UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REED KIRK MCDONALD, Plaintiff - Appellant, v. EAGLE COUNTY, a quasi-municipal corporation and political subdivision of the State of Colorado; BELLCO CREDIT UNION, Defendants - Appellees.	No. 19-1101 (D.C. No. 1:18-CV-00105-CMA-NRN) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Mar. 19, 2020)

Before **TYMKOVICH**, Chief Judge, **HARTZ** and **BACHARACH**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Reed Kirk McDonald appeals from the district court's order granting Eagle County's and Bellco Credit Union's ("Bellco") motions to dismiss under Fed. R. Civ. P. 12(b)(1), and awarding them attorney fees incurred in defending against McDonald's suit. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal and award of fees; however, we remand the case for the court to amend the judgment to reflect a dismissal *without* prejudice.

I. BACKGROUND

McDonald's federal suit was based on two unrelated Colorado state court cases.

A. Eagle County Suit

The first suit, filed in 2009 in Eagle County District Court ("Eagle Court"), was an action by McDonald against Zions First National Bank ("Zions"), in which he alleged Zions breached a loan agreement and the duty of good faith and fair dealing when it failed to advance the draws he requested. Zions denied the allegations and counterclaimed for a deficiency judgment. Shortly after the Eagle Court granted summary judgment in favor of Zions on McDonald's claims, Zions voluntarily dismissed its counterclaim without prejudice. Thereafter, the Eagle Court awarded Zions $102,267.75 in attorney fees and costs incurred in defending against McDonald's suit.

When McDonald tried to appeal—including an appeal of Zions's voluntary dismissal of its counterclaim without prejudice—the Colorado Court of Appeals ordered him to obtain certification under Colo. R. Civ. P. 54(b), "because the cross-claims [sic] were dismissed without prejudice, [and therefore] an appealable order has not entered." R., Vol. I at 30. The court noted if it "had found that a final and appealable order had been entered, it would have found that the time for filing an appeal had not started to run because there was no evidence that [McDonald] ever was served a copy of the [Eagle Court's] order." *Id.* at 30-31. McDonald's appeal was dismissed when he failed to obtain certification. Sometime later, as part of its efforts to collect the judgment for attorney fees and costs, Zions obtained a writ of garnishment from the Eagle Court for an account McDonald maintained at Bellco.

B. Arapahoe County Suit

The second suit, filed by Bellco in county court in Arapahoe County in 2016, was a collection action against McDonald for an unpaid debt of $14,664.09—it had nothing to do with Zions's garnishment of McDonald's Bellco account several years earlier in the Eagle Court litigation. Nonetheless, McDonald filed counterclaims against Bellco and a third-party claim against Eagle County for perceived violations of his due process right by the Eagle Court in the 2009 suit. At the same time, McDonald removed the action to the Arapahoe County district court (the "Arapahoe County litigation"). Eventually, McDonald's counterclaims and

third-party claims were dismissed, leaving only Bellco's original collection claim.

C. Federal Court Suit

Shortly after Bellco filed a motion for summary judgment in the Arapahoe County litigation, McDonald sued Eagle County in federal court. Days later, McDonald attempted to avoid summary judgment by filing a pleading in the federal suit titled "Notice of Removal . . . Complaint and Jury Demand," *id.* at 246, which asserted four claims against Bellco. From that point forward, McDonald maintained—and continues to maintain—there was no state proceeding because the Arapahoe County litigation had been removed to federal court.

Next, McDonald filed an amended complaint in the federal suit adding Bellco as a defendant. The amended complaint also alleged four claims against Eagle County, all of which were based on the outcome in the Eagle Court litigation: (1) under 42 U.S.C. § 1983 for violating his Fifth and Fourteenth Amendment rights by "fail[ing] its obligation to obey the Court of Appeals Order [to provide] due process and equal protection" and by "refusing to conclude the [litigation in Eagle Court], *id.* at 314; (2) under § 1983 for violating his Fourth Amendment rights by "knowingly fil[ing] and issu[ing] [a] writ allowing [Zions] to seize Plaintiff's bank accounts to financially prevent [him] from pursuing his civil case," R., Vol. I at 316; (3) under § 1983 for violating "the United States Constitution"

by "knowingly and improperly refus[ing] under color of state law to allow Plaintiff to present his case against [Zions]," *id.* at 317; and (4) under 42 U.S.C. § 1985 for conspiring with the clerk of the Eagle Court and Zions to violate his civil rights.

As to Bellco, McDonald realleged the failed defenses and/or counterclaims he raised in the Arapahoe County suit: (1) violation of his Fourteenth Amendment rights by refusing to dismiss its collection suit and "conspir[ing] with [the] state court to prosecute a civil action out-of-time in violation of Colorado's statute of limitations," *id.* at 320; (2) violation of the federal Fair Debt Collection Practices Act; (3) violation of Colorado's Fair Debt Collection Practices Act; and (4) violation of his First Amendment rights to privacy "by trespassing his gated property to illegally search and seize Plaintiff's personal property," *id.* at 324.

D. Disposition of Federal and Arapahoe County Litigation

Thereafter, the Arapahoe County district court determined McDonald's attempted removal was improper and entered summary judgment in favor of Bellco on its collection claim. McDonald appealed.

While McDonald's appeal was pending, Eagle County and Bellco moved to dismiss the federal suit on several grounds. Relevant to the issues on appeal, the magistrate judge recommended the following: (1) dismissal of the claims against Eagle County for lack of subject-matter jurisdiction under the *Rooker-Feldman*

doctrine[1]; (2) dismissal of the claims against Bellco under the *Younger* abstention doctrine[2] if the state-court proceedings had not concluded, or under *Rooker-Feldman* if the proceedings were completed; and (3) an award of attorney fees to Eagle County and Bellco.

In his objections to the magistrate judge's recommendations, McDonald argued that *Rooker-Feldman* and *Younger* did not apply, and in any event, the dismissal should be without prejudice. On de novo review, the district court affirmed the magistrate judge's recommendation to dismiss the claims with prejudice under *Rooker-Feldman* and *Younger*. The district court reviewed the recommendation to award attorney fees for clear error and affirmed.

An "update" recently filed by McDonald confirms the Arapahoe County suit is still ongoing. Shortly after the federal district court entered its order in March 2019, the Colorado Court of Appeals decided McDonald's appeal, affirming the state court's judgment. *Bellco Credit Union v. McDonald*, No. 18CA0689, 2019 WL 1873422 (Colo. App. Apr. 25, 2019) (unpublished). When the Colorado Supreme Court denied certiorari review, *McDonald v. Bellco Credit Union*, No. 19SC475, 2019 WL 4643619 (Colo. Sept. 23, 2019) (unpublished), McDonald filed a petition for a writ of certiorari in the United States Supreme Court, which has not been

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[1] *See Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[2] *See Younger v. Harris*, 401 U.S. 37 (1971).

resolved. *McDonald v. Bellco Credit Union*, 2020 WL 290965 (U.S. Jan. 15, 2020) (No. 19-895).

II. STANDARD OF REVIEW

We review de novo the district court's dismissal under both the *Rooker-Feldman* doctrine and the *Younger* abstention doctrine. *Campbell v. City of Spencer*, 682 F.3d 1278, 1281 (10th Cir. 2012) (*Rooker-Feldman*); *Taylor v. Jaquez*, 126 F.3d 1294, 1296 (10th Cir. 1997) (*Younger*).

III. ANALYSIS

A. Claims Against Eagle County

The *Rooker-Feldman* doctrine bars "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).

McDonald argues the district court erred by determining his claims against Eagle County are barred by *Rooker-Feldman*. We will not consider McDonald's argument because he has failed to adequately brief the issue; instead, he continues to denounce the actions of the Eagle County District Court, Bellco, the magistrate judge, and the district court. McDonald's failure to adequately brief the issue means that we will not consider the issue on appeal. *See Holmes v. Colo. Coal. For*

Homeless Long Term Disability Plan, 762 F.3d 1195, 1199 (10th Cir. 2014) (declining to consider arguments on appeal that were inadequately briefed); *Murrell v. Shalala*, 43 F.3d 1388, 1390 n.2 (10th Cir. 1994) (declining to consider "a few scattered statements" and "perfunctory" arguments that failed to develop an issue).

We affirm the district court's dismissal of McDonald's claims against Eagle County as barred by *Rooker-Feldman*.

B. Claims Against Bellco

In contrast with the *Rooker-Feldman* doctrine, the *Younger* abstention doctrine applies when state proceedings have not concluded; it "dictates that federal courts not interfere with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—when such relief could adequately be sought before the state court." *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999) (internal quotation marks omitted). *Younger* abstention is nondiscretionary and must be applied when three conditions exist:

> (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state

> interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.

Id. (internal quotation marks omitted).

Once again, we will not consider McDonald's argument because he has failed to adequately brief the issue; instead of addressing *Younger*, he excoriates the Eagle County District Court, Bellco, the magistrate judge, and the district court. McDonald's failure to adequately brief the issue means that we will not consider the issue on appeal. *See Holmes*, 762 F.3d at 1199; *Murrell*, 43 F.3d at 1390 n.2.

We affirm the district court's dismissal of McDonald's claims against Bellco under *Younger*.

