11, Attachment 4

34 *Sims v. Apfel*, 530 U.S. 103, 120 S. Ct. 2080 (U.S. 06/05/2000) The PAB was represented by Lee Bukstein, Staff Attorney. Texas Medical Board, CM.ECF 11, Attachment 4 page 9

floor requiring a "fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case[35]. This is a structural error which requires automatic reversal[36].

V Mr. Perez Was Not Provided Fair Notice of the Precise Charges Against Him in Violation of Procedural Due Process

Due process and due course of law guarantee that an accused must receive notice of the charges against him[37]. An accused is entitled to notice "in advance of trial and with reasonable certainty" of what he is being charged with so that he can properly prepare his defense[38].

The PAB notified Mr. Perez that they were seeking a $3000.00 administrative penalty[39] and that a default would not be entered against him if he answered the complaint[40]. But then a decision was surreptiously made to change the penalty to the revocation of his right to make a living. Even though Mr. Perez answered the complaint his right to earn a living was revoked, the referenced assurances not-

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35 "*Bracy v. Graniley*, 520 U.S. 899, 904-05 (1997) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975))

36 *Austin v. Davis*, No. 13-70024 FN 33 (Fifth Circuit, 2017)

37 *Schmitz v. State*. No. 2-96-387-CR (Tex.App. Dist.2 08/28/1997) U.S. Const. amends. V, XIV; Tex. Const. art. I. Section(s) 19

38 *Ward v. State*, 829 S.W.2d 787, 794 (Tex. Crim. App. 1992)

39 CM.ECF 11, Attachment 4

40 CM/ECF 11, Attachment 5, page 4

withstanding. The absence of fair notice and the precise nature of the charges against the accused deprived Mr. Perez the of procedural due process[41]. Furthermore, the administrative decision to arbitrarily change the penalty to the revocation of his license is retaliatory because Mr. Perez has been intentionally treated differently from others and that there is no rational basis for the difference in treatment[42].

VI The Defendants Had No Authority to Revoke Mr. Perez' License Pursuant to a Default Judgment

The Facts show that Mr. Perez appeared before the administrative agencies via written submissions and they also show that the Defendants had informed Mr. Perez that a default judgment would not be entered against him if he responded to the complaint[43]. Nevertheless a default judgment was entered against him[44] even though they admitted in the same Order that Mr. Perez that Mr. Perez filed an answer as required[45].

In the "post-answer" default judgment, in which the defendant files an answer but does not appear at trial, the same constitutes neither an abandonment of the defendant's answer nor an implied confession

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41 *In re Ruffalo*, 390 U.S. 544, (1968)

42 *Village of Willowbrook v. Olech.* 528 U.S. 562. 120 S. Ct. 1073, 145 L.Ed.2d 1060 (U.S. 02/23/2000)

43 CM/ECF 11. Attachment 5. page 4

44 CM/ECF 11, Attachment 1

45 *Id.* page 2, item #6

of any issues joined by the defendant's answer[46]." Because the merits of the plaintiff's claim remain at issue, judgment cannot be rendered on the pleadings, and the plaintiff must offer sufficient evidence to meet his burden of proof as if at trial[47].

A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true[48]. Put another way, " a defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered.[49]" In sum, the defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law[50]

Wherefore, Mr. Perez respectfully submits that the Physician Assistant Board's March 7th, 2014 Order ought to be declared void and vacated . Mr. Perez also seeks back pay from March 2014 or that he be compensated for the Taking of his property since March 2014. And such other relief as the court deems just and proper.

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46 *In re Gober*, 100 F.3d 1195 (5th Cir. 12/10/1996) citing *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex.1979)

47 *Id.*

48 *Wooten v. McDonald Transit Associates, Inc*, 775 F.3d 689 (5th Cir. 2015) citing *Nishimatsu Constr. Co. v. Hous. Nat'l Bank*, 515 F. 2d 1200,1206 (5th Cir. 1975)

49 *Id.*

50 *Id.*

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