IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel KENNETH GOMEZ,

Plaintiff,

vs. **CIV 10-0594 JAP/LFG**

ELEVENTH JUDICIAL DISTRICT COURT,

Defendants.

DEFENDANT'S AMENDED REPLY IN SUPPORT OF REMOVAL

Defendant, the Eleventh Judicial District Court, through their counsel Robles, Rael & Anaya, P.C. (Luis Robles, Esq.), hereby replies to Plaintiffs' Verified Response Opposing Removal and for Summary Remand, *filed June 28, 2010 [Docket No. 10]*.[1]

Removal was proper under 28 U.S.C. § 1441(b) and § 1446(a) and this Court has jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3) and (4).

BACKGROUND

1. On June 1, 2010, Plaintiff, Kenneth Gomez, filed Plaintiff's Complaint to Void Judgments, and for Writ of Quo Warranto ("Complaint") with the Eleventh Judicial District Court. A copy of the Complaint is attached to Defendant's Notice of Removal, filed June 21,2010 *see [Docket No. 1]* ("Notice of Removal"), as *Exhibit A.* The factual substance of the Complaint was

[1] Plaintiff filed a "response" to Defendant's Notice of Removal. *See [Docket No. 10]*. Instead of a "response," Plaintiff should have titled his pleading, "Motion for Remand." Accordingly, Defendant will construe Plaintiff's "response" as a motion for remand. Thus, the instant pleading is in fact a *response* to Plaintiffs's motion for remand.

an allegation that the judges of the Eleventh Judicial District Court have not been bonded as required by New Mexico law. The Complaint asserted that this alleged failure implicated the United States Constitution and federal law:

a. The initial paragraph of the Complaint alleged that Defendant had"severely injured [Plaintiff] by denying him constitutional rights under section 1 and 3, Fourteenth Amendment and laws giving the constitutional power effect. . . ."

b. At continuation, the initial paragraph of the Complaint stated that Defendant's actions have been "repugnant to both constitutions." In support, the Complaint quoted *Marbury v. Madison*, 5 U.S. 137 (1803) on the supremacy of the United States Constitution over other law.

c. At I.a the Complaint alleged concurrent violations of the Supremacy Clause and the Oath or Affirmation clause of the United States Constitution, U.S. Const. Art. VI, clauses 2 and 3 respectively, and of the NM Const., Art. XX, § 1 (concerning the oath of office), and Art. XXII, § 19 (concerning assumption of office).

d. At I.b the Complaint alleged that the New Mexico Legislature had passed a law that violated or illicitly amended the United States and the New Mexico constitutions.

2. On June 7, 2010, Plaintiff, Kenneth Gomez, filed Plaintiff's First Amended Complaint to Void Judgments, and for Writ of Quo Warranto ("Amended Complaint"). A copyof the Amended Complaint is attached to the Notice of Removal as *Exhibit B*. The factualsubstance of the Amended Complaint was an allegation that the judges of the Eleventh JudicialDistrict Court have not been bonded as required by New Mexico law. The Amended Complaint asserted that this alleged

failure implicated the United States Constitution and federal law:

a. The initial paragraph of the Amended Complaint alleged that Defendant had "severely injured him by denying him constitutional rights under section 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional power effect."

b. At continuation, the initial paragraph of the Amended Complaint stated that Defendant's actions have been "repugnant to both constitutions." In support, the Amended Complaint quoted *Marbury v. Madison*, 5 U.S. 137 (1803) on the supremacy of the United States Constitution over other law.

c. At I.a the Amended Complaint alleged concurrent violations of the Supremacy Clause and the Oath or Affirmation clause of the United States Constitution, U.S. Const.Art. VI, clauses 2 and 3 respectively, and of the NM Const., Art. XX, § 1 (concerning the oath of office), and Art. XXII, § 19 (concerning assumption of office).

d. At I.b the Amended Complaint alleged that the New Mexico Legislature had passed a law that violated or illicitly amended the United States and the New Mexico constitutions.

