IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

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

#2 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SMTIH & BAKHIR JOINT MOTION TO DISMISS

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INTRODUCTION

1. The Plaintiff, Wesley C. Smith, hereby responds to Defendants' Joint Motion to Dismiss filed by Cheri Smith and Igor Bakhir.

2. The Defendants' present no affidavits or facts contrary to those claimed by the Plaintiff but their position rests solely on legal arguments about lack of jurisdiction and failure to state a claim of action.

3. It is shown below that the "Rooker-Feldman Doctrine" does not apply to this case, that this court has original jurisdiction to hear the case and that valid claims of action have been made, thus their Joint Motion To Dismiss should be dismissed entirely.

SUBJECT MATTER JURISDICTION

4. Cheri Smith and Igor Bakhir have claimed that this Federal Court does not have Subject Matter Jurisdiction due to the "Rooker-Feldman Doctrine". Their basis for using "Rooker-Feldman" is deficient in that relies an outdated interpretation of a 1997 case and ignores subsequent Supreme Court rulings that narrow the application and meaning of the "Rooker-Feldman Doctrine".

5. In 2005, the Supreme Court revisited the doctrine in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005). The Court affirmed that the Rooker-Feldman doctrine was statutory (based on the certiorari jurisdiction statute, 28 U.S.C. § 1257), and **not jurisdictional**, holding that it **applies only** in 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.". The Plaintiff has not requested this Court review the state court ruling but rather the unconstitutional procedures used, thus Rooker-Feldman does not apply here.

6. The Supreme Court has continued to narrow the Rooker-Feldman doctrine, as in Lance v. Dennis, 126 S. Ct. 1198 (2006), and seems to want to minimize the use of the doctrine.

7. The Plaintiff has also made "general challenge" to various state laws which does not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the substance of state court judgments.

8. Case precedence also allows cases such as this to go forward in spite of *Rooker-Feldman:*

> See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc., 801 F.2d 186, 188-89 (6th Cir. 1986). There, we noted that although a district court
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> "has no authority to review final judgments of a state court in judicial proceedings," Feldman, 460 U.S. at 482, . . . [a] **federal court "may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake** . . . ." Resolute Insurance Co. v. State of North Carolina, 397 F.2d 586, 589 (4th Cir. 1968).
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> Sun Valley, 801 F.2d at 189. See also Lewis v. East Feliciana Parish Sch. Bd., 820 F.2d 143, 146 (5th Cir. 1987) (**due process challenge to state proceedings not barred by Feldman doctrine**)

9. It should be noted the Plaintiff has alleged fraud on the part of Igor Bakhir both in committing perjury in his deposition and in stating he could not comply with the witness subpoena (he was seen at the courthouse during the trial). The Plaintiff has claimed others such

as Loretta Vardy, Cheri Smith, Ronald Fahy, have engaged in fraudulent and deceptive acts. Such as false statements in motions and in oral arguments.

> 42 U.S.C. § 1985(2). The two categories in which a cause of action under Section 1985(2) will lie are "(1) when there has been **obstruction of justice**, including, for instance, intimidating or injuring a witness, and (2) when there has been a conspiracy for the purpose of **impeding the due course of justice** in any state or territory." Altieri v. Penn. State Police, No. Civ. A. 98-CV-5495, 2000 WL 427272, at *16 (E.D. Pa. Apr. 19, 2000) (citing Messa v. Allstate Ins. Co., 897 F. Supp. 876, 881 (E.D. Pa. 1995)).

10. The Plaintiff is not directly attacking the state court ruling but rather attacks as unconstitutional the **manner** in which the Virginia state court proceeding was conducted. The claims of the alleged procedural violations of the Plaintiff's constitutional rights do not rest on any substantive wrongness of the rulings of the Virginia courts, and thus the *Rooker-Feldman* doctrine does not bar the maintenance of this action.

11. The "Rooker-Feldman Doctrine" does not prevent this court from having jurisdiction and hearing the case on the merits. This is amply demonstrated by *Catz v. Chalker*, 142 F.3d 279, 281 (6th Cir. 1998), Where the Plaintiff asked the Federal Court to void a state court divorce decree and the defendant invoked both the "Rooker-Feldman Doctrine" and the "Domestic Relations Exception" and yet the Federal Appeals Court ruled that neither of those arguments prevented the District Court from having jurisdiction and hearing the case on the merits (merits of the constitutional violations not the merits of the divorce).

