UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES P. TATTEN,

Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF DENVER, a municipality; DEBRA JOHNSON, Clerk and Recorder, in her official capacities; and LSF9 MASTER PARTICIPATION TRUST,

Defendants-Appellees.

No. 17-1141
(D.C. No. 1:16-CV-01603-RBJ-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

(Filed Apr. 11, 2018)

Before **BRISCOE**, **HARTZ**, and **McHUGH**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

James P. Tatten, an attorney representing himself, appeals the district court's dismissal of his complaint against the City and County of Denver and Debra Johnson, the City and County of Denver Clerk and Recorder (the City Defendants), and the LSF9 Master Participation Trust (LSF9). Mr. Tatten asserted claims arising from the foreclosure of his Denver, Colorado home under 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), and the Fair Debt Collection Practices Act (FDCPA). The district court, adopting the magistrate judge's Report and Recommendation (R&R), dismissed the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and denied Mr. Tatten's untimely motion to amend his complaint. We have jurisdiction under 28 U.S.C § 1291 and affirm.

I. BACKGROUND.

A. *Rule 120 Proceedings.* Mr. Tatten signed a note and deed of trust with a bank in 2004 to obtain a mortgage loan of $406,192, secured by his Denver home. He suffered a traumatic brain injury in November 2008, was hospitalized for two months, and was found disabled for purposes of Social Security disability benefits. His last payment on the note was in December 2008. The bank began foreclosure proceedings, but in late 2009, Mr. Tatten signed a loan modification agreement with the bank, but he never made a payment under the modification agreement. In 2012, a Colorado court authorized the bank to sell Mr. Tatten's property. Mr. Tatten sued the bank in federal court, asserting it had breached the terms of the loan

modification agreement and made fraudulent misrepresentations to him to induce him to modify the loan. The district court dismissed the claims, and this court affirmed. *Tatten v. Bank of Am. Corp.*, 562 F. App'x 718, 722 (10th Cir. 2014).

In October 2015, Mr. Tatten received notice that his mortgage loan had been sold to LSF9. In February 2016, LSF9 began foreclosure proceedings under Colorado Rule of Civil Procedure 120. Mr. Tatten contested the Rule 120 proceedings, but following a hearing, the state court issued an order authorizing sale (the OAS order). The day before the scheduled sale, Mr. Tatten filed an emergency motion to enjoin the sale, arguing the foreclosure was time-barred and violated his constitutional rights and the FDCPA. The state court denied the motion and the public trustee sold the property at auction on June 9, 2016.

B. *District Court Proceedings.* On June 23, 2016, Mr. Tatten filed the complaint at issue here challenging the Rule 120 proceedings, the OAS order, and the Defendants' actions in connection with the 2016 foreclosure proceedings. Mr. Tatten asserted three § 1983 claims in connection with the Rule 120 foreclosure proceedings: that all of the Defendants had violated his Fourteenth Amendment due process rights, all had violated his Fourteenth Amendment equal protection rights, and the City Defendants had implemented unconstitutional policies and practices. He also asserted claims against all of the Defendants for violating his FDCPA rights and for intentionally

inflicting emotional distress (IIED). Finally, he asserted the City Defendants had violated his ADA rights.

On July 14, 2016, the City Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and (6), to which Mr. Tatten responded. LSF9 waived Mr. Tatten's failure to effect service and filed its own motion to dismiss under Rules 12(b)(1) and (6) on November 7, 2016. Mr. Tatten never responded to LSF9's motion to dismiss.

Mr. Tatten filed an amended complaint on November 28, 2016. The magistrate judge struck that filing for failure to seek the required authorization under Fed. R. Civ. P. 15(a)(2), and failure to provide a redlined amendment in compliance with D.C.COLO.LCivR 15.1(b). She gave Mr. Tatten leave to refile his amendment in compliance with the rules by December 6, 2016. On January 11, 2017, Mr. Tatten filed his motion to amend his complaint to assert claims under the Colorado Consumer Protection Act, the Colorado Foreclosure Protection Act, and negligent infliction of emotional distress.

C. *Report and Recommendation Adopted.* The magistrate judge concluded the district court lacked jurisdiction over Mr. Tatten's first two § 1983 claims (due process and equal protection), as barred by the *Rooker-Feldman* doctrine, which forbids lower federal courts from reviewing state-court civil judgments. She concluded Mr. Tatten's third § 1983 claim, alleging the City Defendants failed to train and supervise its

employees on how to implement Rule 120 foreclosures in accordance with the U.S. Constitution, was not barred by *Rooker-Feldman*, but that Mr. Tatten's factual allegations were insufficient to state a claim for municipal liability. She also concluded that Mr. Tatten failed to allege sufficient facts to state an ADA claim because his complaint provided no factual allegations that he requested any accommodations because of his disability.

She recommended dismissal of the FDCPA claim because neither the City Defendants nor LSF9 are "debt collectors" within the meaning of that statute. She recommended dismissal of the IIED claim against LSF9 because Mr. Tatten's allegations did not plausibly suggest it engaged in any outrageous and extreme conduct that would state an IIED claim. Further, the Colorado Governmental Immunity Act barred the IIED claim against the City Defendants. Finally, the magistrate judge concluded Mr. Tatten's motion to amend his complaint should be denied because Mr. Tatten offered no explanation for his failure to file a timely motion or to comply with the local rules, and the proposed amendment was futile.

The district court adopted the R&R and dismissed the first two § 1983 claims and the IIED claim against the City Defendants under Rule 12(b)(1), and dismissed all of the remaining claims under Rule 12(b)(6). In doing so, it noted that most of Mr. Tatten's objections to the R&R were too general and conclusory to

preserve any issue for de novo review. It denied the motion to amend. Mr. Tatten timely appeals.[1]

II. DISCUSSION.

A. *Review Standards.* We review de novo the district court's dismissal of the complaint under Rules 12(b)(1) and 12(b)(6). *See Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010). "In reviewing a dismissal, we must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009). We review a district court's denial of leave to amend for abuse of discretion, including a de novo review of a determination that amendment would be futile *Cohen v. Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010). Finally, for the reasons discussed below, we decline to extend the liberal-construction rule afforded typical pro se litigants because Mr. Tatten is an attorney who has chosen to represent himself.

B. *Construction of Pleadings.* The district court concluded that Mr. Tatten was not entitled to any special consideration as a pro se litigant because he is an attorney. The Supreme Court has directed courts to

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[1] Mr. Tatten's opening brief does not mention or raise any challenge to the dismissal of his municipal liability § 1983 claim against the City Defendants or his ADA or IIED claims, and we deem any challenge to the dismissal of these claims waived. *See Culver v. Armstrong*, 832 F.3d 1213, 1214 n.1 (10th Cir. 2016) ("[I]issues not raised in an opening brief are waived.").

hold pro se litigants' pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). We have interpreted the *Haines* rule to mean "that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so." *Hall v. Bellmon*, 935 F.2d 1106, 1110 & n.3 (10th Cir. 1991). This liberal-construction rule does not, however, relieve a pro se plaintiff of his burden to present sufficient facts to state a legally cognizable claim, nor will the court act as his advocate and make his arguments for him. *Id.*

Mr. Tatten argues the district court violated his due process and equal protection rights; the Rules Enabling Act, 28 U.S.C. § 2072(b); and the federal rules of civil procedure by failing to accord him the liberal construction afforded pro se litigants. *See* Aplt. Br. at 7-8 (last clause of First, Second and Third Issues on Appeal). And he argues that the district court had no basis to conclude he was an attorney because he did not include that information in his complaint. The district court did not err.

The district court based its determination that Mr. Tatten was not entitled to liberal construction on our same determination in Mr. Tatten's first appeal, in which we explained that "we do not extend that indulgence [of the pro se liberal-construction rule] to pro se litigants who, like Mr. Tatten, are also attorneys." *Tatten*, 562 F. App'x at 720 (citing *Comm. on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219, 1223 (10th Cir. 2007)). In that case, Mr. Tatten stated in his complaint

that he "is an attorney and professional lobbyist." *Id.*, Appeal No. 13-1408, R. at 77. A court may take judicial notice of its own files and records, as well as facts which are a matter of public record. *Gee v. Pacheco*, 627 F.3d 1178, 1194 (10th Cir. 2010).[2]

Thus, the district court validly determined that Mr. Tatten is an attorney. Indeed, Mr. Tatten's failure to disclose to the district court that he is a licensed attorney, whilst seeking application of the pro-se liberal construction rules may be sanctionable conduct. *Cf. Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001) (per curiam) (noting that failure to disclose that an attorney drafted pleadings, enabling a pro se litigant to seek liberal treatment because he does not have an attorney, constitutes misrepresentation and an ethical violation).

The obvious reason for according liberal construction to pro se litigants is that a typical pro se plaintiff does not have legal training and is "unskilled in the law." 5 Charles Alan Wright & Arthur R. Miller, *Federal*

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[2] Further, the address Mr. Tatten has provided to this court is jimtatten@legislativebasecamp.com, at 8681 East 29th Street in Denver, the address of his foreclosed property, and we take judicial notice that James P. Tatten with an address of Legislative Base Camp, 8681 East 29th Street in Denver, is listed as a licensed inactive attorney with the Nebraska Bar Association, State Bar No. 18958, as of May 15, 2017. http://www.nebar.com/members/?id=26353125/accessed3/27.2018. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 & n.22 (10th Cir. 2009) (taking judicial notice of facts on government websites and observing, "It is not uncommon for courts to take judicial notice of factual information found on the world wide web" (quotations omitted)).

Practice & Procedure § 1286, p. 752 (3d ed. 2004); *see also Haines*, 404 U.S. at 520 (contrasting pleadings by pro se litigants with those "drafted by lawyers"). But Mr. Tatten is a licensed lawyer and does have legal training. This circuit has repeatedly declined to extend the benefits of liberal construction to pro se pleadings filed by attorneys who have chosen to represent themselves. *See Oliver*, 510 F.3d at 1223 ("[W]hile we generally construe pro se pleadings liberally, we decline to extend the same courtesy to Mr. Oliver, a licensed attorney." (internal quotation marks omitted)); *Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007) ("While we generally construe pro se pleadings liberally, the same courtesy need not be extended to licensed attorneys." (quotation omitted)); *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) ("While we are generally obliged to construe pro se pleadings liberally . . . we decline to do so here because Smith is a licensed attorney."). Other circuits have similarly declined to apply liberal construction to attorneys representing themselves. *See, e.g.*, *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 633 (6th Cir. 2008) (district court did not abuse its discretion by denying special consideration to pro se attorney); *Godlove v. Bamberger, Foreman, Oswald & Hahn*, 903 F.2d 1145, 1148 (7th Cir. 1990) ("Ordinarily, we treat the efforts of *pro se* applicants gently, but a *pro se* lawyer is entitled to no special consideration."); *Harbulak v. Cty. of Suffolk*, 654 F.2d 194, 198 (2d Cir. 1981) (party who is a lawyer "cannot claim the special consideration which the courts customarily grant to pro se parties"); *Olivares v. Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977) ("We cannot accord [plaintiff] the advantage of the liberal

construction of his complaint normally given pro se litigants . . . because [plaintiff] is a licensed attorney.").

Mr. Tatten asserts that the district court should have construed his pleadings liberally because he has never represented a client in a courtroom and has cognitive impairments resulting from his traumatic brain injuries. We need not decide whether these factors entitle Mr. Tatten to liberal construction of his pleadings, because we find nothing in the district court's analysis and disposition of Mr. Tatten's claims that would have been different had it applied a liberal construction rule. As the district court explained, even had it construed Mr. Tatten's filings liberally, that would not have relieved him from complying with the Federal Rules of Civil Procedure, *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), or "of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall*, 935 F.2d at 1110.

C. *Rule 12(b) Evaluation of the Complaint.* Mr. Tatten argues that the district court violated his due process and equal protection rights; § 2072(b); and the federal rules of civil procedure by failing to accept as true, and viewing in the light most favorable to him, his allegations that he is a cognitively-disabled litigant with significant intellectual impairments caused by his traumatic brain injury. Aplt. Br. at 7-8 (first and second clauses of First, Second and Third Issues on Appeal). His assertions that the district court ignored, failed to discuss, and failed to make inquiry into his traumatic brain injury and cognitive impairments are his principal arguments on appeal. *Id.* at 9-28.

We find nothing in the R&R or the district court's decision that indicates or suggests that the magistrate judge or the district court failed to accept as true Mr. Tatten's allegations as to his cognitive and intellectual impairments, or failed to view that evidence in his favor. Indeed, the magistrate judge and the district court clearly presumed Mr. Tatten's allegations as to his disability as true in resolving all of his legal claims. Mr. Tatten never articulates why a more detailed discussion of his cognitive impairments would have had any relevance to the court's Rule 12(b) dismissal of his claims. Further, the court could not, as Mr. Tatten argues it should have, inquired into his cognitive impairments beyond the well-pleaded factual allegations in his complaint. *See Muscogee*, 611 F.3d at 1227 & n.1 (court reviewing Rule 12(b)(6) and facial Rule 12(b)(1) dismissal motion may look only to the factual allegations in the complaint). Based on our review of the record, we find no instance in which the district court's dismissal of Mr. Tatten's claims was based on any determination or implied inference that Mr. Tatten did not suffer from the cognitive disabilities he alleged.

Mr. Tatten also repeatedly makes the general allegation that the district court failed to accept his allegations as true and to view his factual allegations in the light most favorable to him. But for the most part, he fails to identify what facts the district court failed to accept as true or view in his favor. Other than his cognitive impairment, the few times Mr. Tatten identifies the facts he claims the district court improperly considered, such as "the relevant time-line of events,"

"the applicable Colorado statute of limitations," and "Colorado's non-judicial Rule 120 hearing," Aplt. Br. at 19, he fails to identify which of his legal claims these facts are relevant to, or how these facts affect the district court's legal analysis of any his claims. His general, "superficial" arguments that the district court failed to accept his allegations as true or view the facts in his favor, unsupported by any legal analysis or discussion of his actual claims, are "insufficient to garner appellate review." *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1232 (10th Cir. 2003) (holding that an appellant "forfeits an issue it does not support with legal authority or argument" (internal quotation marks omitted)).

Mr. Tatten also argues that if the district court had properly viewed his allegations in the light most favorable to him, it would have "inferred" facts, such that he was legally incompetent, that LSF9 is a debt-buyer and debt collector and bought a time-barred, extinguished deed of trust; that the City Defendants knew he was cognitively disabled and failed to provide him with important information regarding his property because he is disabled.[3] But even for pro se litigants afforded liberal construction, courts may not "supply additional factual allegations to round out a plaintiff's

[3] Mr. Tatten also argues the district court should have inferred much about the actions of the bank that initiated the first foreclosure proceedings, entered into the loan modification agreement and sold his note to LSF9, but that bank is not a party to this litigation and Mr. Tatten already raised these same allegations and claims against that bank in his prior unsuccessful litigation, *Tatten*, 562 F. App'x at 720.

complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1175 (10th Cir. 1997).

We conclude the district court applied the proper standards in reviewing the Rule 12(b) motions to dismiss.