C. Attorney Fees

The record shows that McDonald failed to object to the magistrate judge's recommendation to award Eagle County and Bellco their attorney fees incurred in defending against the amended complaint. "We have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate." *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (brackets and internal quotation marks omitted). "The failure to timely object to a magistrate's recommendations waives appellate review of both factual and legal questions." *Id.* (internal quotation marks omitted). There are two exceptions to the rule; however, neither exception applies here. As such, we will not consider the issue on appeal.

IV. CONCLUSION

We affirm the district court's order of dismissal and award of attorney fees and remand only for the district court to amend its judgment to reflect that the dismissal is *without* prejudice. "A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of jurisdiction, as it did here, the dismissal must be without prejudice." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006). *See also Chapman v. Oklahoma*, 472 F.3d 747, 750 (10th Cir. 2006) (addressing *Younger*).

Entered for the Court

Timothy M. Tymkovich
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-00105-CMA-NRN

REED KIRK McDONALD,

Plaintiff,

v.

EAGLE COUNTY, a quasimunicipal corporation and political subdivision of the State of Colorado, and BELLCO CREDIT UNION,

Defendants.

ORDER AFFIRMING THE DECEMBER 12, 2018 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND GRANTING MOTIONS TO DISMISS

(Filed Mar. 6, 2019)

The matter is before the Court upon the December 12, 2018 Recommendation by United States Magistrate Judge N. Reid Neureiter that this Court grant Defendants' Motions to Dismiss (Doc. ## 23, 31). (Doc. # 67.) The Court finds Plaintiff Reed K. McDonald's Objection to the Recommendation (Doc. # 77) to be unpersuasive for the reasons described herein and overrules it. The Court affirms and adopts Magistrate Judge Neureiter's Recommendation and grants Defendants Eagle County's and Bellco Credit Union's ("Defendant Bellco") Motions to Dismiss.

I. BACKGROUND

This action arises out of two unrelated state court cases. (Doc. # 67 at 2.)

A. CLAIMS RELATED TO THE LITIGATION IN EAGLE COUNTY

First, in September 2009, Plaintiff brought suit in the District Court for Eagle County, Colorado, against third party Zions First National Bank ("Zions Bank") for issues related to a loan Zions Bank previously made to Plaintiff (the "Litigation in Eagle County"). (Doc. # 31-3.) Plaintiff claimed that Zions Bank "breached the contract—a loan agreement—by failing to advance requested draws" and that it "breached the duty of good faith and fair dealing in the same manner." *See* (Doc. # 31-1 at 4.) Zions Bank asserted a counterclaim for a deficiency judgment against Plaintiff. *See* (*id.*) The Eagle County District Court dismissed Plaintiff's claims against Zions Bank on summary judgment on March 3, 2011 (*id.* at 5), and Zions Bank voluntary dismissed its counterclaim against Plaintiff on March 18, 2011, *see* (Doc. # 31-3 at 13; Doc. # 1-1 at 1). The Eagle County District Court awarded Zions Bank attorneys' fees and costs in the amount of $102,267.75 on April 7, 2011.[1] (Doc. # 31-3 at 12; Doc. # 31-2 at 2).

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[1] Having reviewed all exhibits to the pleadings, the Court disagrees with Magistrate Judge Neureiter's description of the outcome of the Litigation in Eagle County. *See* (Doc. # 67 at 2.) Magistrate Judge Neureiter wrote that the Eagle County District Court entered judgment against Plaintiff in the amount of

Plaintiff subsequently appealed the Eagle County District Court's decision to summarily dismiss his claims and terminate the case to the Colorado Court of Appeals. On or about November 2, 2011, the Court of Appeals rejected the appeal on the ground that because the Eagle County District Court dismissed Zions Bank's counterclaim without prejudice, "an appealable order [had] not been entered" by the Eagle County District Court. (Doc. # 1-1 at 3-4.) The Court of Appeals noted as an aside that "it [did] not appear that the *pro se* plaintiff [Plaintiff] was ever properly served with the Orders of the district court . . . If this Court had found that a final and appealable order had been entered, it would have found that the time for filing an appeal had not started to run because there is no evidence that Plaintiff was served with a copy of the district court's orders." (*Id.*) Approximately a year later, the Eagle County District Court issued a writ of garnishment on Plaintiff's account with Defendant Bellco. *See* (Doc. # 31-3 at 7.)

In the action presently before this Court, Plaintiff asserts that the Colorado Court of Appeals ordered Defendant Eagle County in its November 2, 2011 Order "to restore 'due process' and 'equal protection of the law' in its proceedings" but that Defendant Eagle County "knowingly refused to obey" the Court of

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$102,267.75, *see* (*id.*), but the record reveals that Zions Bank had voluntarily dismissed its counterclaim on March 18, 2011, and that the $102,267.75 amount was an award of attorneys' fees and costs. However, Magistrate Judge Neureiter's minor mischaracterization of the Litigation in Eagle County does not impact the accuracy of his analysis.

Appeal's order. (Doc. # 14 at 1-2.) Plaintiff raises the following claims against Defendant Eagle County, all of which arise out of the outcome of the Litigation in Eagle County: (1) a claim under 42 U.S.C. § 1983 for violating his Fifth and Fourteenth Amendment rights by "fail[ing] its obligation to obey the Court of Appeals Order [to provide] due process and equal protection" and by "refusing to conclude the [Litigation in Eagle County];" (2) a claim under 42 U.S.C. § 1983 for violating his Fourth Amendment rights by "knowingly fil[ing] and issu[ing] [a] writ allowing [Zions Bank] to seize Plaintiff's bank accounts to financially prevent [him] from pursuing his civil case;" (3) a claim under 42 U.S.C. § 1983 for violating "the United States Constitution" by "knowingly and improperly refus[ing] under color of state law to allow Plaintiff to present his case against [Zions Bank];" and (4) a claim under 42 U.S.C. § 1985 for conspiring with the Clerk of the Court for the District Court of Eagle County and with Zions Bank to violate his civil rights. (*Id.* at 17-22.)

B. CLAIMS RELATED TO LITIGATION IN ARAPAHOE COUNTY

Second, in a completely unrelated proceeding, Defendant Bellco initiated a collection action on December 14, 2016, against Plaintiff in the District Court for the County of Arapahoe, Colorado, for failure to make payments on a car loan (the "Litigation in Arapahoe County"). (Doc. # 67 at 3; Doc. # 31 at 3.) Plaintiff asserted several counterclaims against Defendant Bellco, including claims under the federal Fair Debt Collection

Practices Act, 15 U.S.C. § 1692, *et seq.* (the "federal FDCPA") and the Colorado Fair Debt Collection Practices Act, Colo. Rev. Stat. § 15-16-101, *et seq.* (the "Colorado FDCPA"). (Doc. # 31-4 at 21-30.) Plaintiff also attempted to join Defendant Eagle County as a third-party defendant in the Litigation in Arapahoe County, alleging that the Litigation in Arapahoe County was related to the prior Litigation in Eagle County because of the garnishments entered in the latter. (*Id.*) The Arapahoe County District Court dismissed all of Plaintiff's counterclaims against Defendant Bellco and Defendant Eagle County on September 7, 2017, leaving only Defendant Bellco's original collections claim. (Doc. # 31-5.)

Defendant Bellco moved for summary judgment in the Litigation in Arapahoe County on December 27, 2017. (Doc. # 31 at 4.)

On January 12, 2018, Plaintiff filed this action against Defendant Eagle County alone. (Doc. # 1.) On January 24, 2018, Plaintiff filed a Notice of Removal with this Court to remove the Litigation in Arapahoe County, asserting that the Litigation in Arapahoe County was "intertwined" with his case against Defendant Eagle County before this Court. (Doc. # 6.)

In the Litigation in Arapahoe County, Plaintiff then contended that the Arapahoe County District Court no longer had jurisdiction. (Doc. # 31-6 at 1.)

On March 8, 2018, Plaintiff filed an Amended Complaint in this action, adding Defendant Bellco as a defendant. (Doc. # 14.) Plaintiff argues that "Bellco's

case is intertwined with Eagle Counties [sic] misconduct." (*Id.* at 2.) He asserts four causes of action against Defendant Bellco: (1) violation of his Fourteenth Amendment rights by refusing to dismiss its civil action and by "conspir[ing] with state court to prosecute a civil action out-of-time in violation of Colorado's statute of limitations;" (2) violation of the federal FDCPA; (3) violation of the Colorado FDCPA; and (4) violation of his First Amendment rights to privacy "by trespassing his gated property to illegally search and seize Plaintiff's personal property." (*Id.* at 22-27.)

On March 14, 2018, the Arapahoe County District Court granted summary judgment in favor of Defendant Bellco and entered judgment in its favor in the amount of $14,664.09 in the Litigation in Arapahoe County. (Doc. # 31-7.) Plaintiff is appealing the judgment of the Arapahoe County District Court in the Litigation in Arapahoe County. (Doc. # 31-8; Doc. # 31 at 4.)

C. PROCEDURAL HISTORY

As the Court just described, Plaintiff alleges four causes of action against Defendant Eagle County and four separate causes of action against Defendant Bellco. *See* (Doc. # 14.)

Defendant Eagle County moved to dismiss all claims against it on April 13, 2018, arguing that Plaintiff's claims are barred by the *Rooker-Feldman* doctrine and name the wrong defendant. (Doc. # 23.) Plaintiff filed his Response on May 4, 2018 (Doc. # 33),

to which Defendant Eagle County replied on May 18, 2018 (Doc. # 35).

