PETITION FOR CERTIORARI
APPENDIX 2018

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TENTH CIRCUIT ORDER AND JUDGMENT
ANDERSON v HERBERT 4200

FILED
United States Court of Appeals
Tenth Circuit
August 2, 2018
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREG ANDERSON,
Plaintiff - Appellant,

v.

GARY HERBERT; SEAN REYES; The THIRD DISTRICT COURT; The EIGHTH DISTRICT COURT; The UTAH COURT OF APPEALS; CLARK A. MCCLELLAN, in both his individual and official capacity; DANIEL KITCHEN; JAMES L. AHLSTROM; TERRY WELCH; LYNN KITCHEN; GARY KITCHEN; MATTHEW J. KITCHEN; MARK R. KITCHEN; SAND BAY LLC.; SUN LAKE LLC.; ORCHID BEACH LLC.; ROOSEVELT HILLS LLC,
Defendants - Appellees.

No. 17-4200 (D.C. No. 2:15-CV-00083-RJS-DBP)
(D. Utah)

ORDER AND JUDGMENT*

Before BACHARACH, EID, and CARSON, Circuit Judges.

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* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[2] Greg Anderson, proceeding pro se, appeals from the district court's dismissal of his claims in this civil-rights action. Exercising jurisdiction under 28 U.S.C. § 1291, we hold that the district court erred in concluding that the Rooker-Feldman doctrine[1] deprived it of jurisdiction over this matter. But we affirm the judgment in favor of defendants on other grounds supported by the record.

I. Background

In June 2005, Mr. Anderson and Daniel Kitchen entered into a Real Estate Purchase Contract concerning a certain house owned by the
Kitchen family and/or the Kitchen family's entities. (Defendants Daniel Kitchen, Lynn Kitchen, Gary Kitchen, Matthew J. Kitchen, Mark R. Kitchen, Sand Bay LLC, Sun Lake LLC, Orchid Beach LLC, and Roosevelt Hills LLC are collectively referred to as the "Private-Party Defendants.") From July 2005 to December 2008, Mr. Anderson lived in the house, spending time and money fixing it up. Mr. Anderson contends that he purchased and paid for the house with his improvements. He also contends that he and

1 *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust* Co., 263 U.S. 413, 415-16 (1923). the Kitchen family entered into a partnership for engaging in various real estate projects.

In September 2008, Daniel Kitchen filed suit in Utah's Eighth District Court to evict Mr. Anderson from the house. The court ruled in favor of Mr.

Kitchen and against Mr. Anderson. Defendants Clark A. McClellan, James L. Ahlstrom, and Terry Welch (collectively, the "Private-Party Attorney Defendants") were

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Mr. Kitchen's attorneys in the Eighth District suit. An eviction order issued in December 2008, but final judgment was not entered until June 16, 2015. The Eighth District Court then had before it several post-judgment motions, which it denied on April 7, 2016. Mr. Anderson did not appeal from the decision. While the Eighth District suit was ongoing, Mr. Anderson filed several other federal and state actions. First, in April 2009, he filed a suit in federal court in which his federal-law claims were dismissed for failure to state a claim and his state-law claims were dismissed without prejudice. See *Anderson v. Kitchen*, 389 F. App'x 838, 840 (10th Cir. 2010). This court affirmed. Id. at 842. Second, in June 2011, he filed a complaint in Utah's Third District Court. The court ruled in favor of the Private-Party Attorney Defendants on April 13, 2016, and in favor of the Private-Party Defendants on May 31, 2016. The Utah Court of Appeals affirmed on August 31, 2016. And third, in November 2014, he filed another unsuccessful state action, again in the Third District Court. That judgment was final in July 2015, and Mr. Anderson did not appeal. On February 5, 2015, Mr. Anderson filed another federal complaint to commence the instant litigation. This complaint named as defendants Utah's governor, Gary Herbert, and its Attorney General, Sean Reyes, as well as the Third and Eighth District Courts.

On April 6, 2016, Mr. Anderson filed a separate federal suit against the Private-Party Defendants and the Private-Party Attorney Defendants (including

claims against Mr. McClellan in his individual capacity and his official capacity—
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Mr. McClellan had been appointed as a Utah state judge after the Eighth District suit). In December 2016, the district court consolidated the two proceedings and ordered Mr. Anderson to file a consolidated complaint. He did so in January 2017, at that time adding as a defendant the Utah Court of Appeals. The defendants all moved to dismiss on various grounds. The magistrate judge recommended granting dismissal for lack of jurisdiction under the *Rooker-Feldman* doctrine. He also recommended granting dismissal because neither the Private-Party Defendants nor the Private-Party Attorney Defendants acted under color of state law; the Private-Party Attorney Defendants were entitled to the judicial proceedings privilege; the state court defendants were entitled to Eleventh Amendment immunity and were not "persons" under 42 U.S.C. § 1983; defendants Herbert and Reyes were not constitutionally required to conduct investigations of the judicial system, as Mr. Anderson alleged; Mr. Anderson's claims for injunctive and declaratory relief against Mr. Herbert and Mr. Reyes failed; and certain claims were barred by the applicable statutes of limitation.

Mr. Anderson filed objections to the report and recommendation. The district court rejected his objections and applied the Rooker-Feldman doctrine. It also discussed the other grounds for dismissal that the magistrate judge had identified. After the district court entered judgment for the defendants, Mr. Anderson filed a Fed. R. Civ. P. 59 motion and then a Fed. R. Civ. P. 60(b) motion, both of which the district court denied. Mr. Anderson now appeals. Because he proceeds pro se, we construe his filings liberally. *Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006).

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II. Analysis

A. The *Rooker-Feldman* Doctrine does not apply because the state court proceedings were not final at the time Mr. Anderson filed his federal action. "The *Rooker-Feldman* doctrine . . . provides that only the Supreme Court has jurisdiction to hear appeals from final state court judgments." *Id.* Rooker-Feldman is a matter of subject-matter jurisdiction that we review de novo. See D.A. *Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1231 (10th Cir. 2013). We agree with Mr. Anderson that the Rooker-Feldman doctrine did not deprive the district court of jurisdiction. The Supreme Court has explained that the Rooker-Feldman doctrine was not intended to create "a wide-reaching bar on the jurisdiction of lower federal courts," and that its "cases since Feldman have tended to emphasize the narrowness of the *Rooker-Feldman* rule." *Lance v. Dennis*, 546 U.S. 459, 464 (2006). Importantly, the doctrine applies only in federal cases brought after the state proceedings have ended. *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." (emphasis added)). When a plaintiff files his federal case before the state proceedings have ended, "the *Rooker-Feldman* doctrine does not apply and the district court did have subject matter jurisdiction." *Guttman v. Khalsa*, 446 F.3d 1027, 1031 (10th Cir.

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2006); see also *D.A. Osguthorpe Family P'ship*, 705 F.3d at 1232; Bear, 451 F.3d at 641-42.

This litigation began on February 5, 2015, when Mr. Anderson filed his initial federal complaint against Mr. Herbert, Mr. Reyes, and the Third and Eighth District Courts. *Rooker-Feldman* was inapplicable because the Eighth District case did not become final until April 7, 2016; the first Third District case continued through August 31, 2016, when Mr. Anderson lost his appeal; and the second Third District case was final on July 6, 2015.

We recognize that the district court consolidated the initial February 2015 action with a second federal suit filed on April 6, 2016, against the Private-Party Defendants and the Private-Party Attorney Defendants. These circumstances, however, do not alter the *Rooker-Feldman* analysis. Only the second Third District case was final by April 6, 2016, and Mr. Anderson's claims with regard to each proceeding seem intertwined. So finality remains an issue even measuring from April 6, 2016, with regard to the Private-Party Defendants and the Private-Party Attorney Defendants. The Private-Party and Private-Party Attorney Defendants urge us to rely on the January 2017 filing of the consolidated complaint, rather than the filing of the initial complaint.[2] We decline to do so. "[I]f a federal court has properly invoked subject

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matter jurisdiction at the time of the initial federal complaint, the *Rooker-Feldman* doctrine cannot spring into action and eliminate jurisdiction merely because an amended complaint is filed." *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1072 n.3 (11th Cir. 2013).

B. Alternative Grounds for Affirmance

The district court's error in applying *Rooker-Feldman* "does not end our inquiry into the appropriateness of the federal district court's dismissal. It is well-established that we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *D.A. Osguthorpe Family P'ship, 705 F.3d at 1231* (internal quotation marks omitted). The district court identified several alternative grounds for dismissal under Fed. R. Civ.
P. 12(b)(1) and 12(b)(6). We review these grounds de novo. See *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1242 (10th Cir. 2011) (Rule 12(b)(1)); *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010) (Rule 12(b)(6)).
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1. Private-Party Defendants and Private-Party Attorney Defendants

a. Federal-Law Claims

Mr. Anderson alleged violations of the Fourteenth and Fourth Amendments and 42 U.S.C. § 1983. To proceed with these claims, he had to show that defendants acted under color of state law (§ 1983),

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2 Also, the judicial defendants assert, without citation, that "[a]t the very least the [*Rooker-Feldman*] doctrine applies to claims against the Utah Court of Appeals because the first time Mr. Anderson made claims against that court was in the (continued) amended complaint." Judicial Defs. Resp. Br. at 8. We need not decide whether this circumstance alters our analysis, however, because the Utah Court of Appeals is entitled to Eleventh Amendment immunity. "[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted).

see West v. Atkins, 487 U.S. 42, 48 (1988), or that defendants' conduct constituted state action, see *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (Fourteenth Amendment). The district court held that he failed to satisfy this requirement as to the Private-Party Defendants and the Private-Party Attorney Defendants. We agree, and for substantially the reasons discussed in Mr. Anderson's prior appeal, see Anderson, 389 F. App'x at 840-41, we affirm the dismissal of the federal claims against the Private-Party Defendants and the Private-Party Attorney Defendants for failure to adequately allege state involvement.

b. State-Law Claims

In addition to his federal-law claims, Mr. Anderson sets forth fifteen pendent state-law claims directed toward the Private-Party Defendants and/or the Private-Party Attorney Defendants. These claims are time-barred. The state-law claims are governed by limitation periods of, at most, four years. See Utah Code Ann. § 78B-2-305 (three-year limitations period "for taking, detaining, or injuring personal property," "for relief on the ground of fraud or mistake," and "for a liability created by the statutes of this state"); id. § 78B-2-307

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(four-year limitations period for claims "upon a contract, obligation, or liability not founded upon an instrument in writing," "on an open account for work, labor or services rendered," and "for relief not otherwise provided for by law"). "Under Utah law, a statute of limitations begins to run against a party when the cause of action accrues. As a general rule, a

cause of action accrues when a plaintiff could have first filed and prosecuted an action to successful completion." *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 843 (Utah 1996) (citations omitted). In determining when the causes of action accrued, the district court could
review not only the allegations of the complaint, but also matters subject to judicial notice. *See Gee*, 627 F.3d at 1186. Those matters include "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979). It is apparent from the record that the
state-law claims accrued no later than December 2008. Therefore, the limitations periods for all the state-law claims had run before Mr. Anderson commenced this litigation in February 2015. Mr. Anderson asserts that the limitations periods were tolled during the pendency of the Eighth District case. To the extent that he intends to assert that his state causes of action (such as for wrongful eviction) did not accrue until final judgment in the Eighth District case, we disagree. To the extent that he intends to claim the benefit of Utah's tolling provisions, he has failed to cite any authority or show how it would apply. For example, while Utah Code Ann. § 78B-2-111(1)

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provides that "[i]f any action is timely filed and . . . the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff . . . may commence a new action within one year after . . . the failure," Mr. Anderson has not shown that his state-law claims failed "otherwise than upon the merits" in the state

proceedings. Mr. Anderson also argues that 28 U.S.C. § 1367(d) tolled the limitations periods while his state-court proceedings were ongoing. But this argument is
misplaced. Section 1367(d) preserves a state-law claim that is asserted in a federal proceeding and then is dismissed. It does not indefinitely suspend the limitations period for a state-law claim that first is brought in a state-court action. Further, Section 1367(d) provides no support for Mr. Anderson's position because the state limitations periods had expired before Mr. Anderson brought this federal action. Thus, there was nothing left of the limitations periods for § 1367(d) to toll. In addition, Mr. Anderson briefly asserts that his claims involve continuing violations, but his citation in support discusses his federal-law claims, not his state-law claims. He has not shown that the state-law claims involve continuing violations that would somehow toll the limitations periods.

For these reasons, we affirm the dismissal of the state-law claims against the Private-Party Defendants and the Private-Party Attorney Defendants as barred by the statutes of limitations.

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2. State Defendants – Eleventh Amendment Immunity

a. State Court Defendants

Under the Eleventh Amendment, private parties cannot sue a state in federal court without the state's consent. *See Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007). This protection extends to entities that are arms of the state. See *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). When the defendant is a state or an arm of the state, "Eleventh Amendment immunity applies

regardless of whether a plaintiff seeks declaratory or injunctive relief, or money damages." *Steadfast Ins. Co.*, 507 F.3d at 1252; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) ("This jurisdictional bar applies regardless of the nature of the relief sought."). The parties do not dispute that the Eighth and Third District Courts and the Utah Court of Appeals are arms of the state of Utah. See 13 Charles Alan Wright et al., Federal Practice & Procedure § 3524.2 (3d ed. 2008) ("As a general matter, state courts are considered arms of the state."); Utah Const. Art. 8, § 1 (establishing Utah's court system). Therefore, those courts cannot be sued by private parties in federal court without their consent. Utah has not waived its immunity against civil-rights suits. *See Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1233 (10th Cir. 1999). We therefore affirm judgment in favor of the court defendants on the grounds of Eleventh Amendment immunity.