D. *Dismissal of Due Process and Equal Protection § 1983 Claims.* Mr. Tatten alleged in his first two § 1983 claims that he had a constitutional right to a Rule 120 hearing that was free from prejudice and discrimination. He alleged the OAS was issued in error based on the state court's failure to find Mr. Tatten lacked the capacity to contract and failure to accommodate his cognitive disabilities in issuing its OAS order, and that the City Defendants should have known the statute of limitations barred LSF9's foreclosure. The district court ruled these § 1983 claims were barred by the *Rooker-Feldman* doctrine, which bars claims in lower federal courts "complaining of injuries caused by state-court judgments"; that is, claims "that the state court wrongfully entered its judgment." *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169, 1174 (10th Cir. 2018) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

Mr. Tatten's only argument challenging the district court's ruling that these claims were barred by the *Rooker-Feldman* doctrine consists of a single statement, without any analysis, that the district court misapplied the *Rooker-Feldman* doctrine. Aplt. Br. at 34. "Under Rule 28, which applies equally to pro se

litigants, a brief must contain more than a generalized assertion of error, with citations to supporting authority." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (ellipsis and internal quotation marks omitted). Mr. Tatten has waived appellate review of this argument. *See id.* (holding that plaintiff's brief consisting of "mere conclusory allegations with no citations to the record or any legal authority for support" disentitled him to appellate review); *Eateries*, 346 F.3d at 1232 (issues not supported with legal authority or argument are forfeited).

E. *FDCPA.* Mr. Tatten asserted in his complaint that LSF9 was a debt collector who improperly foreclosed on his property in violation of the FDCPA, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not sufficient to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). His appellate argument as to the dismissal of the FDCPA claims is similarly threadbare; he merely asserts the district judge should have inferred that LSF9 is a third-party, debt buyer; a debt collector; collecting a debt; and that LSF9 bought his time-barred account and foreclosed on his deed of trust, which was extinguished by operation of Colorado law. He does not challenge the district court's legal determinations that, as to City Defendants, the FDCPA expressly excludes from coverage officers and employees of any state, and as to LSF9, that initiating foreclosure proceedings does not constitute the collection of a debt under the FDCPA. *See also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721–22 (2017)

(holding that a debt purchaser that collects debts for its own account is not a "debt collector" under the FDCPA). We find no error.

F. *Motion to Amend.* Mr. Tatten argues the district court erred in denying his untimely motion to amend his complaint because he was cognitively and intellectually confused and overwhelmed, and did not have enough time to understand the court's electronic filing system. He does not address the district court's additional, detailed conclusion that his proposed amendment was futile. As Mr. Tatten articulates no challenge to the futility determination, he has therefore waived any such argument on appeal. The district court did not abuse its discretion in denying leave to amend.

G. *Judicial Bias.*

Mr. Tatten alleges the magistrate judge was biased against him because she formerly was a partner at Faegre & Benson, L.L.P, a law firm that represented a bank adverse to him in unrelated litigation. He also argues the magistrate judge's and district court judge's rulings against him demonstrate bias. Mr. Tatten never filed a recusal motion under 28 U.S.C. § 144 or 28 U.S.C. § 455, which is reason enough to conclude he has forfeited such claims. But in any event, his allegations are insufficient to create doubts about the magistrate judge's or district court judge's impartiality. *See Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1310 (10th Cir. 2015) (holding that disqualification is appropriate only where a reasonable, average

member of the public would doubt the judge's impartiality).

Judgment affirmed.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 16-cv-01603-RBJ-NYW

JAMES P. TATTEN,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER, a municipality, DEBRA JOHNSON, Clerk and Recorder, in her official capacities, and LSF9 MASTER PARTICIPATION TRUST,

Defendants.

ORDER

(Filed Mar. 29, 2017)

This matter is before the Court on defendants City and County of Denver and Debra Johnson's ("City Defendants") motion to dismiss, defendant LSF9 Master Participation Trust's ("LSF9") motion to dismiss, plaintiff James P. Tatten's motion for leave to file his first amended complaint, and Magistrate Nina Y. Wang's report and recommendation. Judge Wang recommends that this Court grant defendants' motions to dismiss and deny plaintiff's motion to file an amended complaint. These recommendations are incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Like Judge Wang, I find that the motions to

dismiss must be granted, and the motion to amend must be denied.

BACKGROUND

Mr. Tatten suffered a traumatic brain injury in November 2008 and subsequently stopped making payments on his home mortgage loan. His bank initiated foreclosure proceedings in August 2009, but withdrew the action when Mr. Tatten agreed to a loan modification. Mr. Tatten made no payments on the modified loan either, however, so the bank again initiated foreclosure proceedings in October 2011. Mr. Tatten challenged the Denver District Court's Order Authorizing Sale and this litigation exhausted the statutory one-year window for the Public Trustee to sell Mr. Tatten's property, so the bank dropped its case once more. The bank later sold Mr. Tatten's home loan account to LSF9.

LSF9 reinitiated foreclosure proceedings in early 2016. In January it filed a Notice of Election and Demand for Sale with the Denver County Public Trustee, and in February it filed a motion for an Order Authorizing Sale with the Denver District Court. In February and March, Mr. Tatten emailed two employees of the Public Trustee's office for information on this foreclosure action. On April 22 and 25, 2016 the Denver District Court held contested Rule 120 hearings. The court issued an Order Authorizing Sale on April 26, 2016. The Public Trustee scheduled its sale of the property for June 9, 2016.

On June 1, 2016 Mr. Tatten hand-delivered a Notice of Intent to Sue to the Public Trustee's office. A week later, on June 8, 2016, Mr. Tatten filed an emergency motion in the Denver District Court seeking to enjoin the planned foreclosure sale. The Court held a hearing that same day and denied the motion. The Public Trustee's website was allegedly unavailable that day, so Mr. Tatten visited the Public Trustee's office in person to obtain more information about the foreclosure sale. According to Mr. Tatten, the employees there refused to answer his questions. The next day, June 9, 2016, LSF9 purchased the property.

On June 23, 2016 Mr. Tatten filed suit in this Court challenging the Rule 120 proceedings and defendants' actions in connection with those proceedings. ECF No. 1. His complaint raises three claims under 42 U.S.C. § 1983 for violations of (1) his Fourteenth Amendment right to due process, (2) his Fourteenth Amendment right to equal protection, and (3) his Fourteenth Amendment rights in general because of the City Defendants' allegedly unconstitutional policies and practices, as well as claims for (4) violation of the Americans with Disabilities Act ("ADA"), (5) violation of the Fair Debt Collection Practices Act ("FDCPA"), and (6) intentional infliction of emotional distress ("IIED").

The City Defendants and LSF9 have filed motions to dismiss. ECF Nos. 4, 34. Mr. Tatten submitted a response to the City Defendants' motion, ECF No. 25, and the City Defendants filed a reply, ECF No. 26. Mr. Tatten has not responded to LSF9's motion to dismiss.

However, Mr. Tatten filed an amended complaint on November 28, 2016. ECF No. 44. Judge Wang issued a minute order the next day striking Mr. Tatten's amended complaint for failure to comply with this District's Local Rules of Civil Practice. ECF No. 45. Judge Wang directed Mr. Tatten to file a proper motion to amend and to refile his amended complaint in compliance with the local rules no later than December 6, 2016. *Id.* More than a month after this deadline, on January 11, 2017, Mr. Tatten filed a motion to amend. ECF No. 53. The proposed amended complaint adds factual allegations about events in June and July 2016, and new claims for violation of the Colorado Consumer Protection Act ("CCPA"), violation of the Colorado Foreclosure Protection Act ("CFPA"), and negligent infliction of emotional distress ("NIED"). ECF No. 53-1. Defendants have responded to the motion to amend. ECF Nos. 57, 58. No replies were permitted. ECF No. 56.

After reviewing all of these filings and holding a hearing on the motions to dismiss—which Mr. Tatten failed to attend, *see* ECF No. 46—Judge Wang recommended that Mr. Tatten's complaint be dismissed, and that he not be permitted to amend it. ECF No. 59. Judge Wang agreed with defendants that the *Rooker-Feldman* doctrine bars Mr. Tatten's first and second § 1983 claims, and that Mr. Tatten's third § 1983 claim fails to state a claim for failure to train and supervise. She also agreed that Mr. Tatten fails to allege sufficient facts to support his ADA, FDCPA, and IIED claims. Additionally, Judge Wang found that the Colorado

Governmental Immunity Act bars Mr. Tatten's IIED claim against the City Defendants. Regarding the motion to amend, Judge Wang agreed that Mr. Tatten's motion should be denied as untimely because he provided no explanation for missing the Court's deadline, he offered no basis for excusing his noncompliance with the applicable rules and order, and he knew of the alleged new facts long before he filed his tardy motion. In any event, Judge Wang agreed that Mr. Tatten's motion could also be denied on futility grounds because he could not maintain a CCPA, CFPA, or NIED claim against defendants.

Mr. Tatten filed an objection to Judge Wang's recommendations, ECF No. 64, and defendants submitted responses to these objections, ECF Nos. 65, 66.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) can either "(1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003). Where, as here, there is a facial attack on the basis for jurisdiction, the Court must consider only the allegations on the face of the complaint, taken as true and viewed in the light most favorable to the plaintiffs. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "Mere conclusory allegations of jurisdiction are not enough." *U.S.*

ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999).

To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L. C. v. Schneider*, 493 F. 3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U. S. 544, 570 (2007)). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), purely conclusory allegations are not entitled to be presumed true, *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See Twombly*, 550 U.S. at 556. "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 plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (quoting *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991)).

Although Mr. Tatten brings this action pro se, he is not entitled to have his filings construed liberally because he is a trained attorney. *See Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007). "Even were [the Court] to construe Mr. Tatten's filings liberally, that would not excuse him from complying with the

Federal Rules of Civil . . . [P]rocedure, including pleading requirements, nor would [the Court] 'supply additional factual allegations to round out [his] complaint or construct a legal theory on [his] behalf.'" *Tatten v. Bank of Am. Corp.*, 562 F. App'x 718, 720 (10th Cir. 2014) (citations omitted).

ANALYSIS

The Court must conduct a de novo review of any part of Judge Wang's recommendation to which Mr. Tatten has properly objected. Fed. R. Civ. P. 72(b)(3). Absent a proper objection, however, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 199 1). An objection "must be both timely and specific to preserve an issue for de novo review." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). And an objection is sufficiently specific if it "focus[es] the district court's attention on the factual and legal issues that are truly in dispute." *Id.* For example, an objection is not specific if it merely "ask[s] that the district court reconsider the magistrate's report and recommendation based on 'the motions, exhibits, testimony[,] briefs, and arguments' that the [party] had submitted to the court." *Id.*

Mr. Tatten's objections are too general and conclusory to preserve any issue for de novo review. His filing consists of two parts: "Specific Written Objections" and "Argument." The first part spans 31 pages and includes numerous sections and subsections, the vast

majority of which simply states that he "specifically objects to each proposed finding and recommendation listed and quoted below" and then quotes Judge Wang's recommendations. *See* ECF No. 64 at 3–33. But it is not enough just to point to parts of a magistrate judge's opinion that are allegedly mistaken—one must also "identify the particular errors the magistrate judge committed." *Wofford v. Colvin*, 570 F. App'x 744, 746 (10th Cir. 2014).

In the remainder of his "Specific Written Objections," Mr. Tatten "specifically objects to Magistrate Judge Wang"—which I will address below—and provides a list of general "reasons" for taking issue with Judge Wang's recommendations. Yet these "reasons" do nothing to focus the court's attention on the facts or legal issues that are in dispute. Instead, they allege error in vague generalities, like: "Each proposed findings [sic] and recommendation . . . includes biased assumptions, misstatements, and misrepresentations." ECF No. 64 at 9, 15. Other "reasons" are marginally more specific, but still do not frame the issues with sufficient particularity. For example, Mr. Tatten repeatedly alleges that defendants acted "independent of the Rule 120 proceedings," but does not explain why Judge Wang was wrong in thinking that these actions were bound up in the Rule 120 proceedings. *See id.* at 10–11 ("Plaintiff Tatten filed this action because City Defendants and Defendant LSF9 Master Participation Trust ("Defendant LSF9") engaged in conduct, *independent of the Rule 120 proceeding*, to collect a debt asserted to be owed; Plaintiff Tatten filed this action because City

Defendants and Defendant LSF9 engaged in threatening conduct, *independent of the Rule 120 proceeding*, to collect a debt asserted to be owed. . . ."). In another section, Mr. Tatten rattles off a list of general accusations, such as: "Magistrate Judge Wang committed error by making medical judgments and legal findings in conflict with the pleadings, attachments, exhibits, filings, and entire case file." *Id.* at 17. All in all, these objections are no better than improperly asking the Court to reconsider Judge Wang's recommendations based on "the motions, exhibits, testimony[,] briefs, and arguments" that Mr. Tatten has submitted to the Court. *2121 E. 30th St.*, 73 F.3d at 1060.

That leaves Mr. Tatten's brief "Argument." Aside from questioning Judge Wang's impartiality once again, this part raises only three objections. First, Mr. Tatten asserts that granting the motions to dismiss or denying his motion to amend will "abridge, enlarge, or modify substantive rights in violation of 28 U.S.C. § 2072(b)." ECF No. 64 at 35. That provision governs the rules of procedure and evidence prescribed by the Supreme Court. *See* 28 U.S.C. § 2072. This limitation on the Supreme Court's power to prescribe rules has no apparent bearing on the case at hand, and Mr. Tatten neither identifies what "substantive right" may be affected nor how such a right might be affected by ruling on the pending motions. Second, Mr. Tatten argues that the *Rooker-Feldman* doctrine does not bar his due process or equal protection claims because "[t]he pleadings, attachments, exhibits, filings, and entire case file show that the conduct alleged[] is independent of the

Colorado Rule 120 proceedings." ECF No. 64 at 36. And third, Mr. Tatten asserts that he should be granted leave to amend his complaint because "[t]he pleadings, attachments, exhibits, filings, and entire case do not indicate or show bad faith, undue delay, prejudice, or futility of amendment." *Id.* at 37. These arguments are directly in the teeth of the Tenth Circuit's prohibition on overly general objections. *2121 E. 30th St.*, 73 F.3d at 1060. Moreover, Mr. Tatten does not object to Judge Wang's recommendation that this Court dismiss his claims for unconstitutional policies and practices, violation of the ADA, violation of FDCPA, or IIED. *See* ECF No. 64.

Mr. Tatten's claim that Judge Wang is biased fares no better. Mr. Tatten essentially accuses Judge Wang of bias based on the fact that before becoming a magistrate judge she was a partner in the law firm of Faegre & Benson, LLP. According to Mr. Tatten, that law firm represented Wells Fargo in a separate action against him in 2011. He does not, however, indicate that Ms. Wang, now Magistrate Judge Wang, was involved in the other case at all, or was aware when this case was referred to her that her former firm had been involved in a case in which Mr. Tatten was a party. Notably, Mr. Tatten did not raise this issue when this Court referred the pending motions to her. Rather, only after he received her unfavorable recommendation did he make this charge. Under 28 U.S.C. § 455(a), a judge must disqualify herself "in any proceeding in which her impartiality might reasonably be questioned." The rule applies not only to actual bias or prejudice but to

the appearance of bias or prejudice. The test is "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). I find that a reasonable person, knowing all the relevant facts, would not harbor doubts about Judge Wang's impartiality in this case.

As a result, Mr. Tatten has failed to preserve any aspect of Judge Wang's recommendations for de novo review. After reviewing the parties' submissions, the Court concludes that Judge Wang's analysis is correct and that "there is no clear error on the face of the record." Fed. R. Civ. P. 72 advisory committee's note.

