

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

WESLEY C. SMITH,)
Plaintiff,) Case No: 7:07-cv-00117
v.)
CHERI SMITH, IGOR BAKHIR, et al.)
Defendants.)

BRIEF IN SUPPORT OF
DEFENDANTS CHERI SMITH AND IGOR BAKHIR'S JOINT MOTION TO DISMISS

COMES NOW Defendants Cheri Smith ("Ms. Smith") and Igor Bakhir ("Mr. Bakhir") by counsel, and as their Brief in Support states as follows:

ARGUMENT

This Honorable Court should dismiss Mr. Wesley Smith's ("Mr. Smith") eight count Verified Complaint ("Complaint") for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6), as discussed herein.

I. BACKGROUND

Mr. Smith is a *pro se* plaintiff. *See* Compl. at 13 (no counsel and no bar number). Mr. Smith alleges that based upon his "divorce and custody case," *id.* ¶ 7, at 2, all Defendants here have and continue to violate various constitutional, statutory and or common law rights of his, under various federal and state law theories, *id.* ¶¶ 1-7, at 1-2. On Ms. Smith and Mr. Bakhir's Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), this Court

reviews Mr. Smith's allegations as follows.

First, although the district court should construe a *pro se* plaintiff's complaint liberally, the district court should neither "conjure up questions never squarely presented to it," nor "explore all potential claims of a *pro se* plaintiff." *Beaudette v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986). For doing so "transform[s] the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Id.* (citing *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), *cert. denied*, 439 U.S. 970).

Second, the district court reviews the jurisdictional facts alleged in the complaint by assuming their truth and construing them in the light most favorable to the plaintiff under both a motion to dismiss under Rule 12(b)(1) and (6). *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992) (citation omitted) (setting forth 12(b)(6) standard); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (citation omitted) (same; likening the first of "two critically different ways" of making a 12(b)(1) review to that of making a 12(b)(6) review).

Third, the district court may disregard the legal conclusions in the complaint. *Schatz*, 943 F.2d at 489.

In these premises, the facts of this case as regards the claims against Ms. Smith, Mr. Bakhir or both are as follows: Mr. Smith is a citizen of Virginia. Compl. ¶ 14, at 4. Ms. Smith and Mr. Bakhir are likewise citizens of Virginia. *Id.* ¶ 15, at 4. All Defendants in this case have acted against Mr. Smith individually and in conspiracy, in an intentional manner, from the outset of Mr. Smith's "divorce and custody case" through its conclusion. *Id.* ¶¶ 1-7, at 1-2. Now, based upon the orders that have issued through the various divorce- and custody-related proceedings involving Mr. Smith, defendants' behavior is continuing in nature. *Id.* All

mentioned proceedings subject to the instant federal action were conducted in Virginia state courts, including those of Pulaski County and Prince William County. *See id.* at 1; *see also id.* ¶¶ 16-20, at 4. The mentioned behavior of Ms. Smith and Mr. Bakhir is as follows.

Under Count 1, Ms. Smith, Mr. Bakhir and the other Defendants "caused court orders issued prohibiting [Mr. Smith] . . . from posting information to his website exposing the illegal misconduct of judges and attorneys . . . [who] didn't want [Mr. Smith] telling anyone about it." *Id.* ¶¶ 26, 28, at 6.

Under Count 2, Ms. Smith, Mr. Bakhir and the other Defendants opposed or denied Mr. Smith's "multiple motions demanding a Jury Trial . . ." *Id.* ¶30, at 6.

Under Counts 3 and 4, Ms. Smith, Mr. Bakhir and the other Defendants used the proceedings to prevent Mr. Smith from "seeing his son for 18 months as punishment" to Mr. Smith. *Id.* ¶¶ 33, 40, at 7, 8. All Defendants did this, even though they "agreed [Mr. Smith] was not a threat to his son, could properly care for his son, and that his son desired to spend time with him, and that in such a situation both the policy, statutes, and case law of Virginia [call for] frequent visitation as deemed in the bests interest of the child." *Id.* ¶40, at 8.

Under Count 5, Defendants "sentenced [Mr. Smith] to indefinitely make monthly payments to Cheri Smith as part of Federal and State Welfare programs and is subject to jail, seizure of assets, loss of drivers license, and other coercive actions, most of which without any court hearing first – that is a presumption of guilty." *Id.* ¶ 42, 9.

Under Count 6, Ms. Smith, Mr. Bakhir and the other Defendants, *id.* ¶ 45, at 9, acted against Mr. Smith by "proceeding with the case" in a manner Mr. Smith alleges is contrary to federal and state statutory law. *Id.* ¶ 46, at 9-10.¹

¹ In Mr. Smith's Count 6, the specific instances of alleged violation of state and federal law

Under Count 7, Mr. Bakhir allegedly perjured himself "in his deposition," "refused to comply with subpoenas for documents, refused to comply with witness subpoenas," and "worked together [with the other Defendants]" to allegedly obstruct justice. *Id.* ¶¶ 47-48, at 10.²

Lastly, Count 8 presents no allegation of conduct on the part of Ms. Smith or Mr. Bakhir; rather it presents facts concerning child custody statistics in Virginia and alleges the unconstitutionality of Virginia domestic relations laws. *See id.* ¶¶ 50-54, at 11-12. However, Mr. Smith premises aspects of this prayer for relief against Ms. Smith and Mr. Bakhir on these grounds. *E.g., id.* ¶ 3, at 12.

