APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOREL SHOPHAR,
Plaintiff - Appellant,

v.

CITY OF OLATHE; SAFE HOME OF KANSAS; LAYNE PROJECT; KVC KANSAS; ASHLYN YARNELL,
Defendants - Appellees.

No. 17-3143
(D.C. No. 5:15-CV-04961-DDC-KGS)
(D. Kan.)

FILED
United States Court of Appeals
Tenth Circuit
January 22, 2018
Elisabeth A. Shumaker
Clerk of Court

JOREL SHOPHAR,
Plaintiff - Appellant,

v.

No. 17-3144
(D.C. No. 5:16-CV-04043-DDC-KGS)
(D. Kan.)

STATE OF KANSAS; KANSAS DEPARTMENT FOR CHILDREN AND FAMILIES; AUDRA WEAVER; KRISSY GORSKI; TEENA WILKIE; MOMS CLUB; MOMS CLUB OF OLATHE EAST,
Defendants - Appellees.

ORDER AND JUDGMENT*

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral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

Before **BALDOCK**, **KELLY**, and **O'BRIEN**, Circuit Judges.

After Krissy Gorski took the children and made her exodus from the family home she shared with Jorel Shophar a child custody dispute ensued. These cases found their genesis in that dispute; Shophar is unhappy with the manner in which various actors handled child custody matters and brought these cases to correct the wrongs he perceives. His complaints allege violations of various state and federal statutes. The precise issue presented here concerns the legal sufficiency of Shophar's pleadings. Since the district judge appropriately dealt with the legal issues, we affirm

the dismissals of Shophar's complaints; we do so for substantially the reasons announced in the four comprehensive and cogent orders addressing the issue.

BACKGROUND[1]

In August 2015, Gorski took the couple's two children from the family home in Kansas and went to a domestic-abuse shelter known as Safe Home. Shophar contacted

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estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1]The following factual background is synthesized from the numerous convoluted allegations asserted throughout Shophar's federal court pleadings. At the motion to dismiss stage, the veracity of factual allegations is not at issue even if the allegations are "unrealistic or nonsensical," "chimerical," or "extravagantly fanciful." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 681 (2009). "It is the conclusory nature of [Shophar's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 681.

MOMS Club (a support group for stay-at-home mothers), the Olathe Police Department, and

the Kansas Department for Children and Families (DCF), but they all refused to disclose the whereabouts of Gorski and the children.

DCF then began investigating Shophar for domestic abuse. He denied the allegations and accused Gorski of prostitution, drug use, and extortion.

In September 2015, the children were placed in state custody pending further investigation. At some point, DCF placed the children with Teena Wilkie (a member of MOMS Club). Ashlyn Yarnell was appointed as the children's guardian ad litem.

Throughout this time, Shophar was allowed to see his children at Layne Project, a child advocacy group that offers supervised parental visits.

I. Appeal No. 17-3143

In November 2015, Shophar filed a pro se federal lawsuit against the City of Olathe, Safe Home, Layne Project, KVC Kansas (a private child welfare/healthcare organization), and Yarnell. He alleged the defendants were indifferent to Gorski's criminal activities and her manipulation of the child-

custody proceedings. He further claimed they had negligently cared for his children and had discriminated against him in violation of "the Biblical laws and . . . the State laws." Compl. 4, ECF No. 1-1. All defendants moved to dismiss.

Shophar was permitted to amend his complaint, which he did in October 2016, adding considerable detail to his allegations about Gorski's criminal conduct and the defendants' involvement therein. The focal point of his allegations remained the defendants' support of Gorski. He claimed violations of 42 U.S.C. § 1983 (with respect to the First, Fourth, Sixth, and Fourteenth Amendments); 42 U.S.C. § 1985(3) (conspiracy to deprive equal-protection rights); 18 U.S.C. § 1029 (fraud in connection with access devices); and Kan. Stat. Ann. § 38-141 (providing a civil cause of action in support of parental rights). The defendants again moved to dismiss. This time, the district court granted the motions and entered judgment against Shophar. He appeals to this court for relief.

II. Appeal No. 17-3144

Meanwhile, in April 2016, Shophar filed another pro se federal suit based on similar allegations, but this time he named as defendants the State of Kansas and DCF. In a lengthy, prolix complaint, he repeated his drug use and prostitution allegations against Gorski and he added the history of the church he had founded, his "private investigation on drug distribution in the State of Michigan," and his "plan to open a rehabilitation center" in Kansas with Gorski. Compl. 3, ECF No. 1. When the defendants moved to dismiss, the district judge allowed Shophar to amend his complaint.

In a July 2016 amended complaint, he expanded the list of defendants to include Gorski; Wilkie; MOMS Club; MOMS Club of Olathe East; and Audra Weaver. Motions to dismiss again ensued, and he was afforded yet another opportunity to amend.

In a December 2016 second-amended complaint, he elaborated on his allegations, providing a rambling narrative of the custody events, interwoven with his concern for "problems facing the inner cities"; his desire "to help the feeble, and the broken, and the fatherless";

and his determination to expose the alleged criminal behavior of Gorski and the named others. Am. Compl. 1, ECF No. 90. He asserted violations of 42 U.S.C.§ 1983 (in regard to the First, Fourth, and Fourteenth Amendments); 42 U.S.C. § 1985(3) (conspiracy to deprive equal-protection rights); 18 U.S.C. § 242 (criminal deprivation of constitutional rights); 18 U.S.C. § 1038 (conveying false information in violation of criminal laws); 8 U.S.C. § 1324c (document fraud in immigration cases); 42 U.S.C. §12203 (retaliation for opposing disability discrimination); Kan. Stat. Ann. § 21-6103(criminal false communications); Kan. Stat. Ann. § 21-5601 (criminal child endangerment); and Kan. Stat. Ann. § 38-2223(e) (criminal failure to report child abuse).

Prompted by another round of motions to dismiss, the district judge entered judgment against Shophar in June 2017. He again appeals to this court for relief.

assertion[s] of error," devoid of any "citations to the authorities and parts of the record on which [he] relies." *Garrett v. Selby ConnorMaddux & Janer*, 425 F.3d 836, 840-41 (10th Cir. 2005). For instance, he "questions the concern the [district] [c]ourt had for the children," and he asserts the dismissals were contrary to "Biblical law" because the defendants were able to "avoid answering[ ] or controverting with their side of the events." Aplt. Opening Br (No. 17-3143) at 5, 6; *id.*(No. 17-3144) at 5, 6. Further, he contends he "submitted clear evidence that the mother of his children falsely accused him of domestic [violence] and child abuse." *Id.*(No. 17-3143) at 7; *id.* (No. 17-3144) at 6. These assertions "are wholly inadequate to preserve issues for review." *Garrett*, 425 F.3d at 840.

Despite Shophar's pro se status, we cannot serve as his advocate, searching the record and fashioning legal arguments for him. *Garrett*, 425 F.3d at 840. "[I]t is the appellant's responsibility to tie the salient facts, supported by specific record citation, tohis legal contentions." *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997) (brackets and internal quotation marks omitted).

Nevertheless, we have exercised our discretion to review the record and the applicable law, *see Garrett*, 425 F.3d at 841, and see no error in the dismissals of Shophar's

complaints. The judge gave Shophar ample opportunities to make plausible claims, which he failed to do.

CONCLUSION

We affirm the orders dismissing Shophar's complaints.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JOREL SHOPHAR,
Plaintiff,

v.
Case No. 15-CV-4961-DDC-KGS
CITY OF OLATHE, et al.,
Defendants.

MEMORANDUM AND ORDER

This lawsuit arises from a child custody dispute between plaintiff Jorel Shophar and a non-party, Krissy Gorski, the mother of two of plaintiff's children. Plaintiff alleges that Ms. Gorski—hoping to terminate plaintiff's parental rights and extort money from others—has "contrived a false campaign of abuse against" him. Doc. 70 at 1. Plaintiff brings this lawsuit pro se against five defendants whom he accuses of helping Ms. Gorski contrive her false abuse claims and her attempts to terminate plaintiff's parental rights. The five named defendants are: (1) the City of Olathe ("Olathe"); (2)

Safehome, Inc.; (3) The Layne Project, Inc.; (4) KVC Kansas; and (5) Ashlyn Yarnell.

All five defendants previously moved to dismiss plaintiff's Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failing to state a claim for relief. At the same time, plaintiff asked the court for leave to file an Amended Complaint. Several defendants opposed plaintiff's Motion for Leave, arguing that plaintiff's proposed amendments were futile. In a September 13, 2016 Memorandum and Order, the court agreed with defendants, finding plaintiff's proposed Amended Complaint was futile because it still failed to state viable claims against some of the defendants. Doc. 65 at 13. Nevertheless he court granted plaintiff leave to file an Amended Complaint. *Id.* But, the court cautioned plaintiff: "[T]he court allows plaintiff one final opportunity to file an Amended Complaint—one that addresses all of the concerns raised by the court in this Order. Specifically, plaintiff must plead *facts*—and not just conclusions—to state plausible claims and cure the deficiencies identified [in the court's Order]." *Id.*

On October 12, 2016, plaintiff filed his Amended Complaint. Doc. 70. Like plaintiff's original Complaint, the Amended Complaint is difficult to understand. But, plaintiff appears to allege, generally, that defendants discriminated against him and violated his constitutional rights. Plaintiff asserts his amended claims under 42 U.S.C. §§ 1983 & 1985, 18 U.S.C. § 1028, and Kan. Stat. Ann. §§ 38-141 & 38-223(e).

All five defendants have filed Motions to Dismiss the Amended Complaint invoking Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Docs. 77, 79, 84, 86, 88. Plaintiff has responded to all five motions. Docs. 90, 91, 92, 97, 101. And, defendants have submitted Replies. Docs. 93, 94, 95, 99, 102. After considering the parties' arguments, the court grants defendants' motions to dismiss because either the court lacks subject matter jurisdiction over plaintiff's claims or plaintiff's claims fail to state plausible claims for relief. The court explains the reasons for its rulings below.

I. Factual Background

following facts are taken from plaintiff's Amended Complaint (Doc. 70), accepted as true, and viewed in the light most favorable to plaintiff.[1] Plaintiff and a woman named Krissy

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1 *ASARCO LLC v. Union Pac. R.R. Co.*, 755 F.3d 1183, 1188 (10th Cir. 2014) (explaining that, on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court must "accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiff]." (citation and internal quotation marks omitted)). The court also construes plaintiff's allegations liberally because he proceeds pro se. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (explaining that courts must construe pro se filings liberally and hold them to a less stringent standard than formal pleadings drafted

Gorski had two children together. Plaintiff accuses Ms. Gorski of abusing pain killer medication starting in 2015. Plaintiff alleges that Ms. Gorski's drug abuse has caused her to behave erratically and harm their children. On August 8, 2015, plaintiff says he "made plans to file for paternity" of the two children. Doc. 70 at 1. But, on August 12, 2015, Ms. Gorski took the children away from plaintiff. Ms. Gorski also reported that plaintiff was abusing her and the children physically to various agencies, including the

Olathe Police Department, the Johnson County District Court, the Department for Children and Families ("DCF"), and Safehome. Plaintiff asserts that Ms. Gorski's abuse claims are false.

On August 12, 2015, plaintiff contacted the Olathe Police Department to report that his children were missing and that Ms. Gorski was abusing pain killers. Plaintiff spoke to an officer who reported that Ms. Gorski already had contacted the Olathe Police Department to make an abuse complaint against plaintiff. The officer told plaintiff that he could do nothing for plaintiff. Later that day, a friend of Ms. Gorski's came to plaintiff's home seeking Ms. Gorski's pain killer medication. When plaintiff's wife refused to give the friend the pain killers, the friend called the Olathe Police Department. An officer arrived at the home and demanded that Ms. Shophar

provide the medication, even though both plaintiff and Ms. Shophar told the officer that Ms. Gorski was abusing the medication as well as her children.

Plaintiff alleges that the Olathe Police Department refused to tell him where his children

were located, prohibited him from filing a police report against Ms. Gorski, ignored his complaints about Ms. Gorski's drug abuse and child endangerment, and improperly investigated Ms. Gorski's false abuse allegations against him. Plaintiff alleges that the Olathe Police

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by lawyers). But, when applying this standard, the court does not become the pro se litigant's advocate. *Id.* Also, a litigant's pro se status does not excuse him from complying with the court's rules or facing the consequences of his noncompliance. *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994) (citing *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)).

Department discriminated against him because of his gender thus allowing the children's mother to report her abuse allegations. The Olathe Police Department nonetheless investigated Ms. Gorski's allegations and prohibited plaintiff (as the father) from asserting his abuse allegations against Ms. Gorski.

Although the Amended Complaint does not explain this clearly, it appears that a Child in

Need of Care ("CINC") case was initiated in the District Court of Johnson County, Kansas for plaintiff's two children. Also, Ms. Gorski filed her own lawsuit in Johnson County, Kansas, seeking an order of Protection from Abuse against plaintiff. Plaintiff accuses all five defendants of helping Ms. Gorski to contrive her false abuse allegations so that plaintiff would lose his parental rights to the two children during the legal proceedings in Johnson County, Kansas.

Plaintiff alleges that Safehome—a shelter for victims of domestic violence—placed his children at its shelter without his consent. Plaintiff contends that Safehome documented the false allegations of abuse against him without evidence and provided therapy to his children without his consent. Plaintiff also alleges that Safehome ignored his complaints that Ms. Gorski was abusing drugs, abusing the children, and engaging in prostitution. Plaintiff contends that Safehome covered up Ms. Gorski's illegal activities, instructed her to file false abuse allegations against plaintiff, and conspired with DCF

and KVC Kansas to move Ms. Gorski to a new residence.

Plaintiff alleges that Layne Project—an organization who provides family services such as supervised parental visitation—discriminated against him because it forced him to pay for services but did not charge Ms. Gorski for services. Plaintiff also accuses Layne Project of documenting the false allegations of abuse against him while ignoring his complaints that Ms. Gorski was abusing drugs and the children and engaging in other criminal activity. Plaintiff contends that Layne Project prohibited him from disciplining his children and prevented one of plaintiff's other children from visiting the two children that were involved in the CINC case.

Plaintiff alleges that KVC Kansas placed the children in the home of Ms. Gorski's friend—someone who is an unlicensed foster parent and who helped Ms. Gorski abuse drugs by supplying her pain killers. Plaintiff contends that KVC Kansas never spoke with him about the placement and never provided him the chance to object to it. Plaintiff also alleges that KVC Kansas documented Ms. Gorski's

false abuse allegations while ignoring evidence that Ms. Gorski had contrived them. He also contends that KVC Kansas ignored his complaints that Ms. Gorski was abusing the children, abusing drugs, and involved with prostitution. Plaintiff accuses KVC Kansas of preventing him from visiting his children, ignoring his phone calls, withholding the case plan from him, lying to the Johnson County District Court about plaintiff's neglect of his children, and conspiring to terminate his parental rights.