Nevertheless, in an abundance of caution, this Court will also conduct a de novo review of the portions of Judge Wang's recommendation to which Mr. Tatten objects. Mr. Tatten filed suit in this Court two weeks after the Rule 120 proceedings ended and LSF9 purchased his property. His due process claim argues that he had "the right to a Rule 120 hearing that was free from prejudice and discrimination." ECF No. 1 at ¶ 143. But this claim "would impermissibly involve a reexamination of the underlying state court proceedings and judgments, which is barred by the *Rooker-Feldman* doctrine." *Driskell v. Thompson*, 971 F. Supp. 2d 1050, 1065 (D. Colo. 2013) (citing *Dillard v. Bank of N.Y.*, 476 F. App'x 690, 692 (10th Cir. 2012)). Mr. Tatten's equal protection claim is based on similar allegations and therefore is barred by the *Rooker-Feldman* doctrine as well. *See* ECF No. 1 at ¶ 163; *Sladek v. Bank of Am., NA*, No. 13-CV-03094-PAB-MEH, 2014

WL 8105182, at *6 (D. Colo. July 10, 2014). Accordingly, his complaint must be dismissed.

Mr. Tatten's motion to amend is equally deficient. He filed this motion more than a month after the court-ordered deadline passed, and he has offered no explanation for missing this deadline. "It is well settled in this circuit that untimeliness alone is a sufficient reason to deny leave to amend, especially when the party filing the motion has no adequate explanation for the delay." *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1365–66 (10th Cir. 1993) (citations omitted). Thus, Mr. Tatten's motion to amend his complaint must be denied.

ORDER

1. The recommendation of United States Magistrate Judge Nina Y. Wang, ECF No. 59, is ACCEPTED and ADOPTED.

2. City Defendants' Motion to Dismiss [ECF No. 4] is GRANTED. Plaintiff's claims against the City and County of Denver and Debra Johnson are dismissed with prejudice.

3. LSF9 Master Participation Trust's Motion to Dismiss [ECF No. 34] is GRANTED. Plaintiff's claims against LSF9 are dismissed with prejudice.

4. Plaintiff's Motion for Leave to File First Amended Complaint and Jury Demand [ECF No. 53] is DENIED.

5. As the prevailing parties, defendants are awarded their reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 29th day of March, 2017.

BY THE COURT:

/s/ Brooke Jackson
R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01603-RBJ-NYW

JAMES P. TATTEN,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER, a municipality, DEBRA JOHNSON, Clerk and Recorder, in her official capacities, and LSF9 MASTER PARTICIPATION TRUST,

Defendants.

FINAL JUDGMENT

(Filed Mar. 29, 2017)

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the ORDER [ECF No. 67] of Judge R. Brooke Jackson entered on March 29, 2017, it is

ORDERED that the Recommendation of United States Magistrate Judge [ECF No. 59] is ACCEPTED and ADOPTED. It is

FURTHER ORDERED that City Defendants' Motion to Dismiss [ECF No. 4] is GRANTED. It is

FURTHER ORDERED that LSF9 Master Participation Trust's Motion to Dismiss [ECF No. 34] is GRANTED. It is

FURTHER ORDERED that the claims against the defendants are dismissed with prejudice. It is

FURTHER ORDERED that Plaintiff's Motion for Leave to File First Amended Complaint and Jury Demand [ECF No. 53] is DENIED. It is

FURTHER ORDERED that judgment is entered in favor of the defendants and against the plaintiff. It is

FURTHER ORDERED that as the prevailing parties, the defendants are awarded their reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. Dated at Denver, Colorado this 29th day of March, 2017.

FOR THE COURT:
JEFFREY P. COLWELL,
CLERK

By: s/ J. Dynes
J. Dynes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01603-RBJ-NYW

JAMES P. TATTEN,

Plaintiff,

v.

CITY AND COUNTY OF DENVER, THE,
DEBRA JOHNSON, and
LSF9 MASTER PARTICIPATION TRUST,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Feb. 3, 2017)

Magistrate Judge Nina Y. Wang

This matter comes before the court on three pending motions:

(1) Defendants City and County of Denver and Debra Johnson's (collectively, "City Defendants") Motion to Dismiss [#4, filed July 14, 2016];

(2) Defendant LSF9 Master Participation Trust's ("LSF9") Motion to Dismiss [#34, filed November 7, 2016]; and

(3) Plaintiff James P. Tatten's ("Plaintiff" or "Mr. Tatten") Motion for Leave to File First Amended

Complaint and Jury Demand (the "Motion to Amend") [#53, January 11, 2017].

The undersigned Magistrate Judge considers the pending motions pursuant to 28 U.S.C. § 636(b)(1), the Order Referring Case dated August 8, 2016 [#23], and the memoranda dated August 8, 2016 [#24], November 8, 2016 [#38], and January 12, 2016 [#54]. This court concludes that oral argument would not materially assist in the resolution of these matters. Accordingly, upon careful review of the Parties' briefing, the applicable case law, and the entire case file, this court respectfully RECOMMENDS that the City Defendants and LSF9's Motions to Dismiss be GRANTED and Plaintiff's Motion to Amend be DENIED.

FACTUAL BACKGROUND

Mr. Tatten initiated this action by filing his *pro se* Complaint on June 23, 2016. [#1]. The Complaint levies several claims against the City Defendants and LSF9 stemming from the foreclosure, and related proceedings, of the property located at 8681 East 29th Avenue, Denver, Colorado 80238 (the "Property"). *See* [*id.* at ¶¶ 7–10]. The following facts are relevant to the pending motions.

On or about March 3, 2004, Mr. Tatten signed a thirty-year adjustable rate note (the "Note") for approximately $406,000, secured by a deed of trust on the Property. *See* [#1-1 at 25]. It appears that Bank of America issued the Note and that BAC Home Loans Servicing, LP ("BAC") serviced the Note. [#1 at ¶¶ 116,

127b.]. However, Mr. Tatten made his last payment on the Note in approximately December 2008, making the Note due on January 1, 2009. *See* [#1 at ¶¶ 94–95]. At around this same time, Plaintiff suffered a traumatic brain injury that required two months of inpatient rehabilitation at Craig Rehabilitation Hospital and an additional twelve months of outpatient brain-injury care and rehabilitation services. [*Id.* at ¶¶ 22–23]. The Social Security Administration concluded that Mr. Tatten's brain injury satisfied the definition of "disability" under the Social Security Act, with a disability onset date of November 7, 2008. [*Id.* at ¶¶ 24–25].

Plaintiff alleges that his family informed Bank of America of his brain injury and cognitive disability; however, soon after, Bank of America began "using foreclosure to mislead, harass, and intimidate [him]." [*Id.* at ¶ 127a.–b.]. For example, following Plaintiff's traumatic brain injury, two foreclosure proceedings on the Property were filed in Denver District Court. *See* [#1-1 at 26–27]. First, on or about August 4, 2009, Countrywide and/or Bank of America initiated a foreclosure proceeding in case No. 09CV75799. *See* [*id.* at 26]. However, Bank of America dismissed its motion for an Order Authorizing Sale ("OAS") after BAC directed Plaintiff to sign a loan modification agreement on September 28, 2009. [#1 at ¶ 104; #1-1 at 26–27].

Though not entirely clear, it appears Plaintiff made no payments on the loan modification agreement [#1 at ¶¶ 111–117], because on or about October 28, 2011, Bank of America initiated a second foreclosure proceeding in case No. 11CV7484. [#1-1 at 27]. The

Denver District Court granted Bank of America's OAS on January 20, 2012. [*Id.*]. However, Mr. Tatten challenged the OAS in state court, Bank of America removed the action to federal court, and the United States District Court for the District of Colorado dismissed Plaintiff's complaint, which the Tenth Circuit affirmed on appeal. *See* [*id.*]; *see also Tatten v. Bank of Am. Corp.*, 912 F. Supp. 2d 1032, 1044 (D. Colo. 2012), *aff'd*, 562 F. App'x 718 (10th Cir. 2014). Because of Mr. Tatten's lawsuit, Bank of America withdrew without prejudice the second foreclosure action on January 23, 2013. [#1-1 at 28].

On October 30, 2015, Mr. Tatten received a "NOTICE OF SALE OF OWNERSHIP OF MORTGAGE LOAN" from LSF9. [#1 at ¶ 131]. The notice informed Plaintiff that Bank of America sold Plaintiff's Note on the Property to LSF9 on September 29, 2015. [*Id.* at ¶¶ 128, 132]. On January 28, 2016, LSF9 filed a Notice of Election and Demand for Sale with the Public Trustee to foreclose on the Property. *See* [#55-2]. On February 18, 2016, LSF9 filed a motion for an OAS with the Denver District Court in case No. 16CV30555—marking the third foreclosure action on the Property. [#1 at ¶¶ 1, 133]. During the months of February and March 2016, Mr. Tatten emailed two employees of the Public Trustee's office, requesting information regarding the third foreclosure action. [*Id.* at ¶¶ 72–75, 78–81]. Then, in March 2016, Mr. Tatten filed a response to the motion for an OAS, arguing that the six-year statute of limitations had run on the Note thereby barring LSF9's foreclosure action. [*Id.* at ¶¶ 138–139].

The Denver District Court held contested Rule 120 hearings on April 22 and 25, 2016. [*Id.* at ¶ 31]. Prior to the hearings, Mr. Tatten contacted the Denver District Court to alert the judge of his cognitive disabilities, and a court representative responded that she informed the judge and that should he need any assistance during the hearing, the court would make necessary accommodations. *See* [*id.* at ¶¶ 33–35]. At the close of the Rule 120 hearing on April 25, 2016, the Denver District Court concluded, *inter alia*, that the statute of limitations did not bar LSF9's foreclosure action, that Plaintiff had the capacity to sign the loan modification agreement in September 2009, and that there was a reasonable probability that Plaintiff defaulted on the Note. *See* [#1 at ¶¶ 49–65, 92–93; #1-1]. The judge then issued an OAS, and the Public Trustee Sale of the Property was set for June 9, 2016.[1] [#1 at ¶¶ 92–93; #1-1].

On June 1, 2016, Plaintiff alleges that he hand-delivered his "Notice of Intent to Sue the City and County of Denver and Clerk and Recorder" to the offices of Denver Mayor Michael Hancock and Debra Johnson, the Denver City and County Public Trustee. [*Id.* at ¶ 82]. This notice stated that he intended to sue the City Defendants because their actions relating to the foreclosure proceedings violated his constitutional rights and were the cause of his damages. [*Id.* at ¶ 83]. A week later, on June 8, 2016, Mr. Tatten filed an "EMERGENCY MOTION TO ENJOIN OR VACATE

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[1] Mr. Tatten challenges the OAS on numerous grounds. *See e.g.*, [#1 at 9–14].

ORDER AUTHORIZING SALE" (the "Emergency Motion to Enjoin") with the Denver District Court. [*Id.* at ¶ 66]. The Emergency Motion to Enjoin argued that LSF9's OAS was void and unenforceable, because it violated: (1) the United States Constitution; (2) Mr. Tatten's due process rights; (3) Mr. Tatten's rights under 42 U.S.C. § 1983; (4) the Fair Debt Collection Practices Act ("FDCPA"); (5) the six-year statute of limitations for actions on promissory notes under Colo. Rev. Stat. § 13–80–103.5(1)(a); and (6) Colo. Rev. Stat. § 38–39–207, which states that any lien extinguishes upon the expiration of any statute of limitations to commence any action on the instrument creating the lien. *See* [*id.* at ¶ 68c.]. In addition, Plaintiff argued that the judge in the Rule 120 proceeding made findings of law and fact beyond the scope of the proceeding and that the proceedings were prejudicial to him. *See* [*id.* at ¶¶ 68d.–e.]. The Denver District Court denied the Emergency Motion to Enjoin, following a hearing on June 8, 2016. [*Id.* at ¶ 70].

Also on June 8, 2016, Plaintiff alleges that the Public Trustee's website was unavailable and that he could not access relevant information pertaining to the foreclosure sale set for June 9, 2016. [*Id.* at ¶¶ 86–87]. Accordingly, Plaintiff went to the Public Trustee's office that same day and asked "Public Trustee employees questions concerning the requirements, administration, and oversight of bids and auction sales." [*Id.* at ¶ 88]. According to Plaintiff, an employee named Juan Guzman interrupted his discussion and informed other employees not to answer any of his questions. [*Id.*

at ¶¶ 89–90]. Allegedly, Mr. Guzman told Plaintiff, "[w]e will continue with our statutory obligations." [*Id.* at ¶ 91].

Accordingly, the Public Trustee sale of the Property was scheduled for June 9, 2016. [*Id.* at ¶ 92]. On June 7, 2016, LSF9 bid a sum of $570,819.45 for the Property, which was the winning bid. [*Id.* at ¶ 84]. On June 23, 2016, Plaintiff initiated the instant suit "in response to ORDER AUTHORIZING SALE issued on April 26, 2016 by the Denver District Court in Case Number 2016CV030555." [*Id.* at ¶ 1]. Essentially, Plaintiff challenges the Rule 120 proceedings, the OAS, and the Defendants' actions in connection with the third foreclosure proceeding. Specifically, Plaintiff levies three constitutional claims under 42 U.S.C. § 1983 for violations of his Fourteenth Amendment rights to due process by all Defendants (Claim I), violations of his Fourteenth Amendment rights to equal protection by all Defendants (Claim II), and violations of his Fourteenth Amendment rights due to the City Defendants' implementation of unconstitutional policies and practices (Claim III); in addition, Plaintiff asserts violations of Title II of the Americans With Disabilities Act ("ADA") by the City Defendants (Claim IV), violations of the FDCPA by all Defendants (Claim V), and that the Defendants' acts or omissions constituted intentional infliction of emotional distress ("IIED") (Claim VI). *See* [*id.* at 34–43]. Plaintiff requests all appropriate relief at law and equity; declaratory relief and other appropriate equitable relief; economic losses on all claims; compensatory and consequential damages;

punitive damages on all claims; attorney's fees and costs; pre and post-judgment interest; and any further relief deemed just and proper by the court. [*Id.* at 44].

PROCEDURAL HISTORY

On July 14, 2016, the City Defendants filed their Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. [#4]. On July 15, 2016, Mr. Tatten filed his Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue ("Motion for Temporary Restraining Order"). [#7]. Plaintiff's Motion for Temporary Restraining Order sought to enjoin LSF9 from "engaging in any acts or actions concerning eviction or possession of Tatten's home." [*Id.* at ¶ 6]. On July 19, 2016, the Honorable Lewis T. Babcock denied the Motion for Temporary Restraining Order [#9], and Magistrate Judge Gordon P. Gallagher issued an Order drawing case [#12].

On July 25, 2016, Plaintiff filed a Motion for Entry of Default against LSF9 that the Clerk of the Court denied for Plaintiff's failure to prove service on LSF9. *See* [#17; #18]. Mr. Tatten then filed a "Motion to Extend the Time for Service of Summons and Complaint Pursuant to FED.R.Civ.P.4(m)," and the undersigned Magistrate Judge granted Plaintiff an additional thirty-days to properly serve LSF9. [#28;#29]. On September 27, 2016, LSF9 returned an executed waiver of service [#31] and, on November 7, 2016, filed its Motion to Dismiss. [#34]. In response to LSF9's Motion to

Dismiss, Plaintiff filed an Amended Complaint and Jury Demand on November 28, 2016. [#44]. However, given Mr. Tatten's noncompliance with this District's Local Rules of Civil Practice and the applicable Federal Rules of Civil Procedure, the undersigned Magistrate Judge struck Plaintiff's Amended Complaint.[2] [#45]. By that same Minute Order, this court directed Plaintiff to file a proper motion to amend and amended complaint no later than December 6, 2016. [*Id.*].