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b. Defendant McClellan in his Official Capacity

Mr. Anderson sued Mr. McClellan in his official capacity as well as his individual capacity. A state employee sued in his official capacity "may also assert Eleventh Amendment immunity as an 'arm' of the state in that []he assumes the identity of the [state entity]." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002); see also *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that a state official sued in his or her official capacity is generally entitled to assert the same immunities as the governmental entity for which he or she works). The exception is for claims against a state official seeking only prospective injunctive relief as a remedy. *See Ruiz*, 299 F.3d at 1180; see also *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (holding that

state officials can be enjoined from enforcing unconstitutional state statutes). It appears that the claim against Mr. McClellan in his official capacity is based on his informing the Third District Court of his status as an Eighth District judge, allegedly influencing the Third District's decision. Any remedy for such action likely would be retrospective, not prospective. See *Buchheit v. Green*, 705 F.3d 1157, 1159 (10th Cir. 2012) ("Because [plaintiff] is merely seeking to address alleged past harms rather than prevent prospective violations of federal law, we can only reasonably categorize such relief as retrospective."). Moreover, the consolidated complaint requested prospective injunctive relief not against Mr. McClellan, but against the Utah state courts themselves. Accordingly, the claims

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against Mr. McClellan in his official capacity are barred by the Eleventh Amendment.

c. Defendants Herbert and Reyes

Mr. Anderson named Mr. Herbert and Mr. Reyes as defendants in their official capacities only. In the consolidated complaint, he alleged that they failed in their
"duty to see that the laws of the State of Utah are faithfully executed." R. at 2891. "[T]hey both . . . have enforcement authority under Utah law, with the ability to use the courts to enforce the law, however they have refused to do so." *Id.* He stated that Mr. Reyes failed to investigate the circumstances of Mr. Anderson's loss of the house "and look into the issue of corruption in Utah courts," id. at 2892, and that Mr. Herbert was "on notice . . . that he has lawyers defrauding the courts," id. at 2893. He sought unspecified injunctive and declaratory relief. As

stated above, the Eleventh Amendment bars claims against state employees
in their official capacities except for claims for prospective injunctive relief, which are allowed by Ex Parte Young. *See Ruiz,* 299 F.3d at 1180. Mr. Anderson maintains that he is seeking prospective relief against these defendants. Although the consolidated complaint is vague, his briefs indicate that the relief he seeks is in the nature of invalidating the state-court judgments. See Opening Br. at 44 ("As to [the requirement of seeking prospective relief], Anderson asks the court for declaratory relief, and to declare the Eighth District Court judgment void."); Reply Br. at 20 ("Anderson sought prospective relief by requesting the court to find the judgments of the Eighth and Third District Courts void."). This is a request for retrospective, not

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prospective, relief. See *Buchheit,* 705 F.3d at 1159. This request also is not properly directed toward these defendants, whose duties as Executive Branch officials would not encompass vacating court judgments. Because Mr. Anderson has failed to establish the applicability of the Ex Parte Young exception, the judgment in favor of Mr. Herbert and Mr. Reyes in their official capacities is affirmed on the ground that they are entitled to Eleventh Amendment immunity. C. Post-Judgment Motions Mr. Anderson's notice of appeal listed the district court's orders denying his Rule 59 and 60(b) motions as additional subjects of the appeal, but his opening brief does not set forth any argument regarding those motions. Accordingly, any challenges to those orders are waived. See *COPE v. Kan. State Bd. of Educ.*, 821 F.3d 1215, 1223 (10th Cir. 2016).

III. Conclusion

The judgment of the district court is affirmed. Mr. Anderson's Motion to Appoint a Special Master is denied. Appellees' motion to declare Mr. Anderson a vexatious litigant and impose filing restrictions is denied.

Entered for the Court
Joel M. Carson
Circuit Judge

MOTION TO DECLARE
EIGHT DISTRICT COURT JUDGMENT VOID

CASE NO. 17 - 4200

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREG ANDERSON

Plaintiff - Appellant,
v.

GARY HERBERT IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF UTAH, SEAN REYES IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF UTAH, CLARK A McCLELLAN, IN HIS INDIVIDUAL CAPACITY, AND IN HIS OFFICIAL CAPACITY FOR HIS EXTRA-JUDICIAL ACTS, THIRD DISTRICT COURT, IN ITS OFFICIAL CAPACITY, EIGHTH DISTRICT COURT IN ITS OFFICIAL CAPACITY, UTAH COURT OF APPEALS IN ITS OFFICIAL CAPACITY, DANIEL W. KITCHEN, JAMES L. AHLSTROM, TERRY WELCH, LYNN KITCHEN, GARY KITCHEN, MATHEW J. KITCHEN, MARK R. KITCHEN, SANDBAY LLC SUNLAKE LLC, ORCHID BEACH LLC ROOSEVELT HILLS LLC, JOHN OR JANE DOE(S) 1 THROUGH 10

Defendants–Appellees

On Appeal from the United States District Court For the District of Utah Case No. 2:15-cv-00083-RJS,

MOTION TO DECLARE EIGHT DISTRICT COURT JUDGMENT VOID

Respectfully Submitted January 2, 2018

Greg Anderson pro se
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Tooele, Utah 84074
Telephone: 385 231-5005

Greg Anderson, pro se hereby presents his motion to declare the Eighth District judgment void, because it is void on its face as a matter of law.

JURISDICTION

This Appellant Court has jurisdiction under Federal Rules of Appellant Procedure, Rule 27(a)(1), to hear this motion for relief. This Appellant Court also has jurisdiction to hear this motion pursuant to Rule 60(d)(1)&(3) of the Federal Rules of Civil Procedure, because the federal district court refused to hear Anderson's similar motion for partial summary judgment, (Dkt. 103).

If a judgment is void, a court must declare it void, see *V. T. A. Inc., v. Airco, Inc.* 597 F.2d 220, 224-225 & n. 8 (10th Cir. 1979),where this court stated,

> [V]oidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the court's **action involves a plain usurpation of power or if the court has acted in a manner inconsistent with due process of law.** [footnotes 8 below, 9 -11 omitted] [all of the above issues apply to the Eighth District Court case.][Emphasis added]

> If voidness is found, relief is not a discretionary matter, it is mandatory. *See* C. Wright & A. Miller, *supra*, note 7, at § 2862.

This court also addressed the issue in *United States v. S. Buck* 281 F.3d 1336, 1341–1342 (10th Cir. 2002) acknowledging there are two ways to set aside a void judgment, (a) through a independent action, and (b) through the inherent power of the court. This is that independent action, requesting this court to use its inherent power to declare the Eighth District judgment void.

In *Hukill v. Oklahoma Native Am. Domestic Violence Coalition, Inc.* 542 F.3d 794 (10th Cir. 2008), the Tenth Circuit's conclusion, mandated the judgment be set aside, stating,

> Because the service in this case, attempted under Oklahoma law, did not substantially comply with the law of that state, the district court did not have personal jurisdiction over Ms. Musgrove and Spirits of Hope. Therefore the district court erred in denying defendants motion to set aside the default judgment under Fed. R. Civ. P. 60(b)(4).

In Utah's unlawful detainer laws, **strict**, not substantial compliance is required, *see Paar v. Stubbs* 117 P.3d 1097 (Utah App. 2005), because it's a summary proceeding.

As to jurisdictional issues, the Rooker-Feldman doctrine does not apply, because the case was filed in federal court four months before the Eighth District case became final. The Colorado River Doctrine is a discretionary issue that can be used by a District Court to abstain while State court proceedings are

ongoing. In *D.A. Osguthorpe Family Partnership v. ASC Utah* 705 F.3d 1223 this court stated: At the outset, we must conclude that the federal district court erred in dismissing the case under the Rooker-Feldman doctrine, and explained the Colorado River doctrine emphasizing that "[o]nly the clearest of justifications will warrant dismissal," 424 U. S. at 819, the court then stated,

> Following Moses H. Cone, we may also look to whether "federal law provides the rule of decision on the merits," 460 U. S. at 23 and whether the state–court proceedings adequately protect the litigant's rights *Id.* at 26-27.

Setting aside a void judgment is not a discretionary issue, the court has no discretion when the judgment is void. See Exhibit "A" Moore's Federal Practice The Eighth District Court judgment is void on its face, and the illicit proceedings show Anderson's rights were in no way protected, but instead trammeled upon.

DEFENDANTS' POSITION

Defendant's claim the judgment is not void, however they've refused to address the legal and factual misrepresentations in Anderson's complaint (Dkt. 78 pp 27 through 52, (Exhibit "B", Contract for comparing contractual issues. originally filed in Eighth District court and a copy filed in Third District Court). Defendants quote adequacy of due process case law out of context, in an effort to get around the issue of holding a purported evidentiary hearing at the motion to dismiss stage of the proceedings, which denied Anderson numerous other rights. (Dkt. 116 pp 3-4)

STATEMENT OF THE FACTS

1. On or about September 5, 2008, case no. 080800143, Daniel Kitchen filed a complaint in Utah's Eighth District Court, claiming Anderson was a tenant in a eviction proceeding, but Anderson was never a tenant under Utah law, (Dkt. 78 pp 34–37, Dkt. 103 p 11, 17–19), see (Exhibit "C" Verified Memorandum).

2. On or about October 31, 2008, at the request of Defendants the court held an illicit evidentiary hearing at the motion to dismiss stage of the proceedings, in which Anderson was not allowed to testify that his home was paid for and therefore prove he was never a tenant.

3. Under Utah law Rule 12, of the Utah Rules of Civil Procedure, if a court thinks it can decide a case summarily, it must give appropriate notice, which the court did not do, (Dtk. 78-1 p. 3-7, showing illicit hearing at motion to dismiss stage of the proceedings).

4. At the above mentioned illicit evidentiary hearing, the court seized Anderson's paid for home in violation of the First, Fourth and Fourteenth Amendments, refused to allow Anderson to testify and then ended all further proceedings, (Ruling (Dkt. 78-2, Exhibits "D" & "E").

5. The federal district court refused to hear Anderson's motion for partial summary judgment *see* (Dkt. 103), having to do with the issues herein. 6 Utah courts also refused to hear any of Anderson's federal claims, *see* (Dkt. 98 and Exhibits attached, 98-1, 98-2, 98-3, 98-4, 98-5).

I. IN THE EIGHTH DISTRICT COURT CASE, DEFENDANTS MISREPRESENTED THE LAW AND CONTRACTUAL FACTS MORE THAN THIRTY TIMES IN THEIR MEMORANDUM

WHICH MAKES THE JUDGMENT VOID AS A MATTER OF LAW

Defendants in District Court have made it sound as though this is a complicated case, however it is simple because the Eighth District Court judgment is void as a matter of constitutional law.

The Eighth District Court case is much like *Hazel-Atlas Co. v. Hartford Co.* 322 U. S. 238, (1943),[1] [*See* Dkt 78 pp 27-54] where a purported disinterested person wrote an article to perpetrate a fraud upon the Patent Office and the Third Circuit Court of Appeals. The Supreme Court of the United States explained that the Third Circuit Court of Appeals should have vacated the void judgment, rather than sending the case back to the District Court and continued at page 245,

> Every element of the fraud here disclosed **demands** the exercise of the historic power of equity to set aside fraudulent begotten judgments. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberate planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. *Cf. Marshall v. Holmes, supra,* Proof of the scheme, and of its complete success up to date is conclusive. *Cf. Ibid.; Hopkins v. Hebard,* 235 U. S. 287. [Emphasis added]

Defendants in the Eighth District Court case used the direct approach misrepresenting the facts more than thirty times in a six page memorandum, and then went well beyond the *Hazel-Atlas, Id.,*

fraudulent article, through a carefully planned scheme enticed the Eighth District Court to hold an illicit evidentiary hearing at the motion to dismiss stage of the proceeding, which, in addition to the fraud upon the court, constituted a seizure under the Fourth Amendment and a denial of procedural due process under the Fourteenth Amendment, (Dkt 78 pp 58). The misrepresentations by Defendant's in the Eighth District Court case is conclusive of their fraudulent scheme, (Dkt. 78 pp 27-54 & Dkt. 78-1). Just as the testimony, in *Giglio v. United States* 405 U. S. 150, 154-155, the Defendants' case in the Eighth District Court depended entirely on the pseudo memorandum. The mathematical odds of randomly making thirty misrepresentations in a row are one (1) chance in one billion, seventy three million, seven hundred forty one thousand, eighth hundred twenty four, (1,073,741,824), more than three times the population of the United States. Of course, when the misrepresentations are calculated to deceive, as here the numbers are off of the charts. The misrepresentations are easy to check because most or the misrepresentations are a matter of law, so there is no question that fraud existed. In *Giglio v. United States*, 405 U.S. 150, 153 (1972), the court stated,

> As long ago as *Mooney v. Holohan*, 294 U. S. 103, 294 U. S. 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U. S. 213 (1942). In *Napue v. Illinois*, 360 U. S. 264 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected

> when it appears." *Id.* at 360 U. S. 269. Thereafter, *Brady v. Maryland*, 373 U.S. at 373 U. S. 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."