Plaintiff's allegations against defendant Ashlyn Yarnell—the guardian ad litem appointed to represent the two children—claim that she failed to conduct a thorough investigation of Ms. Gorski's false abuse claims. Plaintiff contends that Ms. Yarnell spoke only to Ms. Gorski about the abuse allegations and ignored evidence showing that Ms. Gorski had contrived them. Plaintiff also alleges that Ms. Yarnell ignored his complaints about Ms. Gorski's unlawful activity, wrongfully charged plaintiff with neglect, prevented him from seeing his children, and expressed personal disapproval of plaintiff's religious beliefs. Plaintiff accuses Ms.

Yarnell of providing false information to the Johnson County District Court about Ms. Gorski's visitation with the children and about his fitness as a parent. Also, he contends that Ms. Yarnell withheld information from the District Court about Ms. Gorski's false abuse allegations and prostitution.

Plaintiff alleges that defendants' actions wrongfully have deprived him of his children and have caused him humiliation and severe emotional distress. Plaintiff also contends that defendants' actions have allowed Ms. Gorski to expose his children to criminal activity and to subject them to physical abuse and emotional distress while in her care. Plaintiff seeks just one form of relief against defendants: money damages. He asks the court to award special, general, and punitive damages of $350,000 against each defendant. Doc. 70 at 24.

II. Legal Standard

A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction and, as such, must have a statutory basis to exercise jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955

(10th Cir. 2002) (citation omitted). Federal district courts have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States or where there is diversity of citizenship. 28 U.S.C. § 1331; 28 U.S.C. § 1332. "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (citation omitted). Since federal courts are courts of limited jurisdiction, there is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden to prove it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Generally, a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) takes one of two forms: a facial attack or a factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the

complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)) (internal citations omitted).

"Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and [to conduct] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1003 (citations omitted); *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1063–64 (10th Cir. 2012); *see also Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324–25 (10th Cir. 2002) (holding that a court must convert a motion to dismiss to a motion for summary judgment under

Fed. R. Civ. P. 56 only when the jurisdictional question is intertwined with the case's merits).

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Fed. R. Civ. P. 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed factual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court explained, "'will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Under this standard, 'the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.'" *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

And, although the Court must assume that the factual allegations in a complaint are true, it is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Carter*, 667 F. Supp. 2d at 1263 (quoting *Iqbal*, 556 U.S. at 678). "'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'" to state a claim for relief. *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

III. Analysis

As already recited, all five defendants have filed motions to dismiss. Plaintiff asserts claims against defendants under federal and state law. The

court considers the federal claims that plaintiff asserts against each defendant in Part A below. Because the court concludes that none state a plausible claim for relief against any defendant, the court dismisses plaintiff's federal claims against all defendants. And, because the court dismisses all federal claims, the court considers in Part B, below, whether it should exercise supplemental jurisdiction over plaintiff's state law claims. The court declines to do so.

A. Federal Law Claims

1. Defendant Layne Project

Plaintiff asserts that Layne Project violated his constitutional rights under the First Amendment and the Fourteenth Amendment's Equal Protection Clause. Doc. 70 at 12. Layne Project moves to dismiss plaintiff's claims against it under Fed. R. Civ. P. 12(b)(6) for failing to state claims for relief.[2]

a. Fourteenth Amendment Equal Protection Claim

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o *State* shall . . . deny to any person within its jurisdiction the equal

protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). "That language establishes an 'essential dichotomy' between governmental action, which is subject to scrutiny under the Fourteenth Amendment, and private conduct, which 'however discriminatory or wrongful,' is not subject to the Fourteenth Amendment's prohibitions." *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (quoting *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1446 (10th Cir. 1995) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974))). *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'").

The Tenth Circuit instructs courts to "evaluate whether challenged conduct constitutes state action using a flexible approach." *Id.* (citing *Gallagher*, 49 F.3d at 1447). And, it applies four different tests to determine whether a private entity is subject to liability as a state actor: the nexus test, the symbiotic relationship test, the joint action test,

and the public function test. *Gallagher*, 49 F.3d at 1447.

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2 Layne Project also moves to strike plaintiff's Opposition to its Motion to Dismiss because plaintiff filed it one day past the local rule's deadline for filing responses to dispositive motions. *See* Doc. 94 at 2 (citing D. Kan. Rule 6.1(d)). Although plaintiff's pro se status does not excuse him from complying with the federal and local rules, the court nevertheless considers his untimely Opposition because nothing suggests bad faith and Layne Project never alleges prejudice caused by the one-day
delay. Also, plaintiff's Opposition does not change the outcome here. Instead, plaintiff's Opposition only confirms the court's conclusion that his federal claims against Layne Protect fail to state plausible claims for relief. The court thus denies Layne Project's Motion to Strike. Doc. 94.

The nexus test requires a "sufficiently close nexus between the government and the challenged conduct" and, in most cases, renders a state liable for a private individual's conduct "only when [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of

the State." *Id.* at 1448 (citations and internal quotation marks omitted). The symbiotic relationship

test asks whether the state "has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity." *Id.* at 1451 (citations and internal quotation marks omitted). The joint action test requires courts to "examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id.* at 1453 (citations omitted). Finally, the public function test asks whether the challenged action is "a function traditionally exclusively reserved to the State." *Id.* at 1456 (citations and internal quotation marks omitted). No matter the test applied, "'the conduct allegedly causing the deprivation of a federal right' must be 'fairly attributable to the State.'" *Id.* at 1447 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

Here, no matter which test is applied and even assuming the facts alleged in plaintiff's

Amended Complaint are true, his revised pleading still alleges no facts sufficient to state a plausible claim against Layne Project for conduct that was "fairly attributable to the state." Plaintiff makes the conclusory allegation that "Layne Project worked in conjunction with Johnson County Court, and was given authority by the court to act as a State actor." Doc. 70 at 15. Plaintiff also asserts that "Layne Project was a 'nexus' with the Court and made policies against the Plaintiff that violated Plaintiff's Civil Rights." *Id.* But, plaintiff provides no facts anywhere in his Amended Complaint to support these conclusory statements. Plaintiff's allegations thus are insufficient to state a plausible claim against Layne Project. *See Scott v.* 11 *Hern*, 216 F.3d 897, 907 (10th Cir. 2000) (explaining that a plaintiff attempting to assert state action by alleging a conspiracy between private defendants and "state officials" must allege more than "mere conclusory allegations with no supporting factual averments [which] are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action" (citation omitted)); *see also*

Lindsey v. Thomson, 275 F. App'x 744, 746 (10th Cir. 2007) (holding that conclusory allegations of conspiracy are insufficient to subject a private party to liability; instead the "allegations of conspiracy must provide some factual basis to support the existence of any conspiracy to violate the Plaintiff's rights" (quoting *Crabtree ex rel. Crabtree v. Muchmore*, 904 F.2d 1475, 1481 (10th Cir. 1990))).

And, even if plaintiff had alleged sufficiently that Layne Project was a state actor, the Amended Complaint still fails to state a plausible claim for violation of the Fourteenth Amendment's Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 917–18 (10th Cir. 2014) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). Thus, to assert an equal protection claim, plaintiff must allege that Layne Project treated him differently than other similar similarly-

situated individuals. *See id.* (holding that plaintiffs' equal protection claim failed to state a valid claim under Rule 12(b)(6) because plaintiff never alleged differing treatment for similarly-situated individuals).

Here, plaintiff asserts that Layne Project discriminated against him by failing to document his complaints against Ms. Gorski and forcing him to pay for services while not charging Ms. Gorski. But, plaintiff fails to allege facts showing that Layne Project treated him differently than any other similarly-situated parents who used Layne Project's family services. Without such allegations, plaintiff can state no plausible claim against Layne Project for violating the Fourteenth Amendment's Equal Protection Clause.

b. First Amendment Claim

Plaintiff also alleges that Layne Project violated his rights under the First Amendment to the United States Constitution. The First Amendment prohibits Congress from making any "law respecting an establishment of religion, or

Springs, Kan., 217 F. App'x 787, 791 n.3 (10th Cir. 2007) ("The First Amendment . . . requires state action[,]" so to hold a private individual personally liable, the court "must determine whether [the private individual's] actions may 'be fairly attributed to the State.'" (first citing *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); then quoting *Lugar*, 457 U.S. at 937). For the same reasons discussed above, plaintiff's Amended Complaint asserts no facts sufficient to infer that Layne Project's actions are "fairly attributable to the State" such that it can be held liable for violating the First Amendment. Plaintiff thus fails to state a plausible claim against Layne Project under the First Amendment. The court thus dismisses plaintiff's federal claims against Layne Project under Rule 12(b)(6) because plaintiff's Amended Complaint fails to state a plausible claim for relief under federal law.

2. Defendant City of Olathe

Plaintiff brings federal claims against Olathe under 42 U.S.C. § 1983, asserting violations of the Fourth and Sixth Amendments and the Fourteenth

Amendment's Equal Protection and Due Process Clauses. Doc. 70 at 3. Olathe moves to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that plaintiff's federal claims fail to state a claim for relief.

Section 1983 prohibits "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting under color of law. 42 U.S.C. § 1983. The Supreme Court has held that "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Social Servs.*, 436 U.S. 690, 691 (1978). Instead, a plaintiff may sue municipalities only for their own unconstitutional policies or customs—not for acts by their employees. *Id.* at 694–95.

Thus, "[a] plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. Cty. Bd. of Cty. Comm'rs*, 151 F.3d 1313, 1316 (10th Cir.

1998) (citing *Monell*, 436 U.S. at 694). The Tenth Circuit has explained that "[a]n unconstitutional deprivation is caused by a municipal 'policy' if it results from decisions of a duly constituted legislative body or an official whose acts may fairly be said to be those of the municipality itself." *Carney v. City & Cty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008) (citation omitted). And, the Circuit has defined a "custom" as "an act that, although not formally approved by an appropriate decision maker, has such widespread practice as to have the force of law." *Id.* (citation omitted). Such a custom is marked by "continuing, persistent and widespread" actions by municipal employees. *Id.* (quoting *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1041 (10th Cir. 1993)).

In its earlier Memorandum and Order, the court observed that plaintiff's proposed Amended Complaint failed to allege the existence of any custom or policy adopted by a municipal policymaker, or any facts supporting an inference that one exists. Doc. 65 at 8. The court explained that "[t]his is an essential requirement for asserting

a § 1983 claim against a municipality, and, without such allegations, plaintiff fails to state a claim for relief against Olathe." *Id.* The court granted plaintiff leave to file an Amended Complaint, directing him to cure the deficiencies identified. *Id.* at 13–14. Plaintiff's Amended Complaint now asserts conclusory allegations about Olathe's purported customs and practices. It otherwise fails to heed to the court's directive. Plaintiff still has pleaded no *facts* showing that the alleged unconstitutional conduct occurred under a municipal policy or custom sufficient to subject Olathe to liability under § 1983.

Plaintiff's assertions of a municipal policy include the following. First, plaintiff alleges that Olathe's "customs and practice for handling domestic violence issues did not give the male Plaintiff Equal Protection of the law as it was given to a female citizen." Doc. 70 at 3. Plaintiff also asserts:

> City of Olathe customs and practices for domestic violence abuse violated Plaintiff Shophar's constitutional rights, by refusing the Plaintiff claims against the woman subject, however Olathe Police interviewed the Plaintiff on 3 separate

> occasions and threatened the Plaintiff with jail time, if he did not produce evidence that the Plaintiff did not "punch his child."

Id. at 7. Last, plaintiff alleges:

> Olathe Police Department violated the Constitution and Federal law 42 U.S.C. § 1983 through their policy by withholding the Plaintiff from his children without "due process" based on allegations and not a "trial by court" with an adjudication "beyond a reasonable doubt" that the Plaintiff committed a violent act against a woman and children. Olathe Police Department policy violated the "color of the law" by given rights to the female, and allowing the female to make a report, however, refusing the male the rights to his children, and denied the male the same equal rights under the law to make a report against the mother.

Id. at 8. In sum, plaintiff complains about how the Olathe Police Department investigated the abuse allegations asserted by Ms. Gorski. But he fails to allege any *facts* to infer that a municipal policy or

custom provided the requisite moving force behind the alleged constitutional deprivations plaintiff claims he sustained. Instead, plaintiff just makes conclusory allegations about municipal customs, which are insufficient to state a claim. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (explaining that a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based"). Absent sufficient factual allegations, plaintiff fails to state a § 1983 claim against Olathe. *See, e.g., Glaser v. City and Cty. of Denver*, 557 F. App'x 689, 702, 703 (10th Cir. 2014) (affirming Rule 12(b)(6) dismissal of § 1983 claims because plaintiff's allegations that a municipality implemented an unconstitutional policy and failed to train employees properly were conclusory); *McCormick v. City of McAlester*, 525 F. App'x 885, 888 (10th Cir. 2013) (holding that plaintiff's allegations of "several instances of alleged free-speech retaliation by the police department" failed to state a § 1983 claim because he identified no "municipal policy or custom that was the moving force behind [the] alleged

constitutional deprivation"); *Dixon v. City of Wichita, Kan.*, No. 13-1033-RDR, 2013 WL 2422741, at *3 (D. Kan. June 3, 2013) (holding that plaintiff's §
1983 claims failed to state a claim because plaintiff alleged only conclusory allegations of unconstitutional policies without any factual support such as "prior incidents involving similar conduct").

Plaintiff's Amended Complaint fails to state a claim against Olathe under § 1983. Plaintiff's Amended Complaint also fails to assert facts to allege claims for constitutional violations. The court addresses each purported constitutional violation, in turn.

a. Fourth Amendment

Plaintiff alleges that Olathe violated his Fourth Amendment rights because Olathe Police Department officers refused to disclose his children's location to him. Doc. 70 at 4. Plaintiff asserts that the police lacked "probable cause to withhold the children from [him], violating [p]laintiff's Fourth Amendment rights to his blood born children." *Id.* The Fourth Amendment protects "[t]he right of the

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Olathe asserts that plaintiff cannot state a claim under the Fourth Amendment based on officers' refusal to disclose his kids' location. Indeed, plaintiff cites no law holding that these facts could constitute a "seizure" capable of supporting a viable Fourth Amendment claim. And, the court's own research has found no law to support this claim. "A seizure occurs for Fourth Amendment purposes when a reasonable person would have believed that he was not free to leave." *Jones v. Hunt*, 410 F.3d 1221, 1225–26 (10th Cir. 2005). Here, plaintiff never alleges that Olathe seized him. And, generally, "Fourth Amendment rights are personal rights which . . .may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978). Nevertheless, the Tenth Circuit has noted that in some circumstances, "a parent has Fourth Amendment standing to challenge a seizure involving a minor child." *J.B. v. Washington Cty.*, 127 F.3d 919, 928 (10th Cir. 1997). *But see Hollingsworth v. Hill*, 110

F.3d 733, 739 (10th Cir. 1997) (holding that the removal of plaintiff's children did not violate plaintiff's Fourth Amendment rights and that plaintiff could not assert a Fourth Amendment claim on behalf of her children because her complaint did not include the children as plaintiffs).

