IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel KENNETH GOMEZ,

Plaintiff,

vs. **No. CIV 10-00594 JP/LFG**

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT No. I:
DISMISSAL OF PLAINTIFF'S QUO WARRANTO ACTION
AND CLAIMS BROUGHT UNDER 42 U.S.C. §§ 1983, 1985, and 1986

Defendant, Eleventh Judicial District Court, through its attorneys Robles, Rael & Anaya, P.C. (Luis Robles, Esq.) and pursuant to Fed.R.Civ.P. 56 and D.N.M.LR-Civ. 56, states the following for its Motion for Partial Summary Judgment No. I: Dismissal of Plaintiff's Quo Warranto Action and Claims Brought under 42 U.S.C. §§ 1983, 1985, and 1986:[1]

INTRODUCTION

Even when the evidence is viewed in the light most favorable to him, this Court should dismiss Gomez's Quo Warranto action and claims brought under 42 U.S.C. §§ 1983, 1985, and 1986 as a matter of law. With a state district court having previously dismissed Gomez's Quo Warranto action on the merits, the doctrine of collateral estoppel prevents Gomez from relitigating the issue

[1] As allowed by D.N.M.LR-Civ. 7.7, Defendant's counsel has combined this Motion with the memorandum in support thereof. As required by D.N.M.LR-Civ. 7.1(a), Defendant's counsel asked Plaintiff on July 1, 2010, to determine whether Plaintiff would agree to dismiss this lawsuit. Plaintiff did not concur with this motion.

in this case. Having failed to plead an actionable constitutional claim against defendant, Gomez's section 1983 conspiracy claim is subject to dismissal because such a claim is not viable without an underlying, cognizable constitutional right violation. Even accepting all of his allegations as true, Gomez's claim that Defendant conspired to deprive him of his federally protected rights fails to state an actionable claim under 42 U.S.C. § 1985. Since he failed to state actionable claims under 42 U.S.C. § 1985(1), (2) and (3), Gomez's 42 U.S.C. § 1986 claim also fails to state an actionable claim because section 1986 claims are derivative of section 1985 claims. For these reasons, this Court should dismiss Gomez's Quo Warranto action and claims brought under 42 U.S.C. §§ 1983, 1985, and 1986 as a matter of law.

STANDARD OF REVIEW

"Summary judgment procedure is properly regarded not as a procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure a just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1). Under Rule 56(c) of the Federal Rules of Civil Procedure, the movant

> bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (quoting Fed.R.Civ.P. 56(c)). "[W]ith or without supporting affidavits," the movant may meet its Rule 56 burden by pointing out to the court that the non-movant "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322 and 323; Lujan v. National

Wildlife Federation, 497 U.S. 871, 884-85 (1990).

Once the movant has met its Rule 56 burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574, 586-87 (1986). On summary judgment, the court must view the evidence in the light most favorable to the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The court, however, cannot "assume" that a disputed issue of material fact exists if there are insufficient facts to support the non-movant's allegations. Lujan, 497 U.S. at 888. By its terms, Rule 56(c) provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson, 477 U.S. at 248-49 (italics in the original). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248 (citation omitted).

The non-movant, moreover, cannot satisfy its burden with "some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, "conclusory allegations," Lujan, 497 U.S. at 888, unsubstantiated assertions, Wilson v. Meeks, 52 F.3d 1547, 1553 (10th Cir. 1995), or the "mere existence of a scintilla of evidence, in support of the [non-moving party's] position," Anderson, 477 U.S. at 252. To meet its Rule 56 burden, the non-movant must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)). If the non-movant fails to show that there is a genuine issue as to any material

fact, the movant is entitled to summary judgment as a matter of law. Celotex, 477 U.S. at 322.

UNDISPUTED MATERIAL FACTS

In the present case, there is no genuine issue of *material* fact, and Defendant is entitled to summary judgment as a matter of law. The material facts to which no genuine issue exists are as follows:

I. Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6.

1. On April 7, 2004, the Totah Credit Union filed a complaint in the Eleventh Judicial District Court against Plaintiff, Kenneth Gomez ("Gomez") and his wife, Lynette Gomez. *See Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6.*

2. Totah Credit Union brought an action against Gomez, seeking money damages for the Gomezes' failure to pay a promissory note. *See Verified Complaint, filed in Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6 (copy attached as Exhibit A).*

3. On June 28, 2006, Gomez filed a Verified Complaint for Injuries and Damages, arguing this time that Eleventh Judicial District Court Judges are ineligible to hold office because they did not posses a corporate surety bond as required by the New Mexico Constitution and state statute:

> 1. At no time during this cause has the Court, or any other court of law within the State of New Mexico been or could become competent to hear and determine the instant cause: (a) for lack of any judicial officers lawfully holding public office statewide by their deliberate denial of the power contained in Section 26, Article IV, Section 4, Article XIX, Section 10, Article XXI, and Section 19, Article XXII, Constitution of New Mexico;(b) for deliberate practices defying the authority of NMSA §§ 10-2-5, 6, 7, and 9 relative to surety bond requirements; and for deliberate practices defying the authority of NMSA 38-1-1 relative to the substantive rights of the Defendants Kenneth and Lynette Gomez as litigants; (c) for

> which there are remedies available to them under the authority of 42 U.S.C. § 1983 when the Court becomes competent. This cause is not to be heard or acted upon until the Court becomes competent.
>
> * * *
>
> 4. No court of law within the State of New Mexico is competent to hear and determine any cause, civil or criminal, (Bd of Comm'rs of Guadalupe County v. District Court of Fourth Judicial District, 29 N.M. 244 (S.Ct. 1924):
>
> a. for failure of those persons elected or appointed to be judicial officers therein to acquire valid and approved surety bonds coverage through an authorized insurance company prior to taking the oath of office required by Section 1, Article XX, Constitution of New Mexico, and therefore their offices were vacant and their acts were void, (Prieto Bail Bonds v. State,994 S.W.2d 316,at fn [33], (1999. TX. 43751));
>
> b. for lack of jurisdiction thereby to issue any writs, including habeas corpus, essential to serve the interests of justice;
>
> c. for failure of the person specifically assigned as public officer in the instant case:(1) to acquire surety bond coverage for the faithful and diligent performance of the duties required of the oath established by Section 1, Article XX, Constitution of New Mexico; (2) to satisfy the irrevocable requirement of NMSA § 10-2-9, (Articles XIX, XXI, AND XXII, Constitution of New Mexico); or (3) to timely file and record any oath of office valid during any period of time relevant to the instant case;

See Verified Complaint for Injuries and Damages, pp. 1-2, filed in Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6 (copy attached as Exhibit B). In his prayer for relief, Gomez requests money damages based on the failure of the judges of the Eleventh Judicial District Court to obtain a bond. *See Id. at pp. 7-9.*

4. On February 16, 2007, Gomez filed a Motion for Declaratory Judgment, once again arguing that the Eleventh Judicial District Court judges are ineligible to hold office because they do not possess corporate surety bonds as required by the New Mexico Constitution and state statute:

> 2. Every time the personal surety bond instrument requirement was briefed in writing by the Gomezes, the person assigned posing as lawful judge deceptively referred to state self-insured liability bonds which had no relationship whatsoever to the faithful and diligent performance to the obligations contained in the required oath to support both the constitutions and laws of the State of New Mexico. Liability coverage is for misfeasance, malfeasance or nonfeasance in office after one has qualified for office, not for personal surety bond coverage. One never qualifies for office until a personal surety bond or its equivalent instrument is recorded with the New Mexico Secretary of State and with a verified copy of the oath taken binding them to faithful duties of the required oath. See §§ 10-2-1 to 12 NMSA.
>
> 3. No judge of the Eleventh Judicial District Court has fulfilled the requirements and thus been qualified to be judges for being bound by oath to faithfully and diligently perform the duties obliged by the oath as required by said Artic1e VI clause 3, Const. U.S and Article XX, § 1, Const. N.M.
>
> 4. No order issued by the Court to the Gomezes, not otherwise being a competent court of law for lack of qualified judges has any validity. See constitutional powers and statutory authority contained in ¶¶ 1 and 2 above.

See Motion for Declaratory Judgment, pp. 2-3, filed in Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6 (copy attached as Exhibit C). In his prayer for relief, Gomez requests the "impeachment" of the judges of the Eleventh Judicial District Court based on their failure to obtain a bond. *See Id. at p. 2. pp. 5-6.*

5. The parties actually litigated the merits of Gomez's Verified Complaint for Injuries and Damages and Motion for Declaratory Judgment.

6. On February 23, 2007, District Judge Sandra Price entered an Order Denying Motion for Declaratory Judgment & Dismissing Action. *See Order Denying Motion for Declaratory Judgment & Dismissing Action, pp. 1-2, filed in Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6 (copy attached as Exhibit D).* In her Order, Judge Price found that "[t]he

Counterclaims, cross-claims and the Motion for Declaratory Judgment by KENNETH and LYNETTE GOMEZ are not well taken and are based upon a misreading and misinterpretation of the Surety Bond Act. *See Id. at p. 1.* Accordingly, Judge Price dismissed Gomez's cause of action and all counterclaims with prejudice. *See Id. at p. 2.* Judge Price also denied Gomez's Motion for Declaratory Judgment. *See Id. at p. 2.*

7. District Judge Sandra Price actually decided the merits of Gomez' Verified Complaint for Injuries and Damages and Motion for Declaratory Judgment.