12. This case is very similar to Catz v Chalker in that the Plaintiff is not asking the Federal Court to rule on the merits of the underlying divorce case but rather on the unconstitutional manner in which the in which the Virginia state court proceeding was conducted. The topic of the underlying case is largely immaterial. This case is about the Constitution and procedure, not about who is the better parent or who deserves what percentage of the marital assets, as those are issues the Plaintiff has specifically asked to be left to the state courts if he wins this case.

13. Further Rooker-Feldman has no application at all to this case. The Plaintiff has plainly stated his claim that the state court "order" is null and void. A void order is without any force or effect and is the same as a blank sheet of paper. Thus there is no state court ruling upon which to apply the "Rooker-Feldman Doctrine"

> Our disagreement with the district court comes down to the question of whether Catz's action is a "core" domestic relations case, seeking a declaration of marital or parental status, or a constitutional claim in which it is incidental that the underlying dispute involves a divorce. We conclude that the case is best described as the latter. True, the remedy Catz seeks -- a declaration that the Pima County divorce decree is void as a violation of due process -- would seem to "directly impact the marriage status and rights between the husband Plaintiff and his wife." On the other hand, **if the divorce judgment were unconstitutionally obtained, it should be regarded as a nullity**, see Phoenix Metals Corp. v. Roth, 284 P.2d 645, 648 (Ariz. 1955), and **any decree so stating would change nothing at all**. Further, the declaration Catz seeks would not itself address the merits, or ultimately dispose, of Chalker's divorce petition; she would be free to relitigate her marital status in state court. Finally, Catz is **not asking the district court to involve itself in the sort of questions attendant to domestic relations** that are assumed to be within the special expertise of the state courts -- for instance, the merits of a divorce action; what custody determination would be in the best interest of a child; what would constitute an equitable division of property; and the like. Instead, Catz **asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts**. *Catz v. Chalker*, 142 F.3d 279, 281 (6th Cir. 1998)

14. The Defendants also claim a lack of jurisdiction to hear any of the Plaintiff's state law claims. That is beside the point as the Plaintiff has not made any state law claims, but rather that those involved intentionally failed to comply with state laws due to his status of a discriminated class, namely fathers in custody cases, thus depriving the Plaintiff of his Federally protected right to Equal Protection. While state laws were violated the claims made in this court are Federal claims.

15. The Defendants motion goes on about Diversity but that is immaterial. The Constitution allows federal district courts to hear cases involving any rights or obligations that arise from the Constitution or other federal law. This is called federal question jurisdiction. The Plaintiff invoked jurisdiction of the court per 28 U.S.C. § 1331 on page 3 of the complaint.

Diverse citizenship was not essential to exercise of federal question jurisdiction. Ames v Kansas (1884) 111 US 449, 28 L Ed 482, 4 S Ct 437

... District Court does have jurisdiction under 28 USCS 1331 to review **due process** claims and claims of **noncompliance** with statutory directives or applicable regulations. Virginia ex rel. Commissioner, **Virginia** Dept. Of Highways & Transp. v Marshall (1979, CA4 Va) 599 F2d 588.

Where court finds that federal jurisdiction properly rests on 28 USCS 1331 , it is unnecessary to decide whether 28 USCS 1332 affords additional basis for jurisdiction. Watkins v Wilson (1977, DC Dist Col) 425 F Supp 166.

... District Court does have jurisdiction under 28 USCS 1331 to review **due process** claims and claims of **noncompliance** with statutory directives or applicable regulations. Virginia ex rel. Commissioner, **Virginia** Dept. Of Highways & Transp. v Marshall (1979, CA4 Va) 599 F2d 588.

16. Clearly the Plaintiff has invoked federal question jurisdiction by citing both specific Federal Constitution violations as well as citing a series of Federal Statutes that confer jurisdiction - including 28 U.S.C. § 1331, the Federal Civil Rights Act of 1871, Title 42 U.S. Code § 1983, § 1985, and § 1986, under 28 U.S.C. § 1343, 42 U.S.C. § 1988, and 28 U.S.C. § 2412, 28 U.S.C. § 2201 and § 2202.