But, even if plaintiff has standing to assert his own Fourth Amendment claim and even if a seizure occurred under the facts alleged here, plaintiff fails to allege facts supporting an *unreasonable* seizure sufficient to state a claim under the Fourth Amendment. A reasonable seizure requires "[w]ith limited circumstances . . . either a warrant or probable cause." *Jones*, 410 F.3d at 1227 (citing *Camara v. Mun. Court*, 387 U.S. 523, 528–29 (1967)); *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("[I]n the ordinary case, seizures of personal property are unreasonable within the meaning of the Fourth Amendment, without more, unless . . . accomplished pursuant to a judicial warrant, issued by a neutral magistrate after finding probable cause." (citation and internal quotation marks omitted)).

Here, an August 12, 2015 order issued by a Kansas state court judge prohibited officers from disclosing the children's location to plaintiff. *See* Docs. 85-2, 85-3, 85-4 (Orders issued by the District Court of Johnson County, Kansas, ordering that the children reside with Ms. Gorski and that Ms. Gorski's address and telephone number remain confidential for protection).

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3 Under these facts, plaintiff's allegations that the officers refused to tell him the children's location do not assert an "unreasonable seizure" sufficient to state a Fourth Amendment claim. *See, e.g., Hunt v. Green*, 376 F. Supp. 2d 1043, 1056 (D.N.M. 2005) (holding that no unlawful seizure 3 The court may take judicial notice of these state court orders when deciding the motion to dismiss. *See Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008) (explaining that courts may take judicial notice of facts that are a matter of public record and of state court documents, and courts properly may consider those facts when deciding a motion to dismiss); *see also Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

occurred when children were removed from grandmother's physical custody because a state family court had issued an order giving a state agency legal custody of the children). Plaintiff thus

fails to state a plausible claim against Olathe for Fourth Amendment violations.

b. Sixth Amendment

Plaintiff's Second Amended Complaint asserts a Sixth Amendment claim against Olathe, but contains no facts explaining how Olathe violated that constitutional provision. In his response to Olathe's Motion to Dismiss, plaintiff clarifies that he brings his Sixth Amendment claim under the "confrontation clause which guarantees the opportunity to confront the [p]laintiff's accuser." Doc. 92 at 7. The Sixth Amendment's confrontation clause provides that

"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

Plaintiff's Amended Complaint never alleges any facts showing that Olathe prosecuted him for any criminal violations or prevented him from confronting his accuser during such proceedings. To the contrary, plaintiff's Amended Complaint describes the domestic civil case initiated by Ms.

Gorski. *See generally* Doc. 70; *see also* Docs. 85-1, 85-2, 85-3, 85-4.

Plaintiff's Amended Complaint chronicles certain history of that litigation, describes how counsel represented plaintiff in that matter, and even suggests that plaintiff had an opportunity to confront his accuser—Ms. Gorski—in that proceeding. For purposes of Olathe's motion, plaintiff alleges no facts showing that Olathe precluded him from confronting his accuser in any "criminal prosecution" or how even it did so in the civil lawsuit he references. Plaintiff's Amended Complaint thus fails to state a claim under the Sixth Amendment.

c. Fourteenth Amendment

Plaintiff's Amended Complaint asserts claims against Olathe for violating his Fourteenth Amendment rights under the Due Process and Equal Protection Clauses. Doc. 70 at 3. In plaintiff's response to Olathe's Motion to Dismiss, he addresses only his due process claim. As a consequence, Olathe argues that plaintiff has abandoned his equal protection claims. *See Hinsdale v. City of Liberal, Kan.*, 19 F. App'x 749, 768–69 (10th Cir. 2001)

(affirming district court's dismissal of plaintiff's equal protection claim after it concluded that plaintiff had abandoned the claim because he had not addressed it in his memorandum opposing summary
judgment).

Even if plaintiff has not abandoned his equal protection claim, the Amended Complaint still fails to allege facts to state a plausible claim against Olathe. An equal protection claim requires plaintiff to allege facts "demonstrat[ing] that the defendant's actions had a discriminatory effect and were motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *see also Lindsey v. Thomson*, 275 F. App'x 744, 746 (10th
Cir. 2007) (affirming district court's dismissal of plaintiff's equal protection claim under Rule 12(b)(6) because he failed to allege that he was " a member of a protected class (other than a reference to a disability) or that any of the Defendants discriminated against him on that basis").

Here, plaintiff alleges that the Olathe Police Department discriminated against him by ignoring his complaints about Ms. Gorski while investigating Ms. Gorski's abuse allegations against him. But, plaintiff's Second Amended Complaint also describes various communications he had with the Olathe Police Department—including complaints that he made to them about Ms. Gorski's purported drug use and child endangerment. Plaintiff makes the conclusory allegation that the Olathe Police Department allows women to make false abuse allegations without protecting men, but he provides no facts that could support this conclusion, such as facts showing that Olathe treated plaintiff differently than other similarly-situated individuals. Instead, as Olathe argues, plaintiff bases his equal protection allegations on his disagreement with how Olathe's police officers handled his complaints. The Amended Complaint never alleges facts supporting an inference that Olathe acted with a discriminatory animus or that its conduct was motivated by a discriminatory intent. Citizens have every right to disagree with a governmental policy, or how it was

executed in a particular instance. But such a disagreement is not actionable without facts capable of establishing a discriminatory animus. Plaintiff fails to state an equal protection claim against Olathe.

Plaintiff also fails to state a plausible due process claim against Olathe. The Fourteenth Amendment protects individuals against deprivations of life, liberty, and property without due

process of law. U.S. Const. amend. XIV, § 1. Here, plaintiff's allegations are particularly hard to follow, but it appears that he is alleging that Olathe violated the Due Process Clause because it prevented plaintiff from seeing his children, investigated Ms. Gorski's abuse allegations, and enforced a Protective Order entered by the Johnson County District Court. Plaintiff never identifies, though, what liberty or property interest Olathe purportedly deprived him of without due process. But liberally construing the Amended Complaint, the court assumes plaintiff alleges that Olathe deprived him of his liberty interest in his family

relationship with his two children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); *see also Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1245 (10th Cir. 2003) (recognizing that "termination of parental rights impinges upon a liberty interest of which a citizen may not be deprived without due process of
law" (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)).

Olathe argues that the Amended Complaint fails to assert facts showing that plaintiff had an interest protected by due process because, at all times relevant to plaintiff's allegations against Olathe, the Johnson County District Court already had ordered that plaintiff had no right to custody of the children. *See* Doc. 85-2 at 3. Also, the Kansas District Court had placed the children in Ms. Gorski's custody and ordered that her address remain confidential for her protection. *Id.* at 2. Plaintiff thus had no protected liberty interest at

any time relevant to his claims against Olathe. *See, e.g., Shipway v. Jerlinski*, No. 5:11cv00112, 2012 WL 1622395, at *9 (W.D. Va. Apr. 13, 2012) (holding that the removal of a child from the grandmother's home to investigate abuse allegations did not violate the grandmother's constitutional rights because she had "no liberty interest in the custody, care and management of the removed child" and "equally no liberty interest or right . . . to remain free of child abuse investigations" (first citing *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); then citing *Croft v. Westmoreland Cty. Children and Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997))).

Plaintiff's Amended Complaint makes no allegation that Olathe issued the custody orders without due process, much less that it had the authority to do so. Instead, it was the Johnson County, Kansas District Court who issued the relevant custody orders. Under these facts, Olathe never deprived plaintiff of a protected interest, and his due process claim thus fails to state a claim for relief.

As explained above, none of plaintiff's federal claims assert a plausible claim for relief against Olathe. Consequently, the court dismisses the federal claims that plaintiff's Amended Complaint asserts against Olathe under Rule 12(b)(6).

3. Defendant Ashlyn Yarnell

Plaintiff asserts federal claims against Ms. Yarnell under 42 U.S.C. §§ 1983 and 1985. These claims allege violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses and the First Amendment's protection of religious freedom. Ms. Yarnell invokes several arguments to dismiss plaintiff's Complaint, including that she is immune from liability as a court-appointed guardian ad litem. The court explained in its earlier Memorandum and Order that a guardian ad litem is entitled to quasi-judicial immunity for acts "within the core duties of a [guardian ad litem] in assisting the court—that is, in performing a 'function [ ] closely associated with the judicial process.'" Doc. 65 at 5 (quoting *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Tr.*, 744 F.3d 623, 630 (10th

Cir. 2014) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985))). A guardian ad litem is not immune, however, "for acts taken in the 'clear absence of all jurisdiction.'" *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 357 (1978)). But a given act does not exceed a guardian ad litem's jurisdiction just because it is "wrongful, even unlawful." *Id.* at 630–31. Immunity still applies
when an act "was [taken] in error, was done maliciously, or was in excess of . . . authority." *Id.*
at 631 (quoting *Stump*, 435 U.S. at 356–57).

Even though the court's earlier Order explained how the law governing immunity for a court-appointed guardian ad litem works, plaintiff's Amended Complaint still fails to assert claims against Ms. Yarnell to deprive her of immunity. Instead, the Amended Complaint asserts claims against Ms. Yarnell only for acts she performed in her capacity as a court-appointed guardian ad litem and in furtherance of the judicial process. Plaintiff's Amended Complaint merely adds conclusory gloss that Ms. Yarnell "ma[de] a ruling outside of her jurisdiction that Plaintiff was a threat to his

children by limiting Plaintiff's visit[s] with his children based on claims that the Plaintiff 'follows the Bible'" and that plaintiff "would act out of her jurisdiction and refuse to allow the Plaintiff to see his children, unless he used [a particular agency]." Doc. 70 at 20–21, 23. But, plaintiff asserts no facts to support an inference that Ms. Yarnell committed these acts in the absence of jurisdiction. Instead, all of plaintiff's allegations against Ms. Yarnell involve acts she committed as part of her appointment as a guardian ad litem for the children. Plaintiff's allegations that Ms. Yarnell was biased against plaintiff or that she made false statements about him in court also cannot suffice to deprive her of immunity, even if these

acts were wrongful or unlawful. *See Dahl*, 744 F.3d at 631. Ms. Yarnell thus is immune from liability against the claims asserted in plaintiff's Amended Complaint.

Even if plaintiff's allegations sufficiently asserted facts to support an inference that Ms. Yarnell acted without jurisdiction so that immunity would not apply, plaintiff's Amended Complaint still

fails to state a claim against Ms. Yarnell under both § 1983 or § 1985. Plaintiff alleges no facts to infer that Ms. Yarnell is a state actor such that she can be held liable for violating § 1983. *See Meeker v. Kercher*, 782 F.2d 153, 155 (10th Cir. 1986) (holding that a guardian ad litem is not a state actor but instead "is a fiduciary who must act in the minor's best interest" and thus "owes his or her undivided loyalty to the minor, not the state" (citations and internal quotation marks omitted)); *see also Fuller v. Davis*, 594 F. App'x 935, 939 (10th Cir. 2014) (affirming district court's dismissal of § 1983 claim asserted against a guardian ad litem because he was "not a state actor proceeding under color of state law for purposes of § 1983"). Here, plaintiff has included allegations in his Amended Complaint that accuse Ms. Yarnell of "conspir[ing] to force the Plaintiff to use an affiliate Agency so that Barb Sharp could continue to write negative reports against the Plaintiff, to keep him on supervised visits, to get an 'adjudication' by a court that the father was an 'unfit' parent." Doc. 70 at 23. He also alleges that "Ms. Yarnell conspired with the State of Kansas Erica

Miller, DCF and KVC to submit continual false, and negative reports against the father, violating due process of the law." *Id.* But these allegations are just conclusions, and the Amended Complaint alleges no facts to support an inference that Ms. Yarnell's actions are ones fairly attributable to the State. Plaintiff thus fails to state a viable § 1983 claim against Ms. Yarnell. *See Beedle v. Wilson*, 422 F.3d 1059, 1073 (10th Cir. 2005) (affirming Rule 12(b)(6) dismissal of conclusory allegations of conspiracy with state actors because they were insufficient to state a § 1983 claim against a private defendant); *see also Fuller*, 594 F. App'x at 939 (affirming dismissal of a § 1983 claim against a guardian ad litem because plaintiff's "conjecture that [the guardian ad litem] conspired with other defendants to create an unenforceable no-contact order is too speculative and conclusory to suffice" to state a plausible claim).

Plaintiff also fails to state a plausible § 1985 claim against Ms. Yarnell. Section 1985 prohibits persons from conspiring "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws,

or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3). A conspiracy claim under § 1985 "requires at least a combination of two or more persons acting in concert and an allegation of a meeting of the minds, an agreement among the defendants, or a general conspiratorial objective." *Brooks v. Gaenzle*, 614 F.3d 1213, 1227–28 (10th Cir. 2010) (citations omitted). Mere conclusory allegations of conspiracy cannot state a valid claim under § 1985. *Hogan v. Winder*, 762 F.3d 1096, 1114 (10th Cir. 2014).

As described above, plaintiff's Amended Complaint just asserts conclusory allegations of a conspiracy. Such allegations fail to state a plausible claim under § 1985. The Amended Complaint pleads no facts demonstrating a meeting of the minds, an agreement among defendants, or a general conspiratorial objective. Plaintiff thus fails to state a plausible § 1985 claim against Ms. Yarnell. For all these reasons, the court concludes that plaintiff's Amended Complaints fails to state any federal claim for relief against Ms. Yarnell. The

court thus grants Ms. Yarnell's Motion to Dismiss the federal claims asserted against her.

4. Defendant Safehome

Plaintiff asserts that Safehome violated his constitutional rights under the Fourth, Sixth, and Fourteenth Amendment. Doc. 70 at 9. Plaintiff also asserts that Safehome violated 18 U.S.C. § 1028. *Id.* Safehome contends that none of these claims state a plausible claim for relief. The court agrees.

a. Constitutional Claims

To assert viable constitutional claims against Safehome, plaintiff must allege state action. *See, e.g.*, *Lugar*, 457 U.S. at 927 ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"); *United States v. Poe*, 556 F.3d 1113, 1123 (10th Cir. 2009) (explaining that the Fourth Amendment only "guards against unreasonable searches and seizures by state actors" not private individuals unless they are acting as or in concert with the government); *Zapata v. Pub. Defenders Office*, 252 F. App'x 237, 239 (10th Cir. 2007) (affirming dismissal of

plaintiff's claims that a private attorney violated his Sixth Amendment and due process rights because the attorney was not acting under color of state law).

The Amended Complaint never alleges that Safehome is a state actor. Also, it alleges no facts allowing an inference that Safehome's actions are fairly attributable to the state so that it can be held liable, as a private entity, for violating plaintiff's rights under the United States Constitution.