3. On June 16, 2010, Plaintiff, Kenneth Gomez, filed Plaintiff's Second Amended Complaint to Void Judgments, and for Writ of Quo Warranto ("Second Amended Complaint"). A copy of the Second Amended Complaint is attached to Defendant's Supplemental Exhibit to Notice of Removal, filed June 28, 2010 *[Docket No. 8]*, as *Exhibit A*. The factual substance of the Second Amended Complaint is an allegation that the judges of the Eleventh Judicial District Court have not been bonded as required by New Mexico law. The Second Amended Complaint asserts that this alleged failure implicated the United States Constitution and federal law:

a. The initial paragraph of the Second Amended Complaint alleges that Defendant have "severely injured him by denying him constitutional rights under section 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional power effect."

b. At continuation, the initial paragraph of the Second Amended Complaint states that Defendant's actions have been "repugnant to both constitutions." In support, the Second Amended Complaint quotes *Marbury v. Madison*, 5 U.S. 137 (1803), on the supremacy of the United States Constitution over other law.

c. At I.a the Second Amended Complaint alleges concurrent violations of the Supremacy Clause and the Oath or Affirmation clause of the United States Constitution, U.S. Const. Art. VI, clauses 2 and 3 respectively, and of the NM Const., Art. XX, § 1 (concerning the oath of office), and Art. XXII, § 19 (concerning assumption of office).

d. At I.b the Second Amended Complaint alleges that the New Mexico Legislature had passed a law that violated or illicitly amended the United States and the New Mexico constitutions.

4. On June 21, 2010, Defendant filed the Notice of Removal with this Court. The Notice of Removal explained that removal jurisdiction was proper under 28 U.S.C. §§ 1441(b) and 1446(a).

5. On June 28, 2010, Plaintiff filed Plaintiffs' Verified Response Opposing Removal and for Summary Remand, *filed June 28, 2010 [Docket No. 10]* ("Response Opposing Removal"). Plaintiff is *pro se* and the grounds on which he argues against removal are not wholly clear. As best

as can be determined,[2] the Response Opposing Removal argues that remand is required (1) because this Court lacks jurisdiction under the *Rooker-Feldman* doctrine that federal district courts should not function as courts of "appeal" to rehear the merits of state court proceedings, (2) because four judges of this Court have allegedly falsified financial disclosure forms by failing to disclose that while receiving compensation as officers and judges of the State of New Mexico they were not bonded in the manner Plaintiff believes they should have been bonded, (3) because of previous litigation before this Court, and (4) under 28 U.S.C. § 1446(c)(4).

STANDARD OF REVIEW

A federal court's removal jurisdiction is statutory in nature and is to be strictly construed. *Shamrock Oil & Gas v. Sheets*, 313 U.S. 100, 108 (1941). The need for respecting the limits on the removal jurisdiction of the federal courts arises out of respect for the sovereignty of state governments and protection of state judicial power. *Id.* at 108-09. If a case was removed "improvidently and without jurisdiction," this Court must remand the case. 28 U.S.C. § 1447 (1994). However, if this Court has original jurisdiction over the subject matter of this case, this Court has no discretion to remand. *See Adair v. Lease Partners, Inc.*, 587 F.3d 238, 245 (5th Cir. 2009). In determining whether it has jurisdiction, the Court looks only to the jurisdictional facts alleged in the Notice of Removal. *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 488 F.3d 112,

[2] The Response is not a model of legal craftsmanship and contains a number of extraneous allegations; nonetheless, counsel for Defendant has done his best to identify and address the relevant claims in Plaintiff's Response. If this Court believes that Plaintiff's Response Opposing Removal has raised any other significant points that have gone unaddressed, Defendant requests that this Court order supplemental briefing.

124 (2nd Cir. 2007). Once a *prima facie* proof of jurisdiction has been made, jurisdiction continues until the contrary is established. *See Pacific S.S. Co. v. Sutton*, 7 F.2d 579, 581 (9th Cir. 1925).

ARGUMENT

Removal in this case was proper. The *Rooker-Feldman* doctrine does not require remand to state court. Plaintiff's allegations against four judges of this Court do not require remand. Plaintiff's complaints about the outcome of former proceedings before this Court do not require remand. 28 U.S.C. § 1446(c)(4) does not require remand. This Court may properly exercise jurisdiction over this case.

I. Removal in This Case Was Proper.

Removal in this case was proper as Plaintiff has alleged violations of the United States Constitution and of federal civil rights laws.

Removal is proper if the federal district courts have original jurisdiction over the subject matter of the suit. 28 U.S.C.A. § 1441(a) states that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants."

The federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This Court has original jurisdiction over this suit because Plaintiff has alleged violations of the Constitution of the United States: as described above, his Second Amended Complaint refers to violations of his rights under the Fourteenth Amendment, alleges the Defendants have acted in a manner contrary or repugnant to the United States Constitution, and claims that the New Mexico Legislature has passed legislation

that is void as contrary to the United States Constitution. Thus Plaintiff's suit arises under the Constitution of the United States.

This Court also has original jurisdiction over this suit because Plaintiff has claimed a violation of federal civil rights law enforcing the Fourteenth Amendment. *See* Second Amended Complaint, initial paragraph. True, Plaintiff does not identify a specific law, such as 42 U.S.C. § 1983 or any of its brethren. But as Plaintiff does not have an attorney, this Court should interpret his Complaint generously and liberally, inferring legal claims from the Complaint's allegations where appropriate. *See Ledbetter v. City of Topeka, Kan.,* 318 F.3d 1183, 1187 (10th Cir.2003) (stating that *pro se* filings should be interpreted liberally); *Birdo v. Rodriguez*, 84 N.M. 207, 209, 501 P.2d 195, 197 (1972) (stating that a *pro se* Complaint must tell a substantive story from which the elements of a claim are inferable); *see also Green v. United States*, 260 F.3d 78, 83 (2d Cir.2001) (explaining that a pro se litigant's submissions should be read "to raise the strongest arguments that they suggest"). The Tenth Circuit has been willing to construe claims as brought under 42 U.S.C. § 1983, for example, even when the complaint nowhere referred to that or any other specific federal statute. *See* Harrison v. University Of Colorado Health Sciences Center, 337 Fed.Appx. 750, *773 (10th Cir. 2009) ("Mr. Harrison's claims are assumedly brought pursuant to 42 U.S.C. § 1983."); *Davis v. E.P.A.*, 194 Fed.Appx. 523, 525 (10th Cir. 2006) ("Nor does the complaint itself cite or in any way refer to § 1983. . . . Construing Mr. Davis's pro se complaint liberally, we read it as a suit seeking relief under that statute." (citation omitted)). In *Slayton v. Willingham,* 726 F.2d 631 (10th Cir. 1984), the Tenth Circuit construed the facts alleged in a *pro se* Complaint as bringing a claim under a particular Constitutional amendment, even though the Complaint had not only failed to mention

that amendment at all but had in fact cited an entirely different constitutional amendment. *Id*. at 634 n.7 ("A pro se litigant's mere citation of the wrong constitutional amendment does not preclude his cause of action so long as the facts he alleges state a claim under an obviously applicable constitutional provision."). Finally, in *Phillips v. Humble*, 587 F.3d 1267 (Tenth Cir. 2009), the Tenth Circuit considered a case that concerned a *pro se* complaint that was largely based on "state tort law" and did "not specify any federal cause of action." However, because the Plaintiff had alleged that "while she was held in jail, she complained of chest pain and, despite her complaints, she was not allowed to use her asthma inhaler" and because Plaintiff stated that her Fourteenth Amendment rights were violated in a later filing with the district court, the Tenth Circuit held that the Plaintiff had made a claim under 42 U.S.C. § 1983. *Id*. at 1270-71 ("in her response to the Appellees' motion to dismiss she alleged, *inter alia*, that her Fourteenth Amendment rights were violated when she was denied access to medical treatment. In conjunction with the factual allegations in her complaint, this was sufficient to sustain a *pro se* § 1983 claim." (citation omitted)). Plaintiff's allegations of violations of federal civil rights law violations, Fourteenth Amendment violations, and other violations of the United States Constitution are more than sufficient to state a claim that arises under the federal constitution and federal law.

Because Plaintiff has alleged a violation of federal civil rights law, this Court also has jurisdiction under 28 U.S.C. §1343(a)(3), which grants federal district courts jurisdiction over legal action "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens."

Plaintiff admittedly has also claimed concurrent violations of New Mexico constitutional provisions and New Mexico laws. This does not defeat removal, however. Where there is original jurisdiction, the court may also exercise supplemental jurisdiction over pendent state claims. 28 U.S.C. § 1367(a) ("In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966)(a district court has pendent jurisdiction over state law claims whenever the federal law claims and the state law claims in the case "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding"). Plaintiff's federal and state claims all appear to derive from his basic claim that the judges and officers of the Defendant 11th Judicial District Court are illegally in office for failure to comply with bonding requirements. They therefore are part of "the same case or controversy" such that this Court may exercise pendent jurisdiction.

