FILED
United States Court of Appeals
Tenth Circuit

April 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT VU PHAN,

Plaintiff - Appellant,

v.

COLORADO LEGAL SERVICES,

Defendant - Appellee.

No. 18-1307
(D.C. No. 1:18-CV-01403-LTB)
(D. Colo.)

KENT VU PHAN,

Plaintiff - Appellant,

v.

STATE FARM INSURANCE COMPANY; KAISER PERMANENTE; DR. PETER WEINGARTEN, M.D.; DR. KHOI PHAM DUY, M.D.; PATTERSON & SLAG, P.C.; BACHUS & SCHANKER, LLC; HEALTH FIRST COLORADO/MEDICAID AND CHP+DHS; LUKE MEDICAL CENTER; CONCENTRA URGENT CARE,

Defendants - Appellees.

No. 18-1343
(D.C. No. 1:17-CV-03073-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral

APPENDIX: A

Before **PHILLIPS**, **McKAY**, and **O'BRIEN**, Circuit Judges.

Pro se Plaintiff-Appellant Kent Vu Phan is no stranger to the courts—he has pursued eight appeals before us (two of which are addressed in this order and two more are coming down the pipeline (Nos. 18-1493, 18-1494)), at least eleven different cases in federal district court, and at least three state court cases that we are aware of. We are sensitive to Phan's pro se status, as well as his mental and physical health limitations, and have liberally construed his pleadings accordingly. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (noting we liberally construe pro se pleadings, stopping short of serving as a pro se litigant's advocate). But Phan is nevertheless bound by the Federal Rules of Civil Procedure. *See Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 n.3 (10th Cir. 2002) (noting a plaintiff's "pro se status does not relieve him of the obligation to comply with procedural rules"). He cannot file repetitive or frivolous claims; yet he continues to do so. This time, Phan appeals dismissals in two district court cases: *Phan v. Colo. Legal Servs.*, No. 1:18-CV-01403-LTB (D. Colo. June 19, 2018), and *Phan v. State Farm Ins. Co.*, No. 1:17-CV-03073-LTB (D. Colo. July 31, 2018). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm both.

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

STANDARD OF REVIEW

Whenever a plaintiff seeks to proceed *in forma pauperis*, as Phan has done here, 28 U.S.C. § 1915(e)(2)(B) requires the district court judge to screen the complaint and dismiss it if "the action or appeal . . . is frivolous or malicious" or "fails to state a claim on which relief may be granted." We usually review a district court's dismissal of a complaint as frivolous for an abuse of discretion. *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011). But where "the frivolousness determination turns on an issue of law, we review the determination *de novo*." *Id.* (internal quotation marks omitted). A district court properly dismisses a complaint as frivolous "only if it lacks an arguable basis in either law or in fact. In other words, dismissal is only appropriate for a claim based on an indisputably meritless legal theory and the frivolousness determination cannot serve as a factfinding process for the resolution of disputed facts." *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (citations and internal quotation marks omitted).

Moreover, to survive a § 1915 screening, each claim must include "enough facts to state claim for relief that is plausible on its face." *Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009). When a district judge dismisses a complaint under § 1915 as failing to satisfy the pleading standards, our review is de novo. *Curley v. Perry*, 246 F.3d 1278, 1281 (10th Cir. 2001). To determine plausibility, "[w]e must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted). "Dismissal of a

pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999).

CLAIMS AGAINST COLORADO LEGAL SERVICES

In the first appeal before us, Appellate Case No. 18-1307, Phan challenges the district court's dismissal of his claims against Colorado Legal Services (CLS). Phan contends CLS discriminated against him based on his disability and his race when it did not provide an attorney to represent him in two cases—a malpractice claim, and a suit against his realtor and homeowners' association (HOA). He thus asserts claims against CLS under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA), 42 U.S.C. § 12101 *et seq.*; the Rehabilitation Act, 29 U.S.C. §§ 504 and 794; and 42 U.S.C. §§ 1983 and 1981. In a thorough and cogent order, the district court dismissed Phan's complaint against CLS as legally frivolous in part and for failing to satisfy the pleading standards in part. We agree with the district court's analysis.

In pursuing his disability-based discrimination claim, Phan attempts to invoke Title II of the ADAAA, which prohibits discrimination in services offered by public entities. *See* 42 U.S.C. § 12132. To state a viable Title II claim, Phan "must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, or denial of benefits, or discrimination was by

reason of a disability." *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007). Similarly, to recover the compensatory damages Phan seeks under the Rehabilitation Act, he "must establish that the agency's discrimination was intentional." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1263 (10th Cir. 2018) (internal quotation marks omitted). Phan must also make plausible allegations of discrimination to recover in his race-based discrimination claims. Recovery under § 1981 for alleged racial discrimination requires Phan to show "the defendant had the intent to discriminate on the basis of race." *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1102 (10th Cir. 2001). By the same token, to state a viable equal-protection claim under § 1983, Phan "must first make a threshold showing that [he was] treated differently from others who were similarly situated." *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) (internal quotation marks omitted). As the district court correctly concluded, Phan has failed to do so in all claims against CLS.

CLS's decision to decline representation in both of Phan's cases was mandated by federal law—because CLS is a legal-service provider funded in part by the Legal Services Corporation, it is expressly prohibited by 42 U.S.C. § 2996f(b)(1) from providing legal assistance in fee-generating cases. CLS explained this in its letter to Phan declining representation in the malpractice case, stating that it "do[es] not have any attorneys that help with malpractice cases" because a malpractice claim "is a fee-generating case." No. 18-1307 R. at 12 (Compl. Ex. 1). CLS also explained this to Phan when declining to represent him in his suit against his realtor and HOA "because it could be fee-generating" and CLS is "not allowed to help [a litigant] sue

another person or company for damages or help [a litigant] collect a debt." *Id.* at 14 (Compl. Ex. 3).

Phan has utterly failed to allege any facts that would suggest he was treated differently or discriminated against based on his race or disability. His complaint offers nothing to suggest a plausible discrimination claim—he, like any other person seeking representation from CLS in a fee-generating case, was directed to seek assistance elsewhere. There is also nothing to suggest that an opportunity to amend could cure these deficiencies. Accordingly, the district court properly dismissed with prejudice Phan's ADAAA, Rehabilitation Act, and § 1983 claims against CLS as legally frivolous and appropriately dismissed with prejudice his § 1981 claim as failing to state a claim upon which relief may be granted.