17. A federal statute, 28 USCS 1343 **expressly gives Federal District Courts original jurisdiction of any civil action** authorized by law to be commenced by any person (1) to recover damages from one conspiring to interfere with the civil rights of another (42 USCS 1985), (2) to recover damages for neglect to prevent interference with the civil rights of another, (3) to redress the deprivation, under color of any state law, custom, or usage, of any right, privilege, or immunity secured by the Federal Constitution or by any federal statute providing for equal rights of citizens or of all persons within the jurisdiction of the united states, or (4) to recover damages or to secure equitable or other relief under any federal statute providing for the protection of civil rights.

18. Ex Parte conferences, hearings or Orders denying parental rights or personal liberties are unconstitutional, cannot be enforced, can be set aside in federal court, and can be the basis of suits for money damages. RANKIN V. HOWARD, 633 F.2d 844 (1980); GEISINGER V. VOSE, 352 F.Supp. 104 (1972).

19. Federal Courts can rule on federal claims (constitutional questions) involved in state divorce cases and award money damages for federal torts involving intentional infliction of emotional distress by denial of parental rights, "visitation", as long as the Federal Court is not asked to modify custodial status. See LLOYD V. LOEFFLER, 518 F.Supp 720 (custodial father won $95,000 against parental kidnapping wife), FENSLAGE V. DAWKINS, 629 F.2d 1107 ($130,000 damages for parental kidnapping), KAJTAZI V. KAJTAZI, 488 F.Supp 15 (1976), SPINDEL V. SPINDEL, 283 F.Supp. 797 (1969)

Court Should Exercise Jurisdiction

20. Given that the Plaintiff has properly invoked jurisdiction of the court the court has an obligation to exercise that jurisdiction.

> Existence of jurisdiction implied duty to exercise it, and that its exercise might be onerous did not militate against that implication. Second Employers' Liability cases (1912) 223 US 1, 56 L Ed 327, 32 S Ct 169.
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> Litigant who has properly invoked jurisdiction of federal district court cannot be compelled to accept instead a state court's determination of his claims; this would be contrary to principle that when federal court is properly appealed to in a case over which it has by law jurisdiction, **it is duty of court to take such jurisdictio**n. England v Lousiana State Bd. Of Medical Examiners (1964) 375 US 411, 11 L Ed 2d 440, 84 S Ct 461.....
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> Where jurisdiction of court is invoked on grounds, which, if true, spell out existence of federal jurisdiction, cause must be entertained for purpose of fully determining merits either by way of motion or, by trial. Dry Creek Lodge, Inc. v United States (1975, CA10 Wyo) 515 F2d 926, 20 FR Serv 2d 940

FAILED TO STATE A CLAIM

21. Defendants Cheri Smith and Igor Bakhir state that the Plaintiff has not made claims. This is so obviously false that perhaps the court should consider sanctions against them or their counsel for making such a frivolous statement.

> Parent who is wrongfully deprived of physical custody of **children without due process has cause of action** under 42 USCS 1983; **domestic relations exception to federal diversity jurisdiction over custody dispute is inapplicable**. Hooks v Hooks (1985, CA6 Tenn) 771 F2d 935 See Also Elam v Montgomery County 573 F Supp 797

22. The Plaintiff has clearly stated in the complaint that the Defendants engaged in a conspiracy to deprive him of his federally protected rights. Conspiracy to deprive someone of his or her civil rights is actionable by federal statute and was so cited.

23. Perhaps their argument isn't that the Plaintiff didn't make the claim but rather that the misconduct of Cheri Smith and Igor Bakhir was not done "under color of law". In which case their counsel should have done at least a little research to avoid sanctions, as case precedent is clear that those acting in connection with people acting "under color of law" are also to be held responsible.

> To act under "color of law" does not require that the accused be an officer of the state; it is enough that he is a willful participant in joint activity with the state or its agents. Canty v Richmond, **Virginia**, Police Dept. (DC Va) 383 F Supp 1396, affd without op (CA4 Va) 526 F2d 587

24. Under the general federal conspiracy statute (18 USCS 371), a private citizen not acting under color of state law, but acting in consort with one acting under color or pretense of law, or causing a proscribed act to be done by one capable of acting under color of law, can be guilty of conspiring to violate the provisions of 18 USCS 242 (United states v Lester (CA6 Ky) 363 F2d 68, cert den 385 US 1002, 17 L Ed 2d 542, 87 S Ct 705, reh den 386 US 938)