Because Plaintiff's state law claims are intertwined with his federal claims, remand is not proper under 28 U.S.C. § 1441(c) (allowing remand of state law claims that are "separate and independent" from federal law claims). "Where both federal and state causes of action are asserted as a result of a single wrong based on a common event or transaction, no separate and independent federal claim exists under section 1441(c)." *In re City of Mobile*, 75 F.3d 605, 608 (11th Cir. 1996) (a case involving a high speed pursuit by police in which the Eleventh Circuit denied a plaintiff's request for the remand of his § 1983 and state tort claims to state court), *citing American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951). As the Supreme Court has held, "section 1441(c) is not

directly applicable to suits involving pendent claims, because pendent claims are not 'separate and independent' within the meaning of the removal statute. . . ." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 354, 355 n.11 (1988). This Court can properly exercise jurisdiction over all the claims in this suit and removal should be sustained.

II. The *Rooker-Feldman* Doctrine Does Not Justify Remand.

Plaintiff claims that this Court lacks jurisdiction under the *Rooker-Feldman* doctrine because Plaintiff's suit requests as one remedy that several state court decisions be overturned. Response Opposing Removal, I.B.1. The *Rooker-Feldman* doctrine does not apply, however, because Plaintiff has failed to show that Plaintiff's basic claim in this suit was an issue actually litigated or inextricably intertwined with those actually litigated in those state court decisions.

The Tenth Circuit has recently extensively discussed the *Rooker-Feldman* doctrine in *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010). The Tenth Circuit explained that "[g]enerally, the Rooker-Feldman doctrine precludes lower federal courts from effectively exercising appellate jurisdiction over claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment. " *Id.* at 1193 (marks of quotation omitted). The Tenth Circuit added that *Rooker-Feldman* doctrine has a narrow scope: it is "confined to cases of the kind from which the doctrine acquired its name: 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.* (*quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005)). Given the narrow scope of the *Rooker-Feldman* doctrine, it only applies to bar judicial actions reviewing "the proceedings already conducted by the 'lower'

tribunal to determine whether it reached its result in accordance with law." *Id., citing Bolden v. City of Topeka*, 441 F.3d 1129, 1143 (10th Cir. 2006). *Rooker-Feldman* does not bar "claims that do not rest on any allegation concerning the state-court proceedings or judgment." *Id., citing Bolden*, 441 F.3d at 1145. Further, "[i]f a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon Mobil Corp. v. Saudi Basic Industries Corp*., 544 U.S. 280, 293 (2005).

Plaintiff's case is not the classic case to which the *Rooker-Feldman* doctrine applies. Plaintiff has not brought a case in federal court attempting to relitigate the issues already decided in a finished state court action. Plaintiff has brought a case in state court and it has been removed. In effect, Plaintiff is arguing that he is immune from removal even if he raises novel federal claims if he chooses to include a request that a state court judgment be set aside. It is therefore necessary to understand how the *Rooker-Feldman* doctrine has been applied in removal cases.

In *Jenkins v. MTGLQ Investors*, 218 Fed.Appx. 719 (10th Cir. 2007) (unpublished), the *pro se* plaintiff attacked removal on *Rooker-Feldman* grounds. The court responded that "[p]roper removal does not constitute an appeal, de facto or otherwise, of the state court proceedings but a continuation of them. Thus, the *Rooker -Feldman* doctrine has no application to a properly removed case where, as here, there is no attack on a separate and final state-court judgment." *Id.* at 723-24. Some courts have held that remand is proper under *Rooker-Feldman* where the removed state court litigation attacked other state court judgments. *See, e.g., Mills v. Harmon Law Offices, P.C.*, 344 F.3d 42, 45-46 (1st Cir.2003) (vacating dismissal with prejudice under *Rooker-Feldman*, where the

dismissed case had been removed from state court). Another court to consider the matter has upheld the alternative of dismissing the litigation entirely, *see Callico v. City of Belleville*, 99 Fed.Appx. 746, 749 (7th Cir. 2004) (unpublished), where the dismissal was without prejudice and plaintiff's actions had invited removal (in *Callico*, by filing a substantially similar action in federal court). If the *Rooker-Feldman* doctrine did apply, then dismissal would be appropriate because Plaintiff has invited removal by bringing claims that directly question the authority of every judge in the judicial district in which he brought the claim.

This Court need not decide to dismiss, however, because the *Rooker-Feldman* doctrine does not apply in this case. The doctrine only applies to "claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment." *Ex rel. Jensen*, 603 F.3d at 1193. Plaintiff lists a number of cases decided by the state court that he believes are implicated by his claim, *see* Second Amended Complaint, attachment. But Plaintiff does not allege in his Response Opposing Removal that Plaintiff's claims in the present litigation were raised or decided in those listed state court cases. The *Rooker-Feldman* doctrine therefore would only apply if the claims Plaintiff raises in this litigation are *inextricably* intertwined with the listed state court cases. They do not appear to be.

Plaintiff's claims are highly unusual; Defendant is unable to find that any court has considered whether a similar broad attack on the legal authority of all the judges in a jurisdiction over decades has been evaluated as inextricably intertwined with the merits of judgments rendered by those judges or not. Nonetheless, there is reason to believe that there is no inextricable connection. Plaintiff's assertions do not go to the merits of any of the listed state court litigations,

nor do his assertions arise from any of the same transactions or underlying facts that were considered in them. Plaintiff does not even describe any of those merits or those underlying facts, because they are not relevant to his claim. *Rooker-Feldman* bars this Court from sitting in a quasi-appellate fashion to reconsider a state court judgment, but this case does not ask this Court to act in that fashion: nothing specific to the course of any completed litigation is at issue. *See Plyler v. Moore*, 129 F.3d 728, 731 (4th Cir.1997) (holding that federal constitutional claims "are inextricably intertwined with questions ruled upon by a state court . . . when success on the federal claim depends upon a determination that the state court wrongly decided the issues before it" (marks of quotation omitted)). *Rooker-Feldman* does not bar "claims that do not rest on any allegation concerning the state-court proceedings or judgment." *Ex rel. Jensen*, 603 F.3d at 1193, *citing Bolden*, 441 F.3d at 1145.

Further, even where a plaintiff's claims challenge a legal conclusion reached by a state court, *Rooker-Feldman* does not apply to bar "independent claim[s]." *Exxon Mobil Corp.*, 544 U.S. at 293 (2005). The *Rooker-Feldman* doctrine therefore does not bar federal jurisdiction over Plaintiff's claims, which not only are apparently independent of the claims actually litigated in the listed state court cases, but which do not even challenge the substance of whatever legal conclusions may have been reached in those cases. Plaintiff's basic claim in this litigation—that the judges in the 11th Judicial District are not in compliance with their duty to take out a bond—does not necessarily rely on an unfavorable outcome in the listed state court cases or, in fact, on any prior cases at all. *See, e.g.,* Second Amended Complaint, IV.3 (demanding injunctive relief requiring Eleventh Judicial District Court judges to take out a bond in the manner Plaintiff believes the law prescribes). In *Facio*

v. Jones, 929 F.2d 541, 543 (10th Cir. 1991), the Tenth Circuit considered the application of the *Rooker-Feldman* doctrine to the circumstance where a plaintiff requested relief other than overturning a state court decision. The court held that "[a] case is inextricably intertwined with the merits of a state court judgment if the plaintiff would lack standing if he were not challenging the judgment." *Id.* In that case, the plaintiff asked the court to overturn a default judgment against him and also to find that the state's default judgment rules were unconstitutional. *Id.* The court found that the plaintiff did not have standing, absent his request to overturn his default judgment, because he had "not demonstrated any real chance of being subjected in the future to Utah's procedures for reversing default judgments." *Id.* Plaintiff in this case does not appear to lack standing, both because he appears to be particularly litigious and therefore more likely than the average citizen to find himself subject to the authority of Defendant in the future, and also because the requirements for standing in a *quo warranto* action are relaxed, *see* NMSA 1978 § 44-3-4 (1953). His requests for injunctive relief, *e.g.,* are therefore not inextricably intertwined for the purposes of *Rooker-Feldman*. *Rooker-Feldman* does not strip this Court of jurisdiction.