Getting back to *Hazel-Atlas Id.,* at 251, the Supreme Court after the case was closed for 12 years, mandated that, "[a] the Circuit Court of Appeals is directed to set aside its 1932 judgment, [b] dismiss the Hartford's appeal and [c] issue a mandate to the District Court directing it to set aside its judgment entered pursuant to the 1932 mandate, [d] to reinstate its original judgment denying relief to Hartford, and [e] to take such additional action as may be necessary and appropriate." The case at bar deserves nothing less.

The Supreme Court in *Hazel-Atlas Co. v. Hartford Co.* 322 U. S. 238, (1944), found the judgment void for misrepresentation. In *P.J. Ex Rel. Jensen v. Wagner* 603 F. 3d. 1182, 1194, (10th Cir. 2010), this court made it clear that misrepresentations could "infect a judicial proceeding to the point that the proceeding itself becomes constitutionally deficient, *CF. United States v. Vazari,* 164 F.3d 556, 563 (10th Cir. 1999) (concluding that a criminal conviction obtained by perjured testimony violates due process under certain circumstances)." In the Eighth District Court case there were thirty misrepresentations by defendants, and the misrepresentations was the reason for the illicit judgment. The *Vazari id.,* Court followed the United States Supreme Court which explained, "A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury," *Giglio v. United States,* 405 U. S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d

104 (1992) (quoting *Napue,* 360 U. S. At 271, 79 S.Ct. 1173). *See* (Dkt. 78 pp 27-55) detailing the misrepresentations by defendants, which are too lengthy to put into a memorandum. The Tenth Circuit commented on misleading the court in *United States v. Deberry,* 430 Fd. 1294, 1300 (10 Cir. 2005) (quoting *Halloway v. Arkansas* 435 U.S. 475, 486 1978) as follows:

> "Attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."

Attorneys have been sanctioned for misrepresenting the law and/or facts to the court, see *Precision Specialty Metals, Inc. v. U. S.* 315 F.3d 1346 (Fed. Cir. 2003), *U. S. v. McCall* 235 F.3d 1211 (10th Cir. 2000), where the Tenth Circuit affirmed sanctions against the United States. *See* also Rule 3.3 Candor Toward the Tribunal, Utah Rules of Professional Conduct.

In *Allen v. McCurry* 449 U. S. 90, 100-101 (1980), the Supreme Court made it clear that a litigant must have a full and fair opportunity to litigate his claims and if not federal courts could step in stating,

> In reviewing the legislative history of § 1983 in *Monroe v. Pape,* the Court inferred that Congress intended a federal remedy in three circumstances; where state substantive law was facially unconstitutional, where state procedure law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice, 365 U. S. at 173 - 174. In short,

> the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.* at 365 U. S. 176. The understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a court failed to even acknowledge the constitutional principle on which a litigant based his claim. [Emphasis added]

Anderson requested relief from Utah's Third and Eighth District Courts and the Court of Appeals, and all courts refused to even mention the words "due process." (Dtk. 98-1, 98-2, 98-3, 98-4, 98-5)

II. DEFENDANTS ENTICED THE EIGHTH DISTRICT COURT TO HOLD AN ILLICIT EVIDENTIARY HEARING AT THE MOTION TO DISMISS STAGE OF THE PROCEEDINGS, DENYING ANDERSON A FULL AND FAIR HEARING IN DIRECT VIOLATION OF THE RULES OF CIVIL PROCEDURE

In *Heritage Bank & Trust v. Landon.*770 P.2d 1009 (1989), the court **reversed** because Utah Courts must go by the Rules of Civil Procedure, stating,

> A motion to dismiss, therefore, is not a responsive pleading which would preclude an opponent from amending a complaint under Utah R.Civ.P. 15(a) "once as a matter of course." *Vernell v. United States Postal Serv.*, 819 F.2d 108, 110 (5th Cir. 1987).[2] Since the language of the rule entitles a party to amend, it

> **is not a matter within the discretion of the trial court.** *Id* [Emphasis added]

[T]he civil action that produces the judgment "must be prosecuted in the manner prescribed in the Utah Rules of Civil Procedure, *Brigham Young University v. Tremco Consultants, Inc.* 156 P.3d 782, 790. *See* as an example, *Nelson v. Adams* 529 U. S. 460, 463, 465-66, 467 n.1, 468-69 & n.2, 470 (1999), (defining what process is due in regards to Rule 12 under federal law, which governs), *Hernandez v. Baker* 104 P.3d 664, 668 (Utah App 2004), accord. *See Armstrong v. Manzo* 380 U. S. 545, 550-552 (1965), court must wipe the slate clean where due process is denied. The Supreme Court of the United States reversed the decisions in both *Nelson Id.*, and *Manzo, Id.* Federal Law decides if State Procedures for Due Process are adequate. *See Logan v. Zimmerman Brush Co.*, 45 U. S. 422 432 (1982). In *Nelson Id.,* at 466, a case mirroring the Eighth District Court case with Justice Ginsburg writing for the court stating:

> We hold that the District Court erred in amending the judgment immediately upon permitting amendment of the pleading. **Due process as reflected in Rule 15 as well as Rule 12 required that Nelson be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him.** [Emphasis added]
>
> The opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to the original

pleadings under Rule 12(a)(1)

> To summarize, Nelson was never afforded a proper opportunity to respond to the claim against him. Instead, he was adjudged liable the very first moment his personal liability was legally at issue.

Accord *Heritage id.*, Rule 12)(a)(1) of the Utah R. Civ. P. mirrors the Federal Rule, and states:

> (a)(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the trials action.

The State trial court refused to allow Anderson, the time and opportunity which is his right to answer and counterclaim. However the Eighth District Court split the case into two cases, and ended the proceedings at the motion to dismiss stage of the proceedings. If Anderson would have been allowed to testify, he would have been able to prove that the home was paid for by three years of hard work for the partnership. The *Nelson* Court continued:

> Nelson's winning argument . . . rests on his right to have time and opportunity to respond to the claim once Adams gained leave to sue Nelson in his individual capacity, and thereby to reach beyond OCP's corporate till into Nelson's personal pocket. [*Nelson, Id.* at 469]

The Court held that such action violated the corporate president's due process rights since he had no opportunity to defend. The District Court had usurped his right to have time and opportunity to defend the claim. Anderson was refused time and opportunity to respond after his 12(b)(6) motion was denied. This was accomplished by Defendant-attorneys misrepresenting the law and facts to the Court, (Dtk. 78 pp 24–53). The Judge in one fell swoop denied Anderson's Rule 12(b)(6) motion and ruled for Defendant without testimony or confrontation from either side. The decision denied Anderson his Fourteenth Amendment due process rights, and his Utah Rules of Civil Procedure rights under Rule 12(a)(1). The Court not only did not go by the Rules of Civil Procedure, and refused to go by Utah Code 78B-6-810(2)(a), which states,

> In an action for unlawful detainer, the court shall hold an evidentiary hearing upon request of either party, within 10 business days after the day on which the defendant files an answer or response.

The Defendants and judge bypassed that rule, so the unlawful detainer statutes were not strictly complied with, (Dkt. 78 p 29). Utah's unlawful detainer statute and case law mandates that a defendant be allowed a jury trial if he claims a equitable interest in the property.

In the Eighth District Court case, Defendants admit that numerous improvements were made by Anderson to his home, were nearly complete. Defendant's misrepresented the law and facts to the judge, which makes the case the type of case the Supreme Court was talking about in *Connecticut v.*

Doehr 501 U. S. 1, which was one-sided self-serving with a conclusory affidavit. In the Eighth District Court case there was, a conclusory "Statement of Facts and Conclusions of Law, because Anderson was not allowed to testify," (Dkt. 78 pp 59–60) (Judgment void on First Amendment grounds)

Keeping in mind that Anderson was never a tenant, but assuming he was, in Washington D. C. the law mandates that a person has a right to a jury trial in an unlawful detainer case, just as Utah does. Justice Marshall in *Pernell v. Southall Realty* 416 U. S 363 (1974) explained,

> The question presented to in this case is whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property.

The issue was that Southall Realty breached an agreement to waive several months rent in exchange for Pernell's making certain improvements on the property. Pernell claimed a setoff of $389.60 for repairs made to bring the premises into partial compliance with the Districts housing regulations, and a counterclaim of $75 for back paid rent. Pernell also requested a jury trial. The trial judge struck the jury trial demand and the case was affirmed by the District of Columbia Court of Appeals. The Supreme Court reversed stating,

> Since the right to recover possession of real property governed by § 16-1501 was a right ascertained and protected by the courts at common law, the Seventh Amendment preserves to

either party the right to trial by jury.

It is absolutely clear that Anderson had a right to a jury trial pursuant to Utah statutes, Utah Code 78B-1-104, 78B-6-611(2), Utah Constitutional law Article I, Section 10, the Seventh Amendment to the U. S. Constitution, and common law. Anderson's equity in his paid for home was approximately $200,000.00 not counting the setoff's that paid for his home in full. Those setoff's were clearly defined in Anderson's Motion to dismiss in the Eighth District Court. (Case 2:09-cv-00362 Dkt. 16-2 Exhibit "C") Under Utah law setoff's are proper, *see Mark VII Fin. Consultants v. Smedley,* 792 P. 2d. 130, 132 (1990). In *Luger v. Edmondson Oil Company* 457 U. S. 922 (1982), the Supreme Court of the United States reiterated the Fourth Circuit Court of Appeals stating,

> The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official by the private litigant or a surrender of judicial power to the private litigant in a way that the independence of the enforcing officer has been compromised to a significant degree.

There is no question that Judge Anderson surrendered his judicial power to Defendants by denying Anderson a right to respond to Defendant's Complaint after Anderson's 12 (b)(6) motion was denied. Anderson was denied due process as a matter of law, and the judgment is therefore void also as a matter of law.

III. THE SEIZURE OF ANDERSON'S HOME

AT THE MOTION TO DISMISS STAGE OF THE PROCEEDINGS VIOLATED ANDERSON'S FOURTH AMENDMENT RIGHTS AGAINST SEIZURE

The State Judge stated in open court stated that he did not know the law, and to add insult to injury, ruled from the bench, without checking the applicable law. The judge made up his own procedural law. This is exactly the type of case this Court has warned lower courts to be aware of, the chance of erroneous deprivation. The Supreme Court spent seven pages on that exact subject in *Connecticut v. Doehr*, 501 U. S. 1, at 11, a case on point to the Eighth District Court case. In *Mathews v. Eldridge* 424 U. S. 319, the Supreme Court initiated a balancing test to decide what process is due in various Fourteenth Amendment cases. In assessing the first *Mathews* factor -- the importance of private interest at stake, in the majority opinion in *James Daniel Good Real Property*, 510 U. S. 43, 59 - 62, the Supreme Court found the **seizure of a persons real property caused greater harm to the person than the temporary loss of personal property** -- analyzing the second *Mathews* factor -- the need for pre-deprivation process –Justice Kennedy concluded that seizing real property without notice, and without the property owner to present his side of the arguments to the government, creates an unacceptable risk of error. Justice Kennedy then considered the third *Mathews* factor – the nature of the government interest, and whether it justified providing the property owner with only a post deprivation process. The majority held that there was no government interest that justified seizing real property as a means of initiating a civil forfeiture proceeding because under federal law the government could have initiated those proceedings without seizing the property.

In the Eighth District Court case, there was no government interest at stake. The judge at the request of Defendants created and imposed the illicit procedures that denied Anderson his constitutional right to due process.

In *Wyatt v. Cole,* 504 U. S. 158, at 161 the Supreme Court stated:

> The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Carey v. Piphus,* 435 U. S. 247, 254-257 (1978).

The Supreme Court succinctly explained in *Luger v. Edmondson Oil Company* 457 U. S. 922, a similar case to the Eighth District Court case that,

> The Court found potential § 1983 liability in *Lugar* because the attachment scheme was created by the State and because the private defendants, in invoking the aid of state officials to attach the disputed property, were "willful participant[s] in joint activity with the state or its agents." *Id.,* at 941.

That is exactly what happened in the Eighth District Court case, except it is an "abuse of authority" case, (as opposed to an unconstitutional statute case), where the judge abused his authority, as mentioned in *Lugar, Id.,* and defined in *Monroe v. Pape* 365 U. S. 167, 183--187 (1961).

Further, if the Judge signing an order placing a lien on Doehr's, *Id.*, home constituted "State Action," without notice and an opportunity to defend, then in

the Eighth District Court case, the judge signing an order seizing Anderson's home without allowing Anderson to defend denied due process and constituted a much more egregious act than a lien which amounted to state action. The Supreme Court stated in *Daniels v. Williams* 474 U. S. 327, 331 (1986),

> The standard is not negligence, [nor is it conspiracy.] The standard is an affirmative act. The standard is deprivation. Deprivation is an affirmative act and not an negligent act. The touchstone of due process is protection against arbitrary action of the Government." *Dent v. West Virginia,* 129 U. S. 114 123 (1889).