By Minute Order, the undersigned Magistrate Judge scheduled a motions hearing on the pending motions to dismiss for December 19, 2016, at 2:00 p.m. [#39]. However, Mr. Tatten failed to appear for the motions hearing, and the undersigned Magistrate Judge issued an Order to Show Cause as to why the court should not dismiss Plaintiff's case for failure to prosecute or for his failure to comply with an order of this court. *See* [#47]. In addition, this court explained that it would issue a recommendation on the pending motions to dismiss without oral argument. [*Id.*]. Plaintiff responded to the Order to Show Cause, explaining that his cognitive disabilities render it difficult for him to remember scheduled appointments and, in addition, Plaintiff requested that this court reconsider its

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[2] While Mr. Tatten is proceeding *pro se*, he is still bound to follow the same rules of procedure and substantive law as represented parties. *See Dodson v. Bd. of Cty. Comm'rs*, 878 F. Supp. 2d 1227, 1236 (D. Colo. 2012). Although Mr. Tatten proceeds *pro se*, he is also an attorney, and is not entitled to the indulgence that a *pro se* litigant's pleadings and filings be construed liberally. *See Tatten v. Bank of Am. Corp.*, 562 F. App'x 718, 720 (10th Cir. 2014).

decision to issue a recommendation on the pending motions to dismiss without oral argument. [#48; #52]. This court discharged the Order to Show Cause on December 22, 2016, and denied Plaintiff's request for additional oral argument on the motions to dismiss. *See* [#51].

On January 11, 2016, Mr. Tatten filed his Motion to Amend. [#53]. Per this court's order, the City Defendants and LSF9 (collectively, "Defendants") filed their responses on January 19 and 20, 2016, respectively. [#57; #58]. No replies were permitted. In addition, Plaintiff filed a response and the City Defendants a reply to its Motion to Dismiss and, although Plaintiff failed to respond to LSF9's Motion to Dismiss, the time to do so has since expired and nothing precludes this court for issuing a Recommendation on a pending motion at any time. *See* D.C.COLO.LCivR 7.1(d). Accordingly, the pending motions are ripe for recommendation.

LEGAL STANDARD

I. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and, as such, "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter jurisdiction." *The Wilderness Soc. v. Kane Cty., Utah*, 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Indeed, courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a

challenge from any party. *Image Software, Inc. v. Reynolds & Reynolds, Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)). Under Rule 12(b)(1), a court may dismiss a complaint for lack of subject-matter jurisdiction. Doing so is not a determination on the merits of the case; rather, it is a decision that the court lacks the authority to adjudicate the action. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court that lacks jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Id.* Accordingly, Plaintiff in this case bears the burden of establishing that this Court has jurisdiction to hear his claims.

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: a facial attack or a factual attack. *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001); *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt*, 46 F.3d at 1002. Mere conclusory allegations of jurisdiction are insufficient. *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). Nevertheless, "a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when

resolution of the jurisdictional question is intertwined with the merits of the case." *Id.* As explained in *Holt v. United States*, "the jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case." 46 F.3d at 1002.

II. Rule 12(b)(6)

Under Rule 12(b)(6) a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)).

Nevertheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (holding that even *pro se* litigants cannot rely on conclusory, unsubstantiated allegations to survive a 12(b)(6) motion). Rather, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)

(explaining that plausibility refers "to the scope of the allegations in a complaint," and that the allegations must be sufficient to nudge a plaintiff's claim(s) "across the line from conceivable to plausible.").

The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). Should the court receive and consider materials outside the complaint, the court may convert a Rule 12(b)(6) motion to a motion for summary judgment if the parties have notice of the changed status and the nonmovant responded by supplying its own extrinsic evidence. *See Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004). However, a district court may consider legal arguments contained in a brief in opposition to dismissal or documents referred to in the complaint that are central to a plaintiff's claim if the Parties' do not dispute their authenticity without converting the Rule 12(b)(6) motion into a summary judgment motion. *See Cty. of Santa Fe, N.M. v. Public Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002). In addition, the court may consider documents subject to judicial notice, including court documents and matters of public record. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n. 24 (10th Cir. 2006).

III. Rule 15(a)

If a party files a motion to amend prior to the expiration of the deadline for joinder of parties and amendment of pleadings, Rule 15(a) governs whether to grant the movant leave to amend; there is no requirement to also establish good cause to amend the scheduling order under Rule 16(b). *See Fernandez v. Bridgestone/Firestone, Inc.*, 105 F. Supp. 2d 1194, 1195 (D. Colo. 2000). Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The court may refuse leave to amend upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

For example, courts will generally deny a motion to amend as untimely when the moving party offers no adequate explanation for the delay. *See, e.g., Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1495 (10th Cir. 1995) ("untimeliness in itself can be a sufficient reason to deny leave to amend, particularly when the movant provides no adequate explanation for the delay"); *Fed. Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987) ("Courts have denied leave to amend in situations where the moving party cannot demonstrate excusable neglect. For example, courts have denied leave to amend where the moving party was aware of the facts on which the amendment was based for some time prior to the filing of the motion to amend."). In addition, a court may dismiss a motion to amend if

amendment is futile, *i.e.*, the amended complaint would be subject to dismissal for any reason. *See generally Watson v. Beckel*, 242 F.3d 1237, 1239–40 (10th Cir. 2001) (holding that futility includes if the amendment would not survive a motion for summary judgment). Ultimately, whether to allow amendment is within the trial court's discretion. *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975, 978–79 (10th Cir. 1996).

ANALYSIS

I. Dismissal Pursuant to Rule 12(b)(1)

Defendants argue for dismissal of Plaintiff's claims (except for his ADA claim) on the basis that this court lacks subject matter jurisdiction over those claims. First, Defendants argue that the *Rooker-Feldman* doctrine bars Claims I, II, III, V, and VI, as each is an attempt to seek appellate-type review of a final state court decision. *See* [#4 at 6; #34 at 5]. Second, the City Defendants argue that the Colorado Governmental Immunity Act ("CGIA") bars Plaintiff's tort claim against the City Defendants. [#4 at 15]. This court considers these arguments below.[3]

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[3] Although Plaintiff filed his Motion to Amend, which may moot Defendants' Motions to Dismiss, *Strich v. United States*, No. 09-cv-01913-REB-KLM, 2010 WL 14826, at * 1 (D. Colo. Jan. 11, 2010) (citations omitted) ("The filing of an amended complaint moots a motion to dismiss directed at the complaint that is supplanted and superseded."), this court must first determine whether it has subject matter jurisdiction to consider Plaintiff's Complaint. *Herrera v. Alliant Specialty Ins. Servs., Inc.*, No. 11–00050–REB–CBS, 2012 WL 959405, at *3 (D. Colo. Mar. 21, 2012)

A. The *Rooker-Feldman* Doctrine

"*Rooker-Feldman* is a jurisdictional prohibition on lower federal courts exercising appellate jurisdiction over state-court judgments." *Campbell v. City of Spencer*, 682 F.3d 1278, 1281 (10th Cir. 2012). It "precludes a losing party in state court who complains of injury caused by the state-court judgment from bringing a case seeking review and rejection of that judgment in federal court." *Miller v. Deutsche Bank Nat'l Trust Co. (In re Miller)*, 666 F.3d 1255, 1261 (10th Cir. 2012). However, courts in this Circuit have reasoned that the *Rooker-Feldman* doctrine does not apply to issues relevant to the Rule 120 proceedings prior to the foreclosure sale. *See e.g.*, *Niederquell v. Bank of Am., N.A.*, No. 11–cv–03185–MSK–MJW, 2012 WL 1578060, at *3 (D. Colo. May 4, 2012); *In re Miller*, 666 F.3d at 1262 n.6; *Rousseau v. Bank of New York*, Civil Action No. 08–cv–00205–PAB–BNB, 2009 WL 3162153 (D. Colo. Sept. 29, 2009). Rather, *Rooker-Feldman* bars claims seeking to overturn the *final* outcome of a Rule 120 proceeding. *See Mayotte v. US Bank Nat'l Ass'n*, No. 14-CV-3092-RBJ-CBS, 2016 WL 943781, at *4 (D. Colo. Mar. 14, 2016) (discussing *Dillard v. Bank of N.Y.*, 476 F. App'x 690, 692 n. 3 (10th Cir. 2012) (holding that *Rooker-Feldman* barred Ms. Dillard's suit she "[was] attempting to *completely undo* the foreclosure and eviction

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(stating that issues of subject matter jurisdiction "must be resolved before the court may address other issues presented in the motion to dismiss").

proceedings, which were both final before she ever initiated [her] suit.")).

Thus, the inquiry focuses on whether the foreclosure proceedings were sufficiently final when Plaintiff filed his Complaint. *Id.* This can occur in one of two ways. First, the foreclosure proceedings are final for purposes of *Rooker-Feldman* if the state court confirmed the Public Trustee's sale of the foreclosed upon property. *See McDonald v. J.P. Morgan Chase Bank, N.A.*, No. 12-CV-02749-MSK, 2014 WL 334813, at *3 (D. Colo. Jan. 30, 2014). Second, when, at a minimum, Plaintiff's redemption rights pursuant to Colo. Rev. Stat. § 38–38–501 have expired. *See Castro v. Kondaur Capital Corp.*, No. 11-CV-03298-CMA-KLM, 2012 WL 3778346, at *5 (D. Colo. Aug. 14, 2012) ("Accordingly, because Plaintiffs' rights were extinguished prior to the filing of this lawsuit, application of the *Rooker–Feldman* doctrine prevents the Court from determining their rights in the sold property."). Section 38–38–501 provides that "[u]pon the expiration of all redemption periods" title to the foreclosed property vests in the "holder of the certificate of purchase" or, in the absence of any redemption periods, "upon the close of the officer's business eight business days after the sale." Colo. Rev. Stat. § 38–38–501.

Here, the Public Trustee's sale occurred on June 9, 2016, and LSF9 is the holder of the certificate of purchase [#55-8 at 1],[4] meaning that LSF9's title in the

[4] This court finds it appropriate to take judicial notice of the Public Trustee's Certificate of Purchase of the Property [#55-8 at

Property vested on June 21, 2016. Accordingly, as of June 23, 2016, the date Plaintiff filed his Complaint, his rights in the Property had extinguished. *See Mayhew v. Cherry Creek Mortg. Co., Inc.*, No. 09–cv–00219–PAB–CBS, 2010 WL 935674, at *10 (D. Colo. Mar.10, 2012). Nevertheless, Plaintiff's claims may survive to the extent they do not seek to undo the foreclosure sale of the Property. *Cf. Zeller v. Ventures Trust 2013-I-NH*, No. 15-CV-01077-PAB-NYW, 2016 WL 745373, at *6 (D. Colo. Feb. 1, 2016) (noting that *Rooker-Feldman* bars claims seeking to undo the foreclosure proceedings).

1. Claims I and II: Due Process and Equal Protection under the Fourteenth Amendment

Plaintiff's Claims I and II allege that Defendants violated his Fourteenth Amendment rights to due

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1] without converting the Motions to Dismiss to ones for summary judgment. *See* Fed.R.Evid. 201(b)(2) (A court may take judicial notice of a fact "that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."); *Smith v. Krieger*, 643 F. Supp. 2d 1274, 1286 (D. Colo. 2009) ("Facts subject to judicial notice may be considered in a motion to dismiss without converting the motion to dismiss into a motion for summary judgment."). In addition, LSF9 received its Public Trustee Confirmation Deed on July 5, 2016 [#55-9], another event that extinguishes Plaintiff's rights in the Property, *Beeler Properties, LLC v. Lowe Enterprises Residential Inv'rs, LLC*, No. CIV.A.07-CV-00149MSK, 2007 WL 1346591, at *3 (D. Colo. May 7, 2007), and *Rooker-Feldman* applies even if the foreclosure sale becomes final *after* Plaintiff initiated his federal suit. *McDonald*, 2014 WL 334813, at *3–4.

process and equal protection, because Plaintiff had a constitutional right to a "Rule 120 hearing that was free from prejudice and discrimination." [#1 at ¶¶ 143, 163]. Essentially, Plaintiff challenges the Defendants' actions in connection with the third Rule 120 proceeding and subsequent foreclosure of the Property, because: (1) the City Defendants knew or should have known that the applicable statute of limitations barred LSF9's foreclosure on the Property; (2) Defendant Johnson allowed the foreclosure sale to proceed, despite Plaintiff's objections; and (3) the Rule 120 proceedings were prejudicial and discriminatory towards Plaintiff, a disabled homeowner, because the judge made conclusions of law and fact that were outside the scope of his authority and did not accommodate his cognitive disability. *See, e.g.*, [#1 at ¶¶ 4–12, 14–15, 33–34, 143–160, 165–180].

Defendants argue that the *Rooker-Feldman* doctrine bars these claims, because Plaintiff requests that this court reexamine the proceedings and judgment of the state court. *See* [#4 at 7; #34 at 6]. In response to the City Defendants' Motion to Dismiss, Plaintiff argues that his Complaint "seeks relief from certain statements, actions, and conduct attributed to the City Defendants," and that the application of the *Rooker-Feldman* doctrine is factually and legally inconsistent with his Complaint. *See* [#25 at 3, 4]. For the following reasons, this court respectfully disagrees.

First, as to Plaintiff's due process claim (Claim I), the court in *Driskell v. Thompson* explained, "[t]o the extent Plaintiff seeks to state a claim alleging a

violation of his due process rights pursuant to the . . . Fourteen Amendment[ ], such a claim would challenge the judicial process engaged in by the state courts. . . . [and] would impermissibly involve a reexamination of the underlying state proceedings and judgments." 971 F. Supp. 2d 1050, 1064–65 (D. Colo. 2013). Here, Plaintiff seeks declaratory and equitable relief in addition to damages, and frequently asserts that the Rule 120 proceeding and OAS are erroneous, that the foreclosure on the Property is void and unenforceable, and that Plaintiff is the sole lawful owner of the Property. *See, e.g.*, [#1 at ¶¶ 2–9, 12, 48, 60–62, 155; *id.* at 44]. Plaintiff also dedicates an entire section of his Complaint wherein he specifically challenges the Rule 120 judge's conclusions of law and fact. *See* [*id.* at ¶¶ 43–65].

Accordingly, Plaintiff's due process claim would necessarily require this court to reexamine the procedural sufficiency of the Rule 120 hearings and related state court proceedings. *See Driskell*, 971 F. Supp. 2d at 1064–65. Moreover, Plaintiff already challenged the validity of the OAS in Denver District Court on June 8, 2016, by filing his Emergency Motion to Enjoin that argued, *inter alia*, that the Rule 120 proceeding violated his due process rights, which the Denver District Court denied.[5] *See* [#1 at ¶¶ 68, 70]; *Yokomizo v. Deutsche Bank Sec., Inc.*, No. 11-CV-01630-CMA-KLM, 2011 WL 2912691, at *2 (D. Colo. July 20, 2011) ("To the extent that Plaintiff alleges that the foreclosure

[5] And, as noted, Plaintiff filed a similar motion in this case that Judge Babcock denied. *See* [#7; #9].

proceedings were rife with procedural mishaps . . . the more appropriate remedy is to pursue an independent action in state court" that challenges the OAS and sale of the property). Thus, the *Rooker-Feldman* doctrine bars any decision by this court on Plaintiff's due process claim. *See Dillard v. Bank of N.Y.*, No. 09-CV-03008-WYD-BNB, 2011 WL 2728925, at *6 (D. Colo. May 9, 2011) (recommending dismissal of Ms. Dillard's due process claim as barred by *Rooker-Feldman*, because the state courts had already issued final decisions on the matter).