Defendant Bellco filed its Motion to Dismiss on April 25, 2018, on the grounds that the Court lacks jurisdiction under the *Younger* abstention doctrine, that Plaintiff's federal and Colorado FDCPA claims are barred by claim preclusion and issue preclusion, and that Plaintiff fails to state a claim for relief in his other claims. (Doc. # 31.) Plaintiff responded to the Motion to Dismiss on May 22, 2018. (Doc. # 38.) Defendant Bellco replied in support of its motion on June 5, 2018. (Doc. # 42.)

Magistrate Judge Neureiter issued his Recommendation on both Motions to Dismiss on December 12, 2018, advising that this Court should grant both Motions to Dismiss. (Doc. # 67.) Plaintiff filed his Objection to the Recommendation on January 28, 2019 (Doc. # 77), to which Defendant Bellco responded on February 7, 2019 (Doc. # 78), and Defendant Eagle County responded on February 8, 2019 (Doc. # 79). Plaintiff replied in support of his Objection on February 19, 2019. (Doc. # 80.)

Plaintiff has also filed a Motion for Summary Judgment on all of his claims against Defendant Bellco on June 26, 2018 (Doc. # 47), and a Motion to Exceed Page Limits in his summary judgment motion (Doc. # 49). Magistrate Judge has recommended that in light of his Recommendation that the Court grant Defendants' Motions to Dismiss, the Court deny as moot these other motions. (Doc. # 68.)

II. APPLICABLE LEGAL STANDARDS

A. REVIEW OF A RECOMMENDATION

When a magistrate judge issues a recommendation on a dispositive matter, Fed. R. Civ. P. 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommended] disposition that has been properly objected to." An objection is properly made if it is both timely and specific. *United States v. One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d 1057, 1059 (10th Cir.1996). In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. *PRO SE* PLAINTIFF

Plaintiff proceeds *pro se*. The Court, therefore, reviews his pleading "liberally and hold[s] [it] to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Whitney v. New*

Mexico, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (a court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (a court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). Nor does *pro se* status entitle a litigant to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

C. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)

Dismissal pursuant to Rule 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. "The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction." *Port City Props. v. Union Pac. R.R. Co.* 24, 518 F.3d 1186, 1189 (10th Cir. 2008). Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)); *see Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). When reviewing a facial attack, a court takes the allegations in the complaint as true, but when in reviewing a factual attack, the court does not presume

the truthfulness of the complaint's factual allegations and may consider affidavits or other documents to resolve jurisdictional facts. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). Defendant Eagle County's Motion to Dismiss launches a facial attack on this Court's subject matter jurisdiction. *See* (Doc. # 23 at 5.)

D. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at1198. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded

facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id.* at 679-81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

However, the court need not accept conclusory allegations without supporting factual averments. *Southern Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Nor does the complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

III. DISCUSSION

At the outset, the Court observes that Plaintiff's Objection—even when construed liberally—is largely devoid of specific objections to Magistrate Judge Neureiter's analysis. Moreover, many of Plaintiff's objections are frivolous, conclusive, or immaterial. Plaintiff has, consequently, waived *de novo* review of much of the Magistrate Judge's Recommendation. *See In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995). The Court finds no clear error in the portions of the Recommendation to which Plaintiff does not specifically object. It limits the following *de novo* review to the portions of the Recommendation to which Plaintiff unambiguously objects.

A. CLAIMS AGAINST DEFENDANT EAGLE COUNTY

Magistrate Judge Neureiter concluded that the Court lacks subject matter jurisdiction over Plaintiff's claims against Defendant Eagle County pursuant to the *Rooker-Feldman* doctrine and that Plaintiff fails to state a claim against Defendant Eagle County upon which relief can be granted. (Doc. # 67 at 8.) He recommended that Plaintiff's claims against Defendant Eagle County be dismissed with prejudice. (*Id.* at 19.) The Court affirms the Magistrate Judge's conclusion.

1 **Dismissal is appropriate pursuant to Rule 12(b)(1) because the Court lacks subject matter jurisdiction over Plaintiff's claims against Defendant Eagle County pursuant to the *Rooker-Feldman* doctrine.**

The *Rooker-Feldman* doctrine states that federal district courts do not have subject matter jurisdiction to review final state court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). Specifically, the doctrine bars federal review of "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." *Id.*; *see also Bolden v. City of Topeka*, 441 F.3d 1129, 1138 (10th Cir. 2006). The *Rooker-Feldman* doctrine also bars federal district courts from considering "claims inextricably intertwined with a prior state-court judgment." *Tal v. Hogan*, 453 F.3d 1244, 1256 (10th Cir. 2006); *see also Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 483 n.16 (1983). A claim is inextricably intertwined if "the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress." (*Id.*) (internal citations omitted). "In other words, if favorable resolution of a claim would upset a [state-court] judgment, that claim is *Rooker*-barred . . . even if the underlying issue was not raised or addressed in the state court that handed down the judgment." *Bolden*, 441 F.3d at 1140. Challenges brought pursuant to the *Rooker-Feldman* doctrine, like the challenge Defendant Eagle

County raises in its Motion to Dismiss, *see* (Doc. # 23 at 4-5), are challenges to a federal court's subject matter jurisdiction. *See Merrill Lynch Bus. Fin. Servs., Inc.*, 363 F.3d at 1074-75.

In this case, Magistrate Judge Neureiter determined that application of the *Rooker-Feldman* doctrine deprives the Court of subject matter jurisdiction over Plaintiff's claims against Defendant Eagle County. (Doc. # 67 at 10.) He summarized Plaintiff's allegation as follows: Defendant "Eagle County, apparently via the Eagle County District Court, has failed the obey the orders and directives of the Colorado Court of Appeals and refuses to 'conclude' the [Litigation in Eagle County]," (*id.* at 9); the Court agrees with the Magistrate Judge's understanding of Plaintiff's Complaint. Magistrate Judge Neureiter then assessed that:

> In effect, [Plaintiff] is asking the Court to reverse the state court's dismissal of his claims on summary judgment, to vacate the judgment against [Plaintiff], and to somehow undo the garnishment proceedings authorized under Colorado law. Doing so would necessarily upset the state court judgment. . . . The *Rooker-Feldman* doctrine . . . precludes this type of federal review of state court decisions.

(*Id.* at 9–10.)

Plaintiff's objection that the *Rooker-Feldman* doctrine "is inapplicable to this because the Colorado Court of Appeals had adjudged there is no judgment" in the Litigation in Eagle County does not persuade

the Court that Magistrate Judge Neureiter's analysis is incorrect. *See* (Doc. # 77 at 14-16.) Plaintiff misunderstands the decisions of the Eagle County District Court and the Colorado Court of Appeals. First, Eagle County District Court (indisputably a state court) did issue a final judgment on Plaintiff's claims against Zions Bank in the Litigation in Eagle County; it summarily dismissed Plaintiff's claims on March 3, 2011. (Doc. # 31-1 at 4.) The Colorado Court of Appeals' orders regarding Plaintiff's attempted appeal, *see* (Doc. # 1-1), did not impact the Eagle County District Court's judgment. The Court of Appeals only determined that because Zions Bank's counterclaim against Plaintiff was voluntarily dismissed on March 18, 2011, without prejudice, an appealable order had not entered and that it could therefore not entertain Plaintiff's appeal. *See* (*id.*) Its determination that an appealable order had not entered in the Litigation in Eagle County does not mean that, as Plaintiff contends, there was no judgment in the Litigation in Eagle County. Plaintiff provides no support for his assumption otherwise.

The Court therefore rejects Plaintiff's objection regarding the application of the *Rooker-Feldman* doctrine to Plaintiff's claims against Defendant Eagle County. The Court does not have subject matter jurisdiction over these claims.

2. Dismissal is also appropriate pursuant to Rule 12(b)(6) because Plaintiff fails to allege claims against Defendant Eagle County.

In addition to his conclusion that the Court is without subject matter jurisdiction over Plaintiff's claims against Defendant Eagle Court, Magistrate Judge Neureiter also concluded that Plaintiff fails to allege claims upon which relief can be granted against Defendant Eagle County, warranting dismissal under Rule 12(b)(6).[2] (Doc. # 67 at 10-11.) The Magistrate Judge observed that though Plaintiff's claims are raised against Defendant Eagle County, his claims for relief "are really directed at the Eagle County District Court." (*Id.* at 10.) None of Plaintiff's allegations, such as that "Defendant" failed to obey orders of the Colorado Court of Appeals and refused to allow him to present his case against Zions Bank, "pertain to actions . . . taken by Eagle County," Magistrate Judge Neureiter described. (*Id.*) Rather, they concern actions of the Eagle County District Court. (*Id.*) The Magistrate Judge stated, "Eagle County and the Eagle County District Court are not synonymous." (*Id.*) He therefore concluded that "Eagle County is not the proper

[2] Despite its determination that it is without subject matter jurisdiction over Plaintiff's claims against Defendant Eagle County, the Court nonetheless also considers Defendant Eagle County's additional argument that Plaintiff's claims fail to state a claim upon which relief can be granted in order to determine whether it would be futile to dismiss Plaintiff's claims without prejudice. The Court addresses this further in Section III(C) below.

defendant for claims against the Colorado Judicial Branch" and that Plaintiff fails to state any claims against Defendant Eagle County upon which relief can be granted. (*Id.* at 11.)