Plaintiff's Amended Complaint also fails to state viable claims against Safehome under the Fourth, Sixth, and Fourteenth Amendment for the same reasons already discussed. Plaintiff alleges that Safehome placed his children in a shelter without his consent and assisted Ms. Gorski with finding a residence. Doc. 70 at 9, 10. These facts allege no unreasonable search or seizure violating the Fourth Amendment. *See supra* Part III.A.2.a. The Amended Complaint also alleges no facts explaining how Safehome violated plaintiff's Sixth Amendment rights. In his Opposition, plaintiff contends that Safehome denied plaintiff the right to confront his accuser. Doc. 97 at 4. But, the Amended

Complaint fails to allege facts supporting an inference that Safehome precluded plaintiff from confronting his accuser in a criminal prosecution, much less the relevant civil proceedings here. *See supra* Part III.A.2.b. Finally, plaintiff fails to allege facts to infer that Safehome violated plaintiff's rights under the Fourteenth Amendment's Equal Protection or Due Process Clauses. *See supra* Part III.A.2.c.

b. 18 U.S.C. § 1028

Plaintiff also fails to state a plausible claim for relief under 18 U.S.C. § 1028. This statute criminalizes fraud in connection with identification documents. This criminal statute provides no private right of action. *See Obianyo v. Tennessee*, 518 F. App'x 71, 72 (3d Cir. 2013) (holding that § 1028 "provide[s] no private right of action for use by a [private] litigant");

see also Sump v. Schaulis, No. 07-4014-RDR, 2007 WL 1054277, at *1 (D. Kan. Apr. 9, 2007) (holding that plaintiff, as a private citizen, could not bring an action under § 1028). So, plaintiff fails to state a

plausible claim for relief against Safehome under this statute.

5. Defendant KVC Kansas

Plaintiff brings claims against KVC Kansas under 42 U.S.C. § 1985, alleging violations of the Fourteenth Amendment's Equal Protection and Due Process Clauses. Doc. 70 at 15. Plaintiff's claims against KVC Kansas fail to state a plausible claim for relief for two reasons.

First, the Amended Complaint fails to allege facts sufficient to state a § 1985 claim against KVC Kansas. As described in Part III.A.3. above, a conspiracy claim under § 1985 "requires at least a combination of two or more persons acting in concert and an allegation of a meeting of the minds, an agreement among the defendants, or a general conspiratorial objective." *Brooks v. Gaenzle*, 614 F.3d 1213, 1227–28 (10th Cir. 2010) (citations omitted). And, mere conclusory allegations of conspiracy are insufficient to state a valid claim under § 1985. *Hogan v. Winder*, 762 F.3d 1096, 1114 (10th Cir. 2014). Plaintiff's Amended Complaint just makes conclusory allegations that KVC Kansas conspired

against plaintiff to terminate his parental rights and place plaintiff's children with Ms. Gorski. *See, e.g.*, Doc. 70 at 18, 19. But, the pleading alleges no facts capable of supporting this conclusion. More specifically, the pleading fails to allege facts demonstrating a meeting of the minds, an agreement among defendants, or a general conspiratorial objective sufficient to state a § 1985 claim. Plaintiff's conclusory allegations simply fail to state a plausible claim against KVC Kansas under § 1985.

Second, plaintiff fails to allege facts sufficient to state a claim against KVC Kansas for violating the Fourteenth Amendment. The Amended Complaint makes the conclusory allegation that KVC Kansas "worked in conjunction with Johnson County Court, and was given authority by the court to act as a State Actor." Doc. 70 at 19. But, the Amended Complaint contains no facts to support this conclusory assertion. It also asserts no facts supporting an inference that

KVC Kansas' actions are fairly attributable to the state such that it can be held liable for violating the Fourteenth Amendment. *See, e.g.*, *Lugar*, 457 U.S.

at 927 ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"). For both of these reasons, plaintiff's claims against KVC Kansas fail to state a plausible claim for relief.

B. State Law Claims

Plaintiff's Second Amended Complaint also asserts state law claims against the four defendants. Namely, plaintiff brings a claim under Kan. Stat. Ann. § 38-141 against Olathe, Layne Project, KVC Kansas, and Ashlyn Yarnell. Doc. 70 at 3, 12, 15, 20. Plaintiff also asserts that Layne Project violated Kan. Stat. Ann. § 38-223(e). Doc. 70 at 12. Defendants argue that the court lacks subject matter jurisdiction over these claims because plaintiff's Amended Complaint only invokes jurisdiction under 28 U.S.C. § 1331. Section 1331 confers federal courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Because plaintiff's state law claims arise under Kansas

statutes—not federal laws—section 1331 confers no subject matter jurisdiction for them.

Nevertheless, the court could exercise supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367. Although plaintiff never pleads supplemental jurisdiction under § 1367 specifically, the court liberally construes his Amended Complaint as doing so. But, the court also may decline to exercise supplemental jurisdiction under § 1367 if it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3).

The decision whether to exercise supplemental jurisdiction is committed to a district court's sound discretion. *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1138–39 (10th Cir. 2004). Section 1367 "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity.'" *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172–73 (1997)

(quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ.*, 484 U.S. at 350 n.7; *see also Tonkovich v. Kan. Bd. of Regents*, 254 F.3d 941, 945 (10th Cir. 2001) (holding that where pretrial proceedings and discovery have not commenced in earnest, "considerations of judicial economy, convenience, and fairness do not favor retaining jurisdiction" (citations and internal quotation marks omitted)). Also, "[n]otions of comity and federalism demand that a
state court try its own lawsuits, absent compelling reasons to the contrary." *Thatcher Enters. v. Cache Cty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990).

Here, the court has dismissed every claim against defendants which it had original jurisdiction to decide. No pretrial proceedings or discovery have taken place yet, and this case is not unusual. The

court thus exercises its discretion and declines to exercise supplemental jurisdiction over plaintiff's state law claims.

IV. Conclusion

For all these reasons, plaintiff's Amended Complaint fails to state plausible claims under federal law against each of the five defendants. The court notes that it already has afforded plaintiff the opportunity to amend his complaint, but yet his Amended Complaint still fails to plead "factual content" that allows the court to "draw the reasonable inference that the defendant[s] [are] liable" for plaintiff's asserted federal claims. *Iqbal*, 556 U.S. at 678.

When the court granted plaintiff leave to file an amended pleading, the court cautioned
him that he had "one final opportunity to file an Amended Complaint—one that addresses all of the concerns raised by the court in this Order." Doc. 65 at 13. The court also explained to plaintiff that his amended pleading "must plead *facts*—and not just conclusions—to state plausible claims and cure the deficiencies identified [in the court's Order]." *Id.* Despite this admonition, plaintiff's Amended

Complaint failed to cure the deficiencies the court had identified.

Because plaintiff fails to plead facts to state plausible federal claims against the five defendants, the court grants defendants' motions to dismiss plaintiff's federal claims. The court declines to exercise supplemental jurisdiction over plaintiff's state law claims.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants Layne Project, Ashlyn Yarnell, City of Olathe, Safe Home of Kansas, and KVC Kansas' Motions to Dismiss (Docs. 77, 79, 84, 86, 88) are granted.

IT IS FURTHER ORDERED THAT defendant Layne Project's Motion to Strike (Doc. 94) is denied.

IT IS SO ORDERED.

Dated this 16th day of June 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOREL SHOPHAR,
Plaintiff,
v.
Case No. 16-CV-4043-DDC-KGS
STATE OF KANSAS, et al.,
Defendants.

AMENDED MEMORANDUM AND ORDER1

Pro se plaintiff Jorel D. Shopar brings this action against the mother of his two children, various state and local agencies, and individuals who, he contends, have contrived a false campaign against him and conspired to terminate his parental rights. Generally, plaintiff alleges that defendants discriminated against him and violated his constitutional and civil rights when his children were placed in the temporary custody of the State of Kansas in September 2015, and later placed in the custody of their mother. Plaintiff asserts claims under 42 U.S.C. §§ 1983 and 1985 and various federal and Kansas criminal statutes.

Five of the seven defendants have filed motions to dismiss plaintiff's Second Amended Complaint (Doc. 90).2 These motions include: defendant State of Kansas' Motion to Dismiss (Doc. 91), defendant MOMS Club's Motion to Dismiss (Doc. 93), defendant Audra Weaver's Motion to Dismiss (Doc. 94), defendant Kansas Department for Children and Families' Motion

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1 The court issues this Amended Memorandum and Order to correct a typographical error that appears in the original Memorandum and Order issued on March 17, 2017. Doc. 111. On page 23 of the original order, the court referenced defendant Audra Weaver when it should have referred to defendant Krissy Gorski. This Amended Memorandum and Order reflects the appropriate correction. 2 These defendants also filed motions to dismiss plaintiff's original Complaint (Doc. 1) and his First

Amended Complaint (Doc. 31). *See* Docs. 9, 28, 45, 46, 64, 68. Plaintiff's filing of his Second Amended Complaint renders these motions moot. The court thus denies the motions as moot.

to Dismiss (Doc. 95); and defendant Krissy Gorski's Motion to Dismiss (Doc. 98).3 After carefully considering the parties' motions and plaintiff's

responses to them, the court concludes that plaintiff's claims against these five defendants fail as a matter of law because the court either lacks subject matter jurisdiction or the claims fail to state a claim for relief. The court thus grants the motions to dismiss filed by defendants State of Kansas, MOMS Club, Audra Weaver, Kansas Department for Children and Families, and Krissy Gorski. The court explains why
below.

I. Pro Se Litigant Standard

Because plaintiff proceeds pro se, the court must construe his filings liberally and hold them to a less stringent standard than formal pleadings drafted by attorneys. *James v. Wadas*,724 F.3d 1312, 1315 (10th Cir. 2013); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). This liberal standard requires the court to construe a pro se plaintiff's pleadings as stating a valid claim if a reasonable reading of them allows the court to do so "despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax

and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110.

But, at the same time, the court will not serve as a pro se litigant's advocate. *James*, 724 F.3d at 1315. The court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*,

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3 The other two defendants have not answered plaintiff's Second Amended Complaint. Pro se defendant Teena Wilke filed a "Response" to plaintiff's First Amended Complaint. Doc. 49. The filing was docketed as an Answer, but it appears to seek dismissal of plaintiff's First Amended Complaint for failing to state a claim. Even if the court construes Ms. Wilke's "Response" as a motion to dismiss, the court must deny the filing as moot because plaintiff's Second Amended Complaint is now the operative pleading in the case. Ms. Wilke never has responded to plaintiff's Second Amended Complaint. Ms. Wilke also filed a purported answer on behalf of MOMs Club of Olathe East (Doc. 52). On August 11, 2016, the court ordered Ms. Wilke to show cause why it should not strike the purported answer because parties proceeding pro se may not represent other parties in federal court. Doc. 60. Ms. Wilke never has responded to the Show Cause Order. In a separate order, the court strikes the Answer of MOMs Club of Olathe East filed by

Ms. Wilke, for reasons already explained in the Show Cause Order.

425 F.3d 836, 840 (10th Cir. 2005). Also, the requirement that the court must read a pro se plaintiff's pleadings broadly "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall*, 935 F.2d at 1110. And, a plaintiff's pro se status does not excuse him from complying with federal and local rules. *See Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) ("This court has repeatedly insisted that
pro se parties follow the same rules of procedure that govern other litigants." (citations and
internal quotation marks omitted)).

II. Factual Background

The following facts are taken from plaintiff's Second Amended Complaint (Doc. 90) and viewed in the light most favorable to him. *See, e.g., S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (explaining that on a Rule 12(b)(6) motion, the court "accept[s] as true all wellpleaded factual allegations

in the complaint and view[s] them in the light most favorable to the [plaintiff]" (citation and internal quotation marks omitted)). The court also construes plaintiff's allegations liberally because he proceeds pro se.

Plaintiff and defendant Krissy Gorski had two children together. On August 12, 2015, Ms. Gorski took the children away from plaintiff. Ms. Gorski also reported that plaintiff was physically abusing her and the children to various agencies, including the Olathe Police Department, the Johnson County District Court, and the Department for Children and Families ("DCF"). Plaintiff asserts that Ms. Gorski's abuse claims are false.

Plaintiff accuses defendant Teena Wilke of hiding the children in her home while she and Ms. Gorski contrived the false abuse allegations. Plaintiff also accuses Audra Weaver, President of MOMs Club of Olathe East, of assisting Ms. Gorski by hiding his children from him. He claims Ms. Weaver knew where his children were located but refused to share that with him. He also contends that Ms. Weaver

endangered his children's safety by failing to disclose their location to him.

Also, in August 2015, plaintiff complained to DCF that Ms. Gorski was abusing drugs and physically abusing the two children. Plaintiff claims that DCF ignored his complaints and never investigated them. Plaintiff also asked DCF to require Ms. Gorski to submit to a urinalysis test so she would not continue to abuse drugs. But, DCF refused plaintiff's request.

In September 2015, the Johnson County District Court placed the two children into DCF custody. Plaintiff alleges that the judge's decision to remove the children from their parents' custody was based on false evidence submitted by Ms. Gorski. Plaintiff claims that the state court placed the children in the temporary custody of Teena Wilkie. Plaintiff claims that Ms. Wikie is an unlicensed foster parent who helped Ms. Gorski abuse drugs. Plaintiff also contends that Ms. Wilke refused to allow plaintiff to see or talk to his children but permitted Ms. Gorski to visit the children at her home each day.

Plaintiff alleges that various agencies and individuals—including DCF and Assistant District Attorney Erica Miller—conspired to mischaracterize plaintiff as an abusive and aggressive man as part of an effort to deprive him of his parental rights. To that end, plaintiff claims DCF manipulated evidence and covered up information about Ms. Gorski's criminal and drug abuse history. Plaintiff also claims that Assistant District Attorney Erica Miller filed motions requesting the state court to forbid contact between plaintiff and his children based on false information, submitted other false evidence about plaintiff in the state court proceedings, ignored plaintiff's complaints about Ms. Gorski, withheld evidence of Ms. Gorski's criminal record and drug abuse, and authorized the children's reintegration into Ms. Gorski's home. Plaintiff contends that Ms. Miller took these actions to retaliate for plaintiff's filing of a federal lawsuit.4

On January 16, 2016, DCF reintegrated the children into Ms. Gorski's home. Plaintiff claims this happened without a court ruling or other adjudication. Plaintiff also contends that the

children were admitted to the emergency room on several occasions after they were placed in Ms. Gorski's care. And, plaintiff asserts that DCF ignored his requests to see his children throughout the time when these events occurred and also ignored his requests for his children's medical information.

Plaintiff alleges that defendants' actions have violated his constitutional rights. He also claims that defendants' actions have injured him by: depriving him of his children; causing him to suffer humiliation, severe emotional distress, and heartache; tarnishing his reputation as a father and church leader; and losing business. Plaintiff also claims that defendants' actions have injured his children because separating them from their father has caused them to experience abandonment, trauma, loss of appetite, loss of weight, loss of sleep, and emotional distress. Plaintiff seeks monetary damages of $350,000 from each defendant. Doc. 90 at 22.