II. Gomez, Kenneth v. Eleventh Judicial District Court, CIV 2010-00941 JAP/LFG

1. In his complaint in the instant case, Gomez raised the argument that elected officials throughout the State of New Mexico are ineligible to hold office because they do not possess a corporate surety bond as required by the New Mexico Constitution and state statute. *See [Docket No. 8-1, pp. 2-4].*

2. In his complaint in the instant case, Gomez raised the argument that elected officials are ineligible to hold office because they do not possess a corporate surety bond as required by the New Mexico Constitution and state statute:

> a. Whereas, not one of the persons holding positions as judges within the jurisdiction of the courts of law in the Defendant District Court, during times relevant, have personally given, filed, and recorded a prerequisite penal bond to lawfully acquire title to the public office being entered, (Section 10-2-9 NMSA 1978), since 1963 binding them to the promises of the oath of office contained in Article XX, Section 1, Constitution of the State of New Mexico as mandated by Article XXII, Section 19, Constitution of the State of New Mexico and the provisions of Article VI, Clauses 2 and 3, Constitution for the United States of America; to wit, respectively:
>
> > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

> made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Clause 2, Article VI, Constitution for the United States of America,]
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States, [Clause 3, Article VI, Constitution for the United States of America,]

b. Whereas, the New Mexico Legislature has no power or authority to unilaterally and without constitutional processes enact laws amending either the Constitution for the United States of America or the Constitution of the State of New Mexico as it did when, contrary to Marbury, it enacted Section 34-6-22 (Personnel; oaths and bonds, (1968)) NMSA 1978 altering, revising, or amending Article XXII Section 19 Constitution of the State of New Mexico and Article VI, Clauses 2 and J, Constitution for the United States of America; to wit said § 34-6-22:

> Before entering upon their duties, all district court personnel who receive or disburse money or have custody of property shall take the oath prescribed by the constitution for state officers and file with the secretary of state a corporate surety bond in an amount fixed by the director of the administrative office of the courts. Each bond shall be approved in writing on its face by the director of the administrative office of the courts and conditions upon faithful performance of duties and payment of all money received to the person entitled to receive it. In lieu of individual bond coverage, the director of the administrative office of the courts may prescribe schedule or blanket bond coverage in any judicial district. Bond premiums shall be paid from funds appropriated to the district courts.

History 1953 Comp., § 16-3-9, enacted by Laws 1968, ch. 69, § 23.

* * *

c. Now Therefore, neither the Defendant District Court nor a surrogate acting therefore possesses jurisdiction and thus competence to act for hearing and determining the instant case.

See [Docket No. 8-1, pp. 2-4].

3. Unlike his state case in which he requested money damages against and "impeachment" of state district judges who served with out bonds, Gomez requested different relief in this case:

III. RELIEF DEMANDED UNDER 42 U.S.C. §§ 1983, 1985, 1980, AND 1994

1. All Defendant Court judgments and decisions rendered since 1963 are to be voided:

a. Against Kenneth Gomez by the Defendant District Court and all subordinate courts of law within its jurisdiction. See attached list of cases.

b. In favor of F. Douglas Moeller from 1986 onwards on grounds he became an accessory after-the-fact in murder when he sat as a juror while an attorney authorized to practice law in Defendant Court by the New Mexico Supreme Court in violation of Article IV, Section 26, Constitution of the State of New Mexico, and in violation of Section 38-1-1 NMSA 1978; on grounds he was an agent of the New Mexico Supreme Court while a juror and voted to acquit a recent and known former client, a defendant on trial for murder in Defendant Court where the person sitting as judge was not under oath, was not bound by an oath of office, and the Court was not competent to proceed thereby.

c. Against pro se litigants who are forbidden to practice law under state law while opposed by a party who is authorized to practice law; a practice with special privileges which denies and deprives a pro se litigant a substantive right to acquire legal prowess; such judgments could not guarantee a fair and objective determination of the matter before the Defendant District Court because the practicing attorney gains legal prowess through practice under special privileges IV, Section 26, Constitution of the State of New Mexico and Section 38-1-1 NMSA 1978, a special and substantive privilege unavailable to pro se litigants.

2. The Court award the sum of one hundred thousand dollars in cash money in and at time of a final judgment for each judgment and decision rendered against Kenneth Gomez in attached cases since year 1997.

3. That persons holding office as judge in courts of law within the jurisdiction of the Defendant District Court who have not acquired lawful title to the office held show what cause, if any, they may have, under what authority they

> qualify, hold, and possess title to the office, (§ 1 0-2-9), without previously and personally giving, filing, and recording a penal bond binding them to the promises contained in their contract oath of office as mandated by Article VI, Clauses 2 and 3, Constitution for the United States of America and AI1icie XXll, Section 19, Constitution of the State of New Mexico.