Similarly, Plaintiff's equal protection claim largely reiterates his allegations that form the basis of his due process claim, *i.e.*, that Defendants knew the statute of limitations barred foreclosure, but proceeded with foreclosure nonetheless, which violates his equal protection rights because he is disabled. *See* [#1 at 37–39]. Again, the basis for this claim centers on matters previously adjudicated by the Denver District Court that issued the OAS and would require review of a decision that has become final; therefore, "granting Plaintiff[] the relief requested here would require this Court to invalidate a state court judgment"—relief the *Rooker-Feldman* doctrine precludes. *Sladek v. Bank of Am., NA*, No. 13-CV-03094-PAB-MEH, 2014 WL 8105182, at *6 (D. Colo. July 10, 2014) (recommending dismissal of the plaintiffs' equal protection claim under *Rooker-Feldman*).

Based on the foregoing, this court concludes that Plaintiff's due process and equal protection claims (Claim I and II) necessarily require an appellate-like

review of the Rule 120 proceedings and subsequent foreclosure sale of the Property in violation of *Rooker-Feldman*. This conclusion holds true even to the extent Plaintiff seeks monetary damages pursuant to § 1983 for constitutional violations allegedly caused by the Rule 120 proceeding and subsequent foreclosure sale. *See Kenmen Eng'g v. City of Union*, 314 F.3d 468, 477 (10th Cir. 2002) (holding that the *Rooker-Feldman* doctrine barred the plaintiffs' request for monetary relief for alleged due process violations stemming from the state-court proceedings, because the claim was "inextricably intertwined" with the state-court judgment). Consequently, this court respectfully RECOMMENDS that Plaintiff's due process and equal protection claims (Claims I and II) be DISMISSED.

2. Claims III, V, and VI

Defendants also argue that the *Rooker-Feldman* doctrine bars Plaintiff's Claims III, V, and VI for the same reasons discussed above. *See* [#4 at 7; #34 at 7]. However, this court respectfully disagrees.

First, Plaintiff's Claim III asserts that the City Defendants violated his Fourteenth Amendment rights to due process and equal protection by failing to train and supervise its employees. *See* [#1 at 40]. Specifically, Plaintiff alleges that the City Defendants failed to train and supervise its employees on how to implement foreclosures in accordance with State laws and Rule 120, or in accordance with due process and equal protection, especially when dealing with disabled persons. *See* [*id.*]. Based on these allegations,

it does not appear that Plaintiff's Claim III seeks an appellate-type review of the Rule 120 proceeding and subsequent foreclosure sale. Rather, Plaintiff attempts to use his experience to establish a policy or custom of constitutional violations by the City Defendants and their employees who implement foreclosures within the state. *See Rigg v. City of Lakewood*, 37 F. Supp. 3d 1207, 1212 (D. Colo. 2014) (holding that "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability" under § 1983). Accordingly, this court concludes that the *Rooker-Feldman* doctrine does not bar Claim III.

Similarly, this court concludes that the *Rooker-Feldman* doctrine does not bar Claims V and VI. Claim V alleges that Defendants violated several provisions of the FDCPA. [#1 at 42–43]. And, although the actions giving rise to Plaintiff's FDCPA claim occurred prior to the Rule 120 proceeding and relate to the foreclosure of the Property, Plaintiff's FDCPA claim is "not an attack on the judgment or proceedings . . . but rather [a] claim[] that could have been brought regardless of what occurred at the state-court level." *Amerson v. Chase Home Fin. LLC*, No. 11-CV-01041-WJM-MEH, 2012 WL 1686168, at *10 (D. Colo. May 7, 2012) (citation omitted). Likewise, it appears that Plaintiff's IIED claim (Claim VI) arises from conduct that occurred prior to the Rule 120 proceeding or that was independent of the Rule 120 proceeding. *See* [#1 at 16–17, 21–22]. Thus, the state-court judgment does not

appear to be the sole cause of Plaintiff's IIED injury.[6] *See McDaniel v. John Suthers*, No. CIVA 08CV00223 WDM MEH, 2008 WL 4527697, at *6 (D. Colo. Oct. 2, 2008) (citation omitted) (holding that *Rooker-Feldman* bars only those claims caused by a state court judgment).

Based on the foregoing, this court respectfully RECOMMENDS that Defendants' Motions to Dismiss be DENIED as to Plaintiff's Claims III, V, and VI on *Rooker-Feldman* grounds.

B. Claim VI – The CGIA

The CGIA bars actions in tort against public employees and entities, subject to certain provisions waiving immunity. *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001). "Governmental immunity raises a jurisdictional issue." *Springer v. City & County of Denver*, 13 P.3d 794, 798 (Colo. 2000).

The CGIA provides that a "public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort." Colo. Rev. Stat. § 24–10–106(1). However, in limited circumstances, public

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[6] However, to the extent that Plaintiff's Complaint can be interpreted as alleging an IIED claim against Defendants based solely on the Rule 120 proceeding, this court recommends that Plaintiff's IIED claim (Claim VI) be dismissed under the *Rooker-Feldman* doctrine. As discussed in detail below, this court also recommends dismissal of Plaintiff's IIED claim (Claim VI) against all Defendants for lack of subject matter jurisdiction based on sovereign immunity conferred by the CGIA, or in the alternative, for failure of state a cognizable claim.

entities waive their sovereign immunity for injuries resulting from, *inter alia*, the operation of a public hospital or correctional facility; any dangerous condition in a public building; a dangerous condition on a public highway, road, or street that physically interferes with the movement of traffic; a dangerous condition caused by failure to properly maintain stop signs; dangerous conditions caused by accumulation of ice or snow; or for dangerous conditions of areas open to the public, maintained by the public entity. *Id.* §§ 24–10–106(1)(a)–(i). The term "public entity" is defined as "the state, county, city and county, municipality, school district . . . and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law." *Id.* at § 103(5). Here, there is no dispute that the City and County of Denver constitutes a "public entity."

Similarly, the CGIA also covers "public employees," defined as "an officer, employee, servant, or authorized volunteer of the public entity." *Id.* at § 103(4). Here, Defendant Johnson, as Public Trustee for the City and County of Denver, is a "public employee." Specifically, the CGIA provides

> [a] public employee shall be immune from liability in any claim for injury . . . which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his

> employment unless the act or omission causing injury was willful and wanton . . .

Colo. Rev. Stat. § 24-10-118(2)(a).

Whether an action lies or could lie in tort "depends on the factual basis underlying the claim and, specifically, the nature of the alleged injury." *First Nat'l Bank of Durango v. Lyons*, 349 P.3d 1161, 1164 (Colo. App. 2015). Thus an action lies or could lie in tort if the defendant's duties, which are implied by law, are designed to protect against the risk of harm to persons of property. *Foster v. Bd. of Governors of the Colorado State Univ. Sys. by & on behalf of Colorado State Univ.*, 342 P.3d 497, 501 (Colo. App. 2014). Here, Mr. Tatten's "state law claim for outrageous conduct [*i.e.*, IIED] is governed by the [CGIA]." *Parker v. Salzman*, No. 11-CV-02192-REB-CBS, 2014 WL 3561119, at *8 (D. Colo. July 17, 2014).

1. Notice

Pursuant to section 24–10–109(1), a plaintiff must file written notice with the public entity or public employee "within one hundred eighty-two days after the date of discovery of the injury, regardless of whether the person knew all of the elements of a claim or of a cause of action for such injury." The issue of proper notice is a jurisdictional prerequisite to bringing any action under the CGIA.[7] *See Bassett v. Klinkler*, No.

[7] Section 24–10–109(6) also requires a plaintiff to wait at least ninety-days before filing a complaint after serving the public entity or employ. Here, Plaintiff filed his Complaint 22-days after

13-CV-03 391-MJW, 2014 WL 5444086, at *4 (D. Colo. Oct. 27, 2014). "When a plaintiff fails to plead compliance with the CGIA, and a court addresses the case in the context of a motion to dismiss, the court must accept as a matter of 'fact' that the plaintiff failed to comply with the notice provisions." *Aspen Orthopedics & Sports Med., LLC v. Aspen Valley Hospital Dist.*, 353 F.3d 832, 840 (10th Cir. 2003). "This lack of compliance, then, is a jurisdictional issue." *Id.*

The City Defendants argue that the CGIA bars Plaintiff's IIED claim (Claim VI), because Plaintiff failed to comply with the notice provisions of Colo. Rev. Stat. § 24–10–109, which is a jurisdictional prerequisite to any CGIA action. *See* [#4 at 16–17]. Specifically, Plaintiff hand-delivered his "Notice of Intent to Sue the City and County of Denver and Clerk and Recorder" on June 1, 2016; however, the potentially relevant allegations to his IIED claim occurred on June 8 and 9, 2016, "*after* Tatten's Notice of Intent." [*Id.*].

Here, Plaintiff served his written notice on the City Defendants on June 1, 2016 [#1 at ¶¶ 82–83], and, although some of his allegations pertain to conduct that occurred after serving his written notice, the statute allows a plaintiff to serve such notice even if she did not know all of the elements of her claim. Colo. Rev. Stat. § 24–10–109(1). In addition, Plaintiff's Complaint lists some of the relevant content provided in his

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serving his written notice; however, noncompliance with section 24–10–109(6) does not serve as a jurisdictional bar to maintaining Plaintiff's claim. *See Dicke v. Mabin*, 101 P.3d 1126, 1130 (Colo. App. 2004).

written notice; thus, this court concludes that Plaintiff complied with the notice provisions under the CGIA. *See Aspen Orthopedics & Sports Med., LLC*, 353 F.3d at 841 (observing that an allegation of "Plaintiff fully complied with the [notice] provisions of [section] 24–10–109" would be sufficient to survive a motion to dismiss).

Therefore, this court declines to recommend dismissal of Plaintiff's IIED claim (Claim VI) for failure to comply with the CGIA's notice requirements.

2. "Willful and Wanton"

Although not raised by the Parties, this court interprets the CGIA's waiver of immunity for "willful and wanton" conduct as presenting a subject matter jurisdiction issue rather than a Rule 12(b)(6) issue. *See Martinez v. Estate of Bleck*, 379 P.3d 315, 317 (Colo. 2016) (holding as error the district court's determination that "Bleck had adequately pled that Martinez's conduct was willful and wanton," because the district court should have determined "all issues relating to Martinez's immunity claim, including factual issues, regardless of whether those issues are jurisdictional in nature.").[8] It is well-settled that this court, as one of

[8] To the extent that this court misapprehends the holding in *Martinez*, this court also recommends dismissal of Plaintiff's IIED claim (Claim VI) on the basis that Plaintiff fails to allege that Defendant Johnson's conduct was "willful and wanton," as required under sections 24–10–110(5)(a) and 24–10–110(5)(b). This is because Plaintiff relies on the conduct of other Public Trustee employees, which does not establish Defendant Johnson's liability

limited jurisdiction, must *sua sponte* consider issues of subject matter jurisdiction even if not raised by the Parties. *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). As an initial matter, "the CGIA does not provide a waiver of immunity for Mr. [Tatten's] outrageous conduct claim" under sections 24–10–106(1)(a)–(i). *Parker*, 2014 WL 3561119, at *8. Thus, Mr. Tatten cannot maintain his IIED claim against the City and County of Denver.

Similarly, this court concludes that Defendant Johnson's conduct was not "willful and wanton" under section 24–10–118(2)(a). To constitute "willful and wanton" conduct, Defendant Johnson "must be consciously aware that [her] acts or omissions create danger or risk to the safety of others, and [she] then act, or fail to act, without regard to the danger or risk." *Gray v. Univ. of Colorado Hosp. Auth.*, 284 P.3d 191, 198 (Colo. App. 2012); *accord Martinez*, 379 P.3d at 323 (holding that "willful and wanton" conduct "must exhibit a conscious disregard of the danger."). Thus, the facts presented must demonstrate that Defendant Johnson's conduct "exhibit[ed] a conscious disregard for the danger." *Martinez*, 379 P.3d at 323.

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under CGIA, *see A.B. ex rel. B.S. v. Adams-Arapahoe 28J Sch. Dist.*, 831 F. Supp. 2d 1226, 1259 (D. Colo. 2011), and his own self-serving, conclusory allegations that Defendant Johnson acted "willfully and wantonly"—allegations that are insufficient to establish liability. *See Robinson v. City & Cty. of Denver*, 39 F. Supp. 2d 1257, 1264 (D. Colo. 1999) ("Conclusory allegations therefore do not satisfy section 24–10–110(5)."); *Wilson v. Meyer*, 126 P.3d 276, 282–83 (Colo. App. 2005) (holding that conclusory allegations of "willful and wanton" conduct are insufficient).

Plaintiff alleges that the acts or omission of each Defendant "were intentional or reckless and extreme and outrageous," and were the legal and proximate cause of his "severe emotion distress," his "damages," his "actual physical, cognitive" distress, and his "injuries" that include "threat to his health, safety, and welfare." [#1 at ¶¶ 209–213]. In addition, Mr. Tatten alleges that the "facts, circumstances, records, documents, and a partial transcript from the Rule 120 hearing establish that the acts or omissions of . . . [Defendant Johnson] were committed intentionally, maliciously, willfully, wantonly, and/or in recklessly to collect a time-barred debt from Tatten, a disabled homeowner." [*Id.* at ¶ 12].

Upon review Mr. Tatten's Complaint, it appears that the premise for his IIED claim (Claim VI) against Defendant Johnson stem from the Rule 120 proceeding and his various, limited interactions with the Denver Public Trustee's office and its employees. [*Id.* at 16]. These interactions include February 2016 email correspondences with John Davies regarding LSF9's foreclosure of the Property [*id.* at ¶ 72–73]; February and March 2016 email correspondences with Juan Guzman regarding LSF9's foreclosure [*id.* at ¶¶ 74–75, 78–81]; his hand delivering of his notice of intent to sue to the Public Trustee's office [*id.* at ¶¶82–83]; his allegations that the Public Trustee's website was being updated on June 8, 2016, [*id.* at ¶¶ 86–87]; and his allegations that Juan Guzman instructed Public Trustee employees to not answer his questions [*id.* at ¶¶88–91]. Notably, these allegations do not refer to Plaintiff's interactions

with Defendant Johnson; instead, Plaintiff alleges that Defendant Johnson's conduct, in administering the foreclosure sale of the Property, was "willful and wanton."

The factual allegations in Plaintiff's Complaint do not support a finding that Defendant Johnson's conduct was "willful and wanton" for purposes of waiving her immunity under the CGIA, and there is no other evidence in the record for this court to draw such a conclusion. Rather, these allegations demonstrate that Defendant Johnson performed her duties as Denver Public Trustee—duties that included administering the foreclosure sale of the Property in accordance with the OAS issued by the Denver District Court. This court concludes that simply because Plaintiff is aggrieved by Defendant Johnson's conduct, the factual allegations in the record do not justify a conclusion that her conduct "exhibit[ed] a conscious disregard for the danger" or risk to Plaintiff's safety. *Martinez*, 379 P.3d at 323. Accordingly, this court RECOMMENDS that Plaintiff's IIED claim (Claim VI) be DISMISSED as barred by the CGIA.

II. The Motion to Amend

Before reaching Defendants' Rule 12(b)(6) arguments, this court considers Mr. Tatten's Motion to Amend, as an amended pleading supersedes the pleading it modifies thereby mooting any motions to dismiss directed at an inoperative pleading. *Gotfredson v. Larsen LP*, 432 F. Supp. 2d 1163, 1172 (D. Colo. 2006).