CLAIMS AGAINST STATE FARM, ET AL.

In the next appeal, Appellate Case No. 18-1343, Phan challenges the district court's dismissal of his claims against State Farm Insurance Company, Kaiser Permanente, Dr. Peter Weingarten, Dr. Khoi Pham Duy, Patterson & Slag, P.C., Bachus & Schanker, LLC, Health First Colorado/Medicaid and CHP+DHS, Luke Medical Center, and Concentra Urgent Care. This matter concerns a 2012 car accident and the subsequent insurance dispute and medical treatment. Phan once again argues all named defendants discriminated against him based on his race and disability, in violation of the ADAAA, the Rehabilitation Act, and §§ 1981, 1983, 1985, and 1986. He further asserts State Farm violated Colorado's bad faith insurance practice statutes and, along with attorneys at Patterson & Slag, P.C.,

plotted to evade service of a state court lawsuit. He also claims Bachus & Schanker, LLC committed legal malpractice in his state court lawsuit, Health First Colorado/Medicaid violated the ADAAA in disrupting his Medicaid benefits, and Luke Medical Center and Concentra failed to provide him with needed medical care. In another comprehensive order, the district court properly dismissed all of Phan's claims without providing relief to amend and appropriately warned Phan that it "may impose appropriate sanctions if [he] persists in engaging in abusive litigation tactics by filing repetitive complaints raising the same claims for relief against the same Defendants." No. 18-1343 R. at 150 (Order of Dismissal, at 15).

In its § 1915 screening, the district court first dismissed Phan's claims against Kaiser Permanente, Dr. Weingarten, and Dr. Duy. About a year prior, Phan brought the same claims against the same defendants as he does now. In that case, *Phan v. State Farm*, No. 16-cv-02728-RBJ (D. Colo. May 10, 2017), the district court dismissed the claims for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine and incorporated by reference that holding in dismissing the claims reasserted in this case. Appropriately so. The *Rooker-Feldman* doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Phan cannot lose in state court and then expect a federal court to revisit the same claims again. *See id.* In that same vein, as the district court explained to Phan, he "may not use a new action to attempt to

resuscitate claims that have been resolved." No. 18-1343 R. at 139 (Order of Dismissal, at 4). Accordingly, the district court properly dismissed without prejudice the claims against Kaiser Permanente, Dr. Weingarten, and Dr. Duy for lack of subject-matter jurisdiction.

The district court next dismissed the claims against State Farm based on the doctrine of res judicata. "A district court's conclusions as to res judicata are conclusions of law and reviewable *de novo*." *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237 (10th Cir. 1992). Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* at 1238. In both the present case and in *Phan v. State Farm*, No. 16-cv-02728-RBJ, Phan sued State Farm for denying his insurance claim stemming from the 2012 car accident. In the previous case, the court dismissed with prejudice Phan's claims against State Farm under the ADAAA and § 1983 as legally frivolous and dismissed his § 1981 claim for failure to state a claim upon which relief could be granted. Because "there was an identity of parties" and "a judgment on the merits" in the previous case, Phan is barred from relitigating those claims. *Clark*, 953 at 1238; *see Brooks v. Barbour Energy Corp.*, 804 F.2d 1144 (10th Cir. 1986) ("[A] dismissal with prejudice by order of the court is a judgment on the merits."). Phan is similarly barred by the doctrine of res judicata from bringing claims against State Farm under the Rehabilitation Act and §§ 1985 and 1986 for denying his insurance claim following the 2012 car accident. *See Clark*, 953 F.2d at 1238 (explaining that because "the doctrine of res judicata precludes

parties from relitigating issues that were or *could have been raised*, parties cannot defeat its application by simply alleging new legal theories" (emphasis added)). Phan has raised identical issues, factual arguments, and the same allegations of race- and disability-based discrimination in both cases. It follows that he knew of the same facts when he filed his earlier case against State Farm and thus could have brought his Rehabilitation Act and §§ 1985 and 1986 claims in the previous case and chose not to. Thus, the district court properly dismissed with prejudice all of Phan's claims against State Farm under the doctrine of res judicata.

The district court then dismissed Phan's § 1981 claims against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra Urgent Care for failing to state a claim upon which relief may be granted. According to Phan, the law firm of Patterson & Slag, P.C. represented State Farm in two of Phan's state court cases and "intentionally harassed" and discriminated against Phan based on his race. No. 18-1343 R. at 39 (Compl., at 36). Phan also hired Bachus & Schanker, LLC to represent him in his suits against State Farm and American Family Insurance, but he alleges that his attorney conspired with the insurance companies against him. Similarly, Phan contends Luke Medical Center conspired and retaliated against him because he is an "Asian plaintiff [who] filed a lawsuit against American defendants," *id.* at 47 (Compl., at 44), and Concentra had his "name on [a] black list of the hospital system," *id.* at 50 (Compl., at 47). For a claim to survive a § 1915 screening, the plaintiff must offer more than mere conclusions and a list of legal theories—he must allege facts that could demonstrate a plausible claim. *See Hall*,

935 F.2d at 1110 ("[I]n analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations."). As previously discussed, to plead a viable § 1981 claim, "the plaintiff must show: (1) that the plaintiff is a member of protected class; (2) that the defendant had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity." *Hampton*, 247 F.3d at 1101-02. Here, Phan has offered nothing more than allegations of a conspiracy against him based on his race. As the district court noted, if anything, the complaint merely shows Phan "disagrees with the medical Defendants' medical conclusions and the attorney defendants' approach to [Phan's] lawsuit regarding the car accident." No. 18-1343 R. at 144 (Order of Dismissal, at 9). Because Phan fails to offer more than mere conclusions and speculation, the district court properly dismissed without prejudice the § 1981 claims against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra for failing to satisfy the pleading standards.

The district court next considered Phan's claims against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra, dismissing them all as legally frivolous. Section 1983 requires state action, and Phan has not alleged any—Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra are all private, non-state entities and thus Phan's § 1983 claims against them are legally frivolous. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from

its reach merely private conduct, no matter how discriminatory or wrongful." (internal quotation marks omitted)). Likewise frivolous are Phan's §§ 1985 and 1986 claims against these defendants. Section 1985 concerns suits against those who conspire to deprive others of their civil rights and, as such, requires "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971); *see also Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). Because Phan has no arguable basis for imputing invidious discrimination to any actions of the attorneys or medical providers, the district court properly dismissed with prejudice his § 1985 claims against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra as legally frivolous. The frivolous nature of his § 1985 claims also inherently requires dismissal of his § 1986 claims against these defendants, as liability under § 1986 "is premised upon the existence of a valid Section 1985 claim." *Abercrombie v. City of Catoosa, Okla.*, 896 F.2d 1228, 1230 (10th Cir. 1990).