III. Legal Standard

A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction and, as such, must have a statutory basis to exercise jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citation omitted). Federal district courts have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States or where there is diversity of citizenship. 28 U.S.C. § 1331; 28 U.S.C. § 1332. "A court lacking jurisdiction cannot render judgment but must

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4 Plaintiff references a separate federal lawsuit, not this one. He refers to a lawsuit he has filed against the City of Olathe, Layne Project, Safehome, Inc., KVC, and Ashlyn Yarnell (a guardian ad litem). Doc. 90 at 12; *see also* Case No. 15-4961 (D. Kan.).

dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (citation omitted). Since federal courts are courts of limited jurisdiction, there

is a presumption against jurisdiction, and the party invoking federal jurisdiction bears the burden to prove it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Generally, a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) takes one of two forms: a facial attack or a factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)) (internal citations omitted).

"Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other

documents, and [to conduct] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1003 (citations omitted); *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1063–64 (10th Cir. 2012); *see also Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324–25 (10th Cir. 2002) (holding that a court must convert a motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56 only when the jurisdictional question is intertwined with the merits of case).

B. Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction

A plaintiff bears the burden to establish personal jurisdiction over each defendant named in the action. *Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1179–80 (10th Cir. 2014). But in the preliminary stages of litigation, a plaintiff's burden to prove personal jurisdiction is a light one. *AST Sports Sci., Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054, 1056 (10th Cir. 2008).

Where, as here, the court is asked to decide a pretrial motion to dismiss for lack of personal jurisdiction without conducting an evidentiary hearing, plaintiff must make no more than a prima facie showing of jurisdiction to defeat the motion. *Id.* at 1056–57. "The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1091 (10th Cir. 1998).

To defeat a plaintiff's prima facie showing of personal jurisdiction, defendants "must present a compelling case demonstrating 'that the presence of some other considerations would render jurisdiction unreasonable.'" *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)). Where defendants fail to controvert a plaintiff's allegations with affidavits or other evidence, the court must accept the well-pleaded allegations in the complaint as true, and resolve any factual disputes in the plaintiff's favor. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (1oth Cir. 1995).

C. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Fed. R. Civ. P. 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed factual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court explained, "will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter,accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*,550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Under this standard, 'the complaint

must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.'" *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

Although the court must assume that the factual allegations in the complaint are true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1263 (quoting *Iqbal*, 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim for relief. *Bixler v.Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court may consider not only the complaint itself, but also attached exhibits and documents incorporated into the complaint by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). A court "may consider documents referred to in the complaint if the documents are central to the

plaintiff's claim and the parties do not dispute the documents' authenticity." *Id.* (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)) (internal quotation marks omitted).

IV. Analysis

As stated above, five of the seven defendants have filed motions to dismiss. The court considers each motion separately below.

A. Defendant State of Kansas' Motion to Dismiss

Plaintiff's Second Amended Complaint asserts claims against the State of Kansas ("the State") under 42 U.S.C. §§ 1983 and 1985, for alleged violations of plaintiff's rights under the Fourteenth Amendment's Equal Protection Clause and Due Process Clause. Doc. 90 at 12. The State moves to dismiss plaintiff's claims under Fed. R. Civ. P. 12(b)(1). It asserts that the Eleventh Amendment bars plaintiff's claims against the State, and thus the court lacks subject matter jurisdiction over them.

The Eleventh Amendment provides: "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." The Eleventh Amendment grants immunity that "accord[s] states the respect owed them as joint sovereigns," "applies to any action brought against a state in federal court, including suits initiated by a state's own citizens," and "applies regardless of whether a plaintiff seeks

declaratory or injunctive relief, or money damages." *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007) (citations omitted). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). Eleventh Amendment immunity applies not only to states but also extends to state entities that are considered "arm[s] of the state." *Steadfast Ins. Co.*, 507 F.3d at 1253 (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977)).

"Two circumstances exist where a citizen may sue a State in federal court without running afoul of

the Eleventh Amendment." *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186,1195 (10th Cir. 1998). "First, a federal court may hear such suits if the State has expressly waived its Eleventh Amendment protection and consented to such suit[s] in the federal courts." *Id.* "Second, a State may have its Eleventh Amendment immunity abrogated by Congress if such abrogation was accomplished pursuant to a valid exercise of power by Congress." *Id.* The State asserts that neither exception applies here. The court agrees.

First, the State never has waived its Eleventh Amendment immunity by expressly consenting to suit in federal court. "The test for determining whether a State has waived its Eleventh Amendment immunity 'from federal-court jurisdiction is a stringent one' and in 'the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction,' [the court] will not find that a State has waived its constitutional immunity." *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute on other grounds as*

stated in Lane v. Pena, 518 U.S. 187, 198 (1996)). Although the State "has consented to suits for damages under the Kansas Tort Claims Act," it has not unequivocally waived Eleventh Amendment immunity through this enactment. *Jones v. Courtney*, 466 F. App'x 696, 700 (10th Cir. 2012) (quoting *Wendt v. Univ. of Kan. Med. Ctr.*, 59 P.3d 325, 335 (Kan. 2002)). To the contrary, the Kansas Tort Claims Act includes a specific preservation of this immunity: "Nothing in this section or in the Kansas tort claims act shall be construed as a waiver by the state of Kansas of immunity from suit under the 11th amendment to the constitution of the United States." Kan. Stat. Ann. § 75-6116(g); *see also Jones*, 466 F. App'x at 700–01 (explaining that the Kansas Tort Claims Act is no "waiver of Eleventh Amendment immunity" because "the statute tells us so" (citing Kan. Stat. Ann. § 75-6116(g))).

Second, Congress has never abrogated the State's Eleventh Amendment immunity through a valid exercise of its power. It is well-established that Congress never intended to abrogate Eleventh

Amendment immunity when it enacted 42 U.S.C. §§ 1983 and 1985. *Ellis*, 163 F.3d at 1196 (citing *Quern v. Jordan*, 440 U.S. 332, 345 (1979)). Thus, plaintiff's §§ 1983 and 1985 claims against the State here are barred by Eleventh Amendment immunity.

Although not relevant here, an exception to Eleventh Amendment immunity exists when suits challenge the constitutionality of a state official's action enforcing state law. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex Parte Young*, 209 U.S. 123, 159–60 (1908)). The Supreme Court has held that such a suit is not one against the state itself. *Id.* (citing *Ex Parte Young*, 209 U.S. at 159–60). Here, plaintiff asserts no claims against state officials for actions taken in their official capacities. Plaintiff's Second Amended Complaint also never seeks any form of injunctive or declaratory relief. Thus, the *Ex Parte Young* exception does not apply here.

It appears that plaintiff's Second Amended Complaint seeks to assert claims against the State on a respondeat superior theory based on actions by Assistant District Attorney Erica Miller. Plaintiff alleges, for example, that Ms. Miller filed motions

requesting no contact between plaintiff and his children premised on false information, submitted other false evidence about plaintiff in the state court proceedings, ignored plaintiff's complaints about Ms. Gorski,withheld evidence of Ms. Gorski's criminal record and drug abuse, and authorized the children's reintegration into Ms. Gorski's home. But, plaintiff cannot hold the State vicariously liable for Ms. Miller's actions under §§ 1983 or 1985. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989) ("Respondeat superior or vicarious liability will not attach under § 1983."); *Howard v. Topeka Shawnee Cty. Metro. Planning Comm'n*, 578 F. Supp. 534, 538–39 (D. Kan. 1983) (holding that no vicarious liability exists for claims brought under §§ 1983 or 1985).

For all these reasons, the Eleventh Amendment confers sovereign immunity on the State. The court thus lacks subject matter jurisdiction over plaintiff's claims. And, consequently, it grants the State's Motion to Dismiss.

B. Defendant Department for Children and Families' Motion to Dismiss

Plaintiff's Second Amended Complaint asserts claims against DCF under 42 U.S.C. §§ 1983 and 1985, for alleged violations of plaintiff's rights under the Fourteenth Amendment's Equal Protection and Due Process Clauses. Doc. 90 at 12. Plaintiff also asserts a claim under Kan. Stat. Ann. § 21-5601, a criminal statute prohibiting child endangerment.

Defendant DCF moves to dismiss plaintiff's claims because, it contends, it also is entitled to Eleventh Amendment immunity. Eleventh Amendment immunity applies not only to states but also extends to state entities that are considered "arm[s] of the state." *Steadfast Ins. Co.*, 507 F.3d at 1253 (citing *Doyle*, 429 U.S. at 280).

Here, DCF is an agency of the State of Kansas, and "not a legal entity capable of being sued." *Protheroe v. Pokorny*, No. 16-2387-CM, 2016 WL 6822657, at *4 (D. Kan. Nov. 18,2016); *see also McCollum v. Kansas*, No. 14-1049-EFM-KMH, 2014 WL 3341139, at *6 (D.Kan. July 8, 2014), *aff'd*, 599 F. App'x 841 (10th Cir. 2015) (explaining that "DCF

is the agency through which the state acts in all matters that relate to children who are found to be in need of care" and thus is "an arm of the state"). Thus, the court lacks subject matter jurisdiction over plaintiff's claims against DCF for the same reasons that it lacks subject matter jurisdiction over the claims against the State of Kansas, as discussed in the preceding section. The court thus grants defendant DCF's Motion to Dismiss.

C. Defendant MOMs Club's Motion to Dismiss

Plaintiff's Second Amended Complaint asserts claims against MOMs Club ("MOMs Club") under 42 U.S.C. § 1983, for alleged violations of plaintiff's rights under the Fourth Amendment and the Fourteenth Amendment's Due Process Clause. Doc. 90 at 20.

MOMs Club moves to dismiss plaintiff's claims for two reasons. First, MOMs Club asserts that the court lacks personal jurisdiction over it. Second, MOMs Club asserts that plaintiff cannot assert a claim against MOMs Club under § 1983 because such a claim requires state action and

MOMs Club is not a state actor. The court agrees on both points. It explains why below.

1. Defendant MOMs Club is not subject to personal jurisdiction in Kansas.

Plaintiff's Second Amended Complaint asserts federal question subject matter jurisdiction. Doc. 90 at 1 ("The Federal Court has subject matter jurisdiction and has the power to hear and make binding judgment over this complaint because it is a Case brought under the Federal Laws of Civil Rights."). Section 1331 of Title 28 of the United States Code confers original jurisdiction on federal district courts over "all civil actions arising under the

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In a federal question case, like this one, a court can assert personal jurisdiction over a defendant if: (1) the applicable statute potentially confers jurisdiction by authorizing service of process on the defendant; and (2) the exercise of jurisdiction comports with due process. *Klein v. Cornelius*, 786 F.3d 1310, 1317 (10th Cir. 2015).

Here, plaintiff brings claims against MOMs Club under § 1983. This statute does not provide for nationwide service of process. *Trujillo v. Williams*, 465 F.3d 1210, 1217 (10th Cir. 2006). Fed. R. Civ. P. 4(k)(1)(A) thus governs service. *Id.*; *see also Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (citing Fed. R. Civ. P. 4(k)(1)(A)). This Rule requires the court to apply the law of the forum state where the district court is situated. Fed. R. Civ. P. 4(k)(1)(A).

Kansas' long-arm statute is construed liberally to permit exercise of jurisdiction in every situation consistent with the United States Constitution. *Federated Rural Elec. Ins. Corp. v.Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994); *see also* Kan. Stat. Ann. § 60-308(b)(1)(L) & (b)(2). Thus, the court need not conduct a separate personal jurisdiction analysis under Kansas law, because the "first, statutory, inquiry effectively collapses into the second, constitutional, analysis." *Dudnikov*, 514 F.3d at 1070.

The constitutional analysis requires a court to determine whether "exercise[ing] jurisdiction [is] in

harmony with due process." *Id.* This analysis involves a two-step inquiry: (1) a defendant "must have 'minimum contacts' with the forum state, such that having to defend a lawsuit" in the forum, (2) "would not 'offend traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Plaintiffs can satisfy the "minimum contacts" standard in either one of two ways—by establishing general jurisdiction or specific jurisdiction based on a defendant's contacts with the forum state. *Rockwood Select Asset Fund*, 750 F.3d at 1179. The Tenth Circuit has described how general jurisdiction and specific jurisdiction differ, as follows:

> General jurisdiction is based on an out-of-state defendant's "continuous and systematic" contacts with the forum state, and does not require that the claim [at issue] be related to those contacts. Specific jurisdiction, on the other hand, is premised on something of a *quid pro quo*: in exchange for "benefitting" from some purposive conduct directed at the forum state, a

party is deemed to consent to the exercise of jurisdiction for claims related to those contacts.

Dudnikov, 514 F.3d at 1078 (citations omitted).

Here, neither general nor specific personal jurisdiction exists. MOMs Club lacks sufficient contacts with Kansas to subject itself to jurisdiction in this forum. With its Motion to Dismiss, MOMs Club has submitted a Declaration of Mary James. Doc. 93-1. Ms. James is the Founder and Chairman of MOMs Club. *Id.* Ms. James declares that MOMs Club is a corporation organized under California law. *Id.* Its corporate operations are carried out by volunteers located throughout the country, but none of the volunteers are in Kansas. *Id.* It does not own any real property in Kansas. *Id.* The corporation's registered agent is located in California. *Id.* Plaintiff served MOMs Club in this action by certified mail. *Id.* Ms. James also declares that Audra Weaver is not and never has been the President of MOMs Club. *Id.* And, she declares that MOMs Club did not direct, coordinate, support, approve, condone, participate in, or provide advice

for any of the actions alleged in plaintiff's Second Amended Complaint. *Id.*

Under these facts, MOMs Club lacks sufficient contacts with Kansas to confer specific personal jurisdiction. *See Newsome v. Gallacher*, 722 F.3d 1257, 1264 (10th Cir. 2013) (explaining that a court may exercise specific personal jurisdiction if: (1) the out-of-state defendant "purposefully directed" his activities at residents of the forum state, and (2) the plaintiff's injuries arose from those purposefully directed activities). These facts also fail to establish sufficient minimum contacts for the court to exercise general jurisdiction. *See Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can., Ltd.*, 703 F.3d 488, 493 (10th Cir.2012) (explaining that a court may exercise general jurisdiction if the defendant's contacts with the forum are "so continuous and systematic as to render [it] essentially at home in the forum State" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))).