See [Docket No. 8-1, pp. 2-4].

3. The cause of action in Totah Credit Union v. Gomez, Kenneth and Lynette, CV 004-386-6 is substantially different than the cause of action in Gomez, Kenneth v. Eleventh Judicial District Court, CIV 2010-00941 JAP/LFG.

CAUSES OF ACTION SUBJECT TO DISMISSAL

In his Complaint, Gomez brought an action for Quo Warranto. *See [Docket No. 8-1, pp. 1-9]*. Gomez also alleged the violation of his federal constitutional rights and the following federal statutes, 42 U.S.C. §§ 1983, 1985, 1980, and 1994. *See [Docket No. 8-1, pp. 1 & 6]*. More specifically, Gomez claims that Defendant violated his Fourteenth Amendment rights in the following manner:

> [Defendant has] severely injured him by denying him constitutional rights under Sections 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional powers effect. In addition, said decisions and judgments have damaged his personal character without recourse, since there are no persons who have acquired title to positions as judges in any State of New Mexico courts of law, and since there are no courts of law to which he could appeal the non-competent judgments rendered.

See [Docket No. 8-1, p. 1].

LEGAL ARGUMENT

I. WITH A STATE DISTRICT COURT HAVING PREVIOUSLY DISMISSED GOMEZ'S QUO WARRANTO ACTION ON THE MERITS, THE DOCTRINE OF COLLATERAL ESTOPPEL PREVENTS GOMEZ FROM RELITIGATING THE ISSUE IN THIS CASE.

The Full Faith and Credit Act, 28 U.S.C. § 1738 (1966), requires this Court to give the State Court's Final Order entered collateral estoppel effect. See, e.g., Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 380 (1985). The Full Faith and Credit Act "allow[s] the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effects of judgments of their own courts." Id. The United States Supreme Court has taken the firm position that state law determines the collateral estoppel impact of a state court judgment on a federal court. Migra v. Warren City School District Board of Educ., 465 U.S. 75, 83-85 (1984); Franklin v. Thompson, 981 F.2d 1168, 1170 (10th Cir. 1992). For example, Section 1983 does not override the applicability of the Full Faith and Credit Clause nor allow federal civil rights plaintiffs to relitigate issues that could have been raised in the state criminal proceeding. See Allen v. McCurry, 449 U.S. 90 (1980).[2]

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[2] In Allen v. McCurry, the United States Supreme Court stated that:

> nothing in the language or legislative history of Section 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of Section 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings.

449 U.S. at 103-04.

(continued...)

> Under New Mexico law, four elements must be present to invoke collateral estoppel:
>
> (1) the parties are the same or are privies of the original parties; (2) the cause of action is different; (3) the issue or fact was actually litigated; and (4) the issue was necessarily determined.

International Paper Co. v. Farrar, 102 N.M. 739, 741-42, 700 P.2d 642, 644-45 (1985). However, both the New Mexico and the federal courts have abandoned the requirement of mutuality of parties. Reeves v. Wimberly, 107 N.M. 231, 234, 755 P.2d 75, 78 (Ct. App. 1988) (New Mexico has "eliminated the traditional rule that the parties must be the same or in privity if the doctrine of

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[2] (...continued)
The Court in Allen further recognized that:

> federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Cromwell v. County of Sac, 94 U.S. 351, 352. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Montana v. United States, 440 U.S. 147, 153 [footnote omitted]. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Id. at 153-154.

Id. at 94. "[R]es judiata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." Id. at 95-96 (citation omitted).

The Court in Allen acknowledged that in recent years it has applied the doctrine of preclusion in contexts not formerly recognized at common law, but it continues to refuse to apply the doctrine of collateral estoppel "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Id. at 94-95 (citations omitted). The Court went on to discuss the Full Faith and Credit Clause, indicating that Congress has enacted an express requirement that all federal courts give preclusive effect to state court judgments whenever the state courts from which the judgments emerged would do so. Id. at 96.

collateral estoppel is to apply"); Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979).

In this case, the "cause of action" in the underlying state court matter is substantially different than the Quo Warranto\civil rights claim brought by Gomez in this case. In the underlying state court matter, Gomez had a full and fair opportunity to litigate the issue of whether state district judges had failed to obtain the required corporate surety bond. The state court judge necessarily decided the issue regarding the state judges' failure to obtain a surety bond claim. Thus, this Court should enter an order precluding the parties from relitigating the Quo Warranto action brought by Gomez based on the doctrine of collateral estoppel.

A. THE "CAUSE OF ACTION" IN THE UNDERLYING STATE COURT MATTER IS SUBSTANTIALLY DIFFERENT THAN THE QUO WARRANTO\CIVIL RIGHTS CLAIM BROUGHT BY GOMEZ IN THIS CASE.