The Supreme Court in *Lugar, Id.*, speaking of cases such as this one said,

> Beginning with *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachments procedures whenever officers of the State act jointly with a creditor in securing the property in dispute. *Sniadach*and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), involved state-created garnishment procedures; *Mitchell v. W. T. Grant* 416 U. S. 600 (1974), involved execution of a vender's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in

> litigation between creditor and debtor in the state courts and no state official was named. **Necessary to that conclusion is the holding that the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment** (*Lugar Id.,* page 932-33, [Emphasis Added].

IV. ANDERSON DIDN'T HAVE A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CLAIM THAT HIS HOME WAS PAID FOR

The Eighth District Court was unwilling to protect Anderson's federal rights and refused to even acknowledge the constitutional principal of due process. The illicit Eighth District Court decision shows a complete disregard of due process, equal protection, free speech and Anderson's Fourth Amendment right against unlawful seizure of his paid for home. There was never a mention by the court or a hearing concerning Anderson's federal claims in spite of Anderson's detailed memorandums. (Dkt 98-2 through 98-6). Because of the Illicit evidentiary hearing at the motion to dismiss stage of the hearing, Anderson was denied a right to a jury trial and a trial is mandated under Utah law when a person has a counterclaim, *see P. H. Inv. v. Oliver* 818 P. 2d 1018, 1020-1022 (1991). It is not an evidentiary hearing if a litigant is not allowed to present evidence and testify.

When the Court denied Anderson his right to testify or to respond by cutting of the proceedings at the motion to dismiss stage of the proceedings, the proceedings became completely inadequate under federal law and also denied Anderson numerous other

rights mandated by the constitution. In order for due process to be effective and complied with where the property interest is a paid for home a litigant must receive: (1) adequate notice *Goldberg v. Kelly* 397 U. S. 254, 267; (2) an opportunity for oral argument to the adjudicator; (3) a chance to present evidence to the adjudicator; *Goldberg Id.*, at 267, 268, *Haines v. Kerner* 404 U. S. 519, 521(1972); (4) an opportunity to confront any witnesses who are adverse to his claim *Goldberg Id.*, at 269; (5) an opportunity to cross examine those witnesses *Goldberg Id.*, at 269, also *see ICC v. Louisville & Nashville R. R.*, 227 U. S. 93 – 94 (1913); (6) disclosure of all evidence against him through discovery, See Utah Rules of Civil Procedure, Rules 26 through 37 (7) a right to have an attorney present at his case, *Powell v. Alabama* 287 U. S. 45, 68–69; (8) a decision based solely on the evidence produced at the hearing *Goldberg Id.*, at 271; (9) the decision must rest solely on the legal rules and evidence adduced at the hearing, and must state the reasons for judge's determination, and the evidence that he relied on *Goldberg Id.*, at 271; and (10) that the decision maker be unbiased and impartial. *Goldberg Id.* as 271. Furthermore, a party is entitled to a; (11) complete record or showing the above requirements were complied with; together with; (12) a formal finding of fact or opinion encompassing the prior eleven requirements. (13) Also, in a case such as the Eighth District Court case, Anderson was entitled to a jury trial, *see* Rule 38 of the Rules of Civil Procedure. And of course, the hearing or trial cannot be a sham, *Moore v. Dempsey* 261 U. S. 66 (1923).[1] If the hearing is a sham it is void, *Moore, Id.* See (Dkt. 103 pp 20-33, for additional reasons why judgment is void, which Anderson reserves the right to refer to in his reply memorandum.)

CONCLUSION

The Colorado River Doctrine is a discretionary issue that is extremely limited in its scope that can be used by a District Court to abstain while State court proceedings are ongoing, involving complicated cases. Setting aside a void judgment is not a discretionary issue. Other issues are also present under the same set of facts, including denial of access to the court, denial of free speech and the Eighth District Court lacking jurisdiction. In addition, Anderson was an Occupying Claimant, Under most circumstances, a single unconstitutional error is enough for reversal in federal courts, therefore Anderson requests this court find the Eighth District Court decision void as a matter of law.

Respectfully Submitted this 2nd day of January 2017

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Greg Anderson

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1. We shall not say more concerning the corrective process afforded to the petitioners than that **it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.** See *Screws v. United States* 325 U. S. 91 at 126; *Culp v. United States*, 131 F.2d 93 *Catlette v. United States*, 132 F.2d 902.

(Dkt 111) ANDERSON V HERBERT FEDERAL DISTRICT COURT UTAH ORDER ADOPTING REPORT AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GREG ANDERSON,

Plaintiff,
v.

GARY HERBERT, SEAN REYES, the THIRD DISTRICT COURT, the EIGHTH DISTRICT COURT, the UTAH COURT OF APPEALS, CLARK A. McCLELLAN in both his individual and official capacity, DANIEL KITCHEN, JAMES L. AHLSTROM, TERRY WELCH, LYNN KITCHEN, GARY KITCHEN, MATTHEW J. KITCHEN, MARK R. KITCHEN, SAND BAY LLC, SUN LAKE LLC, ORCHID BEACH LLC, and ROOSEVELT HILLS LLC, Defendants.

ORDER ADOPTING
REPORT AND RECOMMENDATION

Case No. 2:15-cv-00083-RJS-DBP
Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead

In 2008, a state court entered an Eviction Order against Plaintiff Greg Anderson. Believing the Order improper, Anderson subsequently filed various state and federal lawsuits collaterally attacking it, culminating in the filing of this case. Defendants moved to dismiss Anderson's Consolidated Complaint, and Magistrate Judge Pead issued a Report and Recommendation recommending their motions be granted. Anderson objected. For the reasons below, the Objection is overruled and the Report and

Recommendation is adopted in full.

ANALYSIS

Judge Pead recommended dismissal of the Consolidated Complaint against all Defendants on the basis of lack of jurisdiction under the *Rooker–Feldman* doctrine Anderson's objections to the *Rooker–Feldman* analysis, and then turns to the objections to Judge Pead's alternative rulings.[1]

The Rooker–Feldman Doctrine

Judge Pead first recommended dismissing the case under the Rooker–Feldman doctrine, which limits a federal district court's jurisdiction to review a dispute already resolved by a state court.[2] The doctrine bars review not only of claims actually raised before the state court, but also of matters not raised before the state court but "inextricably intertwined" with the state court's denial of the plaintiff's claims, the justification being that in either case, the district court is "in essence being called upon to review the

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1. All facts are taken from Anderson's Consolidated Complaint and are construed in the light most favorable to him. *See Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). The court presumes Anderson's factual allegations to be true and liberally construes his pro se pleadings. Id. Where, as here, a magistrate judge has issued a Report and Recommendation, the court will review de novo any parts of the Report and Recommendation that were properly objected to. Fed. R. Civ. P. 72(b). Any part not objected to will be reviewed for clear error. *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991). (In the absence of timely objection, the district may review a magistrate's report under any standard it deems appropriate.

2. See *Guttman v. Khalsa*, 444 F.3d 1027, 1031 (2006)

state-court decision.[3] The question before judge Pead then, whether the claims in Anderson's s Consolidated Complaint were the same as or inextricably intertwined with those raised in Anderson's previous state court decision lawsuits.

The prior state court actions at issue stem from an Eviction Order entered against Anderson in 2008. After being evicted, Anderson filed five subsequent state and federal lawsuits collaterally attacking the Eviction Order, the fourth and fifth of which were filed in this court and later consolidated into the present case. In his Consolidated Complaint, Anderson asserts twenty-eight claims—twelve federal claims and sixteen state law claims. Judge Pead concluded the thrust of all these claims was to overturn the Eviction Order, and determined the *Rooker–Feldman* doctrine therefore barred review by this court. Anderson objected to this conclusion,

("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate."). contending: (1) the *Rooker–Feldman* doctrine does not apply because this case was filed before all of his state court cases went final; and (2) the doctrine does not apply to allegations of misrepresentations in state court. The first objection is overruled. Anderson is correct that Tenth Circuit law has evolved on this point; previously, the Tenth Circuit stated Rooker–Feldman barred a federal suit regardless of whether it was filed before or after the related state court action went final.[4] The Supreme

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3. *Id.*

4. See Kenmen Eng'g v. City of Union, 314 F.3d 468, 473 (10th Cir. 2002), overruled in part by Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005).

Court reversed that holding in *Exxon Mobil,* confining *Rooker–Feldman* to cases in which the state court judgments in question went final before federal district court proceedings were initiated.[5] The reason for this limitation is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court"; rather, the practice to be avoided is "district courts exercise[ing] appellate jurisdiction over state-court judgments."[6] This case presents a unique situation in that the original Complaint (in what was Anderson's fourth lawsuit) was filed before all Anderson's state proceedings went final, but both the fifth lawsuit and the subsequent Consolidated Complaint were filed after Anderson's state proceedings went final. The Tenth Circuit has not provided guidance on application of *Rooker–Feldman* in this instance, but given the strict post-*Exxon Mobil* interpretation of *Rooker–Feldman* and the likelihood that this case, for purposes of Rooker–Feldman, should be considered "filed" before Anderson's state proceedings went final (notwithstanding that the fifth lawsuit and operative Consolidated Complaint came afterward), it might seem that the court could properly assert jurisdiction. The Tenth Circuit, however, has made clear that even where *Rooker–Feldman* is not otherwise applicable, "jurisdiction, even though properly obtained, may—and sometimes must—be declined under the principles of abstention."[7] And district courts in the Tenth Circuit have interpreted this guidance to mean that where related state court proceedings are still pending when a federal action is filed, but go final before the federal court rules,

5. See *Exxon Mobile* 544 U. S. at 292

6. *Id.* at 291,292

7. *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1232 (10th Cir. 2013).

invocation of *Rooker–Feldman* may nonetheless be appropriate.[8]

In *McDonald,* for example, a district court dismissed on the basis of *Rooker–Feldman* notwithstanding that the case was filed before related state proceedings went final, because the court concluded that "[w]ere the state court . . . proceedings involving Mr. McDonald ongoing, this Court would likely have concluded that the factors governing Colorado River abstention would have required this Court to stay (if not dismiss) Mr. McDonald's claims here pending the conclusion of the [state court] proceeding.[9] The court explained that "the practical effect of doing so would place the Court in an appropriate circumstance to now correctly invoke the *Rooker–Feldman* doctrine."[10]

Similar reasoning applies here. The decision whether to abstain under Colorado River turns on a balancing of four factors, only two of which are applicable here: (1) the desirability of avoiding piecemeal litigation, and (2) the order in which jurisdiction was obtained by the concurrent forums.[11] These factors would have counseled against asserting jurisdiction in this The second factor is not relevant because the state and federal courts are "at no great 5 case while state proceedings were still ongoing.

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8. *McDonald v. J.P. Morgan Chase Bank, N.A.,* No. 12-CV-02749-MSK, 2014 WL 334813, at *3 (D. Colo. Jan. 30, 2014).

9. *Id.*

10 Id. at *4.

11. See *D.A. Osguthorpe Family P'ship.*, 705 F.3d at 1234. The other two factors are whether the state or federal court first assumed jurisdiction over the same res, and the inconvenience of the federal forum. The first factor is not relevant because "[n]either the state nor district court has acquired jurisdiction

Anderson's Consolidated Complaint relates primarily to proceedings and orders issued in the original Eviction Lawsuit and the second action filed in Third District Court. When this case was filed, the original Eviction Order had long since issued, the case had been up to the Utah Court of Appeals and geographical distance from each other, back, and after relatively dormant for six years, the Eighth District Court was addressing motions for a new trial, for entry of judgment, and for other relief. [12] Similarly, at that time, the second lawsuit had sat idle in the Third District Court for three years, and the court entered judgment four months after this case was filed.[13] The piecemeal federal review of any issues raised in these cases would be undesirable both because it would be duplicative of any ongoing state trial or appellate review and because it would raise federalism concerns. And as to the second factor, the state courts were the first to obtain over the eviction issue. Had this court been called on at the time to review proceedings in the Eighth and Third District courts, abstention (and a stay or dismissal) would have been required under Colorado River. That would place the court in a position now to appropriately invoke *Rooker–Feldman.*

Thus, the fact that this case was filed before all of Anderson's state court proceedings went final does not save the Consolidated Complaint from dismissal for lack of jurisdiction. Until the point at which the state proceedings went final, abstention would have been proper. And now that the state proceedings have gone final, the case presents exactly the situation *Rooker–Feldman* seeks to avoid: Anderson's

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over property in the course of this litigation." *Id.* and no party has suggested any physical or logistical inconvenience suffered as a result of litigating in dual forums." *Id.*

12. Dkt. 86-2.

13. Dkt. 86-7.

Consolidated Complaint, like the complaints and lawsuits that preceded it, asks not that this court address a legal issue in parallel with the state court—a request, as discussed above, that is not necessarily improper—but instead asks that this court sit in review of a state court Eviction Order and various state court orders addressing the Eviction Order. This court is without jurisdiction to do so, and the Consolidated Complaint was therefore properly dismissed for lack of jurisdiction. Anderson's other objection to Judge Pead's invocation of *Rooker–Feldman* is his argument that *Rooker–Feldman* does not apply to allegations of misrepresentations in state court proceedings. In essence, this is an argument that Anderson's current claims were not actually raised before the state court and are not "inextricably intertwined" with those proceedings, as they relate only to perceived procedural improprieties with those proceedings. For support, Anderson relies on Wagner, in which the Tenth Circuit concluded that claims related to misrepresentations by defendants in a child custody proceeding that was ultimately dismissed were "sufficiently extricable from any state-court judgment for *Rooker–Feldman* purposes."[14] In Wagner, the Tenth Circuit laid out the following test for invoking Rooker–Feldman: Would the federal claims be identical had there been no adverse state court judgment?[15] If so, the claims are extricable from any state court orders and *Rooker–Feldman* is not applicable. If not, *Rooker–Feldman* bars jurisdiction

14. *See P. J. ex rel. Jensen v. Wagner*, 693 F.3d 1182, 1194 (10th Cir. 2010)
15. *Id. at 1193*

over those claims. The claims in Anderson's Consolidated Complaint would not exist but for the adverse state court order. These claims concern arguments regarding state court judges' handling of Anderson's claims in state court, including allegations that the court violated Anderson's constitutional rights by unreasonably seizing his home, by allowing opposing counsel to misrepresent the law, by holding an evidentiary hearing on a motion to dismiss, by allowing opposing counsel to draft findings of fact and conclusions of law, and by not allowing Anderson to file an answer and counterclaim, among others. These claims are all aimed at a central premise: that the state court failed to fulfil its duties and/or conspired with opposing parties and counsel to evict Anderson from a home he believes was rightfully his. This premise may in fact be true; that is a matter for the state appellate courts, and, if appropriate, the United States Supreme Court, which has exclusive jurisdiction over appeals from state supreme courts.[16] Regardless, these claims would not exist but for the state court judgments and Eviction Order, much less "be identical" absent those proceedings. For that reason, this court is without jurisdiction to review them, and Judge Pead properly dismissed the Consolidated Complaint.