Phan fares no better with his disability-discrimination claims against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra. Because he does not have an employment relationship with any of these defendants, Title I of the ADAAA does not apply; because none of these defendants is a public entity, Title II does not apply; and because Phan seeks monetary damages, Title III cannot provide the relief he seeks. *See Tennessee v. Lane*, 541 U.S. 509, 516-17 (2004) (explaining the ADA "forbids discrimination against persons with disabilities

in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III"); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 n.7 (10th Cir. 1998) ("The ADA enlarges the scope of the Rehabilitation Act to cover private employers, but the legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference when interpreting the ADA."). In any event, even if the ADAAA did apply, Phan once again only offers mere conclusions and allegations without any substance or rational explanation—that is not enough. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong. Recitation of a tale of apparent injustice may assist in that task, but it cannot substitute for legal argument."). The district court thus properly dismissed with prejudice Phan's claims under the ADAAA and the Rehabilitation Act as legally frivolous.

The district court next declined to exercise supplemental jurisdiction over the remaining state-law claims of medical malpractice, legal malpractice, and bad faith insurance practices against Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra because of the dismissals of the federal claims against these defendants. Here, we apply the abuse of discretion standard. *Nielander v. Bd. of Cty. Comm'rs*, 582 F.3d 1155, 1172 (10th Cir. 2009). Under 28 U.S.C. § 1367(c)(3), the district court may decline to exercise supplemental jurisdiction over state-law claims if it "has dismissed all claims over which it has original jurisdiction." Indeed,

we have directed courts that they should usually do so in these circumstances. *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011). Here, because all federal claims against these defendants were properly dismissed, the only remaining claims against them were rooted in state law. As such, we cannot say the district court abused its discretion in declining to exercise supplemental jurisdiction and dismissing the state-law claims without prejudice.

Lastly, the district court dismissed without prejudice the ADAAA and Rehabilitation Act claims against Health First Colorado/Medicaid based on Eleventh Amendment immunity. Phan does not address this issue in his brief on appeal, so we will not consider it. *See Utah Envtl. Cong. v. Bosworth*, 439 F.3d 1184, 1194 n.2 (10th Cir. 2006) ("An issue mentioned in a brief on appeal, but not addressed, is waived.").

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's orders dismissing *Phan v. Colo. Legal Servs.*, No. 1:18-CV-01403-LTB (D. Colo. June 19, 2018), and *Phan v. State Farm Ins. Co.*, No. 1:17-CV-03073-LTB (D. Colo. July 31, 2018).

Because Phan has failed to show "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised," *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted), we **DENY** his applications to proceed *in forma pauperis* on appeal and direct him to make full and immediate payment of all outstanding appellate filing fees in these matters.

Phan has also titled each of his briefs, "Appellant's Combined Opening Brief and Application for a Certificate of Appealability." If he thinks he needs a certificate of appealability to appeal these dismissals, he is mistaken. *See* 28 U.S.C. § 2253(c). We therefore **DENY AS MOOT** Phan's nominal requests for certificates of appealability.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01403-GPG

KENT VU PHAN,

Plaintiff,

v.

COLORADO LEGAL SERVICES,

Defendant.

ORDER OF DISMISSAL

Plaintiff, Kent Vu Phan, resides in Aurora, Colorado and has initiated this action by filing a Complaint and Jury Demand. (ECF No. 1). Plaintiff asserts jurisdiction under 28 U.S.C. § 1331, § 1391 and § 1343 for various alleged violations under federal law by the Defendant in twice failing to provide him with an attorney, once with regard to a malpractice action he wished to pursue and the second time with regard to a lawsuit against Plaintiff's realtor/HOA concerning disclosure of a problem in the basement of the condo he had purchased. (*Id.*). In this regard, Plaintiff claims federal law violations by the Defendant of the Americans with Disabilities Act ("ADA"), the Americans with Disabilities Act Amendments Act ("ADAAA"), and Section 504 of the Rehabilitation Act, as well as 42 U.S.C. §§ 1981 and 1983. (*Id.*). Plaintiff seeks solely monetary compensation as relief. (*Id.*).

Plaintiff has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Under § 1915(e)(2)(B), the Court must dismiss the action if Plaintiff's claims are frivolous or malicious, or if the Plaintiff is suing a defendant who is immune

APPENDIX: B

from liability. A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

The Court must construe the Complaint liberally because Plaintiff is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for *pro se* litigants. *See Hall*, 935 F.2d at 1110. Additionally, pro se status does not relieve Petitioner of the duty to comply with various rules and procedures governing litigants or of the requirements of substantive law. *See McNeil v. U.S.*, 508 U.S. 106, 113 (1993); *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994). The Court cannot "supply additional factual allegations to round out [the *pro se* litigant's] complaint or construct a legal theory on [his] behalf." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). For the reasons discussed below, this action will be dismissed as legally frivolous.

I. Analysis

A. ADA/ADAAA and Rehabilitation Act Claims

The ADA contains three titles which address discrimination against persons with disabilities in three contexts. Title I bars employment discrimination, 42 U.S.C. § 12112, Title II bars discrimination in services offered by public entities, 42 U.S.C. § 12132, and Title III bars discrimination by public accommodations engaged in interstate commerce, such as restaurants, hotels, and transportation carriers, 42 U.S.C. §§ 12182, 12184.

Plaintiff is attempting to invoke Title II of the ADA, which states, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be

excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." See 42 U.S.C. § 12132. The ADAAA broadened the scope of protection available under the ADA by expanding the definition of a disability that substantially limits a major life activity. *See* PUB.L. NO. 110-325, 122 Stat. 3553; *Smothers v. Solvay Chem., Inc.*, 740 F.3d 530, 545 n.16 (10th Cir. 2014) ("The [ADAAA] created a broader definition of disability to protect more individuals, by, inter alia, expanding what is considered a major life activity and directing courts to interpret 'substantial limitation' broadly in favor of coverage."). Also, section 794 of the Rehabilitation Act (Amendment of Rehabilitation Act of 1973, § 504) prohibits discrimination against an individual with disabilities by the recipient of federal financial assistance and creates a private right of action in favor of such an individual injured by a violation. 29 U.S.C. § 794.