To invoke collateral estoppel, the cause of action in the underlying case must be different from the claims brought in the subsequent case. International Paper Co., 102 N.M. at 741-42, 700 P.2d at 644-45. In the underlying state court case, Gomez filed a Verified Complaint for Injuries and Damages and Motion for Declaratory Judgment. In his prayer for relief, Gomez requests the "impeachment" of the judges of the Eleventh Judicial District Court based on their failure to obtain a bond.

In the instant case, Gomez brought a Quo Warranto and civil lawsuit. Although Gomez also seeks monetary damages, Gomez's request for relief seeks to unseat the district judges of the Eleventh Judicial District and void a number of judgments entered against Gomez by those judges. Without question, the "cause of action" in the underlying state court matter is substantially different than the Quo Warranto/civil rights claim brought by Gomez in this case.

B. IN THE UNDERLYING STATE COURT MATTER, GOMEZ HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE OF WHETHER STATE DISTRICT JUDGES HAD FAILED TO OBTAIN THE REQUIRED CORPORATE SURETY BOND.

Collateral estoppel only applies if the issue or fact was actually litigated in the prior proceeding. International Paper Co. v. Farrar, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985). New Mexico precludes re-litigation of an issue if "a party against whom estoppel is asserted has had a full and fair opportunity to litigate [the issue]." Silva v. State, 106 N.M. 472, 475, 745 P.2d 380, 384 (1987). The equities to be considered in making such a decision include "prior incentive for vigorous defense, inconsistencies, procedural opportunities, and inconvenience of forum. . .." Id.

Applying the above analysis to this case, the facts show that Gomez had a full and fair opportunity to litigate the issue of whether the state district judges had failed to obtain the required corporate surety bond. It is an undisputed fact that Gomez had the opportunity to argue the merits of his claim to Judge Price after conducting the discovery that was necessary to prosecute his claim. In the underlying state court matter, therefore, Gomez had a full and fair opportunity to litigate the issues.

C. THE STATE COURT JUDGE NECESSARILY DECIDED THE ISSUE REGARDING THE STATE DISTRICT COURT JUDGES' FAILURE TO OBTAIN A SURETY BOND CLAIM.

For collateral estoppel to apply, the court in the prior action must "necessarily determine" the issue in question. International Paper, 102 N.M. at 742, 700 P.2d at 645; Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978). Issues necessarily determined are only those in the prior case which "were essential to a decision therein and upon the determination of which the prior judgment was rendered." McCarthy v. Kay, 52 N.M. 5, 7, 189 P.2d 450, 451 (1948). In this case,

Judge Price necessarily decided the issue regarding the State District Court judges' failure to obtain a surety bond claim.

In the underlying state court action, Gomez filed a Verified Complaint for Injuries and Damages, arguing this time that Eleventh Judicial District Court judges are ineligible to hold office because they did not posses a corporate surety bond as required by the New Mexico Constitution and state statute. Gomez followed up with a Motion for Declaratory Judgment. Judge Price could not conclude this case without deciding the merits of Gomez's claim. Thus, the state court judge necessarily decided the issues regarding the State District Court judges' failure to obtain a surety bond claim.

II. HAVING FAILED TO PLEAD AN ACTIONABLE CONSTITUTIONAL CLAIM AGAINST DEFENDANT, GOMEZ'S SECTION 1983 CONSPIRACY CLAIM IS SUBJECT TO DISMISSAL BECAUSE SUCH A CLAIM IS NOT VIABLE WITHOUT AN UNDERLYING, COGNIZABLE CONSTITUTIONAL RIGHT VIOLATION.

As set forth in Defendant's Motion to Dimiss No. I, Gomez failed to allege actionable Fourteenth Amendment claims. Having failed to plead an actionable constitutional claim against Defendant, Gomez's Section 1983 conspiracy claim is subject to dismissal because a Section 1983 conspiracy claim is not viable without an underlying, cognizable constitutional right violation.

In Dixon v. City of Lawton, Okla., 898 F.2d 1443 (10th Cir. 1990), the Tenth Circuit reviewed a Section 1983 conspiracy claim based on the circumstances surrounding an officer involved shooting. In Dixon, two police officers' account of the shooting death of Dixon was called into question because the ballistics evidence did not support the officers' version of the incident. Id. at 1446. After the officers and the City of Lawton defeated the Estate's Fourth Amendment and

conspiracy claims at trial, the Estate of Mr. Dixon appealed. Id. at 1444.

In its consideration of the Estate's Section 1983 conspiracy claim, the Tenth Circuit in Dixon stated the following:

> to recover under a § 1983 conspiracy theory, a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient. This is because the essence of a § 1983 claim is the deprivation of the right rather than the conspiracy.