Plaintiff's objection is without merit. He contends that because "the people of each county dully [sic] elect their district judges," district courts "are perceived as a county operative," but he provides no authority for that proposition. (Doc. # 77 at 2.) Plaintiff's assertion that "Colorado's Attorney General's Office . . . agrees[s] [that] Eagle County, who dully [sic] elected all four judges [to the district court] lie [sic] responsible for their actions" is also without support and contrary to law. *See* (*id.* at 12.) The Court therefore agrees with Magistrate Judge Neureiter's assessment that Plaintiff's claims against Defendant Eagle County must be dismissed pursuant to Rule 12(b)(6).

B. CLAIMS AGAINST DEFENDANT BELLCO

Magistrate Judge Neureiter agreed with all four of Defendant Bellco's arguments for dismissal of Plaintiff's claims against it and therefore recommended that Plaintiff's claims against Defendant Bellco be dismissed with prejudice. (Doc. # 67 at 12-19.) The Court affirms the Magistrate Judge's recommendation, though it declines to reach all four arguments.

1. **The *Younger* abstention doctrine requires this Court to abstain from exercising jurisdiction over Plaintiff's claims against Defendant Bellco.**

The *Younger* abstention doctrine "dictates that federal courts not interfere with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—when such relief could adequately be sought before the state court." *Reinhardt v. Kelly*, 164 F.3d 1296, 1302 (10th Cir. 1999) (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)). Pursuant to the *Younger* abstention doctrine, a federal court must abstain from exercising jurisdiction when: "(1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings 'involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.'" *Amantullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999) (quoting *Taylor v. Jaquez*, 126 F.3d 1294, 1297 (10th Cir. 1997), *cert denied*, 523 U.S. 1005 (1998)). Where these three conditions are met, "*Younger* abstention is non-discretionary and, absent extraordinary circumstances, a district court is required to abstain." *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) (citing *Seneca-Cayuga Tribe v. Okla.*, 874 F.2d 709, 711 (10th Cir. 1989)).

In the case presently before the Court, Magistrate Judge Neureiter concluded that "to the extent that the [Litigation in Arapahoe County] is ongoing . . . , it is appropriate for the Court to abstain from exercising subject-matter jurisdiction under the *Younger* doctrine." (Doc. # 67 at 13.) As to the first prerequisite to *Younger* abstention, the Magistrate Judge that the Litigation in Arapahoe County is an ongoing state civil proceeding, assuming Plaintiff's appeal has not yet been resolved. (*Id.* at 12-13.) Second, Magistrate Judge Neureiter determined that the state courts (the Arapahoe County District Court and, presumably, the Colorado Court of Appeals) provide an appropriate forum to hear Plaintiff's claims against Defendant Bellco, especially given that Plaintiff alleges that Defendant Bellco knowingly "bore false witness" in the Litigation in Arapahoe County and "colluded with the Court to evade" liability. (*Id.*) Third, the Magistrate Judge was satisfied that the Litigation in Arapahoe County involve simportant state interests, "most notably Colorado's application of its statute of limitations." (*Id.* at 12.) Magistrate Judge Neureiter therefore concluded that this Court must abstain from exercising jurisdiction over Plaintiff's claims against Defendant Bellco pursuant to the *Younger* doctrine, so long as the Litigation in Arapahoe County is ongoing. (*Id.* at 13.) If the Litigation in Araphoe County is no longer active, Magistrate Judge Neureiter stated that the *Rooker-Feldman* doctrine, which this Court explained in Section III(A)(1), applies to bar Plaintiff's claims against Defendant Bellco. (*Id.*)

Plaintiff's Objection does not explicitly challenge the application of the *Younger* abstention doctrine, but Plaintiff does assert that "[s]imply, there is no state Bellco case." (Doc. # 77 at 11.) Reviewing the Objection liberally, the Court understands this to be an objection to Magistrate Judge Neureiter's finding that the Litigation in Arapahoe County constitutes an ongoing state civil proceeding for purposes of *Younger*. *See* (Doc. # 67 at 12-13.) Plaintiff contends that he removed the Litigation in Arapahoe County to this Court on January 24, 2018, citing his Notice of Removal (Doc. # 6). (Doc. # 77 at 10.) The Court disagrees; Plaintiff's attempt to remove the Litigation in Arapahoe County was fatally flawed, and the Litigation in Arapahoe County remains an ongoing state civil proceeding. As Defendant Bellco cogently explains in its Response to the Objection, *see* (Doc. # 78 at 5-7), Defendant Bellco, the plaintiff in the Litigation in Arapahoe County, "only brought a state law collections action that could not be removed to federal court." (*Id.* at 7.) The fact that Plaintiff may have asserted a defense or counterclaim under federal law did not give him the right to remove the litigation. "[A] case may not be removed to federal court solely because of a defense or counterclaim arising under federal law." *Topeka Housing Auth. v. Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005). Accordingly, the Court rejects Plaintiff's Objection to the extent it takes issue with application of the *Younger* abstention doctrine to his claims against Defendant Bellco.

2. <u>Dismissal is also appropriate because Defendant Bellco was not properly joined in this action</u>.

Magistrate Judge Neureiter also concluded that Defendant Bellco was improperly joined in this case, constituting an additional ground for dismissal of Plaintiff's claims against Defendant Bellco. (Doc. # 67 at 16-17.) He explained that joinder of Defendant Bellco was improper under Rule 19 because "[t]here is no indication from the pleadings that [Defendant] Bellco has an interest in [Plaintiff's] claims against [Defendant] Eagle County, or that its absence in this case would affect these claims in any way." (*Id.*) The Magistrate Judge then stated that Defendant Bellco also could not be joined as a permissive party under Rule 20(a)(2) because Plaintiff's "claims against [Defendant] Bellco are entirely unrelated to [his] claims against [Defendant] Eagle County." (*Id.* at 17.) He continued, "the only possible connection between the Defendants—that the writ of garnishment in [the Litigation in Eagle County] was served on [Plaintiff's] Bellco bank account—has nothing to do with [Plaintiff's] claim that [Defendant] Bellco acted improperly in its attempt to collect on an unpaid loan." (*Id.*)

The Court affirms Magistrate Judge Neureiter's determinations that joinder of Defendant Bellco was improper and that dismissal with prejudice of the claims alleged against it is appropriate. Though Plaintiff previously stated that the Litigation in Arapahoe County was "intertwined" with his claims against Defendant Eagle County in this case, *see* (Doc. # 6 at 1),

Plaintiff concedes in his Objection that the "separate litigation in Arapahoe County . . . has noting [sic] to do with this case, as the underly [sic] facts in that case have noting [sic] to do with this case," (Doc. # 77 at 18).

C. DISMISSAL OF CLAIMS WITH PREJUDICE

As the Court has already stated, Magistrate Judge Neureiter recommended that all of Plaintiff's claims be dismissed with prejudice. (Doc. # 67 at 19.) The Court affirms that dismissal of the action with prejudice is appropriate.

Plaintiff argues that dismissal of his Complaint with prejudice is inappropriate and accuses the Magistrate Judge of "weaponiz[ing] his personal opinion" and "woefully disregard[ing] this District's precedent and that of the 10th Circuit Court of Appeals" by making such a recommendation. (Doc. # 77 at 5.) He contends that because Magistrate Judge recommended dismissal of his Complaint for lack of jurisdiction, "dismissal must be without prejudice." (*Id.* at 6.) Though Plaintiff is correct that where a district court determines that it lacks jurisdiction, "dismissal of a claim must be without prejudice," *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1249 (10th Cir. 2004), Plaintiff fails to comprehend that Magistrate Judge Neureiter's recommended dismissal of the action with prejudice was premised on multiple grounds apart from the lack of the Court's jurisdiction. The Court has already affirmed, for example, Magistrate Judge Neureiter's conclusion that Plaintiff's claims against

Defendant Eagle County must be dismissed pursuant to Rule 12(b)(6) because Defendant Eagle County is not the proper defendant.

Though *pro se* parties should generally be given leave to amend, "it is appropriate to dismiss without allowing amendment '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.'" *Knight v. Mooring Capital Fund, LLC*, 749 F.3d 1180, 1190 (10th Cir. 2014) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010)). In this matter, the multiple alternative grounds for dismissal of the Complaint that Magistrate Judge Neureiter described and that this Court has affirmed are evidence that further amendment of Plaintiff's Complaint would be futile. The Court agrees dismissal with prejudice is the proper outcome of this case.

IV. CONCLUSION

For the foregoing reasons, the Court AFFIRMS AND ADOPTS the Recommendation of Magistrate Judge Neureiter (Doc. # 67) as the findings and conclusions of this Court. It is

FURTHER ORDERED that Defendant Eagle County's Motion to Dismiss (Doc. # 23) is GRANTED. It is

FURTHER ORDERED that Defendant Bellco's Motion to Dismiss (Doc. # 31) is GRANTED. It is

FURTHER ORDERED that this action is DISMISSED WITH PREJUDICE in its entirety. It is

FURTHER ORDERED Plaintiff's Motion for Summary Judgment against Defendant Bellco (Doc. # 47), his Motion to Exceed Page Limits (Doc. # 49), and the Magistrate Judge's Recommendation on those motions (Doc. # 68) are DENIED AS MOOT.