Plaintiff responds5 with unsubstantiated allegations that MOMs Club is "one in the same" as

a local chapter—MOMs Club of Olathe East. Doc. 100 at 4. Plaintiff asserts that the local chapter "functions under the jurisdiction of Moms Club which unites as one organization." *Id.* He also contends that the local chapter pays an annual registration fee to MOMs Club, the national organization, and that the local chapter is required to abide by the national organization's by-laws. *Id.* at 3. Thus, plaintiff asserts, no separation exists between MOMs Club and the local chapter for personal jurisdiction purposes. *Id.*

Even accepting plaintiff's allegations as true, they cannot suffice to confer general personal jurisdiction over MOMs Club, as a national organization. Other courts that have addressed this issue have required the national organization to exert control over the local chapter's actions such that the local chapter's activities are imputed to the national organization. *See, e.g., Amazon.com, Inc. v. Nat'l Ass'n of Coll. Stores, Inc.*, 826 F. Supp. 2d 1242, 1253 (W.D. Wash. 2011) (holding that although a trade association had members in the forum state and provided advocacy services and

resources for those members, those contacts "fall well short of the requisite showing for general jurisdiction" because it did not control the activities of those members (citations and internal quotation marks omitted)); *Grand Aerie Fraternal Order of Eagles v. Haygood*, 402 S.W.3d 766, 778–82 (Tex. Ct. App. 2013) (holding, under Texas law, that no personal jurisdiction existed over a national organization because its alleged contacts

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5 MOMs Club moved to strike plaintiffs' Opposition (Doc. 100) as untimely. *See* Doc. 102 ("Motion To Strike Plaintiff's Response to Motion to Dismiss"). It asserts that plaintiff filed his Opposition two days out of time without seeking the court's leave to do so. *See* D. Kan. Rule 6.1(d)(2) (providing that "[r]esponses to motions to dismiss . . . must be filed and served within 21 days"). The court has discretion to sanction a party for filing an untimely response by striking the filing. *Sheldon v. Khanal*, No. 07-2112-KHV, 2008 WL 474262, at *2 n.3 (D. Kan. Feb. 19, 2008) (citing *Curran v. AMI Fireplace Co.*, 163 F. App'x 714, 718 (10th Cir. 2006, which reviewed a decision to strike untimely response for abuse of discretion). The court finds no need to strike plaintiff's Opposition here. The arguments plaintiff asserts in his filing do not change the outcome of the motion to dismiss, so the court considers it. *See id.* (denying a motion to strike an untimely filing because

"[a]lthough the Court discourages such tardiness, [the filing's] arguments will not materially change the resolution of [the pending] motion"). The court thus denies MOMs Club's Motion to Strike.

with a local chapter were too attenuated for the exercise of specific jurisdiction; the local chapter's contact with state could not be imputed to the national organization on an alter ego theory for purposes of general personal jurisdiction; and alleged contacts of the national organization with the state were insufficient to establish general jurisdiction). *Cf. Acad. of Ambulatory Foot Surgery v. Am. Podiatry Assoc.*, 516 F. Supp. 378, 381 (S.D.N.Y. 1981) (finding venue inappropriate in the forum because the court could not attribute the activities of

the separately incorporated New York chapter to the national organization located in Washington, D.C.).

Plaintiff's conclusory allegations about the connection between MOMs Club and its local chapter in Olathe, Kansas, fail to establish the requisite control to subject the national organization to general personal jurisdiction. Plaintiff bears the

burden to establish personal jurisdiction, and he has not met that burden here. The court thus concludes that no personal jurisdiction exists over MOMs Club in this forum. And, the court grants MOMs Club's Motion to Dismiss for this reason.

2. Defendant MOMs Club is not a state actor, and thus cannot be liable for a claim brought under 42 U.S.C. § 1983.

Even if the court could exercise personal jurisdiction over MOMs Club, plaintiff fails to state a claim against it because it is not a state actor. "Section 1983[ ] liability attaches only to conduct occurring 'under color of law.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quoting 42 U.S.C. § 1983). So, "the only proper defendants in a Section 1983 claim are those who 'represent [the state] in some capacity, whether they act in accordance with their authority or misuse it.'" *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (further citations and internal quotation marks omitted)). Section 1983's requirement that a defendant act "under color of state law" "is 'a jurisdictional

requisite for a § 1983 action.'" *Jojola v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995) (quoting *Polk Cty. v. Dodson*, 454 U.S. 312, 315 (1981)).

So, to state a viable § 1983 claim, a plaintiff must allege sufficient facts demonstrating, plausibly, that the private individual or entity's conduct allegedly causing a constitutional deprivation is "fairly attributable to the state." *Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000) (citations and internal quotation marks omitted). The Tenth Circuit has applied four different tests to determine whether a private entity is subject to liability under § 1983 as a state actor: the nexus test, the symbiotic relationship test, the joint action test, and the public function test. *Gallagher*, 49 F.3d at 1447.

The nexus test requires a "sufficiently close nexus between the government and the challenged conduct" and, in most cases, renders a state liable for a private individual's conduct "only when [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1448 (citations and internal

quotation marks omitted). The symbiotic relationship

test asks whether the state "has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity." *Id.* at 1451 (citations and internal quotation marks omitted).

The joint action test requires courts to "examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id.* at 1453 (citations omitted). Finally, the public function test asks whether the challenged action is "a function traditionally exclusively reserved to the State." *Id.* at 1456 (citations and internal quotation marks omitted).

Plaintiff has alleged no facts in his Second Amended Complaint to state an actionable claim against MOMs Club for conduct that was "fairly attributable to the state" under any of these tests. Plaintiff alleges that MOMs Club is "an international community for 'Stay at home moms.'" Doc. 90 at 21. He concedes that MOMs Club is not a

state actor by alleging that it "is not a legal agency to remove children from the home of any residence." *Id.* Plaintiff's Second Amended Complaint never even asserts that MOMs Club acted under color of state law. Although plaintiff accuses members of the local chapter of hiding plaintiff's children and endangering their safety, he never asserts any facts that MOMs Club—the national organization—committed these acts, much less any facts that MOMs Club acted jointly or in some relationship with the State to support a claim under § 1983. Without such allegations, plaintiff's Second Amended Complaint fails to allege an actionable § 1983 claim against MOMs Club. Thus, even if personal jurisdiction existed in Kansas over MOMs Club, the court still
would dismiss plaintiff's claims against it.

D. Defendant Audra Weaver's Motion to Dismiss

Plaintiff's Second Amended Complaint asserts claims against Audra Weaver under 42 U.S.C. § 1983, for alleged violations of plaintiff's rights under the Fourth Amendment and the Fourteenth

Amendment's Due Process Clause. Doc. 90 at 20. Like MOMs Club, Ms. Weaver moves to dismiss plaintiff's claims because she is not a state actor and thus cannot be held liable under § 1983.

Plaintiff's Second Amended Complaint alleges that Audra Weaver is President of MOMs Club of Olathe East. Plaintiff accuses Ms. Weaver of assisting Ms. Gorski with hiding his children from him. He claims Ms. Weaver knew where his children were located and refused to provide him that information. He also contends that Ms. Weaver endangered his children's safety by failing to disclose their location. Plaintiff's Second Amended Complaint never asserts that Ms. Weaver is a state actor. It also never asserts any facts showing that Ms. Weaver's conduct is "fairly attributable to the state" to support a viable § 1983 claim. *Scott*, 216 F.3d at 906. Plaintiff alleges no facts establishing any connection between the State and Ms. Weaver or other facts sufficient to subject her to § 1983 liability as a state actor under the nexus text,symbiotic test, or joint action test. *See Gallagher*, 49 F.3d at 1447. Plaintiff also never asserts any facts showing that

Ms. Weaver's actions are "function[s] traditionally exclusively reserved
to the State" to satisfy the public function test and subject Ms. Weaver to § 1983 liability. *Id.* at 1456 (citations and internal quotation marks omitted). Indeed, plaintiff concedes that MOMs Club is "is not a legal agency to remove children from the home of any residence." Doc. 90 at 21. Thus, Ms. Weaver, as President of MOMs Club, was not performing any state functions because, plaintiff contends, Ms. Weaver's actions involved the illegal removal of children—not something that is a traditional and exclusive function of the State.

Plaintiff submitted an Opposition to Ms. Weaver's motion.6 Doc. 101. In it, he asserts conclusory allegations against Ms. Weaver and the MOMs Club of Olathe East of "working conjointly," "work[ing] collaboratively," and having a "connection to the governmental actors and through their actions with state actors." *Id.* at 3, 4, 5. These allegations appear nowhere in plaintiff's Second Amended Complaint. So, the court cannot consider them on a motion to dismiss. *See Jojola*, 55 F.3d at 494

(explaining that when "determining whether to grant a motion to dismiss, the district court . . . [is] limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint"). And, even so, plaintiff's conclusory allegations fail to establish plausible factual allegations of state action to subject Ms. Weaver to § 1983 liability. *See Wastach Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (explaining that "[t]hreadbare recitals of the elements of a cause of action, supported

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6 Ms. Weaver asks the court to disregard plaintiff's Opposition because it was not timely filed. Because plaintiff's Opposition does not influence the disposition of Ms. Weaver's motion, the court exercises its discretion to consider it, even if it was untimely.

by mere conclusory statements, do not suffice" to state a claim for relief); *see also Banks v. Geary Cty. Dist. Ct.*, 645 F. App'x 713, 716–18 (10th Cir. 2016) (affirming dismissal of a pro se plaintiff's § 1983 claim and explaining that "[c]onclusory allegations are not enough to withstand a motion to dismiss"

and "courts will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf" (citations and internal quotation marks omitted)). For these reasons, plaintiff's Second Amended Complaint fails to assert a viable § 1983 claim against Ms. Weaver. The court thus grants Ms. Weaver's Motion to Dismiss.

E. Defendant Krissy Gorski's Motion to Dismiss

Plaintiff's Second Amended Complaint asserts claims against Krissy Gorski under 8 U.S.C. § 1324c(a), 18 U.S.C. §§ 875, 1038, and Kan. Stat. Ann. §§ 21-6103(1)(a)(b), 38- 2223(e). Doc. 90 at 18. It also alleges that Ms. Gorski violated plaintiff's Fourth Amendment rights. *Id.* Ms. Gorski moves to dismiss plaintiff's claims against her under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failing to state a claim.

Ms. Gorski's motion also accuses plaintiff of initiating vexatious litigation against her. She asks the court to sanction plaintiff and prohibit him from

filing other lawsuits against her. In support of this request, Ms. Gorski asserts that plaintiff is prohibited from contacting her by a court order and that he is litigating this action only as a way of harassing and humiliating her.

Ms. Gorksi accuses plaintiff of bizarre behavior and hallucinations. She also contends that plaintiff tricked her into marrying him in a ceremony that, she later learned was not legal, in an attempt to "mislead [Ms. Gorski] into a polygamous marriage" that involved plaintiff "try[ing] to impregnate his former wife, now his concubine, as well as [Ms. Gorski], and others he could lure in as well, as [the women] were to bore him male children." Doc. 98 at 4–5. Ms. Gorski believes that plaintiff "intended to kill her and the children for a life insurance payout." *Id.* at 6. She believes so because, she contends, plaintiff obtained a firearm and attempted to place a
$250,000 life insurance policy on Ms. Gorksi. Ms. Gorski also accuses defendant of threatening and physically abusing her and her children.

Plaintiff has filed a 28-page opposition to Ms. Gorski's motion. Doc. 99. In it, plaintiff denies Ms. Gorski's allegations of abuse. He contends that plaintiff has falsely accused him of abuse to receive free housing, state assistance, and support from agencies. Plaintiff asserts that the court entered the no contact order to protect him because, he contends, Ms. Gorski was stalking him. Plaintiff accuses Ms. Gorski of having an extensive drug abuse and criminal history. Plaintiff contends that he "rehabilitated" Ms. Gorski, and he denies that he brought her into a polygamous relationship or that he intended to kill her for an insurance payoff. Doc. 99 at 9. Plaintiff also reiterates his accusations that Ms. Gorksi has abused her children. The court also has reviewed various materials that plaintiff has submitted to the court, although not relevant to the pending motions to dismiss. Plaintiff contends these materials support his allegations against Ms. Gorski of making false abuse claims against him. These materials include text messages and an audio file of a telephone call between plaintiff and Ms. Gorski.

After reviewing the parties' competing submissions, the court declines to weigh into their highly contentious allegations and denials of abusive behavior. Plaintiff and Ms. Gorski, it seems, have a complicated and acrimonious history. The court need not discuss their animosity toward each other. Instead, the court can dismiss plaintiff's claims against Ms. Gorski because they fail to state viable and plausible claims recognized by our laws. And, the court declines to sanction plaintiff on this record of competing allegations.

Ms. Gorski asserts that plaintiff cannot bring a claim against her for violations of plaintiff's Fourth Amendment rights. Like the other defendants, Ms. Gorski asserts that she is not state actor, and thus is not subject to § 1983 liability for purportedly violating plaintiff's constitutional rights. The court agrees. Plaintiff's Second Amended Complaint accuses Ms. Gorski of asserting false allegations against him to various state agencies and conspiring to deprive plaintiff of his parental rights. But it never alleges that Ms. Gorksi is a state actor. It also asserts no facts establishing any connection between

the State and Ms. Gorski or her actions sufficient to subject her to § 1983 liability as a state actor under any of the Tenth Circuit's tests. *See Gallagher*, 49 F.3d at 1447.

Plaintiff's Opposition asserts conclusory allegations that Ms. Gorski "worked in conjunction" and in a "collaborated team effort" with state actors. Doc. 99 at 24. But, plaintiff's Second Amended Complaint never asserts these allegations. Thus, the court cannot consider them on a motion to dismiss. *See Jojola*, 55 F.3d at 494. And, even if the court considered them, plaintiff's conclusory allegations, without sufficient factual support, fail to establish plausible allegations of state action sufficient to subject Ms. Gorski to § 1983 liability. *See Wastach Equal.*, 820 F.3d at 386; *see also Banks*, 645 F. App'x at 716–18. The court thus dismisses plaintiff's claims for alleged constitutional violations against Ms. Gorski.

Plaintiff's other statutory claims against Ms. Gorski also fail to state a claim as a matter of law. Plaintiff asserts claims under three federal criminal statutes: 8 U.S.C. § 1324c(a) and 18 U.S.C. §§ 875

and 1038. Section 1324c of Title 8 of the United States Code prohibits any person from making or using fraudulent documents to satisfy the requirements of or to obtain a benefit under the Immigration and Nationality Act. 8 U.S.C. § 1324c. Section 875 of Title 18 of the United States Code prohibits extortion threats using interstate communications. 18 U.S.C. § 875. Section 1038 of Title 18 of the United States Code prohibits criminal hoaxes and terrorist threats. 18 U.S.C. § 1038.

None of these federal criminal statutes confer on plaintiff the right to assert a private cause of action. *See, e.g., Clements v. Chapman*, 189 F. App'x 688, 692 (10th Cir. 2006) (holding that "none of the criminal statutes" that plaintiff cited in his complaint—including 18 U.S.C. § 875—"provide for a private cause of action"); *Johnson v. Working Am., Inc.*, No. 1:12CV1505, 2012 WL 3074775, at *2 (N.D. Ohio July 30, 2012) (finding that, as a private citizen, the plaintiff had no authority to initiate a federal criminal prosecution under 18 U.S.C. § 1038); *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 747 (S.D.N.Y. 1997) (finding, in the

context of 8 U.S.C. § 1324c, that "plaintiff has no standing to assert a claim under the INA because the statute does not create a private right of action to redress a violation" of that statute). Thus, plaintiff's claims under these federal criminal statutes fail to state a claim for relief. *See Clements*, 198 F. App'x at 692 (affirming district court's dismissal of alleged violations of federal criminal statutes because the statutes provided no private cause of action).