III. Plaintiff's Slurs on the Integrity and Probity of This Court Do Not Strip This Court of Jurisdiction.

Plaintiff argues that this Court lacks jurisdiction (and therefore that this case should be remanded) because four judges on this Court have allegedly falsified financial disclosure statements by failing to note they illegally held New Mexico state office (they allegedly illegally held state office because they were improperly bonded in the same way that Plaintiff alleges the constituent judges of the Eleventh Judicial District Court are improperly bonded).

Plaintiff's argument fails. His argument that these four judges were improperly bonded is the same as his argument that the judges of the Eleventh Judicial District Court are improperly bonded: since this Court has jurisdiction to consider its own jurisdiction, it has jurisdiction to judge the merits of Plaintiff's claim, which are identical. Even if Plaintiff's allegation that these four judges had been improperly bonded had any merit, Plaintiff still would not have proved any violation of financial disclosure law. Further, financial disclosure law violations do not *in se* strip a judge or his Court of jurisdiction. At best, Plaintiff may have an argument for recusing certain judges of this Court, but recusal is not jurisdictional.

A. Even if Plaintiff's Allegations Against Four Judges of This Court Had Implications for Jurisdiction, This Court Could Retain Jurisdiction to Determine the Merits of Those Allegations.

Even if Plaintiff's allegations concerning four judges of this Court would somehow strip this Court of jurisdiction if they were true, this Court would still have jurisdiction to determine whether those allegations were true and would therefore also have jurisdiction to determine the merits of this case, since Plaintiff's allegations against four judges of this Court and Plaintiff's allegations against Defendant are substantially the same.

This Court has jurisdiction to determine its own jurisdiction. *See, e.g., Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004). This includes jurisdiction to determine whether it has subject-matter jurisdiction. *See State, ex rel. Oklahoma Tax Commission v. Graham*, 822 F.2d 951, 955 (10th Cir.) (jurisdiction to determine subject matter jurisdiction), *vacated on other grounds*, 484 U.S. 973 (1987). The jurisdiction-to-determine-jurisdiction principle applies to removed cases. *Id.* To the extent that Plaintiff's allegations implicate this Court's jurisdiction, this Court has jurisdiction to

determine whether those allegations are true. Plaintiff's allegation that four judges of this Court were improperly bonded during their service as officers and judges of the State of New Mexico gives this Court jurisdiction to determine whether Plaintiff's bonding theories are correct.

Because this Court has jurisdiction to determine its own jurisdiction, it also has jurisdiction to decide the merits of a case when the merits and the jurisdictional basis overlap. Thus it has been repeatedly held, for instance, that "when subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case," this Court may properly treat a motion to dismiss on jurisdictional grounds as a motion for summary judgment on the merits. *See, e.g., U.S., ex rel. Baker v. Community Health Systems, Inc.*, __F.Supp.2d__, 2010 WL 1740624, 4 (D.N.M. 2010). In this case, Plaintiff's argument that four judges of this Court were improperly bonded is identical to his argument that the judges of the Eleventh Judicial District Court are improperly bonded. Because this Court has jurisdiction to determine whether four judges of this Court were improperly bonded, it has jurisdiction to decide whether the judges of the Eleventh Judicial District Court are improperly bonded.

Plaintiff's argument fails.

B. Even if Plaintiff's Were Correct That Four Judges of This Court Were Improperly Bonded During Their Prior State Employment, It Does Not Follow that They Have Committed Violations of Any Financial Disclosure Laws.

Plaintiff argues that the four Judges of this Court who allegedly were improperly bonded falsified financial disclosure statements and appointment affidavits, Response Opposing Removal at 3, apparently because they did not disclose on these documents that they had not been properly

bonded while in the service of New Mexico.[3] Plaintiff's evidence for this proposition is a copy of a page from the legislative history of Public Law 95-521, see Response Opposing Removal, Exhibit 2, and a citation to 18 U.S.C. § 371, which makes it a crime to "conspire to defraud the United States."