DATED: March 6, 2019

BY THE COURT:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00105-CMA-NRN

REED KIRK MCDONALD,

Plaintiff,

v.

EAGLE COUNTY, a quasimunicipal corporation and political subdivision of the State of Colorado, and BELLCO CREDIT UNION,

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANT EAGLE COUNTY, STATE OF COLORADO'S MOTION TO DISMISS (DKT. #23) and DEFENDANT BELLCO CREDIT UNION'S MOTION TO DISMISS (DKT. #31)

(Filed Dec. 12, 2018)

N. Reid Neureiter
United State Magistrate Judge

This case is before the Court pursuant to Orders (Dkt. ##26 & 32) issued by Judge Christine M. Arguello referring Defendants Eagle County, State of Colorado ("Eagle County") and Bellco Credit Union's ("Bellco") (collectively "Defendants") respective Motions to Dismiss. (Dkt. ##23 & 31.) The Court has carefully considered the motions, Plaintiff Reed Kirk McDonald's Responses (Dkt. ##33 & 38), and Defendants' Replies. (Docket ##35 & 42.) The Court has taken judicial

notice of the Court's file, considered the applicable Federal Rules of Civil Procedure and case law, and makes the following recommendation.

I. BACKGROUND

Mr. McDonald initiated this case by filing a Complaint and Jury Demand against Eagle County. (Dkt. #1.) On March 8, 2018, he filed an Amended Complaint in which he asserted additional claims against Bellco.[1] (Dkt. #14.) Mr. McDonald proceeds pro se and the nature of his claims are convoluted and difficult to ascertain with any certainty. However, construing the pleadings liberally, as it must, the Court gleans the following.

This action stems from two unrelated state court cases. First, Mr. McDonald alleges that in *McDonald v. Zions First Nat'l Bank, N.A.*, Eagle County District Court Case No. 2009-cv-604 (the "Eagle County Litigation"), Eagle County refused to allow him to "present his civil case" against Zions First National Bank, N.A., and successive Eagle County judges have "disobeyed the Court of Appeals Orders."[2] (Dkt. #14 ¶¶ 24-29.) Mr. McDonald's claims in the Eagle County Litigation

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[1] Mr. McDonald erroneously labels Bellco a "Third-Party Defendant," but Eagle County brings no claims against Bellco. Bellco is just a defendant.

[2] It appears that Mr. McDonald is referring to the fact that the Colorado Court of Appeals found that he was not properly served with orders from the Eagle County District Court. (Dkt. #1-1.) Contrary to Mr. McDonald's protestations, however, this was not a "judgment" against Eagle County.

were dismissed on summary judgment. (Dkt. #31-1.)[3] Judgment was entered against him on April 7, 2011 in the amount of $102,267.75. (Dkt. ##31-2 & 31-3.) A writ of garnishment was issued on Mr. McDonald's Bellco bank account. (*Id.*) All this somehow led to Mr. McDonald's arrest by the FBI.[4] (Dkt. #14 ¶ 36.)

Mr. McDonald asserts the following claims against Eagle County: (1) Violations of his Fifth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983 by denying him equal protection and due process within "its court proceedings"; (2) Violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983 for issuing a writ of garnishment and the issuance of an unlawful arrest warrant; (3) Violations of his Fifth and Fourteenth Amendment rights by denying equal protection and due process; and (4) Violation of 42 U.S.C. § 1985 for conspiring to violate his civil rights.

The second state court case relates to Mr. McDonald's claims against Bellco in *Bellco Credit Union v. McDonald*, Arapahoe District Case No. 17-cv-162 (the "Arapahoe County Litigation"). That case started as a county court collections action initiated after Mr. McDonald

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[3] As discussed below, the Court may consider matters outside the pleading when determining whether it has subject-matter jurisdiction over the case. *See Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002).

[4] The Court notes that Mr. McDonald's Amended Complaint refers to exhibits that are not attached to the pleading.

failed to pay on a car loan.[5] Mr. McDonald counterclaimed against Bellco under the state and federal fair debt collection laws and attempted to join Eagle County as a third-party defendant. (Dkt. #31-4.) The matter was removed to Arapahoe County District Court, and all claims save for Bellco's original collections claims were dismissed, including Mr. McDonald's counterclaims against Bellco and the third-party claims against Eagle County. (Dkt. #31-5.) Mr. McDonald improperly purported to remove the Arapahoe County Litigation to this Court on January 24, 2018 (Dkt. #6), and then argued in the state court case that the Arapahoe County District Court did not have jurisdiction. (Dkt. #31-6 at 1.) This strategy proved futile; on March 14, 2018, the Arapahoe County District Court entered summary judgment in favor of Bellco. (Dkt. #31-7.) Judgment in the amount of $14,664.09 was entered in favor of Bellco and against Mr. McDonald on March 14, 2018. (Dkt. #31-8 at 9.) Mr. McDonald has appealed. (*Id.* at 2.)

Mr. McDonald asserts the following claims against Bellco: (1) Violation of the Fourteenth Amendment; (2) Violation of the federal Fair Debt Collection Practices Act ("FDCPA"); (3) Violation of Colorado's FDCPA; and (4) Violation of his First Amendment rights.

Defendants now move to dismiss Mr. McDonald's claims pursuant to Fed. R. Civ. P. 12(b)(1) and (12)(b)(6).

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[5] Mr. McDonald denies that the loan was for an automobile; instead, he alleges that he borrowed money from Bellco to pay a private attorney. (Dkt. #14 ¶ 52.)

II. LEGAL STANDARDS

a. Pro Se Plaintiff

Mr. McDonald is proceeding pro se. The Court, therefore, "review[s] his pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). A plaintiff's pro se status does not entitle him to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

b. Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure Rule 12(b)(1) empowers a court to dismiss a complaint for lack of

subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Id.* The dismissal is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006)

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the Court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other

documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

c. Failure to State a Claim Upon Which Relief Can Be Granted

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1198. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations

in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679–81. Second, the court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

However, the court need not accept conclusory allegations without supporting factual averments. *Southern Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

In assessing a motion to dismiss under Rule 12(b)(6), the usual rule is that a court should consider no evidence beyond the pleadings. *See Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1216 (10th Cir.2007). "If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded

by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, "the district 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." *Alvarado*, 493 F.3d at 1216 (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)); *see also GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997) ("[i]f a document is referenced in and central to a complaint, a court need not convert the motion but may consider that document on a motion to dismiss."). In addition, "facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment." *Tal v. Hogan*, 453 F.3d 1244, 1264 n. 24 (10th Cir.2006).

III. ANALYSIS

a. Claims against Eagle County

Eagle County argues that the Court lacks subject-matter jurisdiction over Mr. McDonald's claims under the *Rooker-Feldman* doctrine, and that Mr. McDonald's Amended Complaint fails to state a claim upon which relief can be granted. The Court agrees.

i. Rooker-Feldman Doctrine

Under 28 U.S.C. § 1257(a), "federal review of state court judgments can be obtained only in the United States Supreme Court." *Kiowa Indian Tribe of Okla. v.*

Hoover, 150 F.3d 1163, 1169 (10th Cir. 1998). The *Rooker–Feldman* doctrine stems from two United States Supreme Court cases which interpret this limitation on the review of state court judgments. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). "The *Rooker–Feldman* doctrine precludes '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.'" *Tal*, 453 F.3d at 1255–56 (10th Cir. 2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). Accordingly, the doctrine forecloses "appellate review of [a] 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." *Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (1994). The doctrine "applies only to suits filed after state proceedings are final." *Guttman v. G.T.S. Khalsa*, 446 F.3d 1027, 1173 (10th Cir. 2006). Challenges brought pursuant to the *Rooker-Feldman* doctrine are challenges to a federal district court's subject matter jurisdiction. *Crutchfield v. Countrywide Home Loans*, 389 F.3d 1144, 1147 (10th Cir. 2004).

The *Rooker–Feldman* doctrine is not limited to the preclusion of claims actually litigated and decided on the merits by the state court. It also precludes claims which are inextricably intertwined with the state court judgment. *Tal*, 453 F.3d at 1256. "A claim is inextricably intertwined if 'the state-court judgment caused,

actually and proximately, the injury for which the federal-court plaintiff seeks redress.'" *Id.* (quoting *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 478 (10th Cir.2002)). "[I]f a favorable resolution of a claim would upset a [state court] judgment, the claim is [barred under the *Rooker–Feldman* doctrine] if it is 'inextricably intertwined' with the judgment, even if the underlying judgment issue was not raised or addressed in the state court that handed down the judgment." *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1140 (10th Cir. 2006). However, if the plaintiff presents an independent claim, even if it denies a legal conclusion that a state court has reached, the federal district court has jurisdiction. *Id.* at 1143 (citing *Exxon*, 544 U.S. at 1527).