To state an arguable claim under Title II, the Plaintiff must allege that "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1193 (10th Cir. 2007) (citation omitted); *see also Moore v. Diggins*, No. 15-1271, 2015 WL 8479678, at *4 (10th Cir. Dec. 10, 2015) (unpublished). Based on the second element, courts have recognized two separate causes of action in Title II cases: (1) exclusion from or denial of benefits and (2) discrimination. *J.V. v. Albuquerque Public Schools,* 813 F.3d 1289, 1295 (10th Cir. 2016) (citing *Gohier v. Enright,* 186 F.3d 1216, 1219 (10th Cir. 1999)). The Tenth Circuit has generally held that both causes of action require allegations demonstrating the

three elements comprising a Title II claim, including proof that any exclusion from or denial of benefits or discrimination was "by reason of the plaintiff's disability." *Id.*

To state a claim for disability discrimination under the Rehabilitation Act, a plaintiff must prove the same elements required to prevail under Title II of the ADA. *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 N.7 (10th Cir. 1998). Additionally, the Tenth Circuit has held that to be entitled to compensatory damages under Section 504 of the Rehabilitation Act, a plaintiff must prove the defendant intentionally discriminated against him on the basis of disability. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999)

The Plaintiff cannot satisfy the elements of a Title II ADA/ADAAA claim under either an exclusion from or denial of benefits or a discrimination cause of action, and also cannot satisfy the elements of a Rehabilitation Act claim of discrimination. Plaintiff attaches to his Complaint written communications dated in 2015 to him from the Defendant which indicate that his requests for legal counsel were denied because both the malpractice case and the relator/HOA case were "fee-generating" cases, which their office was not allowed to take. (ECF No. 1 at 10 & 12).

Publicly available records reflect that Defendant receives funding from the Legal Services Corporation ("LSC"). *See* www.lsc.gov/grants-grantee-resources/our-grantees; *see also Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir.2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001) (the Court may take "judicial notice of its own files and records, as well as facts which are a matter of public record."). LSC is a private nonprofit corporation created by Congress "for the purpose of providing financial support for legal assistance

in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a).

Section 1007(b)(1) of the Legal Services Corporation Act of 1974 prohibits LSC grantees from using funds received from the LSC to provide legal assistance with respect to fee-generating cases. 42 U.S.C. § 2996f(b)(1). LSC implemented this statutory consideration through 45 C.F.R. part 1609, and part of its purpose "is designed . . . [t]o ensure that [LSC grantees] do not use scarce legal services resources when private attorneys are available to provide effective representation . . .". The definition of "fee-generating case" encompasses "any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to the client, from public funds or from the opposing party." 45 C.F.R. § 1609.2 (2015). Therefore, Plaintiff fails to demonstrate that any alleged exclusion from or denial of benefits or discrimination was "by reason of the plaintiff's disability" under the ADA/ADAAA or an intent to discriminate as required under the Rehabilitation Act. Accordingly, Plaintiff's ADA/ADAAA and Rehabilitation Act claims will be dismissed as legally frivolous.

B. 42 U.S.C. § 1981

To state a valid claim under § 1981, Plaintiff must "allege facts supporting a plausible inference that he was a member of a protected class[,] the defendant[ ] had intended to discriminate on the basis of [Plaintiff's] protected status[,] and the discrimination had interfered with a protected activity." *Phan v. Hipple, et al.*, 2018 WL 2277364, *1 (10th Cir. 2018) (citing *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1101-02 (10th Cir. 2001)). The protected activities defined in § 1981 include "the

making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981 protects against nongovernmental discrimination, as well as discrimination "under color of State law." 42 U.S.C. § 1981(c).

Plaintiff has stated he was discriminated against because he is Asian and disabled. (ECF No. 1 at 7). Assuming without deciding that Plaintiff is a member of a protected class, Plaintiff does not allege any facts to suggest intent by the Defendant to discriminate against him on the basis of his race or disability. The Defendant indicated to the Plaintiff that his requests for legal counsel were denied because both the malpractice case and the relator/HOA case were "fee-generating" cases, which their office was not allowed to take. (ECF No. 1 at 10 & 12). With no basis in fact or other reasonable support, Plaintiff speculates and conjectures that he instead was not provided with legal assistance because the defendants were American and he is Asian. (*Id.* at 7). Plaintiff fails to raise any facts or allegation directed at a denial of legal assistance because he is disabled. Essentially, all Plaintiff has provided is labels and conclusions with regard to a § 1981 cause of action. "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief may be based." *Hall,* 935 F.2d at 1109-10. Accordingly, the Plaintiff has failed to state a viable claim pursuant to 42 U.S.C. § 1981. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (a viable complaint must include "enough facts to state a claim to relief that is plausible on its face").

C. 42 U.S.C. § 1983

Publically available records reflect that Defendant is a Colorado non-profit corporation. *See* www.coloradolegalservices.org. Section 1983 "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights." *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("[T]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quotation marks omitted).

Private conduct constitutes state action only if it is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). While state action can be "present if a private party is a 'willful participant in joint action with the State or its agents,'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir.1995) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)), "the mere acquiescence of a state official in the actions of a private party is not sufficient," *id.* (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978)). "[C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). State action is not established merely because a private individual or entity receives government funding or is subject to extensive government regulation. *See, e.g., San Francisco Arts &*

Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-47 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1003-11 (1982). Instead, Plaintiff must allege specific facts to demonstrate a nexus between a defendant's conduct and state action. *See Blum*, 457 U.S. at 1004 (The "nexus" test is only satisfied "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.").

Plaintiff alleges that "[a]ttorney who is licensed in Colorado State classified as state officials, this case [Defendant] acted under color of state law by his/her/their/its individual capacities, because law is provides and available to my qualified applicant." (ECF No. 1 at 7). Plaintiff's allegation is facially and substantively insufficient to establish state action. Further, even if Plaintiff would be allowed opportunity to attempt to demonstrate a nexus between the Defendant's conduct and state action, his sole claim of an equal rights violation under § 1983 (ECF No. 1 at 8) could not be sustained.