Id. at 1449 (citations omitted). "[I]n other words, a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law." Id. at 1449 n. 6 (citations omitted).

In this case, Gomez pled a Section 1983 conspiracy claim without having alleged an actionable constitutional claim upon which to base his conspiracy claim. Defendant filed a motion to dismiss which seeks the dismissal of Gomez's Fourteenth Amendment claims. If this motion is granted, all of Gomez's constitutional claims will be dismissed and all that will remain is the conspiracy claim. Therefore, the dismissal of Gomez's Section 1983 conspiracy claim is proper because his Section 1983 conspiracy claim will not be viable without an underlying, cognizable constitutional right violation.

III. EVEN ACCEPTING ALL OF HIS ALLEGATIONS AS TRUE, GOMEZ'S CLAIM THAT DEFENDANT CONSPIRED TO DEPRIVE HIM OF HIS FEDERALLY PROTECTED RIGHTS FAILS TO STATE AN ACTIONABLE CLAIM UNDER 42 U.S.C. § 1985.

Based on Defendant's conspiracy to violate his Fourteenth Amendment rights, Gomez asserted a conspiracy claim under 42 U.S.C. § 1985. However, Gomez's Complaint does not state any facts upon which this Court can determine the nature of Defendant's alleged conspiratorial acts. Conclusory allegations of a conspiracy are insufficient to state a 42 U.S.C. § 1985 claim. See, e.g.,

Gallegos v. City and County of Denver, 984 F.2d 358 (10th Cir.1993), cert. denied, 508 U.S. 972 (1993).

Even accepting all of Gomez's allegations as true, Gomez failed to allege the facts necessary to state actionable conspiracy claims under 42 U.S.C. § 1985(1), (2), and (3). Gomez's Complaint failed to state an actionable claim under 42 U.S.C. § 1985(1) because Gomez has not alleged that he was acting as a federal officer when Defendant allegedly deprived him of his constitutional rights. Having failed to allege that Defendant interfered with the administration of justice in the federal or state courts or that their actions were based on some race-based or other class-based invidious discriminatory animus, Gomez's Complaint failed to state an actionable claim under 42 U.S.C. § 1985(2). Having failed to allege that Defendant's actions were based on some race-based or other class-based invidious discriminatory animus, Gomez's Complaint fails to state an actionable claim under Section 1985(3). For these reasons, this Court should dismiss Gomez's 42 U.S.C. § 1985(1), (2), and (3) claims.

A. GOMEZ'S COMPLAINT FAILED TO STATE AN ACTIONABLE CLAIM UNDER 42 U.S.C. § 1985(1) BECAUSE GOMEZ FAILED TO ALLEGE THAT HE WAS ACTING AS A FEDERAL OFFICER WHEN DEFENDANT ALLEGEDLY DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS.

Subsection (1) of 42 U.S.C. 1985 states:

> If two or more persons conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, trust or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer or the United States to leave any state, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties.

See 42 U.S.C. § 1985(1). Section 1985(1) is part of the Ku Klux Klan Act of 1871, its purpose being an "enforcement vehicle for the thirteenth amendment, in that Congress intended to provide black persons equal protection of the laws . . ." Santistevan v. Loveridge, 732 F.2d 116, 118 (10th Cir. 1984).

On its face, Section 1985(1) relates solely to federal officers. Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 717 (9th Cir.), cert. denied, 454 U.S. 967 (1981). There is nothing in the language of Section 1985(1) nor the legislative history to support the argument that Section 1985(1) applies to anyone other than federal officers. Id. Furthermore, interference with a federal officer's duties through the use of "force, intimidation or threats" is required to state an actionable Section 1985(1) claim. See, e.g., Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336-37 (7th Cir.), cert. denied, 434 U.S. 975 (1977).

In this case, Gomez failed to allege the facts necessary to support a Section 1985(1) claim. Gomez has not alleged that he was acting as a federal official when Defendant allegedly deprived him of his constitutional rights. Instead, Gomez was a private citizen petitioning the State Court for the redress of his grievances. Moreover, Gomez did not allege that Defendant used "force, intimidation or threats" to prevent Gomez from performing his duties as a federal official. Having failed to allege that he was acting as a federal officer or that force, intimidation or threats were used when Defendant allegedly deprived him of his constitutional rights, Gomez's Complaint fails to state an actionable claim under Section 1985(1).

B. HAVING FAILED TO ALLEGE THAT DEFENDANT INTERFERED WITH THE ADMINISTRATION OF JUSTICE IN THE FEDERAL OR STATE COURTS OR THAT THEIR ACTIONS WERE BASED ON SOME RACE-BASED OR OTHER CLASS-BASED INVIDIOUS DISCRIMINATORY ANIMUS, GOMEZ'S COMPLAINT FAILED TO STATE AN ACTIONABLE CLAIM UNDER 42 U.S.C. § 1985(2).