Here, Mr. McDonald alleges that Eagle County, apparently via the Eagle County District Court, has failed to obey the orders and directives of the Colorado Court of Appeals and refuses to "conclude" the Eagle County Litigation. In effect, Mr. McDonald is asking the Court to reverse the state court's dismissal of his claims on summary judgment, to vacate the entry of judgment against Mr. McDonald, and to somehow undo the garnishment proceedings authorized under Colorado law. Doing so would necessarily upset the state court judgment. As Judge Volz recognized when dismissing Mr. McDonald's claims against Eagle County in the Arapahoe County Litigation, "This Court cannot review cases from another jurisdiction, nor can it review the actions of judicial officers from the 5th Judicial District. Such authority is vested in the State's

appellate courts and the federal courts, not this Court." (Dkt. #31-5 at 4.) The *Rooker–Feldman* doctrine similarly precludes this type of federal review of state court decisions.

ii. Failure to State a Claim

Even if the *Rooker-Feldman* doctrine did not bar Mr. McDonald's claims against Eagle County, they still fail as a matter of law. As Eagle County notes, Mr. McDonald's constitutional claims for relief are really directed at the Eagle County District Court. In his Amended Complaint, Mr. McDonald makes it clear that he objects to the actions taken by the Eagle County District Court in (1) failing to obey orders of the Colorado Court of Appeals; (2) issuing an arrest warrant; (3) authorizing the garnishment of his bank account; (4) refusing to allow Mr. McDonald to present his case against Zions First National Bank; and (5) conspiring with the bank to "thwart" him from prosecuting his civil action." (Dkt. #14 ¶¶ 86-125.) However, none of these allegations pertain to actions allegedly taken by Eagle County. Eagle County and the Eagle County District Court are not synonymous. In Colorado, counties are political subdivisions of the State of Colorado that exist to administer state programs on a local level. As an administrative branch of government, counties do not have a court system of their own. Instead, the judicial power of the state is "vested in a supreme court, district courts, . . . county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court[.]" Colo. Const. art. VI, § 1.

The state judicial system represents a separate branch of government that operates independent of any Colorado county.

Thus, the actions of district court judges cannot, by definition, give rise to a municipal liability claim against a county government because district court judges are state, not county, employees. In other words, Eagle County is not the proper defendant for claims against the Colorado Judicial Branch.

Moreover, Mr. McDonald's Amended Complaint is devoid of any allegations that Eagle County had a policy or custom which led to any of the alleged constitutional violations. Therefore his 42 U.S.C. § 1983 claims should be dismissed. *See Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004) (to state a claim for municipal liability, a party must allege sufficient facts to demonstrate it is plausible that (1) the municipal employee committed a constitutional violation; and (2) a municipal policy or custom was the moving force behind the constitutional deprivation). Nor has Mr. McDonald sufficiently alleged that Eagle County engaged in a civil rights conspiracy under 42 U.S.C. § 1985. Indeed, he does not even specify under which part of § 1985 his claim arises.

Accordingly, Mr. McDonald fails to state any claims against Eagle County upon which relief can be granted.

b. Claims against Bellco

Bellco argues that the Amended Complaint should dismissed (1) under the *Younger* abstention doctrine; (2) based on claim and issue preclusion; (3) for failing to state a claim; and (4) for improper joinder. The Court will address each in turn.

***i. Younger* Abstention**

First, Bellco claims that *Younger v. Harris*, 401 U.S. 37 (1971), requires the Court to abstain from interfering with pending state court proceedings. The *Younger* doctrine applies when (1) there is an ongoing civil proceeding, (2) there is an adequate state forum to raise the plaintiff's claims, and (3) the state proceedings involve important state interests. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). Citing the three *Younger* factors, Bellco argues that abstention is appropriate here because first, there is an ongoing state civil proceeding, namely, the Arapahoe County Litigation. Second, Bellco maintains that nearly all of Mr. McDonald's claims in the case at bar relate to the Arapahoe County Litigation, and that if the Court granted Mr. McDonald's requested relief, it would necessarily have to overturn the state court's granting of summary judgment in Bellco's favor. Finally, Bellco claims that the Arapahoe County Litigation involves important state interests, most notably Colorado's application of its statute of limitations.

In his Amended Complaint, Mr. McDonald alleges that Bellco: "knowingly concealed or knowingly and

improperly bore false witness" in the Arapahoe County Litigation; failed to obey Colorado Court of Appeals orders; "refused and continues refusing to dismiss" the Arapahoe County Litigation; "redacted their own voluntary admission of wrongdoing" in the state court; conspired to violate the applicable statute of limitations; "colluded with the Court to evade" liability under the state and federal FDCPA; and "invaded [his] right to privacy by trespassing his gated property to illegally search and seize Plaintiff's personal property."[6] (Dkt. #14 ¶¶ 126-61.)

The Court finds that Mr. McDonald's allegations and claims for relief against Bellco, whether they are brought under the Constitution or state and federal law, are essentially collateral attacks on the determinations and rulings made by the state court in the Arapahoe County Litigation. To grant the relief Mr. McDonald seeks, the Court would have to overrule the state court's determination that Mr. McDonald was indebted to Bellco in the amount of $14,664.09, and that the statute of limitations did not bar Bellco's collections action. (Dkt. #39-7.) Therefore, to the extent that the Arapahoe County Litigation is ongoing (the Court is unaware of the current status of Mr. McDonald's appeal), it is appropriate for the Court to abstain from exercising subject-matter jurisdiction under the *Younger* doctrine. If the Arapahoe County Litigation is

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[6] Reviewing Mr. McDonald's Response, this seemingly refers to the attempted repossession of an automobile. (Dkt. #38 at 18.)

no longer active, then the *Rooker-Feldman* doctrine applies to bar Mr. McDonald's claims.

ii. Issue and Claim Preclusion

Next, Bellco argues that Mr. McDonald's claims are barred by the doctrines of claim preclusion and issue preclusion.

A party asserting the defense of issue preclusion must establish four elements:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Moss v. Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009).

Claim preclusion, on the other hand, requires a judgment on the merits in an earlier action, identity of the parties in the two suits, and identity of the cause of action in both suits. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999). To determine whether the claims in two suits are identical, it must be determined whether the claims arise out of the same transaction, or a series of connected transactions. *Id.* at 1227. "[A] new action will be permitted only where it raises *new and independent claims*, not part of the previous transaction, based on the new facts." *Hatch v. Boulder Town*

Council, 471 F.3d 1142, 1150 (10th Cir. 2006) (emphasis in original).

Turning first to issue preclusion, Bellco argues that the statute of limitations question Mr. McDonald refers to throughout his Amended Complaint was irrefutably resolved in the Arapahoe County Litigation. There, the state court held that Bellco filed its collections action within the six-year period provided by Colo. Rev. Stat. § 13-80-103.5. (Dkt. #31-5 at 5-6.) Mr. McDonald had an opportunity to litigate this issue and did, in fact, litigate it. (*Id.*) Thus, this issue has been decided for issue preclusion purposes. To the extent that Mr. McDonald's claims revolve around the "conspiracy to prosecute a civil action out-of-time in violation of Colorado's statute of limitations," which seems applicable to all but his First Amendment claim (*see* Dkt. # 14 ¶¶ 132, 141, & 150), those claims must be deemed barred.

Bellco also argues that Mr. McDonald's state and federal FDCPA claims are subject to dismissal under the doctrine of claim preclusion. Bellco accurately notes that Mr. McDonald brought FDCPA claims against it in the Arapahoe County Litigation. (Dkt. #31-4 at 22-24.) Those claims were dismissed. (Dkt. #31-5 at 7.) Accordingly, Mr. McDonald's FDCPA claims are barred and must be dismissed.

iii. Failure to State a Claim

Bellco argues that Mr. McDonald has failed to state claims under Rule 12(b)(6) for several reasons. The Court concurs.

First, to state a claim 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." *West v. Atkins*, 487 U.S. 42, 48 (U.S. 1988). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Id.* (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Here, Mr. McDonald has not alleged that Bellco was a state actor, and "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). Mr. McDonald cannot maintain a § 1983 claim against Bellco.

Mr. McDonald also brings a First Amendment right-to-privacy claim against Bellco for "trespassing his gated property to illegally search and seize his property." (Dkt. #14 ¶ 155.) However, the First Amendment provides that "*state actors* 'shall make no law . . . abridging the freedom of speech.'" *Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999) (emphasis added) (quoting U.S. Const. amend. I). Thus,

the First Amendment only limits state—as opposed to private—action. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1276 (10th Cir. 2005). Bellco is not a state actor, and its initiation of a collections lawsuit or replevin action against Mr. McDonald is not state action. Accordingly, Mr. McDonald's First Amendment claim must be dismissed.

Next, Bellco argues that Mr. McDonald's FDCPA claims fail as a matter of law because Mr. McDonald does not allege that Bellco is a "debt collector" within the meaning of the applicable statutes. Both the state and federal FDCPA statutes exclude from the term "debt collector" those creditors who collect debts that they originate. See 15 U.S.C. § 1692a(6)(A); Colo. Rev. Stat. §§ 5-16-103(9). Here, although he disputes the purpose for the loan, Mr. McDonald concedes that he took out a loan from Bellco and that Bellco attempted to collect on the debt. (Dkt. #14 ¶¶ 51-52, 56-57.) Creditors cannot be liable for collecting debts owed to them. *See Rader v. Citibank (South Dakota), N.A.*, 2007 WL 3119543, at *8 (D. Colo. Oct. 18, 2007) ("[U]nder the FDCPA, creditors cannot be held liable for collecting on debts that originated with them."); *Commercial Serv. of Perry, Inc. v. Fitzgerald*, 856 P.2d 58, 62 (Colo. App. 1993) (recognizing that those who originally extend credit are not subject to the Colorado FDCPA). Accordingly, Mr. McDonald's FDCPA claims fail to state a cognizable claim for relief.

iv. Improper Joinder

Finally, Bellco argues that it cannot properly be joined in this action under the Federal Rules of Civil Procedure. Rule 19 governs the required joinder of parties and defines a "required party" as either one in whose absence "the court cannot accord complete relief among existing parties," or one "who claims an interest relating to the subject of the action. . . ." Fed. R. Civ. P 19(a)(1)(A)-(B). There is no indication from the pleadings that Bellco has an interest in Mr. McDonald's claims against Eagle County, or that its absence in this case would affect these claims in any way.