"The equal protection clause provides that '[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.'" *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659 (10th Cir. 2006) (quoting U.S. Const. amend. XIV, § 1), "which is essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To state an arguable equal protection claim, a plaintiff must first make a "threshold showing" that he or she was treated differently than others with whom the plaintiff was similarly situated. *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011) (internal quotation marks omitted); *see also Matelsky v. Gunn*, No. 00-7097, 15 F. App'x 686, 689 (10th Cir. July 19, 2001) (unpublished) ("In the absence of any specific allegations of differential treatment, the Equal Protection claim is patently inadequate

under any of the three equal protection theories—fundamental rights, suspect classification, or "class of one"—and was properly dismissed as frivolous."); *accord Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (stating that even in "class of one" equal protection claim, the plaintiff must show that he "has been intentionally treated differently from others similarly situated.").

Plaintiff appears to allege that the Defendants discriminated against him because he is Asian and disabled. However, Plaintiff alleges no facts in his pleading to support an equal protection violation claim based on disability. In order to state a race-based equal protection claim, a plaintiff must sufficiently allege that the defendant was motivated by racial animus. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir.1989) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). Conclusory allegations of discriminatory motive fall short of stating an arguable claim for relief. *See Green v. Corrs. Corp. of Am.*, No. 10-3217, 401 F. App'x. 371, 376 (10th Cir. Nov. 8, 2010) (unpublished) (conclusory allegations of racial motivation are insufficient to state an equal protection claim). *See also Hall,* 935 F.2d at 1110 (stating that courts need not accept as true a pro se litigant's conclusory allegations). Moreover, "[m]ere differences in race do not, by themselves, support an inference of racial animus." *Green*, 401 F. App'x at 376 (internal citations omitted). Plaintiff does not allege any specific facts to show that the Defendant's decision to decline to provide legal representation was motivated by discriminatory animus. Consequently, the equal protection claim(s) will be dismissed as legally frivolous.

II. Orders

As discussed in this Order, it is obvious on its face that Plaintiff cannot prevail on the allegations in his Complaint and it is also apparent that further investigation and development would not raise substantial issues for consideration. *See Reynoldson v. Shillinger,* 907 F.2d 124, 127 (10th Cir. 1990) (stating that prejudice should attach to a dismissal unless the plaintiff has made allegations "which, upon further investigation and development, could raise substantial issues"). Therefore, Court has no basis for concluding that, if given the opportunity to amend his complaint, Plaintiff could allege viable facts that would support his claims in this matter. For these reasons, Plaintiff's action will be dismissed with prejudice. Therefore, it is

ORDERED that the Complaint and Jury Demand (ECF No. 1) and this action are DISMISSED WITH PREJUDICE as legally frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B). It is

FURTHER ORDERED that that leave to proceed *in forma pauperis* on appeal is denied for the purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal she must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED at Denver, Colorado, this 19th day of June, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-03073-GPG

KENT VU PHAN,

Plaintiff,

v.

STATE FARM INSURANCE COMPANY,
KAISER PERMANENTE,
DR. PETER WEINGARTEN, M.D.,
DR. KHOI PHAM DUY, M.D.,
PATTERSON & SLAG, P.C.,
BACHUS & SCHANKER, LLC,
HEALTH FIRST COLORADO/MEDICAID AND CHP+DHS,
LUKE MEDICAL CENTER, and
CONCENTRA URGENT CARE,

Defendants.

ORDER OF DISMISSAL

On December 20, 2017, Plaintiff Kent Vu Phan filed *pro se* a Complaint (ECF No. 1) and an Application to Proceed in District Court without Prepaying Fees or Costs (Long Form) (ECF No. 3). The Court granted him leave to proceed *in forma pauperis* (ECF No. 4). The Court must construe Plaintiff's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons discussed below, the Court dismisses this action.

The allegations in the 52-page Complaint arise from a car accident in April 2012 and resulting insurance dispute and medical treatment. (*See* ECF No. 1 at 4). Plaintiff

APPENDIX: C

alleges Defendants committed "medical malpractice, legal malpractice, racial discrimination." (*Id.* at 5). He asserts Defendants have violated the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and 42 U.S.C. §§ 1981, 1983, 1985, and 1986. (*Id.*). He complains that Defendant State Farm Insurance Company and its attorneys Patterson & Slag, P.C. plotted to evade service of a state court lawsuit related to the car accident. (*Id.* at 12-13, 34). He further alleges State Farm violated the Colorado state bad faith insurance practice statutes. (*Id.* at 19). He asserts Defendant Bachus & Schanker, LLC and attorney Maaren Johnson committed legal malpractice with regard to his state court lawsuit. (*Id.* at 38-40). He alleges Defendant Health First Colorado/Medicaid violated the ADA by disrupting his Medicaid benefits. (*Id.* at 42). He claims Defendants Luke Medical Center and Concentra did not provide him with needed medical care. (*Id.* at 44-49). Plaintiff seeks declaratory judgment and money damages. (*Id.* at 49-50).

Plaintiff has filed nine cases in this District, which the Court summarizes as follows:[1]

1. *Phan v. State Farm Insurance Company, et al.*, Case No. 16-cv-02728-RBJ: this case concerned a state court lawsuit arising from a 2012 automobile accident and was dismissed in part on the basis of the *Rooker-Feldman* doctrine and in part without prejudice for failure to prosecute.

2. *Phan v. Hipple, Smith, Nelson, Lobato, Beaudoin, and State Farm Insurance Company*, Case No. 16-cv-03111-LTB: this case concerned the alleged contamination of Plaintiff's condominium apartment. He alleged claims under the Americans with Disabilities Act as well as based on alleged racial discrimination. The Court entered an Order of Dismissal dismissing certain claims with prejudice as legally frivolous and other claims without prejudice for failure to comply with Fed. R. Civ. P. 8.

[1] "[A] court may take judicial notice of its records and files." *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

3. *Phan v. American Family Insurance Company*: Case No. 17-cv-00196-LTB: this case also concerned the state court lawsuit arising from the 2012 automobile accident and was dismissed without prejudice for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

4. *Phan v. Cross, et al.*, Case No. 17-cv-01067-LTB: in this case, Plaintiff attempted to sue the judges who presided over his state court actions and opposing counsel involved in those actions. The Court dismissed this case as legally frivolous, which was affirmed by the U.S. Court of Appeals for the Tenth Circuit.