Other Bases for Dismissal

Judge Pead also enumerated several alternative bases for dismissal. The court will briefly address Anderson's objections to each. First, of the seventeen Defendants named in the

16. 28 U.S.C. § 1257

Consolidated Complaint, eleven are what Judge Pead

termed "Private-Party Defendants"—that is, Defendants who were not sued in their official capacity and who are not judicial bodies. Judge Pead recommended granting the Private-Party Defendants' Motion to Dismiss Anderson's federal claims (all of which are constitutional) on the basis that the Private-Party Defendants are not state actors, a prerequisite for constitutional claims under 42 U.S.C. § 1983 and the Fourteenth Amendment.[17] Anderson objected, contending the Private-Party Defendants are state actors as a matter of law because "Defendants made more than thirty misrepresentations in a six page memorandum, convinced the Eighth District Court judge to hold an evidentiary hearing at 16 28 U.S.C. § 1257. the motion to dismiss stage of the proceedings, and wrote the 'Statement of Facts and Conclusions of law.'"[18] The court disagrees. As demonstrated by Judge Pead's Report and Recommendation, the practice of asking counsel to draft orders for the court's adoption is not unusual, and does not render counsel a state actor. Nor does the fact that a party convinces a court to rule in a particular manner, even if done through misrepresentation. The authority Anderson cites is not to the contrary. Judge Pead also alternatively granted the Private-Party Defendants' Motion to Dismiss claims against the Private-Party Attorney Defendants under the judicial proceedings privilege, which insulates attorneys from claims stemming from statements made in judicial

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17. The "under color of law" requirement under § 1983 and the "state action" requirement under the Fourteenth Amendment are identical. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982).

18. Dkt. 98 at 6.

proceedings.[19]

In his Objection, Anderson contends he alleged the Private Party Attorney Defendants committed fraud and therefore exceeded the scope of their representation, in which case the judicial proceedings privilege would not apply. [20] Judge Pead dismissed this argument, concluding that Anderson nowhere alleges the Private-Party Attorney Defendants exceeded the scope of their representation. This court agrees. Anderson's Consolidated Complaint alleges that the Private Party Attorneys and their clients defrauded Anderson out of his home, and committed fraud by misrepresenting the law to the court. This is not an

allegation that the attorneys "engaged in independent acts, that is to say acts outside the scope of [their] representation of [their] client's interests, or [have] acted solely for [their] own interests and not [their] clients."[21] As such, Judge

Pead properly determined the judicial proceedings privilege applies.

Judge Pead next granted the Motion to Dismiss all claims against the Private-Party Defendants arising prior to April 5, 2012 as barred by the statute of limitations. In Anderson's Objection, he contends the Eviction Order is void and therefore not subject to a statute of limitations. Judge Pead correctly determined, however, that Anderson's allegations that

19. See Moss v. Parr Waddoups Brown Gee & Loveless, 285 P.3d 1157, 1165 (Utah 2012).

20. See Dkt. 98 at 14; Moss, 285 P.3d at 1166 ("[W]here an attorney has committed fraud or otherwise acted in bad faith, which is inherently 'acting in a manner foreign to his duties as an attorney,' the privilege will not shield an attorney from civil liability.")

21 See, e.g., Moss, 285 P.3d at 1166–68.

the Order is wrong (whether because it was influenced by misrepresentations or otherwise) does not render it void. Anderson also argues for the first time in his Objection that Utah's Savings Statute excuses any late filings. But Anderson has not demonstrated the Statute applies, as he has not shown, as required by the statute, that a timely-filed action was either reversed or dismissed other than on the merits, or that the present action was filed within one year of the reversal or dismissal.[22] Judge Pead next concluded the State Court Defendants [23] were entitled to Eleventh Amendment Immunity. Anderson objected based on his purported ability to sue a state official in an official capacity for prospective relief—what is known at the Ex parte Young exception to Eleventh Amendment immunity. Judge Pead concluded, however, that the State Court Defendants are immune under the Eleventh Amendment, not that the Individual State Defendants are, and he correctly determined that the Ex parte Young exception "has no application in suits against States and their agencies, which are barred regardless

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22. See Utah Code § 78B-2-111. Additionally, the only authority on which Anderson relies is Hebertson v. Bank One, Utah, N.A., 995 P.2d 7, 10 (Utah Ct. App. 1999), but that case was superseded by statute. See Norton v. Hess, 374 P.3d 49, 52 (Utah Ct. App. 2016) (recognizing that the Savings Statute now has a single use limitation and no longer permits "serial recourse" to the statute).

23. In addition to suing Private Party Defendants, Anderson named various State Party Defendants that can be separated into two groups: the "State Court Defendants" (the Third District Court, the Eighth District Court, and the Utah Court of Appeals) and the "Individual State Defendants" (Gary Herbert, Sean Reyes, and Clark McClellan).

of the relief sought."[24] Last, Judge Pead also variously concluded: the State Court Defendants are not "persons" for purposes of § 1983; Individual State Defendants Herbert and Reyes were not constitutionally required to conduct investigations of codefendant McClellan; Anderson's claim for injunctive and declaratory relief against Individual State Defendants Herbert and Reyes fails; Anderson's official capacity claims against McClellan fail because he did not act under color of state law; and various claims against the Individual State Defendants were untimely. Anderson does not meaningfully object to any of these conclusions,[25] and the court concludes none of them are clearly erroneous. Anderson's Objection [26] to Judge Pead's Report and Recommendation[27] is OVERRULED.

The Report and Recommendation is adopted in full, and the Private Party Defendants' Motion to Dismiss[28] and State Party Defendants' Motion to Dismiss[29] are GRANTED.[30]

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24. Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 495 (10th Cir. 1998).
25. See Dkt. 98 at 23–25.
26. Dkt. 98.
27. Dkt. 97.
28. Dkt. 86.
29. Dkt. 88.
30. Anderson's Motion for the Court to Take Judicial Notice is denied. Dkt. 101. Anderson's supplemental authority and argument related to his statute of limitations argument is not proper material for judicial notice. Anderson's Motion for Partial Summary Judgment at Dkt. 103 is withdrawn 107), and his Motion for Leave to File and related **Motion for Partial Summary Judgment are denied because the Consolidated Complaint has been dismissed. Dkts. 105, 106.** [Emphasis added]

The Clerk of Court is directed to close the case.
SO ORDERED this 6th day of November, 2017.

BY THE COURT:

ROBERT J. SHELBY
United States District Judge

REPORT & RECOMMENDATION Pead 2017

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

GREG ANDERSON,
Plaintiff,
v.

GARY HERBERT, SEAN REYES, the THIRD DISTRICT COURT, the EIGHTH DISTRICT COURT, the UTAH COURT OF APPEALS, CLARK A. McCLELLAN in both his individual and official capacity, DANIEL KITCHEN, JAMES L. AHLSTROM, TERRY WELCH, LYNN KITCHEN, GARY KITCHEN, MATTHEW J. KITCHEN, MARK R. KITCHEN, SAND BAY LLC, SUN LAKE LLC, ORCHID BEACH LLC, and ROOSEVELT HILLS LLC,

Defendants.

REPORT & RECOMMENDATION
Case No. 2:15-cv-00083
United States District Court
Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead

I. INTRODUCTION

This case is before Magistrate Judge Dustin Pead pursuant to a 28 U.S.C. §636 (b)(1)(B) referral from District Court Judge Robert Shelby. (ECF No. 15.)

On December 20, 2016, Judge Shelby consolidated Anderson v. McClellan, case number 2:16-cv-271-RJS, into the above entitled case, and instructed Plaintiff Greg Anderson (Plaintiff or

Anderson) to file a consolidated pleading to include all of the claims that Anderson intended to continue prosecuting. (ECF No. 77.) In addition, the District Court deemed all pending motions, filed in both this case and the consolidated case, moot. (Id.)

Thereafter, on January 5, 2017, Plaintiff filed a one hundred twenty page "Verified Consolidated Complaint" against Defendants Gary Herbert, Sean Reyes, Clark McClellan, the Third District Court, the Eight District Court, the Utah Court of Appeals (collectively, the "State Defendants"), and Defendants Daniel W. Kitchen, James L. Ahlstrom, Terry Welch, Lynn Kitchen, Gary Kitchen, Matthew J. Kitchen, Mark R. Kitchen, Sand Bay LLC, Sun Lake LLC, Orchid Beach LLC, and Roosevelt Hills LLC (collectively, the "Private-Party Defendants"). (ECF No. 78.)

II. LITIGATION HISTORY

The consolidated pleading is the latest in a series of collateral attacks mounted by Anderson against a 2008 eviction order (the "Eviction Lawsuit") issued against him. The Eviction Lawsuit was brought by Defendant Daniel Kitchen (Kitchen) in the Eighth District State Court. (ECF No. 78, ¶¶ 377-390), and a final judgment was entered on June 16, 2015. (ECF No. 86-2.)[1]

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1. On April 7, 2017, Anderson's five post judgment relief motions, (1) Motion for New Trial, (2) Amended Motion for New Trial, (3) Motion that the Judge in the Case Agree to Personally Review the Law, (4) Motion that Court Declare Judgement Void and (5) Amended Motion that Court Declare Judgment Void, were denied leaving Plaintiff's eviction as the final judgment which he did not appeal. (ECF No. 86-3.)

Private-Party Defendants identify five prior actions brought by Anderson in response to the Eviction Lawsuit. (ECF No. 86.) Given this court's discretionary authority to judicially notice earlier portions of the same or similar proceedings, the court adopts Defendants' comprehensively outlined litigation history and takes judicial notice of the underlying cases and matters of public record as set forth in the Private-Party Defendant's motion. *See United States v. Estep*, 760 F.2d 1060, 1063 (10 Cir. 1985).[2] Given the procedural relevance of the prior lawsuits to the current action, the court takes a moment to cursorily address Anderson's five earlier actions.

Prior Related Actions Filed By Anderson.

On April 24, 2009, Anderson filed a federal civil rights lawsuit against the Private-Party Defendants in the United States District Court for the District of Utah (Case Number 2:09-cv00362) (the "First Action"). (ECF No. 86-4.) The District Court dismissed the First Action (ECF No. 86-5), and Plaintiff appealed the dismissal to the Tenth Circuit Court and the United States Supreme Court. Both appeals were denied. (ECF No. 86-6.)

On June 15, 2011, Plaintiff filed a complaint against Private-Party Defendants in the Third District Court for the State of Utah (Case Number 110914438) (the "Second Action"). (ECF No. 86-7.) In the Second Action, the State Court granted summary judgment in favor of the non-attorney Private-Party Defendants and dismissed the attorney Private-Party Defendants from the case. (ECF No.

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2. See also infra pg. 5-6.

86-9, ECF No. 86-10, ECF No. 86-11.) On November

24, 2014, Anderson filed another complaint against Private-Party Defendants in the Third District Court for the State of Utah. (Case Number 140908017) (the "Third Action"). (ECF No. 86-13.) The State Court dismissed the Third Action and entered a final judgment on July 6, 2015. (ECF No. 86-15, ECF No. 86-16.)