Section 1985(2)[3] "contains four clauses that create four distinct causes of action." Wright v. No Skiter, Inc., 774 F.2d 422, 425 (10th Cir.1985) (citing Kimble v. D.J. Duffy, Inc., 623 F.2d 1060, 1064-1065 (5th Cir. 1980)). The first clause of Section 1985(2) provides a cause of action for a party, witness or juror who by force, intimidation, or threat is prevented from attending or participating in a federal judicial proceeding. Wright, 774 F.2d at 425. The second clause makes available a remedy for a party, witness, or juror who was injured for having attended or participated in a federal judicial proceeding. Id. Section 1985(2)'s third clause is aimed at actions by two or more persons who conspire for the purpose of impeding, hindering, obstructing or defeating "the due

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[3] Section 1985(2) of the Civil Rights Act provides in pertinent part:

> If two or more persons in any state or territory conspire to deter, by force, intimidation or threat, any party or witness in any Court of the United States from attending such Court, or testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment or indictment of any grand or petit juror in any such Court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. § 1985(2).

course of justice" with intent to deny a person equal protection of the laws. Id. The fourth clause provides a claim for injuries suffered by a person for having to enforce his or another person's rights to equal protection of the laws. Id.

The first and second clauses of Section 1985(2) deal with the administration of justice in the *federal* courts. Kush v. Rutledge, 460 U.S. 719, 724 (1983). The third clause addresses the administration of justice in the *state* courts. Id. at 725. The fourth clause protects the private enjoyment of "equal protection of the laws." Id. at 724.

With respect to the language of Section 1985(2) which immediately follows the semicolon (clause No. four), this language is very similar to language in Section 1985(3), which states:

> Two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted *authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws*;

42 U.S.C. § 1985(3) (emphasis added). Section 1985(3) requires, "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' actions" for a claim to be viable. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (footnote omitted).

Thus, when a Plaintiff proceeds under the fourth clause of Section 1985(2), courts require the same quantum of proof as a cause of action under 42 U.S.C. § 1985(3) because both statutes are directed towards equal protection of the laws. See Smith v. Yellow Freight System, Inc., 536 F.2d 1320, 1323 (10th Cir. 1976) (citing Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976)). This means that a plaintiff must allege racial or, at the very least, other class-based invidious discriminatory animus to state an actionable claim under the fourth clause of Section

1985(2). Id.

In this case, Gomez failed to allege the facts necessary to support a claim under *any* clause of Section 1985(2). In his Complaint, Gomez failed to allege any fact which would indicate that Defendant somehow interfered with the administration of justice in the *federal* courts as required by the first and second clauses. See Kush, 460 U.S. at 724. Gomez also failed to allege any fact which would indicate that Defendant somehow interfered with the administration of justice in the *state* courts as required by the third clause. See Id. Finally, Gomez failed to allege that Defendant was motivated by a racial or, at the very least, other class-based invidious discriminatory animus as required by the fourth clause. Smith, 536 F.2d at 1323. Having failed to allege interference with the administration of justice in the federal or state courts or some race-based or other class-based invidious discriminatory animus, Gomez's Complaint fails to state an actionable claim under Section 1985(2).

C. HAVING FAILED TO ALLEGE THAT DEFENDANT'S ACTIONS WERE BASED ON SOME RACE-BASED OR OTHER CLASS-BASED INVIDIOUS DISCRIMINATORY ANIMUS, GOMEZ'S COMPLAINT FAILED TO STATE AN ACTIONABLE CLAIM UNDER SECTION 1985(3).

Section 1985(3)[4] provides a private civil remedy for persons injured by conspiracies to

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[4] Section 1985(3) provides in pertinent part:

> If two or more persons ... conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United

(continued...)

deprive them of their right to equal protection of the laws. 42 U.S.C. § 1985(3). The landmark case construing Section 1985(3) is Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, a group of black citizens were assaulted by a group of white citizens as they traveled on an interstate highway in Mississippi. Id. at 90-91. The assault was conducted under the mistaken belief that the Plaintiffs were civil rights workers. Id. The issue before the Supreme Court was whether the coverage of Section 1985(3) reached individuals acting in a purely private capacity. Id. at 93.

In holding that it does, the Court in Griffin enumerated the guidelines for measuring the sufficiency of a complaint under Section 1985(3).