5. *Phan v. National Jewish Health, et al.*, Case No. 17-cv-02353-GPG: this case concerned the alleged contamination of Plaintiff's condominium apartment.

6. *Phan v. Hipple, Smith, State Farm Insurance Company, Najanjo, Kennedy Brokerage, Lobato, and Beaudoin*, Case No. 17-cv-02830-LTB: this case also concerned the alleged contamination of Plaintiff's condominium apartment. Plaintiff raised claims under the same federal authorities at issue in the instant matter. The Court dismissed most of this action based *on res judicata*, which was affirmed by the U.S. Court of Appeals for the Tenth Circuit.

7. *Phan v. State Farm Insurance Company, et al.*, Case No. 17-cv-03073-GPG: this is the instant matter, which again concerns the 2012 automobile accident.

8. *Phan v. Hammersmith Management, Inc.*, Case No. 18-cv-01351-GPG: this case concerns the alleged contamination and remains pending.

9. *Phan v. Colorado Legal Services*, Case No. 18-cv-01403-LTB: the Court dismissed this matter with prejudice as legally frivolous.

In Case No. 16-cv-02728-RBJ, the Court dismissed claims arising from the 2012 car accident against Kaiser Permanente, Dr. Weingarten, and Dr. Duy on the basis of the *Rooker-Feldman* doctrine. *See* Case No. 16-cv-02728-RBJ, ECF No. 13 (D. Colo. May 10, 2017). Also in that case, the claims alleged under the ADA, 42 U.S.C. § 1983, and 18 U.S.C. § 242 against Defendant State Farm were dismissed with prejudice as legally frivolous. The claims alleged against State Farm under 42 U.S.C. § 1981, Colo. Rev.

Stat. § 10-3-1115, and Colorado common law governing the tort of bad faith proceeded, but were later dismissed because Plaintiff failed to serve State Farm properly. Case No. 16-cv-02728-RBJ, ECF No. 47 (D. Colo. Nov. 21, 2017).

I. Defendants Kaiser Permanente, Weingarten, and Duy

Plaintiff may not use a new action to attempt to resuscitate claims that have been resolved. There is no indication that anything has changed with regard to Defendants Kaiser Permanente, Weingarten, and Duy. Thus, the Court will dismiss the claims alleged against these defendants without prejudice for lack of subject matter jurisdiction on the basis of the *Rooker-Feldman* doctrine, for the same reasons as set forth in Case No. 16-cv-02728-RBJ. The Court incorporates by reference the Order to Dismiss in Part and to Draw Case in Case No. 16-cv-02728-RBJ, at ECF No. 13, entered by the undersigned on May 10, 2017.

II. Defendant State Farm Insurance Company

The Court will dismiss the claims against Defendant State Farm Insurance Company on the basis of res judicata. Under the doctrine of res judicata or claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores v. Moitie,* 452 U.S. 394, 398 (1981); *see also Baker v. General Motors Corp.,* 522 U.S. 222, 233, n.5 (1998) ("a valid final adjudication of a claim precludes a second action on that claim or any part of it"). Although claim preclusion is an affirmative defense which generally must be pleaded, *see* Fed. R. Civ. P. 8(c)(1); *see also Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 350 (1971), "if a court is on notice that it has previously decided the issue presented, the court

may dismiss the action *sua sponte*, even though the defense has not been raised," *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980).

In the U.S. Court of Appeals for the Tenth Circuit, res judicata or claim preclusion requires: (1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits. *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1202 (10th Cir. 2000) (citation omitted); *see also Phan v. Hipple*, -- F. App'x --, 2018 WL 2277364 (10th Cir. May 18, 2018) (unpublished) (same).

Regarding a judgment on the merits, Plaintiff alleged the same claims under the ADA and 42 U.S.C. §§ 1981, 1983 against Defendant State Farm Insurance Company in Case No. 16-cv-02728-RBJ. In that matter, the Court dismissed with prejudice as legally frivolous the claims under the ADA and 42 U.S.C. § 1983. A dismissal with prejudice of a party's claims is a judgment on the merits for the purpose of res judicata. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992).

Regarding identity of the parties, in this case, Plaintiff again asserts claims against Defendant State Farm Insurance Company arising from the denial of his insurance claim concerning the 2012 car accident, thus the parties are identical to those in Case No. 16-cv-02728-RBJ.

Regarding the "identity of the cause of action," the Tenth Circuit follows a "transactional" approach: "What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as to whether the facts are related in time, space, origin, or motivation . . ." *Id.* Here, the 2012 car accident and subsequent insurance claim dispute is the

transaction giving rise to Plaintiff's claims against State Farm in this case and the previous matter, Case No. 16-cv-02728-RBJ. Thus, the three requisites for res judicata are present.

In Case No. 16-cv-02728-RBJ, Plaintiff's § 1981 claim was dismissed without prejudice for failure to meet Fed. R. Civ. P. 8's pleading standard. Also in that case, he did not raise claims under §§ 1985 and 1986 in that action, as he does here. However, res judicata applies to claims that were or *could have been raised* in the previous action. *Federated Dept. Stores,* 452 U.S. at 398. Parties cannot defeat the application of res judicata by simply alleging new legal theories. *Clark*, 953 F.2d at 1238. The Court must protect against "piecemeal litigation, unnecessary expense, and waste of judicial resources that the doctrine of res judicata is designed to prevent." *Id.* at 1240 (citation omitted).

"[A] cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." *Nwosun v. Gen. Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997). Plaintiff acknowledges that "this claim for accident has been happen[ing] over five years" (ECF No. 1 at 4), thereby demonstrating he has been aware of the events which occurred and the parties involved for a significant period of time before the filing of the prior case in November 2016. The Complaint and the Court's records show Plaintiff could have raised the issues he presents in this case in his prior lawsuit against Defendant State Farm Insurance Company. Plaintiff raises the identical concerns of discrimination based on race and disability and bad faith insurance practices. The factual arguments or

claims arise from the same transaction and core of operative facts and were available to the Plaintiff at the time he litigated his first case against State Farm.