On February 5, 2015, Anderson filed his currently pending federal action against Defendants in the United States District Court for the District of Utah (Case Number 2:15-cv 230083) (the "Fourth Action"). (ECF No. 86-17.) In the Fourth Action, Plaintiff alleged the Private Party Attorney Defendants defrauded the Eighth and Third District State Courts in violation of Anderson's due process rights. (Id.) On November 9, 2015, the Magistrate Judge issued a Report, recommending that the District Court dismiss Plaintiff's complaint. (ECF No. 24.)[3]

Most recently, on April 5, 2016, Anderson filed his pending federal action against Private-Party Defendants in the United States District Court for the District of Utah (Case No. 2:16-cv-00271) (the "Fifth Action"). (ECF No. 86-19.) On December 20, 2016, the District Court consolidated the Fourth and Fifth actions and ordered Anderson to file an Amended Consolidated Complaint (Case Number 2:15-cv-00083) ("Consolidated Action"). (ECF. No. 77, ECF No. 78.)

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3. Anderson filed a timely objection to the Magistrate Judge's Report and Recommendation. (ECF No. 25.) Prior to ruling on the objection, the District Court consolidated Anderson's fourth and fifth actions and deemed all pending motions or objections moot. (ECF No. 77.)

III. PENDING MOTIONS

Currently pending are Private-Party Defendants and State Defendants' motions to dismiss Anderson's consolidated complaint. (ECF No. 86, ECF No. 88.) In his consolidated complaint Anderson alleges Kitchen, along with Kitchen's family members, businesses and attorneys, tricked Eighth and Third District State Court judges and violated Plaintiff's due process rights. In addition, Anderson claims: (1) the State Courts and Private-Party Defendants conspired to violate Anderson's constitutional rights (ECF No. 78, ¶¶ 346-348); (2) Defendant Gary Herbert (Herbert) and Defendant Sean Reyes (Reyes) failed to conduct an investigation into his eviction and into the lawyers representing Kitchen (ECF No. ¶¶ 493-507); and (3) Defendant Clark McClellan (McClellan) abused his office by allowing the word "judge" to appear in front of his name in a Third District Court pleading in a case where Anderson sued McClellan for acts that McClellan had undertaken as a private attorney. (ECF No. 78, ¶¶ 298-302.)

Plaintiff does not seek damages from State Defendants in their official capacities. Instead, Anderson's claims for declaratory and injunctive relief demand that the State Courts render lawful orders (ECF No. 78, pg. 100-110, 117) and declare Utah's Rules of Civil Procedure unconstitutional. (Id., ¶¶ 388-340.)

IV. STANDARDS OF REVIEW

In light of the pending motions and the relevance of Anderson's prior litigation, the court addresses the standard of review for both motions to dismiss and taking judicial notice of matters outside the pleadings.

Standard Of Review For Motions To Dismiss.
When considering a motion to dismiss, "[a]ll

well-pleaded facts, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to the nonmoving party." Teigen v. Renfrow, 511 F.3d 1072, 1078 (10 Cir. 2007); see also Mglej v. th Garfield Cnty., 2013 U.S. Dist. 90438 *3 (D. Utah July 1, 2014) (citing GFF Corp. v. Associated Wholesale Grocers, 130 F.3d 1381, 1384 (10 Cir. 1997). th In order to survive dismissal, a complaint must contain facts sufficient to make the claim "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that
allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed. 2d 868 (2009) [5] (internal quotations and citations omitted). Ultimately, the function of the court 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." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10 Cir. 2003) (citations omitted). the Standard Of Review For Judicial Notice Of Matters Outside The Pleadings.
In general, if a court is asked to consider matters outside the scope of the pleadings, it is required to convert the motion for dismissal into a motion for summary judgment. See Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").
A court is not, however, required to convert a motion to summary judgment if it is considering public records for which the court may take judicial notice. See *Armstrong v. JP Morgan Chase Bank Nat. Ass'n.*, 635

Fed. Appx. 909, 911 (10 Cir. Colo. Dec. 14, 2015) th?? (unpublished) ("A court may consider facts subject to judicial notice— including facts that are a matter of public record, such as documents filed in other litigation— without converting a motion to dismiss into a motion for summary judgment."); see also Tal v. Hogan, 453 F.3d 1244, 1264 n. 24 (10 Cir. 2006). Further, it is within the court's discretionary authority to judicially notice earlier portions of the same or similar proceedings. *See United States v. Estep*, 760 F.2d 1060, 1063 (10 Cir. 1985); St. Louis Baptist Temple v. Fed. Deposit Ins. Corp., 605 F.2d 1169, th 1172 (10 Cir. 1979) ("[I]t has been held that federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system if those proceedings have a direct relation to matters at issue.").

V. ANALYSIS

In reviewing the pending motions, all facts are taken from Anderson's consolidated complaint and viewed in a light most favorable to the Plaintiff. See *Jordan-Arapahoe, LLP v. Bd. of Cnty. Comm'rs.*, 633 F.3d 1022, 1025 (10 Cir. 2011); *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10 Cir. 2002) (citation omitted) (explaining court "must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed."). As a pro se litigant, the court is required to construe Mr. Anderson's pleadings liberally. *See Riddle v. Mondragon*, 83 F. 3d 1197, 1202 (10 Cir. 1996); see also *Hall v. Belmon*, 935 F.2d 1106, 1110 (10 Cir. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L.Ed. 2d 652, 92 S. Ct. 594 (1972).

As an initial matter both Private-Party Defendants and State Defendants assert Anderson is unable to establish federal jurisdiction and, as a

result, his complaint should be dismissed. See Fed. R. Civ. P. 12(b). Federal jurisdiction is limited, and consequently "'there is a presumption against [this court's] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof.'" *Marcus v. Dept. of Revenue*, 170 F.3d 1305, 1309 (10 Cir. 1999) (quoting *Penteco Corp. Ltd. v. Union Gas. Sys., Inc.* 929 F.2d 1519, 1521 (10 Cir. 1991). Upon consideration, this court concludes it lacks jurisdiction over all of Anderson's claims seeking review of state court judgments and accordingly recommends dismissal on this ground.

The Rooker Feldman Doctrine Divests This Court Of Subject Matter Jurisdiction Over Plaintiff's Claims Requiring Review Of State Court Judgments.

Plaintiff complains of injuries caused by what he believes were wrongfully entered state court judgments. Pursuant to 28 U.S.C. §1257 and the Rooker Feldman doctrine, this court lacks [7] subject matter jurisdiction to hear any claims seeking review of state court judgments.

28 U.S.C. Section 1257 states: [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. §1257(2). Under the plain language of the statute, all final judgments or decrees of the highest court of a State may only be reviewed by the United States Supreme Court and any "United States District Court is without authority" to do so. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). In this case, Anderson failed to fully pursue his state court remedies or to follow the jurisdictional requirements of 28 U.S. C. §1257 and consequently this court lack subject matter jurisdiction

over his claims. Additionally, in response to litigants' attempts to re-litigate failed state court claims, the Supreme Court articulated the Rooker-Feldman doctrine. Feldman 460 U.S. 462 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413, 44 S. Ct. 49, 68 L.Ed. 362 (1923.) Under Rooker-Feldman, "state-court losers complaining of injuries caused by state-court judgments" may not bring a federal action to remedy those injuries. *Exxon v. Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L.Ed. 2d 454 (2005); *Knox v. Bland*, 632 F.3d 1290, 1292 (10 Cir. 2011); *Tal v. Hogan*, 453 F.3d 1224, 1255-56 (10 Cir. 2006). The doctrine broadly applies to both temporary and non-final orders, *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1075 (10 Cir. 2004),[4] as well as §1983 claims, *Facio v. Jones*, 926 F.2d 541, 544 (10 Cir. 1991),[5] and operates to deny any federal court, other than the United States Supreme Court, jurisdiction to consider "claims actually decided by a state court" or claims that are "inextricably intertwined with a prior state-court judgment." *Tal* 453 F.3d at 1256 (10 Cir. 2006) (*citing Kenman Eng'g v. City of Union*, 314 F.3d 468, 473 (10 Cir. 2002) (internal citation and quotations omitted). A claim is considered to be "inextricably intertwined

4. The claims set forth in Anderson's complaint stem from the Eviction Lawsuits' December 3, 2008, Findings of Fact and Conclusions of Law (ECF No. 86-2), and Orders issued in the Second Action on March 13, 2012 and June 4, 2015. (ECF No. 86-9.) When Plaintiff originally filed this action on February 5, 2015 (ECF No. 1) the allegedly improper orders had already been issued, despite final judgments not being entered until later.

5. See Anderson v. State of Colo. 793 F.2d 262, 263 (10 Cir. 1986) (Rooker-Feldman bars §1983 claim seeking to reverse or modify a state court judgment where issues could have been reviewed on direct appeal by the state appellate courts.).

if the state court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress." *Id.* (*citing Kenman Eng'g.* 314 F.3d at 476).

Although *Rooker-Feldman* does not bar claims seeking prospective injunctive and declaratory relief, it does bar claims requiring a federal district court to review and reject state court judgments. *PJ Ex Re. Jensen v. Wagner*, 603 F.3d 1182, 1193 (10 Cir. 2010). Under the doctrine,"[b]arred claims are those [claims] 'complaining of injuries caused by state court judgments.' In other words, an element of the claim must be that the state court wrongfully entered its judgment." *Campbell v. City of Spencer*, 682 F.3d 1278, 1283 (10 Cir. 2012) (*quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1527, 161 L. Ed. 2d 454 (2005).

The thrust of Anderson's consolidated complaint is to overturn the eviction issued by Eighth District Court as well as the orders of the Third District Court and the Utah Court of Appeals both of which turned aside his collateral attacks on the eviction. Anderson's claims, however, have either already been decided by the Eighth and Third District Courts, or are inextricably intertwined with his serial state court litigation. Thus, after the Eighth and the Third District Courts decided Anderson's claims, his remedy to contest those rulings was to appeal them to Utah's appellate courts and then to the United States Supreme Court. At this juncture, for this court to engage in any adjudication of Anderson's claims would improperly require it to "effectively act as an appellate court reviewing the state court disposition." *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 363 F.3d 1072, 1075 (10 Cir. 2004) ; *see also Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462,483 n. 16, 75 L.Ed. 2d 206, 103 S. Ct. 1303 (1983) (Under the

Rooker-Feldman doctrine, "lower courts possess no power whatever to sit in direct review of state court decisions.").

Anderson attempts to evade *Rooker-Feldman* by arguing that he commenced his lawsuit prior to the entry of final judgments in the state court litigation and therefore the doctrine does not apply. (ECF No. 92.) Plaintiff's claim fails. Anderson's consolidated complaint, which adds a new party and new claims, was filed on January 5, 2017----well after the conclusion of the state court litigation.[6] Further, as a matter of policy, it would be inappropriate to allow Anderson to circumvent application of *Rooker-Feldman* simply by filing federal lawsuits prior to the entry of final judgment in state court cases. *See McDonald v. J.P. Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 11574 *12 (D. Colo. Jan. 29, 2014) (*citing D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223, 1232 (10 Cir. 2013).

In this case, Anderson's claims are inextricably intertwined with his prior state-court judgments. As a result, Plaintiff is barred from seeking appellate review of those state court judgments through this action filed in the United States District Court. Accordingly, the court recommends dismissal of all Plaintiff's claims against Private-Party and State Defendants seeking this court's review of previously issued state court judgments.

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6. Final judgment was entered in the Eviction Lawsuit on June 16, 2015 (ECF No. 86-2), 6 and final judgments in the Second Action were entered on April 13, 2016 and May 31, 2016. (ECF No. 86-10.) The Utah Court of Appeals affirmed the judgments on August 30, 2016. (ECF No. 86-12.) Final judgment in the Third Action was entered on July 6, 2015 (ECF No. 86-16), and Anderson's consolidated complaint was filed on January 5, 2017. (ECF No. 78.)

Private-Party Defendants' Motion To Dismiss

In addition to lack of jurisdiction, the court recommends dismissal of Anderson's claims against Private-Party Defendants because: (1) they did not act under color of state law; (2) the claims are barred by the judicial proceeding privilege; and (3) claims arising prior to April 5, 2012 are barred under the applicable statute of limitations.

Where necessary for purposes of clarity, the court divides the Private-Party Defendants into two main groups: (1) the Private Party Non-Attorney Defendants which includes Daniel Kitchen, Lynn Kitchen, Matthew Kitchen, Mark Kitchen, Sand Bay, LLC, Sun Lake, LLC, Orchid Breach, LLC and Roosevelt Hills LLC; and (2) the Private Party Attorney Defendants who are attorneys licensed in the State of Utah and include James L. Ahlstrom, Terry E. Welch and Clark A. McClellan, in his individual capacity.

Private-Party Defendants Did Not Act Under Color Of State Law And Therefore May Not Be Held Liable Under 42 U.S.C. §1983.[7]

42 U.S.C. §1983 "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights." *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L.Ed. 2d 399 (1999). To state a cause of action under 42 U.S.C. §1983,

> [f]irst, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived

> him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show the defendant[s] acted "under color of law." *Yanaki v. Iomed,* Inc., 319 F. Supp. 2d 1261, 1264 (D. Utah Mar. 11, 2004) (citing *Adickes v. S.H. Kres & Co.,* 398 U.S. 144, 150, 26 L.Ed. 2d 142, 90 S. Ct. 1598) (1970).