Plaintiff's citation to a page of legislative history from a public law is not at all persuasive or informative absent actual citation to specific provisions of the United States Code, or even citation to actual provisions of the public law that Plaintiff believes are relevant. 5 U.S.C. App. 4 § 101 does require judges to file financial disclosure reports. But nothing requires that a judge, in filing those reports, disclose that he was not "properly" bonded during his prior tenure as an officer of New Mexico. 5 U.S.C. App. 4 § 102 requires that these financial disclosure reports to identify the sources and the amounts of income, honoraria, gifts, and reimbursements. Section 102 does not require any disclosure of the kind Plaintiff suggests.

Plaintiff's citation to 18 U.S.C. § 371 is also defective. No case or precedent has ever found that errors in financial disclosure reporting constitutes "defraud[ing] the United States." Further, section 371 only penalizes conspiracies, and Plaintiff has not alleged any conspiracy to falsify financial disclosure reports.

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[3] Plaintiff also cites to several federal laws concerning bonds—28 U.S.C. § 1737 (stating the conditions on which the holder of a bond of an officer of the United States must provide a certified copy, and the evidentiary value thereof) and 31 U.S.C. §§ 9304 and 9305 (stating the requirements for sureties to be an acceptable source of bonds for bonds required by the United States government). Plaintiff's argument is not clear but he appears to be suggesting that the four judges "failure" to have penal bonds while in the service of New Mexico also violated United States law. But 28 U.S.C. § 1737 and 31 U.S.C. §§ 9304 and 9305 are only applicable to officers of the United States, not officers of the State of New Mexico.

Further, Plaintiff has not alleged or demonstrated that any judge of this Court knowingly filed a false report. To do so, Plaintiff would have to demonstrate that the judges knew of Plaintiff's theory regarding bonds for New Mexico state officers and accepted it, and that the judges also knew that such information should be disclosed in financial disclosure forms. Plaintiff has not even attempted to do so. Knowingness and willingness are traditional requirements of criminal law and are specifically required by federal law concerning violations of financial disclosure requirements, *see* 5 U.S.C. App. 4 § 104(a)(2)(A).

Plaintiff has not cited any authority concerning appointment affidavits. The only reference to appointment affidavits in the United States Code is found in 42 U.S.C.A. § 5197a, concerning employees of the Federal Emergency Management Association.

Further, though Plaintiff apparently alleges that financial disclosure reports and appointment affidavits failed to include statements regarding bonding, he does not produce any evidence that this is so. He has not attached copies as exhibits or even asserted that he has examined these documents. It is simply not the case that even on removal Plaintiff can make wild accusations without evidence or argument and have them taken seriously. Once a *prima facie* case for jurisdiction has been made, Plaintiff must produce something in rebuttal. *See Triax Co. v. United States*, 20 Cl.Ct. 507, 511 (Cl.Ct. 1990) (holding that "once plaintiff comes forward with a *prima facie* showing of facts necessary to establish jurisdiction, the burden shifts to defendant to show that jurisdiction is not proper"), *New Jersey Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4*, 581 F.Supp.2d 581, 582-83 (S.D.N.Y. 2008) ("The party seeking removal from State to federal court bears the burden of proving subject matter jurisdiction, but once proven, that burden shifts to the

plaintiff to show that an exception to removal applies."), *Parker v. Brown*, 570 F.Supp. 640, 643 (D.C.Ohio 1983) ("Once the removing party has made a prima facie case of having satisfied all procedural requirements, the burden shifts to the party seeking remand to offer evidence rebutting that *prima facie* case."), *McGlynn v. Huston*, 693 F.Supp.2d 585, 588 (M.D.La. 2010) (stating that in removed diversity cases, if a removing defendant shows that the amount in controversy is likely to exceed the federal jurisdictional minimum, the burden then shifts to the plaintiff to show that it is certain that it will not).

So even if Plaintiff's allegations that four judges of this Court were improperly bonded during their service as officers of the state of New Mexico, Plaintiff's conclusion that financial disclosure laws were criminally violated in no way follows. Plaintiff has failed to show that the judges did not make these disclosures; that such disclosures were required by law; that failure to make such disclosures has been criminalized; and that failure to make such disclosures was knowing. Plaintiff's argument fails.

C. Even if Plaintiff Were Correct That Four Judges of This Court Had Violated Financial Disclosure Laws, Plaintiff Has Not Demonstrated that the Failure Is Jurisdictional.

Plaintiff appears to assume that if judges violate financial disclosure laws in some way, they are stripped of jurisdiction. Plaintiff errs.