The time to amend as a matter of course has expired; however, because the court has yet to set a deadline for amendment of pleadings and joinder of parties, Mr. Tatten brings his Motion to Amend pursuant to Rule 15(a). *See Fernandez v. Bridgestone/Firestone, Inc.*, 105 F. Supp. 2d 1194, 1195 (D. Colo. 2000). Rule 15(a) provides, "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, "[t]his policy is not limitless and must be balanced against [Rule] 7(b)(1), which governs the requirements for all motions and provides that any motion 'shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999) (citation omitted). Accordingly, the movant must "give adequate notice to the district court and to the opposing party of the basis of the proposed amendment before the court is required to recognize that a motion for leave to amend is before it." *Id.* at 1186–87 (holding that a district court may properly deny requests to amend pleadings when no proper motion is before it, because district courts are not required to "engage in independent research or read the minds of litigants to determine if information justifying an amendment exists."). Nevertheless, a district court has discretion to deny leave to amend upon a showing of undue delay, futility, or undue prejudice to the nonmoving party. *See generally Shifrin v. Toll*, 483 F. App'x 446, 450 (10th Cir. 2012) (citation omitted).

A district court may deny a motion to amend "when the party filing the motion has no adequate explanation for the delay." *Frank*, 3 F.3d at 1365–66; *see also Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir.1994) ("[U]nexplained delay alone justifies the district court's discretionary decision."). Further, courts are justified in denying leave to amend "when it appears that the plaintiff is using Rule 15 to make the complaint a moving target, . . . to salvage a lost case by untimely suggestion of new theories of recovery, . . . [or] to present theories in seriatim in an effort to avoid dismissal." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006) (internal quotations and citations omitted). Thus, the inquiry focuses on the reasons for the delay. *Id.*

Here, Defendants oppose Mr. Tatten's Motion to Amend on two grounds. First, Defendants argue that Plaintiff's proposed amendments are futile, because the *Rooker-Feldman* doctrine bars Plaintiff's claim and, alternatively, his proposed amendments fail to state a claim. *See* [#57 at 6–7; #58 5–6]. Second, LSF9 argues that Plaintiff's Motion to Amend is untimely, as he offers no explanation for why he waited until January 11, 2016, to file his Motion to Amend when the court directed him to file no later than December 6, 2016, and the relevant proposed allegations occurred in July 2016. *See* [#58 at 4–5]. Because this court concludes that this latter argument justifies denial of the Motion to Amend, it focuses on it.

The Motion to Amend states that Plaintiff seeks to amend his Complaint because "[a]fter June 23, 2016,

Defendant City and County of Denver, Defendant Debra Johnson, and Defendant LSF9 Master Participation Trust committed acts which are relevant and material to the facts and claims contained within the original complaint and jury demand file (sic) in this action." [#53 at 1–2]. Specifically, Plaintiff proposes to include new facts that largely occurred between June 23, 2016, and July 8, 2016, *see* [#53-1 at ¶¶ 140–141, 143–149, 150–162, 166–169, 173–176], as well as three additional claims against Defendants for violations of the Colorado Consumer Protection Act ("CCPA"), Colo. Rev. Stat. §§ 6–1–101 *et seq.*; the Colorado Foreclosure Protection Act ("CFPA"), Colo. Rev. Stat. §§ 6–1–1101 *et seq.*; and negligent infliction of emotional distress. [*Id.* at 80–88]. However, Plaintiff offers no explanation as to why he delayed amending his complaint, either from the time he could ascertain the need for amendment in July, or after the court's order striking his attempt to amend in November. *See Birmingham v. Experian Info. Sols., Inc.*, 633 F.3d 1006, 1021 (10th Cir. 2011) (affirming the district court's denial of leave to amend because the plaintiff offered no explanation to justify the delay in amending).

Plaintiff originally filed his proposed First Amended Complaint and Jury Demand without an appropriate motion on November 28, 2016. *See* [#43; #44]. Accordingly, this court struck Mr. Tatten's filing as non-compliant with the Local Rules and the Federal Rules of Civil Procedure. [#45]. This court's Minute Order dated November 29, 2016, directed Mr. Tatten to file his Motion to Amend no later than December 6,

2016. *See* [*id.*]. Rather, Mr. Tatten filed the Motion to Amend over one month after this deadline and has provided no explanation to this court for the delay, nor did he seek an extension of time to file his Motion to Amend. *See Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (noting that all litigants, even those proceeding *pro se*, must abide by the applicable Federal Rules of Civil Procedure, Local Practice Rules of the District, and Practice Standards of the presiding judge).

Even construing Mr. Tatten's pleadings and filing liberally, there is no explanation to justify his delay in amending. He states no good cause that excuses him from complying with the relevant Federal Rules of Civil Procedure. *Id.* Nor does Mr. Tatten provide any basis for this court to conclude that he has good cause to be excused from this court's order of November 29, 2016. [#45]. Between July and November, Mr. Tatten made other filings, including responding to the Motion to Dismiss filed by the City and County of Denver and Debra Johnson [#25], and a Motion to Extend Time to Serve [#28]. These alleged new facts were within his control when he sought additional time to serve Defendant LSF9, and it appears that some were included in that Motion to Extend Time. *Compare* [#28] *with* [#53-1]. The brief in support of the Motion to Amend appears simply to be the proposed First Amended Complaint, with no justification for the delay. *See* [#55]. While respectful of Mr. Tatten's cognitive limitations, this court finds no basis to excuse him from complying with applicable rules or orders. Accordingly, this court RECOMMENDS that Plaintiff's Motion to

Amend be DENIED as untimely.[9] *See Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1195 (10th Cir.

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[9] Briefly, even if the motion was timely, this court also recommends denial of Plaintiff's Motion to Amend on futility grounds. First, Plaintiff cannot maintain a CCPA claim against the City Defendants, because they are not businesses dealing with the public. *See Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp. 2d 1175, 1185 (D. Colo. 2002). Similarly, to maintain a CCPA claim, Plaintiff must allege that LSF9's conduct "significantly impacts the *public*," which Plaintiff does not allege, and Plaintiff cannot merely use the CCPA to remedy a purely private wrong. *See NetQuote, Inc. v. Byrd*, 504 F. Supp. 2d 1126, 1135–36 (D. Colo. 2007). Second, Plaintiff cannot maintain a CFPA claim against either the City Defendants or LSF9, as neither are "foreclosure consultants" nor "equity purchasers" as defined under the statute. *See* Colo. Rev. Stat. §§ 6–1–1103(2)(c) (excluding from "equity purchasers" any person who receives title by a deed from the public trustee as the result of a foreclosure sale, *i.e.*, LSF9), (4)(a) ("foreclosure consultant" includes anyone that does not have a direct interest in the house, but offers services related to stopping or postponing foreclosure sale), (b) (excluding holder or servicer of an evidence of debt secured by a deed of trust on any residence in foreclosure). Third, for the reasons stated above, this court concludes that the CGIA bars Plaintiff's IIED claim against the City Defendants and, thus, would also bar his negligent infliction of emotional distress claim. *See Medina*, 35 P.3d at 453. And, similarly, Plaintiff's added allegations against LSF9 fail to demonstrate that LSF9's conduct was so extreme or outrageous (in fact, their conduct was consistent with foreclosing on the Property), to maintain an IIED claim, let alone a negligent infliction of emotional distress claim. *See Watson*, 242 F.3d at 1239–40 (holding that futility means that the amendment would not survive dismissal). Finally, it does not appear to this court that Plaintiff's added factual allegations sufficiently bolster Plaintiff's original claims such that amendment would survive a subsequent Rule 12(b)(6) challenge. In fact, a vast majority of Plaintiff's factual allegations in his Complaint and proposed Amended Complaint concern Plaintiff's grievances with Bank of America, a *non-party*.

2015) (affirming the district court's denial of leave to amend, because the plaintiff offered no adequate explanation for his delay in amending even under Rule 15(a)'s more lenient standard).

III. The Motions to Dismiss Pursuant to 12(b)(6)

This court now turns to Defendants' arguments for dismissal of Plaintiff's Complaint under Rule 12(b)(6).

A. Claim III – Failure to Train & Supervise

To prevail on a failure to train and supervise claim under § 1983, a plaintiff must demonstrate an "affirmative link" between the supervisor-defendant and the constitutional violation—this requires more than the supervisor's "mere knowledge" of her employee's conduct. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013) (citing *Iqbal*, 556 U.S. at 677). Accordingly, a plaintiff must establish: (1) the defendant's personal involvement; (2) a causal connection; and (3) a culpable state of mind. *See Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010). This is because "[s]ection 1983 does not authorize liability under a theory of respondeat superior." *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011). The plaintiff must establish a "deliberate, intentional act" by the supervisor-defendant. *See generally Porro v. Barnes*, 624 F.3d 1322, 1327 (10th Cir. 2010).

For liability purposes under § 1983, a municipality cannot be liable for constitutional violations when

there is no underlying constitutional violations by any of its officers, nor can it be held liable under the theory of vicarious liability for the constitutional deprivations of its officers. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317–18 (10th Cir. 2002). "Rather, to establish municipal liability, a plaintiff must show 1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury alleged." *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). As relevant here, Mr. Tatten may establish a policy or custom by the City and County of Denver's failure to adequately train or supervise its employees, including Defendant Johnson, so long as that failure results from deliberate indifference to the injuries that may be caused. *See Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010). However, it is not enough for Mr. Tatten to point to a single violation of federal rights—he must also allege that the City and County of Denver has "failed to train its employees to handle recurring situations presenting obvious potential for such a violation." *Allen v. Muskogee*, 119 F.3d 837, 841–42 (10th Cir. 1997).

The City Defendants argue that Plaintiff's Complaint fails to allege a viable failure to train and supervise claim (Claim III), because Plaintiff appears to base his claim on the assertion that the City Defendants should not have proceeded with the foreclosure of the Property given his objections to its validity, and that the City Defendants' employees failed to communicate properly with Mr. Tatten, a disabled homeowner. [#4 at 11]. According to the City Defendants,

Plaintiff fails to allege any constitutional violations based on the City Defendants' failure to train or supervise. [*Id.*].

In response, Plaintiff contends that his Complaint adequately alleges that he informed the City Defendants' employees of his cognitive disability, that he sought relevant information from these employees regarding the foreclosure on the Property, and that the employees' failure to provide that information prohibited him from defending his legal and property rights. [#25 at 5]. For the following reasons, this court respectfully disagrees.

Claim III alleges that the City Defendants "failed to properly instruct, train, supervise, guide, and/or monitor its employees with respect to communicating with the public, including [persons] with a disability." [#1 at ¶ 182]. Further, that the City Defendants failed to train and/or supervise its employees on Colorado's foreclosure laws, including Rule 120, and failed to train and/or supervise its employees on how to communicate with homeowners, including those with disabilities. [*Id.* at ¶¶ 183, 185]. According to Plaintiff, this failure led to violations of his due process and equal protection rights under the Fourteenth Amendment. [*Id.* at 39].

Plaintiff bases Claim III on his limited interactions with Public Trustee employees and his frustrations associated with those encounters. Specifically, in February and March 2016, Plaintiff emailed John Davies and Juan Guzman (employees of the Public Trustee), seeking information concerning LSF9's

foreclosure of the Property. [*Id.* at ¶¶72–75, 78–81]. And, on at least one occasion, Mr. Guzman apparently provided the information Plaintiff sought. *See* [*id.* at ¶ 75]. However, Plaintiff alleges that on June 8, 2016, the Public Trustee's website was undergoing maintenance and he was unable to retrieve important information regarding the foreclosure sale set for June 9, 2016. *See* [*id.* at ¶¶ 86–87]. Thus, he went personally to the Public Trustee's office to ask its employees for information regarding the foreclosure sale; however, Mr. Guzman instructed these employees not to answer Plaintiff's questions and stated, "[w]e will continue with our statutory obligations." [*Id.* at ¶¶ 88–91].

Based on the foregoing, this court concludes that Plaintiff fails to state a viable failure to train and supervise claim under § 1983. First, Plaintiff's allegations fail to establish a violation of his constitutional rights to due process or equal protection, let alone that Defendant Johnson, as Public Trustee, "promulgated, created, implemented or possessed responsibility for the continued operation of [the] policy" that allegedly violated the plaintiff's constitutional rights. *Dodds*, 614 F.3d at 1199–1200. Next, even if Plaintiff could sufficiently allege a constitutional violation by either Defendant Johnson or her employees, Plaintiff's allegations fail to identify a City and County of Denver policy or custom that was the direct link to Plaintiff's alleged constitutional injuries. *See Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (holding that a municipality may be liable under § 1983 only for its own unconstitutional customs or policies, not for the

tortious acts of its employees). Rather, Plaintiff appears to predicate Claim III on his frustrations with Mr. Guzman's instruction to Public Trustee employees not to answer his questions. And, again respectful of Mr. Tatten's cognitive disability and frustrations with the foreclosure of the Property, this court concludes that a single incident as pled does not give rise to municipal liability under § 1983. *See Olsen*, 312 F.3d at 1318 (holding that a single constitutional violation *may* satisfy the requirements for municipal liability under § 1983 only when the violation is a "highly predictable and plainly obvious" consequence of a municipality's failure to train and/or supervise its employees). Therefore, this court respectfully RECOMMENDS that Claim III be DISMISSED.

B. Claim IV – the ADA

Title II of the ADA provides, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To state a claim under Title II, Mr. Tatten must allege: "(1) [ ]he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Cohon ex rel. Bass v. New Mexico Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (internal quotations omitted) (quoting *Robertson v. Las Animas*

Cty. Sheriff's Dep't, 500 F.3d 1185, 1193 (10th Cir. 2007)).

The City Defendants argue for dismissal of Plaintiff's ADA claim (Claim IV), because Plaintiff does not allege how he was excluded from participation in the Public Trustee's foreclosure services or that, even if he was excluded, that it was solely because of his disability. [#4 at 12–13]. In response, Plaintiff argues that his Complaint adequately alleges that he sought information from the Public Trustee's office regarding the foreclosure on the Property, that the Public Trustee's employees refused to provide that information, and that this refusal was because of his cognitive disability. [#25 at 5].

In his Complaint, Plaintiff alleges that he contacted John Davies (an employee of the Public Trustee) to receive information regarding the foreclosure of the Property, and in that correspondence, Plaintiff informed Mr. Davies that he was cognitively disabled. [#1 at ¶ 73]. Further, the Public Trustee's website was under maintenance on June 8, 2016, which precluded Plaintiff from receiving relevant information regarding the foreclosure sale of the Property [*id.* at ¶¶ 86–87], and, on upon personally seeking information from Public Trustee employees, Mr. Guzman instructed employees not to answer his questions. *See* [*id.* at ¶¶ 88–91]. Plaintiff contends that the City Defendants violated the Title II of the ADA by failing to "communicate effectively with Tatten concerning the foreclosure and the actions of [Defendant Johnson];" by failing to train its employees on how to deal

with disabled homeowners going through foreclosure; and by maintaining records systems that are inaccessible to Plaintiff. *See* [*id.* at ¶¶ 192–94].

"The ADA addresses three broad categories of discrimination: disparate treatment, disparate impact, and a failure to provide a reasonable accommodation." *Shepherd v. U.S. Olympic Comm.*, 464 F. Supp. 2d 1072, 1090 (D. Colo. 2006). Here, Plaintiff's ADA claim appears to be one of disparate treatment, *i.e.*, the City Defendants treated him, as a disabled individual, differently than non-disabled individuals, or that they failed to appropriately accommodate him due to his cognitive disability. However, this court concludes that, under any theory, Plaintiff fails to allege a viable ADA claim.