Liability under §1983 attaches "to conduct occurring under color of state law, and conduct constituting 'state action' under the Fourteenth Amendment satisfies this requirement." *Anderson v. Kitchen,* 389 Fed. Appx. 838, 840 (10 Cir. 2010)

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7. Anderson's complaint alleges claims under the Fourteenth Amendment, Fourth Amendment and a general violation of "free speech", not 42 U.S.C. §1983. The distinction, however, is meaningless in the context of state action because "the statutory requirement of action 'under color of law' and the 'state action' requirement of the Fourteenth Amendment are identical." Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L.Ed. 2d. 482 (1982); see also Salazar v. City of Commerce City, 553 F. App'x 692, 694 (10 Cir. 2013) (applying § 1983 to freedom of speech claims); Becker v. Kroll, 494 F.3d 904, 915 (10 Cir. 2007) (applying § 1983 to Fourth Amendment claims).

(unpublished) (citing *Lugar*, 457 U.S. at 935, n.18 (1982).[8] "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Am. Mfs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (quoting Blum v. *Yaretsky*, 457 U.S. 991, 1002,, 102 S. Ct. 2777, 73 L.Ed. 2d 534 (1982) (citation omitted). While private conduct can constitute state action, in order to do so it must be "fairly attributable to the State." Lugar, 457 U.S. at 937 (1982); see also *Scott v. Hern*, 216 F.3d 897, 906 (10 Cir. 2000). Anderson seeks to establish state action by alleging Private-Party Defendants violated his due process rights through their involvement in the underlying legal proceedings and by acting "in concert" with the Eighth District Court in the Eviction Lawsuit. (ECF No. 78, ¶¶274-279; ECF No. 91.)[9] Private-Party Defendants, however, are not state actors and their participation in lawsuits involving Anderson may not be fairly attributed to the state. See Anderson v. Kitchen, 389 F. App'x

8. Absent state action, the §1983 inquiry ends and consequently it is often prudent for the court to analyze the state action element of the inquiry first. *See Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 637 (10 Cir. 1983).

9. Anderson does not expressly allege that the Third and Eighth District Court judges deprived him of due process in concert with the Private-Party Defendants. Yet, under a liberal reading of the complaint Plaintiff could appear to allege that the Utah State Courts deprived him of due process. When a party in a §1983 action attempts to assert state action by implicating state officials or judges in a conspiracy with private party defendants, there is a heightened pleading requirement mandating more than conclusory allegations without factual averments. *See Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10 Cir. 1983) (*citing Clulow v. Oklahoma*, 700 F.2d 1291, 1301 (10 Cir. 1983). Rather, the pleadings "must specifically present facts tending to show agreement and concerted action." Scott, 216 F.3d 897, 907 (10 Cir. 2000).

838, 841 (10 Cir. 2010) (unpublished) ("defendants' actions in allegedly misleading a state court judge did not constitute joint action between defendants and the judge."); See also Reid v. Klein, Read v. Klein, 1 Fed. Appx. 866, 871 (10 Cir. Jan. 9, 2001) (unpublished) (citing 1 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees, § 5.14, at 291 (2d ed. 1998) (finding a private party's "mere invocation of state legal procedures" does not form joint participation
and thereby establish state action); *Hoai v. Vo*, 935 F.2d 308, 313 (D. C. Cir. 1991) ("mere recourse to state or local court procedures does not by itself constitute 'joint activity' with the state sufficient to subject a private party to liability[13] under section 1983.").[10] Similarly, Plaintiff is unable to establish state action simply because the Private-Party Defendants obtained legal orders with which Anderson disagrees. See *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1208-09 (10 Cir. 2005); Torres v. First State Bank of Sierra Cnty., 588 F.2d 1322, 1326-27 (10 Cir. 1978). And, the "vast weight of authority" holds that attorneys are not state actors merely by virtue of their status as officers of the court. *Barnard v. Young*, 720 F.2d 1188, 1189 (10 Cir. 1983); see also *Catz v. Chalker*, 142 F.3d 279, 289 (6 Cir. 1998) (attorney not a state actor); *Hoai*, 935 F.2d at 313 (D.C. Cir. 1991). In his pleading, Anderson makes the unsupported claim that Defendant McClellan (McClellan) participated as a "state actor" when a motion filed in the Second Action referenced McClellan in his position as a state court judge. (ECF No. 86-22.) The reference relied upon by Plaintiff, was made by the Kitchen Defendants, not by McClellan, and there is no indication that reference to the title "judge" somehow impacted dismissal of Anderson's claims. To the contrary, a reading of the Third District Court's March 15, 2012 Ruling and Order indicates

Anderson's claims were dismissed because: (1) Plaintiff sought to make an improper collateral attack on the Eviction Lawsuit; (2) the judicial proceedings privilege applied to the Attorney Defendants' actions; and (3) Plaintiff acted in bad faith. (ECF No. 86-9.) Ultimately, other than vague and unsupported references to alleged misrepresentations, Anderson fails to raise any specific joint action that is sufficient to support his claim that Private Party Defendants' conduct is attributable to the state. (ECF No. 78, ¶ 274.) Anderson does not assert any supportable claims for state action and his claims against the Private-Party Defendants fail. Plaintiff's Claims Against Private Party Attorney Defendants Are Barred Under The Judicial Proceedings Privilege. Plaintiff's claims against Private-Party Attorney Defendants are also barred by the common law judicial proceedings privilege. The privilege extends to claims stemming from an attorney's conduct or communications made in the course of the attorney's representation of a client. *See Moss v. Parr Waddoups Brown Gee & Loveless,* 2012 UT 42, ¶36, 285 P.3d (citing *Bennett v. Jones, Waldo, Holbrook & McDonough,* 2003 UT 9, ¶ 77, 70 P.3d 17). To determine if a statement falls under the judicial process

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10. Indeed, the Tenth Circuit previously held that Anderson's allegations of misleading a state court judge did not constitute state action. See Anderson v. Kitchen, 389 F. App'x 838, 841 (10 Cir. 2010) (unpublished) (citing Yanaki v. Iomed, Inc., 415 F.3d 1204, 1209 (10 Cir. 2005) ("[t]o hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.").

privilege, Utah courts apply a three pronged test under which "the statement must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant or counsel." *Krouse v. Bower*, 2001 UT 28, ¶8, 20 P.3d 895 (internal quotation and citation omitted). The common law privilege has been applied to federal claims, including claimed violations of 42 U.S.C. §1983. See *Williams v. Westbrook Psychiatric Hosp.*, 420 F. Supp. 322, 323 (E.D. Va. 1976) (judicial proceeding privilege applied to statements made in court by licensed psychiatrist for purposes of determining if plaintiff should be committed). Of note, the privilege is not absolute, and immunity may be lost where an attorney "has committed fraud or otherwise acted in bad faith, which is inherently 'acting in a manner foreign to his duties as an attorney.'" *Moss* 2012 [15] UT 42, ¶37 (*citing Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642, 655) (Idaho 2010). Anderson seeks to evade the privilege by asserting that the Eighth District Court and Private-Party Attorney Defendants colluded to misrepresent the law thereby committing fraud upon the court. (ECF No. 78, ¶275.) In doing so, Anderson does not assert that Private-Party Attorney Defendants were acting outside the scope of representation or in furtherance of their own interests instead of their clients' interests. See *Moss* 2012 UT 42, ¶43 (despite what Plaintiff alleged in the complaint, "it appears that [Defendant's] attorneys at all times acted in [client's] interests. . . ."). Here, the actions of the Private-Party Attorney Defendants' were made in the course of the judicial proceedings and occurred within the scope of the attorneys' representation of their clients. (ECF No. 86-9.) Thus, the judicial process privilege applies and bars

Anderson's claims against Private-Party Attorney Defendants.

Plaintiff's Claims Arising Prior To April 5, 2012 Are Barred By The Statute Of Limitations Period.

In Utah, §1983 claims are governed by the four year statute of limitations period. *See Jenkins v. Utah Cty. Jail,* 2015 U.S. Dist. LEXIS 4231 (D. Utah Jan 13, 2015), appeal dismissed (Sept. 1, 2015) (*citing Arnold v. Duchesne Cnty.*, 26 F.3d 982, 986 (10 Cir. 1994); See also *Garza v. Burnett,* 672 F.3d 1217, 1219 (10 Cir. 2012) (citing Utah Code Ann. § 78B-2-307(3) ("An action may be brought within four years . . . for relief not otherwise provided for by law.") Actions brought under §1983 accrue on the date of the constitutional violation. See *Garza,* 672 F.3d at 1219 (10 Cir. 2012) (citing *Wallace v. Kato,* 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007).

Plaintiff alleges he was denied due process by Private-Party Defendants in both the [16] Eviction Lawsuit and the Second Action. (ECF No. 78, ¶¶110-121.) However, the judgments in both actions were issued after April 5, 2012 and to the extent that any of Anderson's claims arise from statements made or actions taken by Private-Party Defendants prior to April 5, 2012, such claims are time barred.

Anderson further argues that the four year limitations period does not apply to his §1983 claims because the Eighth District Court's eviction judgment is void as a matter of law due to violation of due process and lack of jurisdiction. (ECF No. 91.) More specifically, Anderson claims he was denied due process when the Eighth District Court violated the procedural requirements of the Utah Rules of

Civil Procedure and Utah Code Ann. § 78B-6-810.[11] Voidness may be established for lack of jurisdiction or if a court acts in a manner that is inconsistent with due process. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-225 (10 Cir. 1979) ("For a judgment to be void . . . , it must be determined that the rendering court was powerless to enter it."); See also, 7 Moore's Federal Practice P 60.25(2) (2d ed. 1978). Here, to the extent that Anderson believes the eviction judgment is void because it is somehow incorrect, his argument fails. A judgment is not "void merely because it is or may be erroneous." *V.T.A., Inc.*, 597 F.2d at 224 (10 Cir. 1979) *(citing Marshall v. Bd. of Educ.*, 575 F.2d 417, 422 (3d Cir. 1978). In addition, Plaintiff's reliance upon state statutes to determine what process he is due as a matter of federal constitutional law is misplaced. *Hulen v. Yates*, 322 F.3d 1229, 1247 (10 Cir. 2003) ("[O]nce it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [state] statute."); *Mangels v. Pena*, 789 F.2d 836 (10 Cir. 1986) ("A failure to comply with state or local procedural requirement does not necessarily constitute a denial of due process; the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause."). Consequently, the procedural requirements of the Utah Rules of Civil Procedure and Utah Code Ann. 78B-6-810 are irrelevant to a determination of whether Anderson received procedural due process as a matter of law.[12] For these reasons, Anderson's

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11. Utah Code Annotated § 78B-6-810 is the State of Utah's unlawful detainer statute.

12. Nonetheless, with respect to the Eviction Lawsuit, the record does not support a lack of due process. Instead, the

claim that the Eviction Lawsuit judgment is void fails and to the extent that any of Anderson's claims arise from statements made or actions taken by Private-Party Defendants prior to April 5, 2012, the claims are time-barred.

State Defendants' Motion To Dismiss.[13]

In addition to a failure to establish jurisdiction, the Court recommends dismissal of Anderson's claims against the State Party Defendants because: (1) State Court Defendants are entitled to Eleventh Amendment immunity; (2) State Court Defendants are not "persons" under §1983; (3) Individual State Defendants Herbert and Reyes are not constitutionally required to conduct investigations; (4) Anderson's claim for injunctive and declaratory relief fails; (5) Plaintiff does not allege that Defendant McClellan acted under color of state law; and (6) Anderson's claims are barred under the relevant four year statute of limitations period. When necessary to its analysis, the Court divides the State Defendants into two groups. First, the State Court Defendants (State Court Defendants) which includes the Third District

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record reflects that a hearing was held on Plaintiff's motion to dismiss (ECF No. 93-2, ECF No. 93-3), and Anderson filed several post-decision motions, related to his claim that the 2008 eviction ruling denied him due process, which were considered by the court. (ECF No. 93-4, ECF No. 93-5, ECF No. 93-6).

13. Plaintiff's consolidated complaint names the Eighth District Court "in its official capacity" as a Defendant in this action. (ECF No. 78, ¶¶ 4-5.) There is no return of service on file evidencing service of a summons and complaint on the Eighth District Court. Regardless, State Defendants contend that Anderson's claims against the Eighth District Court are defective and subject to dismissal for the same reasons asserted by the other named State Courts.

Court the Utah Court of Appeals and the Eight District Court.[14] The second group includes Individual State Court Defendants (Individual State Court Defendants) Gary Herbert, Sean Reyes and Clark A. McClellan in his official capacity.

Each of the State Defendants' arguments are addressed herein.

Claims Against The State Court Defendants Are Barred By Eleventh Amendment Sovereign Immunity.