For these reasons, the Court concludes that the federal claims in the Complaint alleged against Defendant State Farm Insurance Company are barred under the doctrine of res judicata and will be dismissed with prejudice. *See Seber v. Bank of Am., N.A.*, 713 F. App'x 801 (10th Cir. 2018) (affirming dismissal "with prejudice on res judicata grounds"); *see also Marin v. Dep't of Def., Sec'y*, 145 F. App'x 754, 755 (3d Cir. 2005) ("To the extent [plaintiff] seeks to raise additional claims involving the same underlying events that could have been raised in his previous action, those claims are also barred [by res judicata]."); *Hommrich v. Marinette Cty.*, 175 F.3d 1020, 1999 WL 106229, at *2 (7th Cir. 1999) (unpublished) ("res judicata bars litigation on claims that could have been brought in a prior suit arising out of the same group of facts, even if the plaintiff alleges different theories of recovery") (citations omitted). The Court will decline to exercise supplemental jurisdiction over any state law claims, which will be dismissed without prejudice.

III. Defendants Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra Urgent Care

It is apparent that Plaintiff is dissatisfied with the result of the insurance claims, state court proceedings, and medical treatment related to the 2012 car accident. However, the federal district court does not serve as another level of appeal from state court determinations. *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (under the *Rooker-Feldman* doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's

federal rights."). Further, such dissatisfaction does not mean, without other indications, that Plaintiff has been subject to discrimination because he is Asian and disabled. Just as in most of Plaintiff's other cases, the law upon which he relies does not provide him with relief in federal court under the facts as alleged.

As he did in his previous lawsuits, Plaintiff has pleaded discrimination because he is Asian and disabled. (ECF No. 1 at 4-5). However, Plaintiff does not allege any facts in this case to suggest that any Defendant intended to discriminate against him based on his race or his disability. Rather, once again, Plaintiff states that certain Defendants did not do what he wanted them to do or otherwise respond in a manner he desired in connection with his injuries resulting from the 2012 car accident. He asserts only an assumption, not based on any identified facts, that any action or inaction was because of Plaintiff's race or disability. (*E.g.*, ECF No. 1 at 5 ("Probably plaintiff's Race is the target for discrimination")).

A. 42 U.S.C. § 1981

Plaintiff alleges in conclusory fashion that Defendants' conduct is racially discriminatory. (*See* ECF No. 1 at 8 ("All defendants are Americans, they're in concert of actions on the purposely protected to each other and retaliate on me")). To establish a claim under § 1981, Plaintiff must show that he is "(1) [a] member[ ] of a protected class; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination interfered with a protected activity as defined in § 1981." *Shawl v. Dillard's Inc.*, 17 F. App'x 908, 911 (10th Cir. 2001). "By its language, Section 1981 establishes four protected interests: (1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4)

the right to be subjected to like pains and punishments." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir. 1989). Section 1981 protects against nongovernmental discrimination, as well as discrimination "under color of State law." 42 U.S.C. § 1981(c).

Plaintiff does not allege any facts to suggest that any Defendant intended to discriminate against him on the basis of his race. Rather, it appears Plaintiff disagrees with the medical Defendants' medical conclusions and the attorney defendants' approach to Plaintiff's lawsuit regarding the car accident. Plaintiff offers only his speculation as to Defendants' conduct being motivated by race, without other indication. These allegations are insufficient to meet the requirements of Rule 8 in setting forth plausible factual allegations supporting a claim of racial discrimination. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.). Thus, these claims will be dismissed without prejudice for failure to meet the Rule 8 pleading standard.

B. 42 U.S.C. § 1983

As noted above, the Court granted Plaintiff leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 (ECF No. 6). Therefore, the Court must dismiss any claims that are frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i); *see also Judy v. Obama*, 601 F. App'x 620, 621 (10th Cir. 2015) (28 U.S.C. § 1915(e)(2) applies to actions filed by nonprisoners). "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also id.* at 328 ("To the extent that a complaint

filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal."). "[T]he frivolousness standard is intended to apply to claims based on an indisputably meritless legal theory or claims describing fantastic or delusional scenarios." *Johnson v. Doe*, No. 18-1038, -- F. App'x --, 2018 WL 3359670, at *2 (10th Cir. July 10, 2018) (unpublished) (internal punctuation and citation omitted).

To state an arguable claim for relief under § 1983, "a plaintiff must 'allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.'" *Bruner v. Baker*, 506 F.3d 1021, 1025-26 (10th Cir. 2007) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). "The elements necessary to establish a § 1983 . . . violation will vary with the constitutional provision at issue." *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (internal quotation marks omitted).

"Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). A private actor may be subject to liability under § 1983 if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 295 (2001) (quotation marks and citations omitted). State action is not established merely because a private individual or entity receives government funding or is subject to extensive government regulation. *See, e.g., San Francisco Arts & Athletics, Inc. v.*

United States Olympic Comm., 483 U.S. 522, 542-47 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1003-11 (1982). The "nexus" test is only satisfied "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004.

Defendants Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra Urgent Care are non-state private individuals or entities. Plaintiff does not allege any plausible facts that defendants acted in concert with governmental officials to violate his constitutional rights. Instead, this case, like many of Plaintiff's other cases in this District, concerns private disputes arising from a car accident. Thus, the allegations do not support an arguable claim for relief under § 1983 and will be dismissed as legally frivolous.

C. 42 U.S.C. §§ 1985, 1986

Section 1985 prohibits a conspiracy to interfere with civil rights. *See* 42 U.S.C. § 1985. Though Plaintiff includes this provision in his pleading, he provides no non-conclusory allegation to support a § 1985 claim in this case. It appears Plaintiff attempts to assert a violation of 42 U.S.C. § 1985(3). "The essential elements of a § 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). Section 1985(3) applies only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" and not "to all tortious, conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). To the extent a § 1985(3) claim can be based on a non-racially

motivated private conspiracy, it is necessary to plead, *inter alia*:

> 1. that the conspiracy is motivated by a class-based invidiously discriminatory animus; and
>
> 2. that the conspiracy is aimed at interfering with rights that by definition are protected against private, as well as official, encroachment.

Tilton, 6 F.3d at 686.

Plaintiff's allegations do not state an arguable claim for relief based on § 1985(3). He alleges in conclusory fashion that Defendants conspired with each other, but toward the apparent end of causing him to not be successful in his insurance claim arising from the car accident. Even if Plaintiff sufficiently alleged a conspiracy based on a class-based invidiously discriminatory animus, there is no public/private right at issue. Thus, this claim is premised on a meritless legal theory and will be dismissed as legally frivolous.

Plaintiff's § 1986 claims are similarly deficient because liability under § 1986 is derivative of § 1985 liability. See *Wright v. No Skiter, Inc.*, 774 F.2d 422, 426 (10th Cir. 1985).