25. Thus private persons jointly engaged with state officials in action prohibited by 18 USCS 242 are acting "under color of law", which action does not require that the accused be an officer of the state, it being sufficient that **he is a willful participant** in joint activity with the state or its agents (United States v Price, 383 US 787, 16 LEd 2d 267, 86 S Ct 1152) See also: Gomez v Florida State Employment Service (CA5 Fla) 417 F2d 569; Baldwin v Morgan; Adickes v S. H. Kress & Co., 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598;

> A concerted action by private parties and state officials has consistently been held to be a sufficient allegation of "state action" for purposes of 42 uscs 1983 Fulton v Emerson Electric Co. (CA5 Miss) 420 F2d 527, cert den 398 US 903, 26 L Ed 2d 61, 90 S Ct 1689
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> **Suit may be brought against private citizens** under 42 USCS 1983 if a conspiracy is established between them and the state or local officials who clearly acted under color of state law. Gillibeau v Richmond (CA9 Cal) 417 F2d 426

26. Under 42 USCS 1983, every person who, under color of state or territorial statute, ordinance, regulation, custom, or usage, subjects any person within the jurisdiction of the United States, or causes any such person to be subjected, to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution or laws, is liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress in enacting this statute, Congress meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position. (Monroe v Pape, 365 US 167, 5 L Ed 2d 492, 81 S Ct 473;p Rivers v Royster (CA4 Va) 360 F2d 592)

27. This statute was enacted as paragraph 1 of the Ku Klux Act of April 20, 1871. It was one of the means whereby Congress exercised the power vested in it by paragraph 5 of the Fourteenth Amendment to enforce the provisions of that amendment. (Monroe v Pape) The purposes of the statue are to override certain kinds of state laws, to provide a remedy where state law is inadequate, to provide a federal remedy where a theoretically adequate state remedy is not

available in practice, and to provide a remedy in the federal courts supplementary to any remedy which any state might provide. (Wilwording v Swenson, 404 US 249, 30 L Ed 2d 418, 92 S Ct 407; McNeese v Board of Education, 373 US 668, 10 L Ed 2d 622, 83 S Ct 1433).

28. The Defendants also seem to claim they are exempt due to the state court ruling. However as discussed above that "order" is not only null and void but also the state's view of the Defendants conduct is irrelevant. An action may brought under 42 USCS 1983 against defendants violating rights protected by the Fourteenth Amendment, **regardless of whether the defendants' conduct was legal** or illegal under state law. See 57 McNeese v Board of Education, 373 US 668, 10 L Ed 2d 622, 83 S Ct 1433

29. The Defendants also seem to overlook the provision that all conspirators are responsible for the acts of the other. Igor Bakhir and Cheri Smith participated in the conspiracy too deprive the Plaintiff of his Constitutional Rights, as such they are liable for the acts of all the conspirators that joined before them or that join in after they left the conspiracy. They are not liable for solely their own actions. See United States v Robinson

30. The Defendants here attacked only the Plaintiff's 1983 claims and did not dispute the claims the Plaintiff made according to § 1985, § 1986 and others. Under 42 USCS 1986, every person who, having knowledge that any of the wrongs mentioned in 42 USCS 1985 is about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects, or refuses so to do, **is liable to the party injured**, if the wrong is committed, for all damages caused by the wrong, which, by reasonable diligence, he could have prevented.

> Unquestionably, § 1985(3) applies to private conspiratorial acts, without any necessity of state involvement. Barrio v McDonough Dist. Hospital (DC Ill) 377 F Supp 317

31. It should also be noted that civil rights statue which provides for no sanctions or remedies whatever has been held to confer upon an aggrieved person the right to recover damages from

the violator in a civil action. Given the Constitution contains many Civil Rights provisions but does not specify any sanctions or remedies, it should confer on the aggrieved person the right to sue for damages. See Joseph v Bidwell, 28 La Ann 382

STANDARD FOR DISMISSAL

32. Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and **can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts** in support of his claim that would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss, pursuant to F.R.Civ.P. 12(b)(1) and (6), should be denied, and plaintiff afforded the opportunity to proceed to discovery and develop a factual record in support of his claims. Plaintiff respectfully requests a hearing on this motion.

Respectfully Submitted,
Wesley C. Smith

_____ May 1st, 2007

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