> The Eleventh Amendment to the United States Constitution states:
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend XI. Absent a state's express waiver of immunity, the Eleventh Amendment bars federal suits against a state or state officials acting in their official capacity. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L.Ed. 2d 662 (1974); see generally *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L.Ed. 2d 301 (1991); *Quern v. Jordan*, 440 U.S. 332, 345, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979). State courts are considered to be "arms of the state" and Eleventh Amendment immunity applies to §1983 suits brought against them. See *Quern*, 440 U.S. at 345 (1979), See also 13 Charles Alan Wright et. al., Federal Practice and Procedure § 3524.2, at 324-25

14. But see ftn. 13.

(3d ed. 2008); *Kerkhoff v. West Valley City Dist. Ct.*, 2015 U.S. Dist. LEXIS 19406 (D. Utah, Feb. 17, 2015) (unpublished).[15] An exception to state sovereign immunity exists under *Ex Parte Young. Ex Parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L.Ed. 714 (1908). Pursuant to the Ex Parte Young doctrine, an action may be brought against a state official, acting in an official capacity, if there is an "ongoing violation of federal law" that "seeks relief properly characterized as prospective." *Buchheit v. Green*, 705 F.3d 1157, 1159 (10 Cir. 2012) *(citing Verizon Md., Inc. v. Pub. Serv. Comm'n.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L.Ed. 2d 871 (2002). Relying upon the doctrine, Plaintiff asserts he is entitled to sue the State Court Defendants because his claims against them seek "prospective injunctive relief." (ECF No. 92). That said, the Tenth Circuit[16] has established that Ex

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15. In the Tenth Circuit, the test of whether an entity is an arm of the state "asks whether a judgment against the particular entity would be payable by the state, and then examines the following additional factors: (1) the characterization of the governmental unit under state law; (2) the guidance and control exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the governmental unit's ability to issue bonds and levy taxes on its own behalf." *New Mexico ex. Rel. Nat'l. Educ. Ass'n. of New Mexico, Inc. v. Austin Capital Mgmt.*
Ltd., 671 F. Supp. 2d 1248, 1252 (D. N. M. 2009) (citing *Sturdevant v. Paulsen*, 218 F.3d 1160, 1165-66 (10 Cir. 2000).

16 Anderson also argues he is entitled to sue State Defendants in federal court because he [16] is entitled to attack "a void judgment at any time, in any proceeding." (ECF No. 92, pg. 11.) The Court previously addressed Plaintiff's voidness claims in conjunction with the Private Party Defendants motion to dismiss. The court applies its analysis to Plaintiff's claim against State Defendants and similarly concludes the state court judgments which Anderson seeks to attack are not void. See supra pg. 15.

Parte Young relief is not available against states or state agencies and therefore the exception does not apply to Plaintiff's claims. *See Buchwald v. Univ. of New Mexico Sch. Of Med.*, 159 F.3d 487, 495 (10 Cir. 1998) (Ex Parte Young exception to sovereign immunity "has no application in suits against the States and their agencies, which are barred regardless of the relief sought.") (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc..*, 506 U.S. 139, 146, 113 S. Ct. 684, 121 L.Ed.2d 605 (1993); *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3507, L. Ed. 2d 1114 (1978) (claim against state for mandatory injunction is barred by the Eleventh Amendment). In this case, the State Court Defendants are immune from suit in federal court and have not waived immunity. *See Edelman*, 413 U.S. at 653 (1974); UCA §63G-7-101 et seq. (2010); See also *Buck v. Utah Labor Comm'n.*, 73 F. App'x 345 (10 Cir. 2003) (holding the Eleventh Amendment shields the State of Utah from claims alleging violations of §1983); *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1233-34 (10 Cir. 1999); *Ball v. Div. of Child and Family Services*, 2012 U.S. Dist. LEXIS 55481, *10 (D. Utah, April 19, 2012) (state retained sovereign immunity for civil rights claims against state officials brought in their official capacity). The Ex Parte Young exception does not apply and therefore the Eleventh Amendment protects State Court Defendants from Anderson's claims.

State Courts Defendants Are Not "Persons" For Purposes of §1983.

Section 1983 provides a federal cause of action against: any person who, under color of any statute, ordinance, regulation, custom or usage, of any State. . . subjects. . . any citizen of the United States. . . to the

deprivation of any rights. . . secured by the Constitution. 42 U.S.C. § 1983. In order to be sued under §1983, an entity must be a "person" as that term is defined by the courts. *Ambus v. Utah State Bd. of Educ.,* 858 P.2d 1372, 1376 (Utah 1993) *(citing Will v. Mich. Dep't. of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed. 2d 45 (1989) "Neither the state, nor a governmental entity that is an arm of the state for Eleventh Amendment purposes, . . . is a 'person; within the meaning of §1983.'" *Harris v. Champion,* 53 F.3d 901, 905-06 (10 Cir. 1995); *Will,* 491 U.S. at 71 (1989). [21] As an arm of the state, the State Court Defendants are not persons for purposes of §1983 and cannot be sued in federal court. As a result, the court recommends dismissal of Plaintiff's claims against State Court Defendants.

Individual State Defendants Herbert And Reyes Are Not Constitutionally Required To Conduct Investigations.

Plaintiff asserts individual State Defendants, Herbert and Reyes, failed to investigate codefendant McClellan's actions or look into the circumstances surrounding Plaintiff's eviction. (ECF. No. 78, ¶¶ 493-507.) In doing so, Plaintiff alludes to corruption in the Utah courts, collusion between law firms and the courts and a failure by Herbert and Reyes to protect[14] citizens from unspecified acts of collusion. *Id.*[15] Individual State Defendants Herbert and Reyes' alleged failure to conduct an investigation does support a violate of any federal right, and Anderson fails to assert any ongoing violation of federal law by either Defendant. *See Garner v. Stephan,* 968 F.2d 19, 1992 U.S. App. LEXIS 25262 (10 Cir. June 19, 1992) (unpublished); *Lee v. U.S. Dept. of Justice,* 366 Fed. Appx. 177, 2010 U.S. App. LEXIS 1465 (D.C. Cir. June

10, 2010) (unpublished); *Fedorowicz v. Pearce* 2015 U.S. Dist. LEXIS 37290 (10 Cir. Utah, Jan 6, 2016).) Anderson's Claim For Injunctive And Declaratory Relief Against Individual State Defendants Herbert And Reyes Fails. Anderson's complaint limits his claims against Defendants Herbert and Reyes to official capacity claims for unspecified injunctive and declaratory relief. (ECF No. 78, p.100.) ("Anderson requests that the court award relief against State defendants for injunctive and declaratory relief, and monetary relief against private defendants and State defendants acting in their individual capacity.") As discussed previously, under Ex Parte Young a party may bring an action against a state official if Plaintiff raises an allegation of "'an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Buchheit v. Green*, 705 F.3d 1157, 1159 (10 Cir. 2012) *(quoting Verizon Md., Inc. v. Pub. Serv. Comm'n.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed 2d 871 (2002) (quotation omitted). In addition, the complaint must raise "some connection" between the named state official and the enforcement of a challenged law. *See Cressman v. Thompson*, 719 F.3d 1139, 1146, n. 8 (10 Cir. 2013). Plaintiff asserts Individual State Defendants Herbert and Reyes failed to investigate his claims of corruption and collusion. In

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14. Specifically, Plaintiff alleges,"[t]he problem of collusion with Utah Courts and large law firms has been going on for many years to the determent [sic] of pro se litigants, and attorneys that are sole practitioners, and needs to be addressed." (ECF No. 78, ¶496.)

15. Anderson claims "[t]wo years is more than enough time for Mr. Reyes and Governor Herbert to investigate Anderson's claims of fraud upon the court and denial of due process; especially when the fraud is spelled out in this law suit [sic] with past complaints, and the fraud upon the courts and denial of due process is a matter of law, which is easy to check." (ECF No. 78, ¶503.

doing so, Anderson does not allege that Herbert or Reyes are engaged in any ongoing violation of federal law or that there is a connection between Defendants and the enforcement of a challenged state law. Moreover, Plaintiff fails to indicate what type of injunctive or declaratory relief he seeks or to explain how Herbert and Reyes could provide Anderson with any relief that might be sought. Additionally, the only challenge to state law even raised appears to be Anderson's claim that the Utah Rules of Civil Procedure are unconstitutional for failure to allow collateral attacks[16] on void judgments. (ECF No. 78, ¶¶338-341.) Plaintiff fails, however, to specify which of the Utah Rules of Civil Procedure rule is constitutionally infirm or to demonstrate how application of a Rule somehow deprived Anderson of an identified constitutional right. There is no constitutional right to an investigation and Plaintiff's allegation that Defendants Herbert and Reyes refused to do so does not amount to a violation of federal law.

Upon review, it appears that Anderson claims for injunctive and declaratory relief are actually more properly characterized as attempts to address perceived past wrongs through the reversal of prior court rulings. Such relief is not categorized as prospective and the Ex Parte Young doctrine does not apply. *See Buchheit*, 705 F.3d at 1159 (10 Cir. 2012) (because Plaintiff "is merely seeking to address alleged past harms rather than prevent prospective violations of federal law, . . . [the relief requested is] retrospective.").

Accordingly, on these grounds the court recommends dismissal of Anderson's claims against Individual State Defendants Herbert and Reyes.

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16. *See Supra*, pg. 20-21.

Plaintiff's Official Capacity Claims Fail Because McClellan Did Not Act Under Color Of State Law.

In order to state a §1983 claim against Defendant in his official capacity, Plaintiff must show that individual State Defendant McClellan acted under color of state law or authority. *Barnard v. Young*, 720 F.2d 1188, 1188-89 (10 Cir. 1983). In general, an official acts under color of state law when there is a misuse of power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Haines v. Fisher*, 82 F.3d 1503, 1508 (10 Cir. 1996) (quoting *West v. Atkins*, 487 U.S. 42, 48, 101 L.Ed. 2d 40, 108 S. Ct. 2250 (1988) (citation and quotation omitted). The "'acts [of a state employee] in the ambit of their personal pursuits," are not considered to be actions under color of state law. *Hall v. Witteman*, 584 F.3d 859, 866 (10 Cir. 2009) (quoting *Screws v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) (plurality opinion). Sanding alone, an "objective indicia of state authority" is insufficient to bring an official's "'purely personal pursuits' within the scope of § 1983." *Dry v City of Durant*, 242 F.3d 388; 2000 U.S. App. LEXIS 36760 (10 Cir. Okla. Dec. 19, 2000) (unpublished). Thus,

> before conduct may be fairly attributed to the state because it constitutes action under color of state law, there must be a real nexus between the employee's use or misuse of their authority as a public employee, and the violation allegedly committed by the defendant.

Schaffer v. Salt Lake City Corp., 814 F.3d 1151, 1156 (10 Cir. 2016) (citations and quotations omitted).

Anderson alleges McClellan exploited his title.

(ECF No. 78, ¶¶ 298-302.) But, Plaintiff does not claim that McClellan abused or utilized any state power vested in his judicial office for conduct that he undertook as a private attorney. *See Hall v. Witteman*, 584 F.3d 859, 866 (10th Cir. 2009) ("[e]xploiting the personal prestige of one's public position is not state action absent at least some suggestion that the holder would exercise governmental power."); *see also Byrne v. Kysar*, 347 F.2d 734 (7 Cir. 1965) (assistant state attorney who executed petition by adding his official title to his signature did not act under color of state law within the meaning of §1983.) Anderson fails to state any facts that support a claim of McClellan acting under color of state law or authority or threatening to use the power of his office to influence the outcome of any proceeding. As a result, the court recommends dismissal of any claims brought by Plaintiff against McClellan in his official capacity

Plaintiff's Claims Are Barred By The Four Year Statute of Limitations.

In Utah, §1983 claims are governed by a four year statute of limitations period. *Garza v. Burnett*, 672 F.3d 1217, 1219 (10 Cir. 2012); Utah Code Ann. § 78B-2-307(3) ("An action may br brought within four years. . . for relief not otherwise provided for by law."). Actions brought under § 1983 accrue on the date of the constitutional violation. Id. (citation omitted.) A relevant statute of limitations period may only be equitably tolled under two circumstances: (1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case present exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the

discovery of the cause of action. *Eyring v. Fondaco,* 2015 U.S. Dist. LEXIS 2702 *7-8 (citing *Helfrich v. Adams* 2013 UT App 37, 299 P.3d 2, 6 (Utah App. 2013). Before a statute of limitations period may be equitably tolled, "the plaintiff must make an initial showing that he did not know nor should have reasonably know the facts underlying the cause of action in time to reasonably comply with the limitations period." Id. (*quoting Berneau v .Martino,* 2009 UT 87, 223 P.3d 1128, 1134 (Utah 2009). The eviction, which is the core of Plaintiff's dispute, took place in December, 2008. (Dkt. No. 86-1.) Anderson's original complaint against State Defendants Herbert, Reyes, the Third District Court and the Eighth District Court was filed on February 5, 2015. (ECF No. 1) On April 5, 2016, Plaintiff first raised his official capacity claims against McClellan (see 2:16-cv-271), and on January 5, 2017, Anderson first raised his claims against the Utah Court of Appeals. (ECF No. 78.) According, any claims arising against State Defendants Herbert, Reyes before February 5, 2011, any official capacity claims arising against McClellan arising before April 5, 2012, and any claims against the Utah Court of Appeals arising after January 5, 2013 are untimely.

RECOMMENDATION

For the reasons as set forth herein, the Magistrate Judge hereby RECOMMENDS that the Private-Party Defendants' (ECF No.86) and the State Defendants' (ECF No. 88) motions to dismiss Plaintiff's consolidated complaint (ECF No. 78) be GRANTED. Copies of the foregoing Report and Recommendation shall be sent to all parties who are hereby notified of their right to object. Within fourteen (14) days of being served with a copy of the Report and Recommendation,

any party may serve and file written objections. Failure to object may constitute a waiver of objections upon subsequent review. See Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.").

DATED this 16th day of June, 2017.

Dustin B. Pead
U.S. Magistrate Judge

Additional material from this filing is available in the Clerk's Office.