D. Americans with Disabilities and Rehabilitation Acts

The Americans with Disabilities Act ("ADA") forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III. *Tennessee v. Lane,* 541 U.S. 509, 516-17 (2004). Under the Rehabilitation Act, the Plaintiff must allege facts to show that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such

exclusion, denial of benefits, or discrimination was because of the disability. *See Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1193 (10th Cir. 2007) (citation omitted); *see also Swenson v. Lincoln Cty. Sch. Dist. No. 2*, 260 F.Supp.2d 1136, 1145 (D. Wyo. 2003) (noting that "[t]he elements of a cause of action under Title II of the ADA and section 504 of the Rehabilitation Act are the same because Congress has directed courts to construe the ADA as giving at least the same amount of protection as the Rehabilitation Act") (citations omitted).

There is no indication that Plaintiff has an employment relationship with any of the defendants, thus Title I of the ADA is inapplicable.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity,* or be subjected to discrimination *by any such entity.*" *Phillips v. Tiona*, 508 F. App'x 737, 747 (10th Cir. 2013) (citing 42 U.S.C. § 12132) (emphasis in original). Plaintiff does not allege any fact to suggest he was somehow denied the benefits of public services, programs, or activities. (*See* ECF No. 1). Defendants Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra Urgent Care do not appear to be public entities or governmental instrumentalities. (*See id.*). Thus, Title II does not apply here.

Plaintiff requests money damages in relation to his ADA claims, thus Title III of the ADA does not provide the relief he seeks. *Phillips*, 508 F. App'x at 754 (under 42 U.S.C. § 12188(a), the "sole remedy for a Title III claim is injunctive relief"); *see also Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004) ("A private individual may only obtain injunctive relief for violations of a right granted under Title III; he cannot recover

damages.").

Plaintiff's allegations of discrimination based on a disability arise from his disagreement with the outcome of his medical treatment, insurance claim, and state court proceedings related to the 2012 car accident. The facts as alleged do not support an arguable claim for relief under the ADA or Rehabilitation Act, thus these claims will be dismissed with prejudice as legally frivolous.

E. State Law Claims

The federal claims will be dismissed as set forth above. To the extent Plaintiff asserts this Court's supplemental jurisdiction over a state law claims of medical malpractice, legal malpractice, or bad faith insurance practices, the Court declines to exercise supplemental jurisdiction over such claims because the federal claims over which the Court has original jurisdiction will be dismissed. *See* 28 U.S.C. § 1367(c)(3).

IV. Defendant Health First Colorado/Medicaid

Plaintiff alleges Defendant Health First Colorado/Medicaid is the state entity which "granted [his] Medicaid benefits based on [his] disability status." (ECF No. 1 at 42). He asserts that the "Colorado Medicaid Office" conspired with Kaiser Permanente to "disrupt" his benefit, as retaliation for his lawsuit against Kaiser Permanente. (*Id.*). He requests a declaration that Medicaid violated the ADA and Rehabilitation Acts and money damages. (*Id.* at 42-43).

Plaintiff's conclusory allegations regarding Colorado's Medicaid program are insufficient to overcome Eleventh Amendment immunity. "Medicaid is a cooperative federal-state program under which states choosing to participate receive federal funds for state-administered Medicaid services . . ." *Lewis v. New Mexico Dep't of Health*, 261

F.3d 970, 974 (10th Cir. 2001). As a state program, Defendant Health First Colorado is entitled to Eleventh Amendment immunity. "Although citizens may not generally sue states in federal court under the Eleventh Amendment, the *Ex parte Young* doctrine has carved out an alternative, permitting citizens to seek prospective equitable relief for violations of federal law committed by state officials in their official capacities." *Lewis*, 261 F.3d at 975. In order to proceed under the *Ex parte Young* exception, Plaintiff must establish he 1) is suing state officials, rather than the state itself; 2) has alleged a non-frivolous violation of federal law; 3) seeks prospective equitable relief, rather than money damages; and 4) does not implicate "special sovereignty interests." *Id.*

Plaintiff does not meet the first three requirements and has made no showing as to the fourth. He seeks money damages against a state entity for claims of ADA violations and conspiracy based only on conclusory allegations. Thus, Eleventh Amendment immunity bars the claims against this Defendant.

V. Sanctions

The Court again warns Plaintiff that "the right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (per curiam) (citation omitted). Thus, "[f]ederal courts have the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions in appropriate circumstances." *Andrews v. Heaton*, 483 F.3d 1070, 1077 (10th Cir. 2007). The Court may impose appropriate sanctions if Plaintiff persists in engaging in abusive litigation tactics by filing repetitive complaints raising the same claims for relief against the same Defendants.

VI. Conclusion

As set forth above in the list of Plaintiff's cases in this District, Plaintiff has filed repetitive and duplicative lawsuits arising from two state court proceedings concerning the 2012 car accident and an alleged contamination of his condominium apartment. The Court has provided Plaintiff with ample instruction on the pleading requirements and tenets of law applicable to his claims. Nevertheless, Plaintiff has not filed cognizable claims. Thus, the Court finds that *sua sponte* dismissal of this action is warranted, without providing leave to amend.

Accordingly, it is

ORDERED that Complaint (ECF No. 1) and this action are DISMISSED as set forth herein. All claims alleged against Defendants Kaiser Permanente, Weingarten, and Duy are DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. The federal law claims alleged against Defendant State Farm Insurance Company are DISMISSED WITH PREJUDICE on the basis of res judicata. The federal law claims alleged against Defendants Patterson & Slag, P.C., Bachus & Schanker, LLC, Luke Medical Center, and Concentra Urgent Care are DISMISSED in part with prejudice as legally frivolous and in part without prejudice for failure to comply with Rule 8 as set forth herein. The claims alleged against Defendant Health First Colorado/Medicaid are DISMISSED WITHOUT PREJUDICE on the basis of Eleventh Amendment immunity. Any remaining state law claims are DISMISSED WITHOUT PREJUDICE because the Court declines to exercise supplemental jurisdiction over such claims. It is

FURTHER ORDERED leave to proceed *in forma pauperis* is denied for the

purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. It is

FURTHER ORDERED that all pending motions are denied as moot.

DATED at Denver, Colorado, this 30th day of July, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK
U.S. Senior District Judge