Nevertheless, Bellco could be joined as a permissive party under Rule 20 if "(A) any right to relief is asserted against [it] jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). Mr. McDonald's claims against Bellco are entirely unrelated to its claims against Eagle County. As Bellco points out, the only possible connection between the Defendants—that the writ of garnishment in Eagle County Litigation was served on Mr. McDonald's Bellco bank account—has nothing to do with Mr. McDonald's claim that Bellco acted improperly in its attempt to collect on an unpaid loan. This provides a separate, alternative grounds for dismissal.

c. Attorneys Fees and Costs

Both Defendants request an award of attorney fees and costs against Mr. McDonald.

A prevailing party in a civil rights suit may recover attorney fees. 42 U.S.C. § 1988(b). "[A] prevailing defendant in a civil rights action may recover attorney fees only if the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Mitchell v. City of Moore*, 218 F.3d 1190, 1203 (10th Cir. 2000) (quotations omitted). "Although this is a demanding standard, and it is rare for attorney fees to be assessed against a pro se plaintiff in a § 1983 action, a district court has discretion to do so." *Olsen v. Aebersold*, 149 F. App'x 750, 752 (10th Cir. 2005) (citations omitted). Attorney fees are not available against a pro se litigant unless the action is "meritless in the sense that it is groundless or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14, (1980).

Furthermore, on a finding by the court that a federal FDCPA action "was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C.A. § 1692k(a)(3). In Colorado FDCPA cases, an unsuccessful plaintiff "shall be liable to each defendant in an amount equal to that defendant's cost incurred in defending the action, together with reasonable attorney fees as may be determined by the court." Colo. Rev. Stat. § 5-16-113.

The Court finds that circumstances that would justify an award of attorney fees are present in this

case. Mr. McDonald's claims were brought in federal court after already being litigated in two separate state court actions.[7] There is no plausible basis for his claims. They appear to have been brought for no legitimate purpose other than harassment have no reasonable prospect of success. The Court's conclusion is bolstered by the fact that this is not Mr. McDonald's first unsuccessful attempt to use the federal court to review state court decisions. *See, e.g., McDonald v. Arapahoe Cty.*, No. 18-1070, 2018 WL 6242214, at *3 (10th Cir. Nov. 28, 2018) (unpublished) (affirming district court's dismissal of Mr. McDonald's collateral attack on state eviction proceeding as being barred by *Rooker-Feldman* doctrine); *McDonald v. Colorado's 5th Judicial Dist.*, 646 F. App'x 697, 700 (10th Cir. 2016) (unpublished) (under *Younger*, the district court properly abstained and dismissed Mr. McDonald's federal claims arising from two Colorado state court actions involving real property). Therefore, the imposition of costs and fees is appropriate. *See Olsen*, 149 F. App'x at 753 (affirming imposition of attorney fees on a pro se civil rights plaintiffs where the plaintiffs had filed several federal lawsuits which involved jurisdictional challenges and had failed to address previously identified pleading deficiencies).

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[7] The Court notes that these claims were *fully* litigated. The docket sheet for the Eagle County Litigation runs 18 pages, while that of the Arapahoe County Litigation is eight pages long. (Dkt. ## 31-3 & 31-8.)

IV. RECOMMENDATION

WHEREFORE, for the foregoing reasons, it is hereby **RECOMMENDED** that

- Defendants Eagle County, State of Colorado and Bellco Credit Union's Motions to Dismiss (Dkt. ##23 & 31) be **GRANTED**; that
- Mr. McDonald's Amended Complaint (Dkt. #14) be **DISMISSED WITH PREJUDICE**; and that
- Defendants be awarded their reasonable costs and attorney fees related to defending Mr. McDonald's Amended Complaint.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1210

(10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

BY THE COURT

Date: December 12, 2018
Denver, Colorado

/s/ Reid Neureiter
N. Reid Neureiter
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

REED KIRK MCDONALD, Plaintiff - Appellant, v. EAGLE COUNTY, a quasimunicipal corporation and political subdivision of the State of Colorado, et al., Defendants - Appellees.	No. 19-1101 (D.C. No. 1:18-CV-00105-CMA-NRN) (D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

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

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202	**COPIES MAILED TO COUNSEL OF RECORD** ~~Tr. Ct. Judge~~ ~~Tr. Ct. Clerk~~ AND PROSC ON 10-5-11 BY SH
Eagle County 2009CV604	
Plaintiff-Appellant: Kirk McDonald, v. **Defendant-Appellee:** Zion First National Bank. N A.	Court of Appeals Case Number: 2011CA1537
ORDER OF COURT	

TO: ALL PARTIES:

Upon consideration of the motion for extension of time to file a notice of appeal out of time, the Court notes that appellant has not accompanied that motion with the notice of appeal. Appellant shall file the notice of appeal with the attached orders of the district court before the Court rules on the motion.

The Court ACCEPTS the response to the motion filed by appellee. However, the response raises two jurisdictional questions to which the Court ORDERS both parties to respond.

First, appellee shall clarify if it served a copy of the March 18, 2011, order on appellant, and provide a copy of the certificate of service. Assuming without deciding

that the March 18, 2011, order is the final order in the case, any notice of appeal would be due 45 days from the date the order was served on appellant. C.R.C.P. 58(a); see also Padilla v. D.E. Frey & Co., Inc., 939 P.2d 475, 476 (Colo. App. 1997).

Second, the March 18, 2011, order is a voluntary dismissal of the cross-claims without prejudice. Therefore, it appears that regardless of service of the order on appellant, it was not a complete resolution of the action that would make the March 3, 2011, order appealable absent certification under C.R.C.P. 54(b). Dismissal of a claim without prejudice does not constitute a final judgment for purposes of appeal because the factual and legal issues underlying the dispute have not been resolved. C.R.C.P. 41(a)(2); District 50 Metro. Recreation Dist. v. Burnside, 157 Colo. 183, 186-87, 401 P.2d 833, 835 (1965); Brody v. Bock, 897 P.2d 769, 777 (Colo. 1995). Moreover, allowing the appeal of claims dismissed with prejudice while other claims have been dismissed without prejudice may permit an appeal that is an end-run around the final judgment rule since the claims voluntarily dismissed without prejudice may be renewed. See e.g. Emmitt v. Dickey, 188 F. App'x. 681, 683 (10th Cir. 2006); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005).

IT IS THEREFORE ORDERED that both parties shall show cause, if any there is, in writing and within 14 days from the date of this Order, why the motion for extension of time to file an appeal should not be

dismissed because there is not yet a final, appealable order.

BY THE COURT

Roy, J.
Webb, J.
Fox, J.

pb/3j

Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202	**COPIES MAILED TO COUNSEL OF RECORD** ~~Tr. Ct. Judge~~ ~~Tr. Ct. Clerk~~
Eagle County 2009CV604	AND PROSC
Plaintiff-Appellant: Kirk McDonald, v. **Defendant-Appellee:** Zion First National Bank. N A.	ON 11-2-11 BY SH Court of Appeals Case Number: 2011CA1537
ORDER OF COURT	

Upon consideration of appellant's response to the court's Order to Show Cause and the reply filed by appellee, the court determines that because the cross-claims were dismissed without prejudice, an appealable order has not entered.

IT IS THEREFORE ORDERED that appellant has 30 [days] to provide this Court with an order from the district court granting certification pursuant to C.R.C.P. 54(b), or the appeal shall be dismissed without prejudice.

The Court FURTHER NOTES that it does not appear that the pro se plaintiff was ever properly served with the Orders of the district court, and that if the district court requires that counsel for the opposing

party to provide copies to a pro se party, a copy of the certificate of service must be filed in the district court. If this Court had found that a final and appealable order had been entered, it would have found that the time for filing an appeal had not started to run because there is no evidence that plaintiff ever was served a copy of the district court's order. *See* C.R.C.P. 58(a); *Padilla v. D.E. Frey & Co.*, 939 P.2d 475 (Colo. App.1997)

BY THE COURT:

Roman, J.
Furman, J.
J.Jones, J.

pb/3j

COLORADO COURT OF APPEALS Court Address: 2 East 14th Ave. Denver, Colorado 80203	
Trial Court District Court, Eagle County Case # 2009CV604 The Honorable Judge Robert Thomas Moorhead	**^COURT USE ONLY^**
R. KIRK MCDONALD Plaintiff – Appellant: v. ZIONS FIRST NATIONAL BANK Defendant – Appellee	Appellate Case# 2012CA 2624 Appellate Case# 2012CA 295 Appellate Case# 2011CA 1537
Attorneys for Plaintiff-Appellant Kirk McDonald/Pro Se 6214 S. Datura St. Littleton, CO 80120 720-272-8598, kirkmcdonald56@gmail.com *Attorney for Defendant – Appellee* Danile R. Delaney Bloom Murr Accomazzo & Siler P.C. 410 17th Street, Suite 2400	~~GRANTED~~ DENIED 1-14, 2013 This court does not have the authority to grant the requested relief. Any further pleadings filed without a certificate of service will be summarily stricken. CAR 25 lb/pa

Denver, Colorado 80202 303-534-2277, ddelaney@bmalaw.com	

EMERGENCY MOTION FOR CONTEMPT, RE:

R. KRIK MC DONALD

v.