Counsel for Defendant has been unable to find any authority from any United States jurisdiction that holds that a judge is *in se* stripped of jurisdiction for violation of financial disclosure laws, or any other laws for that matter. The 5th Century Donatist heresy has not been incorporated into the law of the United States.

In fact, United States law is clear on the consequences of judicial malfeasance. Immediate loss of jurisdiction to remove cases is not one of them. 28 U.S.C. §§ 351-364 legislates a process to hear complaints against judges. Possible penalties include censure, reprimand, referral for impeachment proceedings, and directing that no further cases be assigned the judge, but removing existing cases from the judge is not included. 28 U.S.C. §§ 354 and 355. The judge is only directed to cease to hear and decide cases in the event of a felony conviction. 28 U.S.C. § 364. Although Plaintiff has made a number of irresponsible accusations against the judges of this Court, even he has not accused them of being convicted of felonies.

Plaintiff's argument that, if judges of this Court had violated financial disclosure law, they would not have jurisdiction to hear this case, has no merit.

At most, Plaintiff might have an argument for recusal or disqualification, on the grounds that he is impliedly attacking the validity of the four judges' former tenure in New Mexico state office. *But see United States v. Grismore,* 564 F.2d 929, 933 (10th Cir. 1977) ("A judge is not disqualified merely because a litigant sues or threatens to sue him."). This argument is tenuous, since those judges are no longer in that office and are not affected by his suit. In any case, recusal/disqualification is not jurisdictional.

D. Even if Plaintiff Were Correct That Four Judges of This Court Had Violated Financial Disclosure Laws, Plaintiff Has Not Demonstrated that the Failure Is Jurisdictional.

Plaintiff's argument that the entire Court is stripped of jurisdiction because it allowed the four judges to continue as judges fails for the above-stated reasons. It also fails because Plaintiff has not shown any reason to believe that every judge on the Court knew of Plaintiff's accusations against

those four judges and believed them to be accurate. Additionally, Plaintiff has not shown that judges have any legal duty to initiate action against other judges whom they believe to be in violation of law. Plaintiff has also not shown that the failure to comply with such a duty would be jurisdictional. Plaintiff's arguments against the jurisdiction of the Court fail.

IV. Prior Decisions from This Court Do Not Strip This Court of Jurisdiction.

Plaintiff argues that this Court lacks jurisdiction (and therefore that this case should be remanded) because of prior decisions of this Court. That Plaintiff feels aggrieved by prior decisions of this Court does not even state a basis for recusing the judges concerned, let alone for removing the jurisdiction of this Court. Plaintiff argues that this Court lacks jurisdiction apparently because the Court "wrongfully" exercised jurisdiction in *USA ex rel Gutierrez v. Persons Holding License*, 03-CV- 1320, see Response Opposing Removal, Exhibit 1, and because the Court "wrongly" decided the case of *Flynn v. Yara*, 08-CV-2007.

No legal authority has ever held or stated that an incorrect determination of jurisdiction in a particular case or of the merits in a particular case strip that court of all further jurisdiction over other cases. In fact, no legal authority has ever held that the mere fact of error strips the court of any jurisdiction it would otherwise have.

Further, even if judges of this Court had addressed claims similar to Plaintiff's before, and had rejected them, or had considered cases of Plaintiff's, and had ruled against Plaintiff, it would not even be necessary for those judges to recuse themselves, let alone for jurisdiction to be stripped. *See United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (the alleged prejudice warranting recusal "must result from an extrajudicial source; a judge's prior adverse ruling is not sufficient cause for

recusal."); *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir.2000) (holding that a judge's rulings in a related case are not a sufficient basis for recusal, except where pervasive bias is shown). The legal doctrines of *stare decisis* and *res judicata* expressly permit cases to be "pre-judged" in this way.

V. 28 U.S.C. § 1446(c)(4) Does Not Require Remand.

28 U.S.C. § 1446(c)(4) does not require remand. 28 U.S.C. § 1446(c) deals only with criminal cases.

CONCLUSION

Removal should be sustained. Plaintiff's arguments for remand should be rejected.

Respectfully submitted,

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I hereby certify that on this 16th day of July 2010, the foregoing was electronically served through the CM/ECF system to the following:

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