> To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." A complaint must then assert that one or more of the conspirators (3) did, or cause to be done, "any act in furtherance of the object of (the) conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

403 U.S. at 102-03.

Despite the unanimity in the decision, the broad facial sweep of the language in Section 1985(3) caused considerable concern for the Court. The Court cautioned that although Section 1985(3) was intended by Congress to reach private action, Congress did not intend for it to reach "all tortious, conspiratorial interferences with the rights of others." Griffin, 403 U.S. at 101. To

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[4] (...continued)

> States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

effectuate this congressional intention, the Court further defined the second element set forth above to require "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102 (footnote omitted). Given the facts of the case before it, however, the Court expressly refrained from deciding whether a conspiracy motivated by invidiously discriminatory animus, other than racial bias, would be actionable under Section 1985(3). Id. at 102 n.9.

In the years following Griffin, the lower courts have disagreed concerning which conspiracies motivated by *non*-racial invidiously discriminatory animus fall within the ambit of Section 1985(3) protection. See Canlis, 641 F.2d at 719 n. 15 (listing cases). In a number of cases, the Tenth Circuit, however, has applied the class-based animus requirement consistent with Griffin. See, e.g., Wilhelm v. Continental Title Company, 720 F.2d 1173, 1175-78 (10th Cir. 1983), cert. denied, 465 U.S. (1984); Taylor v. Gilmartin, 686 F.2d 1346, 1356-58 (10th Cir. 1982), cert. denied, 459 U.S. 1147 (1983); Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748 (10th Cir. 1980), cert. denied , 454 U.S. 833 (1981); Lessman v. McCormick, 591 F.2d 605, 608 (10th Cir. 1979).

The Supreme Court, moreover, has yet to deviate from the course it set in Griffin. In 1983, the Supreme Court decided United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 (1983). In that case, the Supreme Court held that, "it is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause." Id. at 836. Accordingly, the Court held that Section 1985(3) was not intended to reach conspiracies to infringe the First Amendment or conspiracies motivated by economic or commercial bias or animus. Id. at 830.

Similar sentiments were expressed by the Supreme Court in 1993 in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993). Following Carpenters, the Court in Bray held that a conspiracy to deprive a woman of her federal right to an abortion is not actionable under Section 1985(3). 506 U.S. at 278 (citing Carpenters, 463 U.S. at 833; United States v. Kozminski, 487 U.S. 931, 942 (1988); United States v. Guest, 383 U.S. 745, 759 n. 17 (1966)). According to Griffin, Carpenters, Bray and a number of Tenth Circuit cases, it is doubtful whether any plaintiff can state a viable Section 1985(3) claim without alleging that the conspiracy was racially motivated.

Even assuming that a conspiracy may be motivated by other class-based discrimination under 42 U.S.C. § 1985(3), a plaintiff must still plead facts which set forth that actions were taken against him or her based solely on class membership and that the aim of the conspiracy was to interfere with rights that by definition are protected against private, as well as official, encroachment. Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993) (citations omitted); Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748 (10th Cir. 1980).

In this case, Gomez failed to allege the facts necessary to support a Section 1985(3) claim. Gomez pled no facts which would suggest that Defendant took any actions against him because of his race or even any other protected class. Gomez, moreover, did not allege that the aim of the conspiracy was to interfere with his rights as a member of a racial minority group that by definition is protected against private, as well as official, encroachment. Indeed, Gomez did not allege what the aim of Defendant's conspiracy was. Having failed to allege that Defendant's actions were based on some race-based or other class-based invidious discriminatory animus, Gomez's Complaint fails to state a claim under Section 1985(3) upon which relief may be granted.

IV. SINCE HE FAILED TO STATE ACTIONABLE CLAIMS UNDER 42 U.S.C. § 1985(1), (2) AND (3), GOMEZ'S 42 U.S.C. § 1986 CLAIM ALSO FAILS TO STATE AN ACTIONABLE CLAIM BECAUSE SECTION 1986 CLAIMS ARE DERIVATIVE OF SECTION 1985 CLAIMS.

Section 1986 provides a cause of action against "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . . are about to be committed, and having power to prevent or aid . . . neglects or refuses to do so." 42 U.S.C. § 1986. "Hence, there can be no valid claim under § 1986 of neglect to prevent a known conspiracy, in the absence of a conspiracy under § 1985." Santistevan, 732 F.2d at 118. As set forth in Sections III A-C of this Motion, Gomez failed to establish a viable Section 1985(1), (2), or (3) cause of action. Having failed to state actionable claims under Section 1985(1), (2) or (3), Gomez's Section 1986 claim also failed to state a claim upon which relief may be granted because Section 1986 claims are derivative of and wholly dependent on the existence of Section 1985 claims.

WHEREFORE, Defendant respectfully requests that this Court grant Defendant's Motion for Partial Summary Judgment No. I, dismiss Gomez's Quo Warranto action and claims brought under 42 U.S.C. §§ 1983, 1985, and 1986, award Defendant its attorney's fees and costs, and for all other relief this Court deems just and proper.

Respectfully submitted,

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I hereby certify that on this 6th day of July 2010, the foregoing was electronically served through the CM/ECF system to the following:

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