Other allegations not presented here are expressly omitted as mere legal assertions this Court is not bound to accept under *Schatz*, 943 F.2d at 489.

II. ARGUMENT

All eight counts of Mr. Smith's Complaint against Ms. Smith and Mr. Bakhir should be dismissed.

- A. Under FRCP 12(h)(1), this Court lacks subject matter jurisdiction over the federal claims set forth in Counts 1 through 8, because those Counts impermissibly seek this Court's review of Virginia state court proceedings.

This Court is without jurisdiction to hear any of Mr. Smith's federal law claims. Federal district courts are without subject matter jurisdiction to review state court proceedings on federal

are in large part mere assertions, without specific factual reference, which this Court is not bound to accept under *Schatz*, 943 F.2d at 489. Yet, in order to accommodate the deferential review of a *pro se* Complaint in this procedural posture, Ms. Smith and Mr. Bakhir have provided this summary characterization of Count 6, because by all appearances is Mr. Smith's Count 6 is his attempt to present grievances regarding various aspects of his "divorce and custody" proceedings.

² Ms. Smith and Mr. Bakhir respectfully take the position that Count 7 is subject to the same legal-factual characterization as Count 6, and urge the same approach to viewing it as Mr. Smith's airing his grievance regarding various aspects of his "divorce and custody" proceedings.

law grounds. See *Plyler v. Moore*, 129 F.3d 728, 731-32 (4th Cir. 1997) (discussing this rule as the "Rooker-Feldman Doctrine" naming as the only exception a *habeas corpus* review; citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923)).

In this case, Mr. Smith's federal law claims in his Complaint center on his "divorce and custody case." Importantly, all conduct of Ms. Smith and Mr. Bakhir complained of by Mr. Smith concerns those proceedings, and how those proceedings violated federal law (and as discussed below, state law). This Court's review of those proceedings on federal law grounds, however, would violate the *Rooker-Feldman Doctrine*, and stretch beyond this Court's subject matter jurisdiction.

B. Further under FRCP 12(b)(1), this Court lacks subject matter jurisdiction over the Virginia state law claims set forth Counts 1 through 4, and 6, because there is not complete diversity of citizenship in this case.

Second, this Court is without jurisdiction to hear any of Mr. Smith's state law claims. Absent complete diversity between all plaintiffs and all defendants, federal district courts do not have subject matter jurisdiction over state law claims, see 28 U.S.C. § 1332, except where discretionary supplemental jurisdiction would be available, see 28 U.S.C. § 1337 (providing supplemental jurisdiction only where an independent basis for jurisdiction is otherwise available for the related claims).

In this case, Mr. Smith's state law claims are presented to the Court in the absence of complete diversity: Mr. Smith, Ms. Smith, and Mr. Bakhir are all citizens of Virginia. Otherwise, supplemental jurisdiction is not available, because no other related claims provide independent grounds for this Court's jurisdiction. Alternatively, if there were related claims over which this Court had subject matter jurisdiction, this Court should exercise its discretion not to

grant supplemental jurisdiction.

C. Under FRCP 12(b)(6), Mr. Smith has failed to state a claim against Ms. Smith and Mr. Bakhir in Counts 1 through 8, to the extent that any claim relies on their conduct outside the "divorce and custody" proceedings.

To the extent that Mr. Smith's claims do not directly relate to his "divorce and custody case," then Mr. Smith fails to state a claim against Ms. Smith and Mr. Bakhir. Federal constitutional claims, whether premised on statute or directly on the Constitution, can only be made against a state actor. See *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (discussing rule in context of 42 U.S.C. § 1983 claims; "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." (citations and internal quotation marks omitted)); cf. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 n.8 (1996) (husband's seeking the "imposition of an official decree" extinguishing a mother's parental rights met the state action requirement). The Thirteenth Amendment's prohibition against involuntary servitude is the only exception, which applies both to the state and to individuals. *United States v. Booker*, 655 F.2d 562, 564 (4th Cir. 1981). But in order to state a claim for involuntary servitude, the claimant must allege some form of "compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 181 (4th Cir. 1996) (citing *Butler v. Perry*, 240 U.S. 328, 332 (1916) (internal quotation marks omitted)).

In this case, Ms. Smith and Mr. Bakhir take the position as set forth in Section II.A above that all Mr. Smith's claims concern his "divorce and custody" proceedings. But to the extent this Court finds they do not, any such claim would fail to state a claim against Ms. Smith and Mr. Bakhir. That is because to the extent that Mr. Smith's claims concern behavior outside the

"divorce and custody" proceedings, such behavior by Ms. Smith and Mr. Bakhir fails the state action requirement as contemplated by *Mentavlos* and *M.L.B.*

Otherwise, nothing about a court ordering Mr. Smith to make monthly support payments to Ms. Smith amounts to "compulsory labor" as contemplated by *Butler*.

For these reasons, Mr. Smith has failed to state a claim against either Ms. Smith or Mr. Bakhir.

III. CONCLUSION

For all the foregoing reasons, Mr. Smith's Complaint should be dismissed for lack of subject matter jurisdiction over the claims against Ms. Smith and Mr. Bakhir, and for failure to state a claim against them.

This 11th day of April 2007

Respectfully submitted,

CHERI SMITH and
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion and Brief in Support was sent by first-class mail, postage prepaid on this 11th day of April 2007 to the following parties:

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