HONORABLE ROBERT THOMAS MOORHEAD
THE STATE OF COLORADO
EAGLE COUNTIES CLERK'S OFFICE
ZIONS FIRST NATIONAL BANK

RID:D0032017CV000162-000154

Print Minute Orders 1/25/18 10:32 AM

Status: District Court, Arapahoe County

Case #: 2017 CV 000162 Div/Room: 202 Type: Money

BELLCO CREDIT UNION, vs. MCDONALD, R KIRK

FILE DATE EVENT/FILING/PROCEEDING

1/25/2018 Minute Order (print)

DATE FILED: January 25,2018

JUDGE: EBV CLERK: REPORTER:

STATUS CONFERENCE

JUDGE: VOLZ CLERK: DJB DIV. 202 FTR: 10:02 AM

CSL DAVID BAUER AND RYAN STEVENS APPEAR FOR PLAINTIFF

DEFENDANT R. KIRK MCDONALD DOES NOT APPEAR

THE COURT RECEIVED TODAY VIA EMAIL DEF'S PETITION FOR REMOVAL TO FEDERAL COURT AND REQUEST TO VACATE TODAY'S HEARING. THE DOCUMENTS HAVE NOT BEEN FILED WITH THE CLERK'S OFFICE. THE COURT DID NOT RESPOND TO THE EMAILS. THE COURT WILL NOT STAY THIS CASE BASED ON 348 P.3D 957 (2015).

THE NOTICE OF REMOVAL FILED BY DEF USES THIS CASE NUMBER (17CV162), HOWEVER THE CASE IS CAPTIONED "PLAINTIFF R. KIRK MCDONALD V EAGLE COUNTY" AND GOES ON

TO REFERENCE THIS CASE IN THE BODY OF THE PLEADING.

DEF'S REMOVAL PETITION IS UNTIMELY PURSUANT TO 28 USC 1446 AND 28 USC 1441. THE COURT FINDS THAT THERE IS NO COLORABLE BASIS FOR REMOVAL TO FEDERAL COURT. DEF'S REQUEST FOR EXTENSION OF TIME TO RESPOND TO BELLCO'S MOTION FOR SUMMARY JUDGMENT DID NOT ASK FOR A SPECIFIC AMOUNT OF TIME. THE COURT WAS PREPARED TO HEAR DEF'S ARGUMENT AT TODAY'S CONFERENCE.

THE COURT GRANTS DEF'S REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION FOR SUMMARY JUDGMENT FOR 21 DAYS FROM TODAY. DEF MUST FILE HIS RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT BY 02/15/2018.

PLAINTIFF'S REPLY WILL BE DUE 03/01/2018.

DEF HAS REQUESTED THE DEPOSITION OF BELLCO (PRESUMABLY 30(B)(6) DEPOSITION). DEF IS ORDERED TO PROVIDE PLAINTIFF'S WITH THE PROPOSED AREAS OF INQUIRY TO WITHIN 7 DAYS, OR BY 02/01/2018.

THE COURT ORDERS THAT AREAS OF INQUIRY SHALL ONLY RELATE TO THE DISPUTE IN THIS CASE, WHICH IS THE DEBT THAT BELLCO ALLEGES MR. MCDONALD OWES, AND MATTERS RELATED TO THE AMOUNT OF DEBT, DATE OF DEBT, PAYMENTS ON THE DEBT, OR ANY

COMMUNICATION FROM BELLCO RELATED TO INTEREST AND/OR EXTENDING PAYMENTS. THE COURT IS SPECIFICALLY PRECLUDING DEF FROM CONDUCTING A DEPOSITION INTO ANYTHING RELATED TO EAGLE COUNTY, OTHER LAWSUITS IN WHICH THIS DEBT IS NOT AN ISSUE, OR ANY PARTIES OTHER THAN BELLCO. IF DEF DOES ISSUE A 30(B)(6) DEPOSITION AND LAYS OUT CATEGORIES THAT DO NOT FIT INTO THESE REQUIREMENTS, BELLCO MAY SUBMIT A REQUEST FOR PROTECTION OR DECLINE TO ANSWER THE QUESTIONS AT THE DEPOSITION. IF DEF DOES NOT ISSUE PROPOSED AREAS OF INQUIRY TO BELLCO W/IN 7 DAYS OF TODAY (BY 02/01/2018), THE COURT WILL DECLINE TO AUTHROIZE DEF TO SCHEDULE SUCH A DEPOSITION.

MEDIATION: THE COURT IS NOT CERTAIN MEDIATION WILL BE HELPFUL UNLESS DEF IS INTERESTED IN PARTICIPATING. THE COURT WAIVES THE REQUIREMENT OF MEDIATION, BUT WILL NOT PRECLUDE MEDIATION. IF THE PARTIES AGREE TO MEDIATION, IT MUST BE COMPLETED BY 03/02/2018.

DUE TO THE MOTION FOR SUMMARY JUDGMENT BRIEFING SCHEDULE, PRETRIAL READINESS CONFERENCE IS RESET TO 03/06/2018 AT 1:30 PM. TRIAL SET ON 04/02/2018 WILL REMAIN AS CURRENTLY SET.

TRIAL MANAGEMENT ORDER IS DUE 03/26/2018.

PLAINTIFF'S COUNSEL WILL DRAFT THE TRIAL MANAGEMENT ORDER AND SEND TO DEF BY EMAIL BY 03/21/2018.

IF NO RESPONSE FROM DEF WITH HIS ADDITIONS/COMMENTS BY 5PM ON 03/23/2018, PLAINTIFF MAY SUBMIT THE TRIAL MANAGEMENT ORDER ON 03/26/2018 WITHOUT DEF'S INPUT. THE COURT ORDERS THAT COMMUNICATION BETWEEN PLAINTIFF AND DEFENDANT SHOULD BE IN WRITING ONLY (EMAIL, LETTER OR TEXT MESSAGE).

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 21, 2020
Arapahoe County 2017CV162	
Plaintiff-Appellee: Bello Credit Union, **v.** **Defendant-Appellant:** R Kirk McDonald	Court of Appeals Case Number: 2020CA1 175
ORDER OF THE COURT	

To: The Parties and the District Court

Upon consideration of the response to the order to show cause, the Court ORDERS that the order to show cause is made absolute.

IT IS THEREFORE ORDERED that the appeal is DISMISSED without prejudice for lack of a final, appealable judgment.

BY THE COURT
Dailey, J.
Navarro, J.
Brown, J.

ARAPAHOE DISTRICT COURT Court Address: 7325 South Potomac Street Centennial, Colorado 80112	Filed: JAN 24 2018 Clerk of the Centennial Court Arapahoe County, Colorado **^COURT USE ONLY^** 2017CV162
Bellco Credit Union Plaintiff/ Third Party Defendant, v. R. KIRK MCDONALD, Defendant/ Third Party Plaintiff. --- *Counsel for Defendant* R. Kirk McDonald *private attorney general - pro se* 5856 S. Lowell Blvd. Suite 32-163 Littleton, Colorado 80123 kirkmcdonald56@gmail.com	
DEFENDANT/THIRD PARTY PLAINTIFF'S NOTICE FOR REMOVAL OF CASE TO THE UNTIED DISTRICT COURT FOR THE DISTRICT OF COLORADO	

COMES NOW, Third-Party Plaintiff/Defendant Reed Kirk McDonald, hereafter (Defendant) provides notice to this Court for removal of Arapahoe County Case No. 2017cv162 to the United States District Court for the District of Colorado as of January 24, 2018.

Provided for the Court is a complimentary and service of the "Notice of Removal" to the federal courts filed in this Court January 24, 2018 and in the District of Colorado on January 24, 2018.

Kirk Mcdonald <kirkmcdonald56@gmail.com>
Jun 30, 2020, 8:37 AM

to Michael

Mr. Buroniconti,

[ICON]

Michael Buoniconti <MBuoniconti@da18.state.co.us> Jul 1, 2020, 11:54 AM

to me

Hello Mr. McDonald

Sorry for the delayed response. I spoke with our Chief Managing DDA about this case. I am following up with the Arapahoe County Clerk of the Courts Office about the standard operating procedure when accepting a motion. Frankly, I had several safety related issues come up and have not contacted their office to date. I will follow up with them early next week.

During the conversation with Chief, there were several issues I addressed concerning criminal charges associated with Judge Voltz specifically. One main issue is Judge Voltz actions are not considered testimony, nor is a Judge's statements sworn testimony related to the perjury statute in CRS.

That being said, our Office is only looking at this case for criminal actions, not administrative actions that would be addressed by the Colorado Commission on Judicial Discipline.

I am looking to finish the criminal aspect of this investigation with the Arapahoe Clerk of the Courts Office

and will complete a report of my findings. I will give you a call and discuss my findings prior to finalizing my report.