First, it is unclear from the Complaint what relevant information Plaintiff sought from the Public Trustee's employees regarding the foreclosure sale, or how the absence of this information excluded him from receiving the benefits of the City Defendants' services. Next, although Mr. Tatten informed an employee of his cognitive disability, he does not allege that he informed the Public Trustee's employees of the accommodation he needed in order to fully participate in the benefits of its foreclosure services, and nothing indicates that his disability was "obvious" (in fact, he labels his disability as "invisible") so that these employees would know he needed accommodations. *See Robertson*, 500 F.3d at 1197 (explaining that even if a public entity has knowledge of a plaintiff's disability, they must also be aware of the plaintiff's need for specific

accommodations, which can be shown if the plaintiff informs the public entity of those accommodations, or if the disability is "obvious"). Further, other than Plaintiff's conclusory allegations, there is no indication that Mr. Guzman instructed employees not to answer Mr. Tatten's questions, or took or failed to take any action, by reason of Plaintiff's disability. *See Baker v. Target Corp.*, 398 F. App'x 364, 364–65 (10th Cir. 2010) (affirming the district court's dismissal of the plaintiff's complaint, because the plaintiff failed to allege factual support for his claim that the defendant discriminated against him on the basis of his disability other than conclusory statements to that effect). Accordingly, this court RECOMMENDS that Plaintiff's ADA claim (Claim IV) be DISMISSED.

C. Claim V – the FDCPA

Congress enacted the FDCPA to combat "abusive, deceptive, and unfair debt collection practices" used by many debt collectors. 15 U.S.C. § 1692(a). The FDCPA defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Accordingly, the FDCPA prohibits debt collectors from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with collection of a debt," *id.* § 1692d, and limits how and when a debt collector may

contact a consumer regarding a debt, *id.* § 1692c. If a plaintiff can prove a violation of the FDCPA, she may recover actual damages, statutory damages up to $1,000, as well as reasonable attorney's fees. *See* 15 U.S.C. § 1692k(a).

1. The City Defendants

The City Defendants argue for dismissal of Plaintiff's FDCPA claim (Claim V), because they are not "debt collectors," as defined under the FDCPA. [#4 at 14–15]. This court respectfully agrees.

Under the definition of "debt collector," the FDCPA explicitly excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of [her] official duties." 15 U.S.C. § 1692a(6)(C). Here, to the extent the City Defendants' actions in administering the foreclosure sale on the Property can be considered collecting or an attempt to collect a debt, these actions were "in performance of [the City Defendants'] official duties." *Id.*; *see also Patrick v. Bank of N.Y. Mellon*, No. 11-CV-01304-REB-MJW, 2012 WL 934288, at *15 (D. Colo. Mar. 1, 2012) (holding that a Public Trustee is not a debt collector because of § 1692a(6)(C)). Even if this exemption did not apply to the City Defendants, Plaintiff fails to allege that the City Defendants' principal purpose is the collection of debts. *See Hayes v. Shelby Cty. Tr.*, 971 F. Supp. 2d 717, 730 (W.D. Tenn. 2013) (dismissing the plaintiff's FDCPA claim against county officials, utilities, and

creditors, because they were not "debt collectors" under the statute).

2. LSF9

LSF9 moves for dismissal of Plaintiff's FDCPA claim for two reasons. First, Plaintiff's allegations are mostly conclusory and insufficient to state a viable FDCPA, and those that are not conclusory, allege violations that are not applicable to LSF9. [#34 at 10]. Second, Plaintiff's FDCPA claim fails because the FDCPA does not apply to foreclosure actions. For the following reasons, this court respectfully agrees.

Here, Mr. Tatten alleges that LSF9 violated multiple provisions of the FDCPA. [#1 at 42–43]. Specifically, LSF9 violated sections 1692c (prohibiting debt collectors from contacting consumers at inconvenient times and locations), 1692d (prohibiting abusive or harassing collection efforts), 1692e (prohibiting the use of false, deceptive, or misleading debt collection tactis), 1692f (prohibiting unfair and unconscionable collection tactics), and 1692g (requiring the debt collector to provide written validation of the debt to the consumer). *See* [*id.* at ¶¶ 197–198, 204, 205]. Aside from his general allegations that LSF9 improperly foreclosed on the Property, the only allegations relevant to Plaintiff's FDCPA claim include that LSF9 is a debt collector who sent debt collection letters to Plaintiff without meaningful attorney review. [*Id.* at ¶¶ 136–137]. However, as LSF9 correctly notes, meaningful attorney review applies only to a law firm that sends a debt collection letter on

behalf its client without actually confirming that a debt is due and owing. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 302 (2d Cir. 2003). Here, the Janeway Law firm sent Plaintiff debt collection letters on LSF9's behalf [#1 at ¶73]; however, Janeway Law is not a party to this action. Thus, Plaintiff's FDCPA claim predicated on a failure of LSF9 to undertake meaningful attorney review fails as a matter of law.

In addition, "[a]lthough not all courts agree on whether and when foreclosure activities are covered by the FDCPA, the majority of courts—including those in this District—have held that foreclosure activities are outside the FDCPA's scope." *Sudduth v. Citimortgage, Inc.*, 79 F. Supp. 3d 1193, 1198 (D. Colo. 2015) (citation omitted); *see also Munholland v. Wells Fargo Bank, Nat. Ass'n*, No. 11-CV-03393-RBJ-KMT, 2013 WL 1130592, at *3 (D. Colo. Feb. 25, 2013) (collecting cases). Here, Plaintiff's allegations arise from LSF9's actions in initiating the Rule 120 proceeding and the correspondences associated with that proceeding—he does not allege that LSF9 "took any action to obtain payment on the debt." *Obduskey v. Fargo*, No. 15-CV-01734-RBJ, 2016 WL 4091174, at *3 (D. Colo. July 19, 2016) ("In sum, the Court does not find any reason in plaintiff's complaint or briefs to support deviating from the majority view that foreclosure proceedings are not a collection of a debt. Mr. Obduskey's FDCPA against McCarthy is dismissed."). Therefore, this court RECOMMENDS that Plaintiff's FDCPA claim (Claim V) be DISMISSED against LSF9.

D. Claim VI – IIED

To maintain an IIED claim (also referred to as an outrageous conduct claim) under Colorado law, Mr. Tatten must allege sufficient facts to show: "(1) the defendant(s) engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress." *Nasious v. Two Unknown B.I.C.E. Agents at Arapahoe Cty. Justice Ctr.*, 657 F. Supp. 2d 1218, 1232 (D. Colo. 2009) (internal quotations omitted) (quoting *Archer v. Farmer Bros. Co.*, 70 P.3d 495, 499 (Colo. App.2002)). The tort of IIED creates liability for only a "very narrow type of conduct," *i.e.*, "conduct so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." *Maiteki v. Marten Transportation Ltd.*, 4 F. Supp. 3d 1249, 1256 (D. Colo. 2013) (quoting *Pearson v. Kancilia*, 70 P.3d 594, 597 (Colo. App. 2003) (observing that the level of outrageousness is an extremely high requirement that does not include "[m]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities")). "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1350 (Colo. 1988) (quotations and citation omitted). Initially, it is the court's duty to determine whether reasonable persons could differ on the question of outrageousness under the presented

circumstances. *Dolin v. Contemporary Fin. Sols., Inc.*, 622 F. Supp. 2d 1077, 1090 (D. Colo. 2009) (dismissing under Rule 12(b)(6) the plaintiffs' IIED claim, because the plaintiffs failed to allege sufficient facts to allow a reasonable person to conclude that the defendant's conduct was outrageous).

LSF9 moves for dismissal of Plaintiff's IIED claim (Claim VI) on two grounds. First, Plaintiff fails to allege that LSF9's conduct was so extreme and outrageous to maintain an IIED claim and, instead, merely recites the elements for establishing such a claim. *See* [#34 at 12]. Second, and in the alternative, because Plaintiff's federal law claims fail as a matter of law, the court should decline to exercise supplemental jurisdiction over Plaintiff's state law claim. [*Id.* at 12–13]. Because this court agrees with LSF9's first argument, it focuses on it.

As discussed, Plaintiff's Complaint alleges that Defendants acts or omissions caused Plaintiff's damages, which include severe emotional distress. [#1 at ¶¶ 99–100, 208–213]. Similar to the City Defendants, Plaintiff merely asserts that LSF9 acted intentionally, maliciously, willfully, wantonly, and recklessly by foreclosing on a time-barred debt. [*Id.* at ¶ 12, 15]. The only relevant allegations against LSF9 include: (1) Bank of America sold Plaintiff's Note to LSF9 on September 29, 2015; (2) LSF9 sent Plaintiff a "NOTICE OF SALE OF OWNERSHIP OF MORTGAGE LOAN" on October 20, 2015; (3) LSF9 initiated the Rule 120 proceeding on February 18, 2016, and sought to foreclose on a time-barred debt; and (4) LSF9 is a debt collector and sent

Plaintiff debt collection letters without meaningful attorney review. [*Id.* at ¶¶ 128, 131–137]. These allegations fail to allege "conduct so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." *Maiteki*, 4 F. Supp. 3d at 1256 (quotations and citation omitted). Moreover, Plaintiff's allegations largely focus on the conduct of Bank of America, a non-party to this action. *See e.g.*, [*id.* at 22–32]. Accordingly, this court RECOMMENDS that Plaintiff's IIED claim (Claim VI) be DISMISSED against LSF9.

CONCLUSION

Therefore, for the reasons state herein, this court respectfully **RECOMMENDS** that:

(1) The City Defendants' Motion to Dismiss [#4] be **GRANTED**;

(2) LSF9's Motion to Dismiss [#34] be **GRANTED**;

(3) Mr. Tatten's Motion to Amend [#53] be **DENIED**; and

(4) Mr. Tatten's Complaint be **DISMISSED**.[10]

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[10] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection

Dated: February 3, 2017

BY THE COURT:

s/Nina Y. Wang
United States Magistrate Judge

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will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES P. TATTEN,

Plaintiff-Appellant,

v.

THE CITY AND COUNTY OF DENVER, a municipality, et al.,

Defendants-Appellees.

No. 17-1141

ORDER

(Filed Jun. 5, 2018)

Before **BRISCOE**, **HARTZ**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service.[1] As no member of the panel and no judge

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[1] The Honorable Joel M. Carson was sworn in officially on May 18, 2018. He did not, however, participate in the court's review of this matter.

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES P. TATTEN, Plaintiff-Appellant, v. THE CITY AND COUNTY OF DENVER, a municipality; CLERK AND RECORDER DEBRA JOHNSON, in her official capacities; and LSF9 MASTER PARTICIPATION TRUST, Defendants-Appellees.	Case No. 17-1141 (D.C. No. 1:16-cv-0163-RBJ-NYW) (D. Colo.)

PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

(Filed May 23, 2018)

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Pro se Plaintiff-Appellant

Fed. R. App. P. Rule 35(b)(1) and Rule 40(2) Statement

The panel decision conflicts with decisions of the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962); *Haines v. Kerner*, 404 U.S. 519 (1972) and *Erickson v. Pardus*, 551 U.S. 89 (2007) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The proceedings and panel decision involve one or more questions of exceptional importance. Finally, the panel decision overlooked or misapprehended several points of law and fact.

Introduction

The federal judiciary has built a complex and confusing system of federal and local rules.

The current system of rules blocks access to the courts for *pro se* civil litigants, who can't afford a lawyer.

Summary

This petition raises a number of questions of exceptional importance related to good-faith attempts by a *pro se*, cognitively-disabled litigant to comply with the federal and local rules and to correct mistakes or errors related to pleadings.

In this case, denying Plaintiff-Appellant, Mr. James P. Tatten, a *pro se* cognitively-disabled litigant, leave to amend was an abuse of judicial discretion.

Background

In November 2008, Mr. Tatten suffered a severe, traumatic-brain injury and he was near death.

Mr. Tatten's disability is expressed by deficiencies in memory, time, space, information processing, communication, and comprehension.

Mr. Tatten is a cognitively-disabled litigant.

The panel inferred, argued, and held otherwise.

The panel decision is judicial error and violates fairness and justice.

Memberships

Mr. Tatten has been a member of the Bar of the Supreme Court of the State of Nebraska since April 1989.

Mr. Tatter' has been a member of the Bar of the Supreme Court of the United States of America since August 1999.

The records of the Supreme Court of the State of Nebraska establish that Mr. Tatten has been in non-practicing status since January 2009.

Argument

The United States Supreme Court clearly established that "outright refusal to grant leave without any justifying reason appearing for the denial is not an

exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178 (1962).

In this case, the panel failed to provide any justifying reason appearing for its outright refusal to grant Mr. Tatten's request for leave to amend under Federal Rule of Civil Procedure 15(a).

Mr. Tatten is a *pro se* cognitively-disabled civil litigant. It is undisputed that Mr. Tatten's cognitive disability is expressed by significant deficiencies in time, space, memory, information processing, communication, and comprehension. Mr. Tatten does not have the resources to hire an attorney.

The magistrate judge's, district judge's, and panel's argument that Mr. Tatten has no right to special consideration under the federal rules is prejudicial, discriminatory, and in violation of the principles of fairness and justice.

Moreover, the panel decision is superficial, patronizing, biased, and in direct conflict with the obligation established under *Foman*.

The complete record, along with a proper reading of his pleadings, show and establish that Mr. Tatten made good-faith efforts to comply with the federal and local rules to the best of his cognitive abilities.

The panel's outright refusal and failure to provide "any justifying reason appearing" is judicial error and inconsistent with the spirit of the Federal Rules.

In its discussion and analysis, the panel wrongly applied some conceptual and undefined "licensed attorney" standard to Mr. Tatten's pleadings.

Any "licensed attorney" standard is not applicable, nor appropriate, for construing Mr. Tatten's pleadings. Regardless of jurisdiction, Mr. Tatten's disability excludes him from any definition of "licensed attorney".

The panel knows or should know that the statement " . . . we take judicial notice that James P. Tatten. . . . is listed as a licensed inactive attorney with the Nebraska Bar Association . . . as of May 15, 2017 . . . " is false.

The panel knows or should know that the statement, quoted-above, is false and a misstatement and misrepresentation of a material fact and forms the legal basis for the panel decision.

A fact is a statement of truth that describes a person, event, circumstance, condition, or occurrence as it is or as it actually happened.

According to the records of the Supreme Court of the State of Nebraska, Mr. Tatten has been a member in non-practicing status since January 2009.

The Nebraska State Bar Association is a voluntary association of lawyers and judges dedicated to improving the administration of justice.

The panel's decision to take judicial notice of " . . . James P. Tatten . . . is listed as a licensed inactive attorney with the Nebraska Bar Association as of May

15, 2017 . . . " is judicial error and an egregious abuse of judicial discretion.

Instead of searching the internet for irrelevant, immaterial, and inaccurate information about Mr. Tatten, the panel should have used the court's resources to search for information about the causes and effects of traumatic-brain injury.

Had a proper research path been chosen, the panel would know that severe injuries to the human brain are often caused by bleeds, bumps, blows, falls, and explosions.

Had a proper path been chosen, the panel would know that a growing number of Americans are living with an injury to the brain, including one out of five men and women who serve in uniform to protect our country.

Had a proper path been chosen, the panel would know that the human brain is not a bone.

Had a proper path been chosen, the panel would know that its application of the federal and local rules to pleadings prepared by a *pro se*, cognitively-disabled civil litigant was judicial error and in violation of the spirit of the Federal Rules.

Despite acknowledging his cognitive and intellectual limitations, the panel felt obligated to identify or describe more than thirty procedural mistakes, errors, or misunderstandings committed by the alleged "licensed attorney" – all before Mr. Tatten had the opportunity to engage in discovery.

Interestingly, despite specific knowledge concerning Mr. Tatten's cognitive and intellectual limitations, the panel went even further by affirming the district court's dismissal of the *pro se* Tatten's complaint on procedural grounds – with prejudice – that is a shame.