Plaintiff also asserts claims against Ms. Gorski under Kan. Stat. Ann. §§ 21-6103(1)(a)(b) and 38-2223(e). Kan. Stat. Ann. § 21-6103 makes a criminal false communication a class A nonperson misdemeanor. Kan. Stat. Ann. § 38-2223(e) makes illegal the willful and knowing failure to make a mandatory report of child abuse, establishing a class B misdemeanor. Neither statute provides that a private litigant may assert a civil cause of action under these criminal statutes. And plaintiff fails to show that the Kansas legislature intended to include a private right of action when it enacted these criminal statutes. *See Brooks v. Sauceda*, 85 F.

Supp. 2d 1115,1128 (D. Kan. 2000) (dismissing plaintiff's claims for violation of Kansas criminal statutes because plaintiff "does not show that the legislature intended to grant him a private cause of action for the violations of the citied criminal statutes"). Plaintiff thus fails to state a claim under either Kan. Stat. Ann. § 21-6103 or § 38-2223(e). And, so, the court grants Ms. Gorski's Motion to Dismiss plaintiff's claims against her. The court declines, however, to impose the requested sanctions.

V. Conclusion

For the above reasons, the court grants each of the pending motions to dismiss. Plaintiff's Second Amended Complaint fails to assert viable claims against these five defendants because either no subject matter or personal jurisdiction exists or the claims fail to state a claim for relief as a matter of law. The operative Complaint is plaintiff's third attempt at asserting claims against these defendants. The court finds no reason to provide him another opportunity to amend his allegations when he has had ample opportunity to do so and his

revised pleading still fails to state claims against these defendants as a matter of law.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant State of Kansas' Motion to Dismiss (Doc. 91) is granted.

IT IS FURTHER ORDERED THAT defendant MOMS Club's Motion to Dismiss (Doc. 93) is granted.

IT IS FURTHER ORDERED THAT defendant Audra Weaver's Motion to Dismiss (Doc. 94) is granted.

IT IS FURTHER ORDERED THAT defendant Kansas Department for Children and Families' Motion to Dismiss (Doc. 95) is granted.

IT IS FURTHER ORDERED THAT defendant Krissy Gorski's Motion to Dismiss (Doc. 98) is granted.

IT IS FURTHER ORDERED THAT defendant MOMS Club's Motion to Strike (Doc. 102) is denied.

IT IS FURTHER ORDERED THAT defendant Kansas Department for Children and Families' Motion to Dismiss (Doc. 9), defendant State of Kansas' Motion to Dismiss (Doc. 28), defendant

Audra Weaver's Motion to Dismiss (Doc. 45), defendant State of Kansas' Motion to Dismiss (Doc. 46), defendant MOMS Club's Motion to Dismiss (Doc. 64), and defendant Kansas Department for Children and Families' Motion to Dismiss (Doc. 68) are denied as moot.

IT IS SO ORDERED.

Dated this 28th day of March, 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOREL SHOPHAR,
Plaintiff,
v.

Case No. 16-CV-4043-DDC-KGS

STATE OF KANSAS, et al.,
Defendants.

MEMORANDUM AND ORDER

Pro se plaintiff Jorel D. Shophar brings this action against the mother of his two children, various state and local agencies, and individuals who, he contends, have contrived a false campaign against him and conspired to terminate his parental rights. Generally, plaintiff alleges that defendants discriminated against him and violated his constitutional and civil rights when his children were placed in the temporary custody of the State of Kansas in September 2015 and, later, placed in their mother's custody. Plaintiff asserts claims under 42 U.S.C. §§ 1983 and 1985 and various federal and Kansas criminal statutes.

On March 23, 2017, the court dismissed five of the seven defendants named in plaintiff's lawsuit because the court either lacked subject matter jurisdiction over plaintiff's claims or plaintiff's claims failed to state a claim for relief against those five defendants. Doc. 111. As the court noted in its March 23, 2017 Memorandum and Order, defendant Teena Wilkie never had answered plaintiff's Second Amended Complaint—the operative pleading in the case. *Id.* at 1 n.1. On March 24, 2017, Ms. Wilkie filed a Motion for Leave to File Out of Time. Doc. 113. It asks the court for leave to respond to plaintiff's Second Amended Complaint out of time because, as a pro se litigant, she did not understand that she was required to file a response. Ms. Wilkie also has filed a Motion to Dismiss. Doc. 114. For the reasons explained below, the court grants both of Ms. Wilkie's motions.

I. Pro Se Litigant Standard

Because plaintiff and Ms. Wilkie proceed pro se, the court must construe their filings liberally and hold them to a less stringent standard than formal pleadings drafted by attorneys. *James v. Wadas*, 724

F.3d 1312, 1315 (10th Cir. 2013); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). This liberal standard requires the court to construe a pro se litigant's pleadings as ones stating a valid claim if a reasonable reading of them allows the court to do so "despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110.

But, at the same time, the court will not serve as a pro se litigant's advocate. *James*, 724 F.3d at 1315. The court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*,425 F.3d 836, 840 (10th Cir. 2005). Also, the requirement that the court must read a pro se plaintiff's pleadings broadly "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall*, 935 F.2d at 1110. And, a

plaintiff's pro se status does not excuse him or her from complying with federal and local rules. *See Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) ("This court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." (citations and internal quotation marks omitted)).

II. Ms. Wilkie's Motion for Leave to File Out of Time

On July 5, 2016, plaintiff filed a First Amended Complaint naming Ms. Wilkie as a defendant. Doc. 31. Ms. Wilkie filed a "Response" to plaintiff's First Amended Complaint. Doc. 49. The Clerk docketed the Response as an Answer. But, the Response includes a request that the court dismiss plaintiff's claims for failing to state a claim upon which relief may be granted. *Id.* at 3. On December 2, 2016, plaintiff filed a Second Amended Complaint. Doc. 90.

This amended pleading also names Ms. Wilkie as a defendant. Plaintiff certified that he served a copy the Second Amended Complaint on Ms. Wilkie by U.S. Mail. *Id.* at 23.

The Federal Rules required Ms. Wilkie to respond to plaintiff's Second Amended Complaint within 14 days after service. Fed. R. Civ. P. 15(a)(3). Ms. Wilkie never responded within the required time. On March 24, 2017, Ms. Wilkie filed a Motion for Leave to File Out of Time, asking for leave to file her response to plaintiff's Second Amended Complaint out of time. Doc. 113. When Ms. Wilkie filed her Motion for Leave to File Out of Time, she also filed a "Motion to Dismiss All Claims Against Teena Wilkie." Doc. 114. This motion asks the court to dismiss plaintiff's Second Amended Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. *Id.* at 1.

Ms. Wilkie states in her Motion for Leave that she is a pro se litigant. Ms. Wilkie also explains that she did not understand that she was required to respond to plaintiff's Second Amended Complaint. She notes that she responded timely to plaintiff's First Amended Complaint. And, because plaintiff's allegations against Ms. Wilkie in the First Amended

Complaint did not differ from his allegations in the Second Amended Complaint, Ms. Wilkie believed that no other response was required.

Plaintiff never has responded to Ms. Wilkie's Motion for Leave to File Out of Time, and the time for doing so has passed. Under D. Kan. Rule 7.4(b), a party "who fails to file a responsive brief or memorandum within the time specified in D. Kan. Rule 6.1(d) waives the right to later file such brief or memorandum" unless there is a showing of excusable neglect. This rule also provides "[i]f a responsive brief or memorandum is not filed within the D. Kan. Rule 6.1(d) time requirements, the court will consider and decide the motion as an uncontested motion. Ordinarily, the court will grant the motion without further notice." D. Kan. Rule 7.4(b). Because plaintiff never has responded to Ms. Wilkie's Motion for Leave to File Out of Time, the court grants the motion. The court also grants the motion because Ms. Wilkie has satisfied the requirements for obtaining leave to file out of time.

A court may extend the time to act after a deadline has passed if the party "failed to act

because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); D. Kan. Rule 6.1(a)(4). Excusable neglect "is a somewhat elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 392 (1993) (citations and internal quotation marks omitted). But, a party's "inadvertence, ignorance of the rules, or mistakes concerning the rules do not usually constitute 'excusable' neglect." *Id.*

The determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. The factors to consider when making this determination include "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* "[P]erhaps the most important single factor" to determine whether neglect is excusable is "[f]ault in the delay." *Jennings v. Rivers*,

394 F.3d 850, 857 (10th Cir. 2005) (citations omitted). "An additional consideration is whether the moving party's underlying claim is meritorious." *Id.* (citing *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444–45 (10th Cir. 1983) (discussing, in the context of a motion to set aside a default judgment, the need to avoid frivolous litigation)). Though these factors guide the court's inquiry, the excusable-neglect determination, ultimately, is an equitable decision that's committed to the court's sound discretion. *See Bishop v. Corsentino*, 371 F.3d 1203, 1206 (10th Cir. 2004) (reviewing excusable-neglect decision under abuse of discretion standard).

After considering the relevant factors, the court exercises its discretion to grant Ms. Wilkie leave to file her response to plaintiff's Second Amended Complaint out of time. Ms. Wilkie acted in good faith: As a pro se litigant, she did not understand that she must file a response to plaintiff's Second Amended Complaint after she already had responded to his First Amended Complaint. And, the day after the court pointed out

Ms. Wilkie's omission in its March 23, 2017 Memorandum and Order (Doc. 111 at 1 n.2), Ms. Wilkie corrected her oversight by filing her Motion for Leave and her Motion to Dismiss. Docs. 113, 114. Although Ms. Wilkie's status as a pro se litigant does not excuse her from complying with the court's rules, *Nielsen*, 17 F.3d at 1277, her ignorance of the rules is probative of her good faith for failing to file a timely response, *see Cooper v. Regent Asset Mgmt. Solutions-Kansas, LLC*, No. 10-2634- JAR-KGG, 2012 WL 3238139, at *3 (D. Kan. Aug. 7, 2012) (holding that pro se defendants had shown excusable neglect when they failed to answer because they mistakenly believed an answer was not required).

The court also finds that granting the motion will not prejudice plaintiff or negatively affect the judicial proceedings. Although plaintiff filed the case over a year ago, the court has not entered a scheduling order yet because defendants have moved to dismiss each amended pleading that plaintiff has filed. So, the court has established no deadlines, including a trial date. Indeed, discovery has not even commenced. So far, the case has not required

significant litigation efforts by plaintiff—other than responding to the several motions to dismiss. The court has granted those motions to dismiss either because the court lacked subject matter jurisdiction or plaintiff's claims fail to state a claim for relief. And, for many of the same reasons, plaintiff's Second Amended Complaint also fails to state a claim against Ms. Wilkie, as the court explains below. Under these circumstances, the court finds it equitable to grant Ms. Wilkie's Motion for Leave to File Out of Time.

III. Ms. Wilkie's Motion to Dismiss

The court now turns to Ms. Wilkie's Motion to Dismiss. Doc. 114. In it, she asks the court to dismiss plaintiff's Second Amended Complaint against her because the court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and plaintiff fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Plaintiff never has responded to Ms. Wilkie's Motion to Dismiss, and the time for doing so has passed. D. Kan. Rule 7.4(b) thus allows the court to "consider and decide the motion as an uncontested motion. Ordinarily, the

court will grant the motion without further notice." D. Kan. Rule 7.4(b). Because plaintiff never has responded to Ms. Wilkie's Motion to Dismiss, the court grants the motion. The court also grants the motion on the merits. The court explains why below.

A. Factual Background

The following facts come from plaintiff's Second Amended Complaint (Doc. 90) and are viewed in the light most favorable to him. *See, e.g.*, *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (explaining that on a Rule 12(b)(6) motion, the court "accept[s] as true all wellpleaded factual allegations in the complaint and view[s] them in the light most favorable to the [plaintiff]" (citation and internal quotation marks omitted)). The court also construes plaintiff's allegations liberally because he proceeds pro se.

Plaintiff and defendant Krissy Gorski had two children together. On August 12, 2015, Ms. Gorski took the children away from plaintiff. Ms. Gorski also reported that plaintiff was physically abusing her and the children to various agencies, including

the Olathe Police Department, the Johnson County District Court, and the Department for Children and Families ("DCF"). Plaintiff asserts that Ms. Gorski's abuse claims are false.

Plaintiff accuses defendant Teena Wilkie of hiding the children in her home while she and Ms. Gorski contrived the false abuse allegations. Plaintiff asserts that Ms. Wilkie helped Ms. Gorski promote her false allegations of domestic abuse so that Ms. Gorski could extort money from the public.

In September 2015, the Johnson County District Court placed the two children into DCF custody. Plaintiff alleges that the judge based the decision to remove the children from their parents' custody on false evidence submitted by Ms. Gorski. Also, plaintiff claims that the state court placed the children in Ms. Wilkie's temporary custody. Plaintiff claims that Ms. Wilkie is an unlicensed foster parent who helped Ms. Gorski abuse drugs. Plaintiff also contends that Ms.Wilkie refused to allow plaintiff to see or talk to his children, but permitted Ms. Gorski to visit the children in her home each day.

Plaintiff also accuses Ms. Wilkie of coming to his home and demanding painkillers for Ms. Gorski. Plaintiff asserts that, when his wife, Sasuah Shophar, refused to give Ms. Wilkie the pain killers, Ms. Wilkie made a false claim against Ms. Shophar with the Olathe Police Department. Plaintiff describes this event as frightening to the children in Ms. Shophar's home.

Finally, plaintiff alleges that Ms. Wilkie's actions have deprived him of his children and violated his constitutional rights. Plaintiff seeks monetary damages of $350,000 from each defendant. Doc. 90 at 22.

B. Legal Standard

1. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction and, as such, must have a statutory basis to exercise jurisdiction." *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002) (citation omitted). Federal district courts have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States or where there is

diversity of citizenship. 28 U.S.C. § 1331; 28 U.S.C. § 1332. "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (citation omitted). Since federal courts are ones with limited subject matter jurisdiction, a presumption against jurisdiction exists, and the party invoking federal jurisdiction bears the burden to prove it exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Generally, a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) takes one of two forms: a facial attack or a factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* (citing *Ohio*

Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)) (internal citations omitted).

"Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and [to conduct] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1003 (citations omitted); *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1063–64 (10th Cir. 2012); *see also Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324–25 (10th Cir. 2002) (holding that a court must convert a motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56 only when the jurisdictional question is intertwined with the merits of case).

2. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

factual support for *these* claims.'" *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

Although the court must assume that the factual allegations in the complaint are true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1263 (quoting *Iqbal*, 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim for relief. *Bixler v.Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court may consider not only the complaint itself, but also attached exhibits and documents incorporated into the complaint by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). A court "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Id.* (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d

1210, 1215 (10th Cir. 2007)) (internal quotation marks omitted).