Even more interesting, but also disturbing, is the panel's decision to use the internet to wrongfully suggest a " . . . misrepresentation and an ethical violation . . . " by Mr. Tatten – a *pro se*, cognitively-disabled civil litigant.

Now – that is really a shame.

The record clearly shows that, in this case, the magistrate judge, district judge, and panel used the rules as a tool to advocate for each defendant.

A proper review of Mr. Tatten's pleadings and court record will convince "a reasonable average member of the public" that the panel decision is an egregious abuse of judicial discretion.

I. Rehearing is Necessary to Resolve Several Issues of Exceptional Importance.

A. The panel decision conflicts with a decision of the United States Supreme Court.

B. The panel decision abridges, enlarges or modifies Mr. Tatten's substantive rights.

II. The Panel Decision Overlooked or Misapprehended Several Points of Law and Fact.

A. The panel decision overlooked or misapprehended the power to define and regulate the

practice of law is the jurisdiction of the Supreme Court of the State of Nebraska and the Supreme Court of the United States of America.

B. The panel decision overlooked or misapprehended Mr. Tatten's cognitively disability by holding that he is not entitled to the *pro se* standard nor special consideration because he is a "licensed attorney".

C. The panel decision overlooked or misapprehended Mr. Tatten's cognitive disability by denying him leave to amend under Fed. R. Civ. P. 15(a) because he failed to explain a misunderstanding, mistake or error under the federal and local rules.

Conclusion

For the foregoing reasons, the petition for rehearing and rehearing en banc should be granted.

Respectfully submitted, this 23rd day of May 2018,

BY: /s/ James P. Tatten

James P. Tatten
8681 East 29th Avenue
Denver, Colorado 80238
(720) 256-3686
jimtatten@
legislativebasecamp.com
Pro Se Plaintiff-Appellant

[Certificate Of Service Omitted]

James P. Tatten, J.D.

Comments to the Supreme Court of the State of Colorado

Proposed Changes to Rule 120

November 10, 2016

May it please the Court,

My name is Jim Tatten.

Today I represent myself.

For far, far, too long, Colorado's Judiciary has authorized state actors to use "non-judicial" foreclosure to deprive Coloradans of rights, privileges, and immunities secured by the Constitution and laws of the United States of America.

According to its official website, the Judiciary " . . . is to provide a **FAIR** and **IMPARTIAL** system of justice – **that**:

- Protects constitutional and statutory rights and liberties;
- Assures equal access;
- Provides fair, timely, and constructive resolution of cases . . . "

As a *pro se* Respondent called to appear in three separate Colorado foreclosure actions over the past 7 years, I state with great confidence:

- Rule 120 **does *not* protect** constitutional and statutory rights and liberties.
- Rule 120 **does *not* assure** equal access.
- Rule 120 **does *not* provide for** fair, timely, and constructive resolution of cases.

For the Court's record, **I find that**:

- Colorado Rule 120 *encourages*, *facilitates*, and *shields* civil and criminal wrongdoing.

Having shaped complex and controversial state legislative, regulatory, and legal matters for more than 25 years, in more than 25 states, Colorado s Rule 120 "shocks my conscience."

Now is the time for the Colorado Supreme Court to honor the oath and advance the mission by crafting a foreclosure rule that complies with the Constitution and the laws of the United States of America.

Thank You.

DISTRCT COURT, COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): LSF9 Master Participation Trust v. **Defendant(s)**: James P. Tatten, and Any and all other occupants claiming an interest under the Defendants.	**▲ COURT USE ONLY ▲**
***Pro se* Defendant:** James P. Tatten 8681 East 29th Avenue Denver, Colorado 80238 Phone: (720) 256-3686 E-mail: jimtatten@legislativebasecamp.com	Case Number: 2018CV000336 Division: Courtroom:
DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS WITH PREJUDICE	

(Filed Aug. 28, 2018)

The *pro se* Defendant and Counter-Plaintiff, James P. Tatten ("Defendant Tatten") respectfully submits this Defendant's Opposition to Plaintiff and Counter-Defendant LSF9 Master Participation Trust's (Plaintiff

LSF9) Motion to Dismiss Counterclaims with Prejudice.

The Plaintiff LSF9 filed its Motion to Dismiss Counterclaims with Prejudice ("Motion") pursuant to Rule 12(b)(5) of the Colorado Rules of Civil Procedure ("C.R.C.P.").

Based on following, Defendant Tatten respectfully requests that Plaintiff LSF9's motion to dismiss be denied in its entirety.

INTRODUCTION

Plaintiff LSF9 is wrong to believe that non-judicial foreclosure and eviction allow them to take possession of real property in violation of state and federal laws and the Constitution of the United States of America, specifically the due process and equal protection provisions of the Fourteenth Amendment.

Additionally, Plaintiff LSF9 continues to knowingly and intentionally engage in unlawful conduct, both civil and criminal, to collect a time-barred debt from Defendant Tatten, a cognitively-disabled *pro se* litigant.

Particularly troubling is Plaintiff LSF9's knowing and intentional misstatements and misrepresentations of material facts to this Court.

Plaintiff LSF9 is mistaken to believe that Colorado's Rule 120, together with Forcible Entry and Detainer, provide a blanket pardon for egregious violations of

state and federal laws, both civil and criminal, and the Constitutions of the State of Colorado and the United States of America.

Plaintiff LSF9's motion under Rule 12(b)(5) is legal folly and must be dismissed.

STANDARD OF REVIEW

Courts should be wary of dismissing a case where the pleadings show an alleged violation of a constitutional right is at issue, since fundamental rights and important public policy questions are necessarily involved. *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972).

A. Rule 12(b)(5)

A motion to dismiss under C.R.C.P. 12(b)(5) tests the "formal sufficiency" of the complaint. *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 221 (Colo. 2013). Such motions are disfavored. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). The allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. *Id.* Dismissal is proper only where the allegations fail to state a plausible claim for relief. Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016).

A motion to dismiss pursuant to C.R.C.P. 12(b)(5) is looked on with disfavor and should not be granted unless it appears beyond doubt that the plaintiff can

prove no set of facts that would entitle him or her to relief. *Allen v. Steele*, 252 P.3d 476 (Colo. 2011).

In assessing such a motion a court must accept all matters of material fact in the complaint as trust and view the allegations in the light most favorable to the plaintiff and may grant the motion only if the plaintiff's factual allegations cannot support a claim as a matter of law. *Asphalt Specialties Co. v City of Commerce City*, 218 P.3d 741 (Colo. App. 2009).

In ruling on a motion to dismiss for failure to state a claim, the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. If relief could be granted under such circumstances, the complaint is sufficient. *Dotson v. Dell L. Bernstein, P.C.*, 207 P.3d 911 (Col. App. 2009)

When deciding whether a complaint is sufficient to state a claim upon which relief can be granted, the material allegations of the complaint must be taken as admitted. *Nelson v. Nelson*, 31 Colo. App. 63, 497 P.2d 1284 (1972).

When reviewing a motion to dismiss, the court must accept the material allegations of the complaint as true and the complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of facts which may be proved in support of the claims. *Douglas County Bank v. Pfeiff*, 809 P.2d 1100 (Colo. App. 1991).

Dismissal is proper only where the allegations fail to state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). A claim is plausible where the factual allegations are "enough to raise a right to relief above the speculative level. . . ." *Id.*

It is error to dismiss a complaint if plaintiff can be granted relief under any state of facts which may be proved in support of the claim. *Fort v. Holt*, 508 P.2d 608 (Colo. App. 1973).

ARGUMENT

I. Plaintiff LSF9's motion to dismiss must be denied because Plaintiff LSF9 filed its FED during the time period allowing Defendant Tatten to petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in Case No. 17-114.

Plaintiff LSF9's motion to dismiss contains numerous misstatements of fact and law that are relevant to this action and a related-pending action in the federal court

Read properly, Plaintiff LSF9's motion to dismiss shows and establishes that Plaintiff LSF9 continues to abuse the courts and the rules, both state and federal, to advance its efforts to unlawfully collect a time-barred debt from the cognitively-disabled, *pro se* Defendant Tatten. [Defendant's Exhibit 8: Email String, Tatten and McCarthy & Holthus.]

In its motion, Plaintiff LSF9 argues to this Court, "Although Tatten has threatened to file a petition with respect to the second appeal, the deadline to do so expired on July 11, 2018. . . ."

The statement quoted-above is not true. In fact, Plaintiff LSF9's statement is false.

On June 8, 2018, Defendant Tatten received, via posting, Plaintiff LSF9's Demand for Possession signed and dated on June 7, 2018.

Plaintiff LSF9's Demand for Possession states "This communication is for the purpose of collecting a debt, and any information obtained from the trustor(s) will be used for that purpose." [Defendant's Exhibit 9: Demand for Possession, Letter, McCarthy & Holthus.]

On July 2, 2018, Defendant Tatten received, via U.S. mail, Summons in Forcible Entry and Detainer and Verified Complaint in Forcible Entry and Unlawful Detainer ("FED"), both documents are time and date stamped June 19, 2018 by the Denver County Court.

On July 26, 2018 Plaintiff LSF9 filed its motion to dismiss with prejudice.

On July 26, 2018, Plaintiff LSF9 knew or should have known that Defendant Tatten's time to file a petition for a writ of certiorari did not expired on July 11, 2018.

On July 26, 2018, Plaintiff LSF9 knew or should have known Defendant Tatten's time to file a petition

was up to and including September 3, 2018. [Defendant's Exhibit 10: Plaintiff-Appellant's Petition for Panel Rehearing and Rehearing En Banc, Case No. 17-1141.]

In its motion, Plaintiff LSF9 argues to this Court, "Plaintiff filed this FED Action following the completion of a non-judicial foreclosure sale of the single family residence at 8681 East 29th Avenue, Denver, CO 80238 (the "Property") on June 16, 2016, and the completion of this litigation and appeals relating thereto".

Again, the statement quoted-above is not true. In fact, Plaintiff LSF9's statement is false.

As of this filing, the time allowed for Defendant Tatten to file a petition for writ of certiorari is up to and including November 2, 2018. [Defendant's Exhibit 11: Notice, Office of the Clerk, Supreme Court of the United States.]

In his application for extension of time to file petition for writ of certiorari, Defendant Tatten states, " . . . on June 28, 2018, this Court granted the petition in No. 17-1307, *Obdusky [sic] v. McCarthy & Holthus LLP, et al* . . . The question presented in *Obdusky [sic] v. McCarthy* may be material to the presentation of the question presented in Petitioner Tatten's writ of certiorari." *See:* [Defendant's Exhibit 12: Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.]

ln his amended answer, Defendant Tatten makes material allegations that Plaintiff LSF9 is a debt collector and is attempting to collect a debt. [Plaintiff's Exhibit D: Letter, McCarthy & Holthus, June 7, 2018.]

In his amended answer, Defendant Tatten makes material allegations that Plaintiff LSF9 filed its FED during the time period allowing Defendant Tatten to petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in Case No. 17-1141. [Amended Verified Answer and Counterclaims, ¶¶ 6, 7]

In his amended answer, Defendant Tatten makes material allegations that Plaintiff LSF9 filed its FED to " . . . disturb my peace and threaten my health, safety, and welfare . . . " and " . . . to influence, delay, or prevent the testimony of any person . . . induce any person to withhold testimony, or withhold a record, document, or other object . . . evade legal process . . . or produce a record, document, or other object, in an official proceeding. . . ." [Amended Verified Answer and Counterclaims, ¶¶ 48-68.] [Defendant's Exhibit 5: Defendant Tatten email to Alex Bailey, Perkins Coie, Attorneys for Plaintiff LSF9.]

In Case No. 17-1141, the Tenth Circuit's three-judge panel begins its discussion and legal analysis with "Mr. Tatten asserted claims arising from the foreclosure of his Denver, Colorado home under 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), and the Fair Debt Collection Practices Act (FDCPA)."

By filing an FED during the time period allowing the Defendant Tatten to petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in Case No. 17-1141, Plaintiff LSF9 admits that Defendant Tatten's amended verified answer is well-pleaded and he has stated plausible claims for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

II. Plaintiff LSF9's motion to dismiss must be denied because Defendant Tatten's well pleaded, Amended Verified Answer contains material allegations that, when viewed in the most favorable light to him, support plausible claims for relief.

Defendant Tatten hereby incorporates each and every averment and argument set forth herein as if each and every averment and argument were set forth verbatim herein.

In a complaint, a plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity, especially as to those matters reasonably unknown to him and within the cognizance of the defendants. *Shockley v. Georgetown Valley Water & San. Dist.*, 37 Colo. App. 434, 548 P.2d 928 (1976).

A trial court is not permitted to make findings of fact under Rule 12(b)(5). *Schwindt v. Hershey Food Corp.*, 81 P.3d 1144 (Colo. App. 2003).

Plaintiff LSE9 is asking this Court to make findings of facts based on Plaintiffs LSF9's misunderstanding of the events, circumstances and law applicable to material allegations set forth in Defendant Tatten's Amended Verified Complaint.

Defendant Tatten's well-pleaded Amended Verified Answer contains material allegations that accurately and truthfully describe the conduct of the Plaintiff LSF9 during the year 2018. [Amended Verified Answer, ¶¶ 58-67.]

Defendant Tatten's well-pleaded Amended Verified Answer contains material allegations that accurately and truthfully describe Plaintiff LSF9's actions concerning its ongoing efforts to collect a time-barred debt. [Amended Verified Answer, ¶¶ 30-68.)

Plaintiff LSF9 admits it is a debt collector attempting to collect a debt subject to the provisions of the Fair Debt Collection Practices Act.

Plaintiff LSF9 argued " . . . This is very important when viewed in light of Defendant's cognitive issues described in the Counterclaim. In other words, Tatten thought Dubrova had a gun or weapon. The item in her hand could have been a camera or a cell phone. . . ."

Plaintiff LSF9 is correct – that the argument is very important because it requires findings of fact – findings that the trial court is not permitted to make under Rule 12(b)(5).

Because Plaintiff LSF9 stated and argued above " . . . Tatten thought Dubrova had a gun or weapon . . . "

the its motion to dismiss with prejudice must fail under Rule 12(b)(5).

Next, Plaintiff LSF9 will argue that every man with eyes can see.

III. Plaintiff LSF9's motion fails to provide any argument concerning this Court's construction and application of C.R.C.P. 12(b)(5) to pleadings prepared by Defendant Tatten, a cognitively-disabled *pro se* litigant.

Defendant Tatten hereby incorporates each and every averment and argument set forth herein as if each and every averment and argument were set forth verbatim herein.

IV. The foreclosure sale violated Defendant Tatten's right to due process and equal protection under the Constitution of the United States of America.

Defendant Tatten hereby incorporates each and every averment and argument set forth herein as if each and every averment and argument were set forth verbatim herein.

Colorado's non-judicial foreclosure process violates the due process and equal protection provisions of Section 1 of the Constitution of the United States of America.

A Rule 120 proceeding is not the equivalent of a civil lawsuit. It is not adversarial in nature. It is very

limited in purpose and scope. The applicable Rule 120 expressly reserves the rights of parties to litigate any issue in any other proceeding.

Plaintiff LSF9 is mistaken in its argument that a foreclosure sale is final and cannot be set aside.

Certainly every court will hold that title does not pass via thief.

CONCLUSION

WHEREFORE, Defendant Tatten respectfully requests that Plaintiff LSF9's Motion to Dismiss Counterclaims with Prejudice be denied in its entirety.

Respectfully submitted this 28th day of August, 2018.

BY: _____

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[Certificate Of Service And Exhibits Omitted]