C. Analysis

Plaintiff's Second Amended Complaint asserts claims against Ms. Wilkie under 42 U.S.C. § 1983, for alleged violations of plaintiff's rights under the Fourth Amendment and the Fourteenth Amendment's Due Process Clause. Doc. 90 at 21–22. Plaintiff also alleges that Ms. Wilkie's false allegations against him violated 8 U.S.C. § 1324c(a)(1), 18 U.S.C. § 875, 18 U.S.C. § 1038(a)(1), and Kan. Stat. Ann. § 21-6103(1)(a)(b). *Id.* Ms. Wilkie moves to dismiss all of plaintiff's claims against her. The court first addresses plaintiff's § 1983 claims, and then considers plaintiff's federal and state criminal statutory claims based on Ms. Wilkie's alleged false allegations.

1. Section 1983 Claims

Ms. Wilkie moves to dismiss plaintiff's claims based on purported constitutional violations because she is not a state actor and thus cannot be held liable under § 1983. As described above, plaintiff's Second Amended Complaint accuses Ms. Wilkie of hiding

plaintiff's children from him and assisting Ms. Gorski with contriving false abuse allegations against him. But, plaintiff's Second Amended Complaint never asserts that Ms. Wilkie is a state actor. This is a requirement for liability under § 1983.

"Section 1983[ ] liability attaches only to conduct occurring 'under color of law.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quoting 42 U.S.C. § 1983). So, "the only proper defendants in a Section 1983 claim are those who 'represent [the state] in some capacity, whether they act in accordance with their authority or misuse it.'" *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (further citations and internal quotation marks omitted)). Section 1983's requirement that a defendant act "under color of state law" "is 'a jurisdictional requisite for a § 1983 action.'" *Jojola v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995) (quoting *Polk Cty. v. Dodson*, 454 U.S. 312, 315 (1981)).

To state a viable § 1983 claim, a plaintiff must allege sufficient facts demonstrating, plausibly, that

the private individual or entity's conduct allegedly causing a constitutional deprivation is "fairly attributable to the state." *Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000) (citations and internal quotation marks omitted). The Tenth Circuit has applied four tests to determine whether a private entity is subject to liability under § 1983 as a state actor: the nexus test, the symbiotic relationship test, the joint action test, and the public function test. *Gallagher*, 49 F.3d at 1447.

The nexus test requires a "sufficiently close nexus between the government and the challenged conduct" and, in most cases, renders a state liable for a private individual's conduct "only when [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1448 (citations and internal quotation marks omitted). The symbiotic relationship

test asks whether the state "has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint

participant in the challenged activity." *Id.* at 1451 (citations and internal quotation marks omitted). The joint action test requires courts to "examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id.* at 1453 (citations omitted). Finally, the public function test asks whether the challenged action is "a function traditionally exclusively reserved to the State." *Id.* at 1456 (citations and internal quotation marks omitted).

Plaintiff's Second Amended never asserts any facts showing that Ms. Wilkie's conduct is "fairly attributable to the state" to support a viable § 1983 claim. *Scott*, 216 F.3d at 906. Plaintiff's Second Amended Complaint alleges that Ms. Wilkie is a member of "Moms Club of Olathe East." Doc. 90 at 21. Plaintiff describes the Moms Club as "an international community for 'Stay at home moms.'" *Id.* Plaintiff's Second Amended Complaint never asserts that either Ms. Wilkie or the Moms Club are state actors or somehow acted under color of state law. Plaintiff's Second Amended Complaint also

alleges no facts establishing any connection between the State and Ms. Wilkie or other facts sufficient to subject her to § 1983 liability as a state actor under the nexus text, symbiotic test, or joint action test. *See Gallagher*, 49 F.3d at 1447. And, plaintiff never asserts any facts showing that Ms. Wilkie's actions are "function[s] traditionally exclusively reserved to the State" to satisfy the public function test and subject Ms. Wilkie to § 1983 liability. *Id.* at 1456 (citations and internal quotation marks omitted). Indeed, plaintiff concedes that Moms Club is not a state actor by alleging that it "is not a legal agency to

remove children from the home of any residence." Doc. 90 at 21. Thus, as a member of the Moms Club, Ms. Wilkie was not performing any state functions because, plaintiff contends, Ms. Wilkie's actions involved the illegal removal of children—not something that is a traditional and exclusive function of the State.

For these reasons, plaintiff's Second Amended Complaint fails to assert a plausible § 1983 claim

against Ms. Wilkie. The court thus grants Ms. Wilkie's Motion to Dismiss plaintiff's § 1983 claims.

2. Violations of Federal Criminal Statutes

Plaintiff's Second Amended Complaint also asserts claims against Ms. Wilkie under 8 U.S.C. § 1324c(a)(1), 18 U.S.C. § 875, and 18 U.S.C. § 1038(a)(1). Doc. 90 at 21. These statutory claims fail to state a claim against Ms. Wilkie as a matter of law. Section 1324c(a)(1) of Title 8 of the United States Code makes it unlawful for a person knowingly to falsify documents to satisfy the requirements of or to obtain a benefit under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1324c(a)(1). Section 875 of Title 18 of the United States Code prohibits extortion threats using interstate communications. 18 U.S.C. § 875. Section 1038 of Title 18 of the United States Code prohibits criminal hoaxes and terrorist threats. 18 U.S.C. § 1038.

None of these federal criminal statutes give plaintiff the right to assert a private cause of action.

See Clements v. Chapman, 189 F. App'x 688, 692 (10th Cir. 2006) (holding that "none of the criminal statutes" that plaintiff cited in his complaint—including 18 U.S.C. § 875—"provide for a private cause of action"); *see also Johnson v. Working Am., Inc.*, No. 1:12CV1505, 2012 WL 3074775, at *2 (N.D. Ohio July 30, 2012) (finding that, as a private citizen, the plaintiff had no authority to initiate a federal criminal prosecution under 18 U.S.C. § 1038); *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 747 (S.D.N.Y. 1997) (finding, in the context of 8 U.S.C. § 1324c, that "plaintiff has no standing to assert a claim under the INA because the statute does not create a private right of action to redress a violation" of that statute). Thus, plaintiff's claims under these federal criminal statutes fail to state a claim for relief. *See Clements*, 189 F. App'x at 692 (affirming district court's dismissal of alleged violations of federal criminal statutes because the statutes provided no private cause of action).

3. Violation of State Criminal Statute

Plaintiff's Second Amended Complaint also asserts a claim against Ms. Wilkie under Kan. Stat. Ann. § 21-6103(1)(a)(b). Doc. 90 at 21–22. This Kansas law makes a criminal false communication a class A nonperson misdemeanor. This criminal statute does not provide that a private litigant may assert a civil cause of action under it. And, plaintiff fails to show that the Kansas legislature intended to create a private right of action when it enacted this criminal statute. *See Brooks v. Sauceda*, 85 F. Supp. 2d 1115, 1128 (D. Kan. 2000) (dismissing plaintiff's claims for violation of Kansas criminal statutes because plaintiff "does not show that the legislature intended to grant him a private cause of action for the violations of the citied criminal statutes"). Plaintiff thus fails to state a claim under Kan. Stat. Ann. § 21-6103. And so, the court dismisses this state statutory claim against Ms. Wilkie.

One final note—the court does not construe plaintiff's Second Amended Complaint to assert a defamation claim under Kansas law against Ms. Wilkie. Plaintiff lists his causes of action in the caption of his Second Amended Complaint. Doc. 90

at 1. This list does not include a defamation claim under Kansas law. Plaintiff's Second Amended Complaint, however, accuses Ms. Wilkie of defamation several times, but alleges that the purported defamation created a cause of action under federal and state statutes. *See, e.g.*, Doc. 90 at 22 (stating that Ms. Wilkie assisted Ms. Gorski "in promoting a defamation ad against the Plaintiff" which "is a 'criminal false communication' pursuant to KSA 21-6103[ ](1)(a)(b) against the Plaintiff."); *id.* (stating that Ms. Wilkie made "a criminal false communication which caused defamation to [plaintiff's] character . . . violating Federal Law 8 U.S. Code §[ ]1324c(a)(1).").

The Second Amended Complaint also references a state court action that plaintiff calls "a defamation suit filed against [Ms. Wilkie] in Third Judicial Court Case: 2016-CV-00214." *Id.* at 6. The Third Judicial District Court in Shawnee County, Kansas has a publically-available online records system.1 A search of that database reveals that plaintiff filed a state court lawsuit against Ms. Wilkie and others in March 2016. Plaintiff alleged

many claims under Kansas law including defamation to character, defamation to business, defamation to church, libel, and slander. Plaintiff filed a Motion to Dismiss Without Prejudice in June 2016, and the court terminated the case in August 2016.

Under these circumstances, the court concludes that plaintiff never intended to assert a defamation claim under Kansas law in this federal lawsuit. This Memorandum and Order thus has no preclusive effect on any state law defamation claims that plaintiff asserted in his state lawsuit and that he asked for dismissal of without prejudice.

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1 Third Judicial District, Shawnee County, Kansas, PublicAccess,at https://public.shawneecourt.org/PublicA/access/?service=Public&fx=access&LSession=0A5FF63105AC CA5F70F36B5F9CBEE9E6 (last visited May 23, 2017).

IV. Conclusion

For the above reasons, the court grants defendant Teena Wilkie's Motion to Dismiss. Plaintiff's Second Amended Complaint fails to assert viable claims against Ms. Wilkie because either no subject matter

jurisdiction exists or the claims fail to state a claim for relief as a matter of law. The operative Complaint is plaintiff's third attempt at asserting claims against Ms. Wilkie and others. The court finds no reason to provide him another opportunity to amend his allegations when he has had ample opportunity to do so and his revised pleading still fails to state claims against Ms. Wilkie as a matter of law.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Teena Wilkie's Motion for Leave to File Out of Time (Doc. 113) is granted.

IT IS FURTHER ORDERED THAT defendant Teena Wilkie's Motion to Dismiss (Doc. 114) is granted.

IT IS SO ORDERED.

Dated this 23rd day of May, 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOREL SHOPHAR,

Plaintiff,

v. **Case No. 16-CV-4043-DDC-KGS**

STATE OF KANSAS, et al.,

Defendants.

MEMORANDUM AND ORDER

On May 23, 2017, the court issued a Show Cause Order to plaintiff. Doc. 124. It explained that plaintiff never had erved one of the defendants he has named in this lawsuit—Moms Club of Olathe East ("Olathe East"). The court thus considered whether it should dismiss plaintiff's lawsuit against Olathe East under Fed. R. Civ. P. 4(m), for failing to effect service within 90 days of filing the complaint, or grant plaintiff a mandatory or permissive extension of time to serve this defendant. The court concluded that plaintiff had failed to establish good

cause entitling him to a mandatory extension. And, the court recognized that a permissive extension of time to effect service is futile if plaintiff fails to state a claim for relief against Olathe East.

The court explained that the 42 U.S.C. § 1983 claims that plaintiff's Second Amended Complaint asserts against Olathe East appear to suffer from the same deficiencies that led the court to dismiss plaintiff's § 1983 claims against other defendants. Specifically, the Second Amended Complaint never alleges facts showing that Olathe East is a state actor who one can hold liable under § 1983. *See Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000) (explaining that,to state a viable § 1983 claim against a private individual, the individual's alleged conduct causing the constitutional deprivation must be "fairly attributable to the state" (citations and internal quotation marks omitted)).

The court thus ordered plaintiff to show cause by June 6, 2017 why a permissive extension of time to effect service on Olathe East is not futile when plaintiff's Second Amended Complaint appears to fail to state a claim for relief against this defendant

for the same reasons that the court already has dismissed plaintiff's § 1983 claims against other defendants in its March 28, 2017 Memorandum and Order (Doc. 115) and its May 23, 2017 Memorandum and Order (Doc. 123).

Plaintiff never responded to the Show Cause Order, and the time for doing so has passed. Plaintiff thus fails to show why the court should grant a permissive extension of time to serve Olathe East. Plaintiff also fails to explain why granting such an extension is not futile when his Second Amended Complaint fails to state a claim for relief against this defendant.

Plaintiff filed this action pro se,[1] and so the court must construe his pleadings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991) (explaining that "pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers[,]" but a court should not "assume the role of advocate for the pro se litigant[,]" and a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to

state a claim on which relief can be based"). Even affording plaintiff's Second Amended Complaint the most liberal construction possible, the pleading never asserts any facts showing that Olathe East's conduct is "fairly attributable to the state" to support a viable § 1983 claim. *Scott*, 216 F.3d at 906. It never alleges that Olathe East is a state actor or somehow acted

under color of state law. It also alleges no facts establishing any connection between the State

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1 On June 5, 2017, an attorney filed a "Limited Entry of Appearance" on behalf of plaintiff. Doc. 128. This attorney did not file plaintiff's Second Amended Complaint. Plaintiff filed that pleading pro se.

and Olathe East or other facts sufficient to subject it to § 1983 liability as a state actor under the various tests promulgated by the Tenth Circuit to establish state action (*i.e.*, the nexus text, symbiotic test, joint action test, or public function test). *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447, 1456 (10th Cir. 1995).

Indeed, plaintiff concedes that Olathe East is not a state actor by alleging that it "is not a legal agency to remove children from the home of any residence." Doc. 90 at 21. Thus, Olathe East never was performing any state functions because, the Second Amended Complaint contends, its actions involved the *illegal* removal of children—something that is not a function traditionally and exclusively reserved to the State. For these reasons, plaintiff's Second Amended Complaint fails to assert a plausible § 1983 claim against Olathe East.

The court thus concludes that a permissive extension of time for plaintiff to serve Olathe East is futile because, even though the court gave plaintiff notice and an opportunity to clarify the basis for his § 1983 claims, his Second Amended Complaint fails to state a claim for relief against this defendant. *See Quarles v. Williams*, No. 04-2101-JWL, 2004 WL 2378840, at *1, 3 (D. Kan. Oct. 21, 2004) (after ordering plaintiff to show cause "why the court should not exercise its discretion and decline to extend the time to effect valid service of process and

consequently dismiss [the] case without prejudice because it appears that plaintiff's complaint fails to state a claim upon which relief can be granted and therefore it would be futile to extend the time for service" and after plaintiff responded to that show cause order, the court still concluded that plaintiff's complaint failed to state a claim upon which relief could be granted so a permissive extension of time to serve defendant was futile).

The court thus dismisses plaintiff's claims against Olathe East without prejudice under Rule 4(m) because plaintiff has failed to serve Olathe East within 90 days, plaintiff has failed to establish good cause for the failure to serve this defendant so no mandatory extension of the time for service is required, and the court declines to exercise its discretion to grant a permissive extension of time to serve Olathe East because doing so is futile when plaintiff's Second Amended Complaint fails to state a plausible claim against Olathe East.

IT IS THEREFORE ORDERED THAT defendant Moms Club of Olathe East is dismissed from this action without prejudice under Fed. R. Civ.

P. 4(m) because plaintiff has failed to effect valid service of process within 90 days of filing his complaint against this defendant.

IT IS SO ORDERED.

Dated this 12th day of June, 2017, at Topeka, Kansas.

s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge