**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**
**CHARLESTON DIVISION**

Cause No.: 2:08-cv-00487-PMD-RSC

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| David A. BARDES, et al., | ) |
| | ) |
| Plaintiffs, | ) |
| v. | ) |
| | ) |
| John M. MAGERA, et al., | ) |
| | ) |
| Defendants. | ) |
| | ) |

## Plaintiff's Written Objections to Discrimination and to the Magistrate's Report and Recommendations

Comes now the undersigned Plaintiff, David A. Bardes, and provides his written objections to several clear errors of law within the current situation, including totally unlawful discrimination, and also in the magistrate's report and recommendations in question, by stating and providing:

1. This filing is timely; The magistrate's report and recommendations were entered by the Clerk on 24 March 2008; Ten (10) days hence, not counting weekends and holidays, is today, the date of filing, 07 April 2008, and there are still an additional three (3) days of time available after being served of such report and recommendations by mail; Fed. R. Civ. P. 6(a), 6(e), 72(b).

2. In short, this Court has completely and utterly violated the undersigned's liberty, due process, and equal protection rights to otherwise free and equal access to the courts, by allowing the magistrate to "screen" his complaint, as if he were somehow a *convicted* state or federal prisoner, *incarcerated*, and filing a federal complaint over *strictly* prisoner issues *only*, which then – and **only** then – would make him subject to the provisions of 28 USC §§ 1915 and 1915A.

3. The undersigned is not convicted, not incarcerated, and the issues go far beyond any jail.

4. Accordingly, the instant **paid, non-prisoner** complaint was not subject to any screening.

5. This Court's wholly unlawful treatment of the undersigned, in refusing to allow his paid civil case to proceed forward immediately upon filing, as in all other non-prisoner civil cases, and in further acting essentially as zealous advocate for the Defendants, by assuming the role of attorney for them and presenting argument and authority fully in their behalves, as would be the natural expected function of defense counsel(s) filing one or more various motions to dismiss in due course, has completely obliterated any resemblance or appearance of impartiality herein.

6. Indeed, this Court has now trampled upon more than one fundamental due process right of the undersigned, vis-à-vis class discrimination, violation of equal protection of the laws, and etc.

7. Because the instant complaint was never subject to screening, the Magistrate's report and recommendations are, *at the very least*, extremely premature, since most of the variously named Defendants have yet to be even served the appropriate Summons and Complaint, let alone still afforded any opportunity to answer of their own volition, and also opportunity for the Plaintiffs to respond in kind, *before* the Court considers any merits, let alone facts reserved unto the Jury.

8. Indeed, because the Magistrate was without any authority under 28 USC §§ 1915/1915A with which to delay and screen the instant complaint, the entire same process is wholly invalid, essentially null and void, and/or voidable, and serves as no moment to control these proceedings.

9. Even notwithstanding, the vast majority of the magistrate's expressed concerns concern only failures to properly allege jurisdiction, or merely clerical omission of failure to state facts regarding a few certain Defendants, raising the corresponding motion to amend the complaint, to which the Plaintiff is fully entitled by well established doctrine of a liberal amendment policy.

> "In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should ... be freely given." *Foman v. Davis,* 371 U.S. 178, 182 (1962).

10. Nevertheless, and without waiving any rights or objections as above described regarding the nullity of screening the instant complaint, the Plaintiffs now address certain of the issues raised by the report and recommendations in question, to prevent any waste of future resources:

a) The instant complaint was **not** subject to *any* delays or screenings. Discussed *supra*.

b) Rooker/Feldman – these arguments do not even apply; the entire point is that the active Defendants were knowingly, recklessly, and/or negligently engaging in various violations of the written law, and/or also knowingly, recklessly, and/or negligently acting in either the total absence of jurisdiction and/or beyond the limits of their jurisdiction, power and authority. There is no immunity for acting in the absence of, or beyond the powers of, jurisdiction, so there is no moment for even discussing any application of *Rooker-Feldman*, which **itself** provides: "[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); *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). For further example, even regarding an otherwise purely state-law matter such as a divorce, if a divorce judgment was unconstitutionally obtained, it should be regarded as a nullity. See, e.g.: *Phoenix Metals Corp. v. Roth*, 284 P.2d 645, 648 (Ariz. 1955); *Catz v. Chalker*, 142 F.3d 279 (6th Circuit 1998). Similarly, none of the abstention doctrines are applicable in the face of allegations of constitutional and due process violations. A federal district court has subject-matter jurisdiction over claims seeking relief from family-court orders which emanated under procedures that allegedly violated due process, equal protection, and other federal statutes. *Agg v. Flanagan*, 855 F.2d 336, 339 (C.A.6 1988). Where *Agg* had been brought under §1983

and alleged deprivation of federal constitutional rights and state procedures that were contrary to federal law and thus invalid under the supremacy clause, the domestic-relations exception doctrine, which concerned federal jurisdiction based on diversity, did not apply. *Id*. at 339. "[J]urisdiction was therefore proper under 28 U.S.C. sec. 1331 or sec. 1343." *Id*., U.S. Const. Art. 6, cl. 2; Amends. 5, 14. See also *Rubin v. Smith*, 817 F.Supp. 987, 991 (D.N.H. 1993);

c) Prosecutorial immunity – again, lack of jurisdiction negates any analysis, in the first place, but additionally, there is no immunity for acts clearly outside the scope of lawful power and authority, such as making personal death threats, obstruction of justice, harassment, abuse of power, and the like. Indeed, one of the citations used by the Magistrate, *Burns v. Reed*, 500 U.S. 478 (1991), is clearly about breaking down prosecutorial immunity for non-covered acts;

d) Color of Law – It is now beyond dispute that private individuals can not only be held liable with state actors under § 1983, but that they can also still be held liable in a federal court for damages and other relief, even after dismissal of all the state actors from the suit. Indeed, even some of the citations used by the Magistrate clarify that basic fact, and are also contradictory to what the Magistrate is trying to imply – that they are somehow "immune";

e) Eleventh Amendment immunity – None of the governmental "persons" are immune in this case, for at least two reasons: (1) By accepting the "bites" of a number of federal fundings for the various governmental agencies and entities in play herein, the State of South Carolina has already waived its any immunity for itself and for those agents that perform in its behalf, as every federal funding scheme for the States also comes with corresponding limitations, prohibitions, and citizen redress provisions, especially including those associated with various forms of discrimination and violations of due process by such entities receiving funding. The Court is surely more than familiar with this basic knowledge. (2) Moreover, the various law

enforcement, or *Executive Branch*, agencies and individuals already waived their objections to being involved in the Judicial Branch with the Plaintiff, as they willfully crossed that line and entered into the judicial branch by coming after Plaintiff. There is no remaining immunity to back out of the courts, after first choosing to involve the courts, themselves.

f) Clerk of Court – There is no such thing as the paradoxical term used by the Magistrate, called "absolute quasi" immunity. Moreover, immunity is never vested in a person or in an office, but is decided upon the acts themselves. If the act was a lawful act within the scope of authority for the person in question, then the person is naturally immune to suit for that act, but if not, then there is no immunity. Additionally, it is improper for the Plaintiff's claims to be re-characterized. The claims against the Clerk of Court are for unlawful takings of money not only personally as against the Plaintiff, but also in defiance of the federal Title IV-D laws, and as the official federal Title IV-D agent, jurisdiction is *not only* proper, it is original herein.

g) Judicial immunity – Again, knowing and/or reckless lack of jurisdiction negates any immunity attempts, and further, there is no immunity available for warring against the Constitution and clear due process rights. Since *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. "*Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.' Id., at 159-160." *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974). The **Jury** must decide the facts involved.

h) State of South Carolina, County of Charleston, et al. – In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976), the Supreme Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Id*., at 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666. This enforcement power, as the Supreme Court has often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), citing *Ex parte Texas*, 100 U.S. 339, 346, 25 L. Ed. 676 (1880). The concept of immunity may afford a sovereign protection from suit "in its own courts without its consent, . . . [but] it affords no support for a claim of immunity in another sovereign's courts." *Nevada v. Hall*, 440 U.S. 410, 416 (1979). As the United States Supreme Court has made plainly clear:

> Although we have held that Congress lacks authority under Article I to override a State's immunity from suit in its own courts, see Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999), it may subject a municipality to suit in state court if that is done pursuant to a valid exercise of its enumerated powers, see id., at 756. Section 1367(d) tolls the limitations period with respect to state-law causes of action brought against municipalities, but we see no reason why that represents a greater intrusion on "state sovereignty" than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action. In either case, a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on "state sovereignty," but merely the consequence of those cases (which respondent does not ask us to overrule) **which hold that municipalities, unlike States, do *not* enjoy a constitutionally protected immunity from suit**. (emphasis added).
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> *Jinks v.* ***Richland County, South Carolina***, 538 U.S. 456, 123 S. Ct. 1667, 155 L.Ed.2d 631 (2003), at 15-16.

i) RICO – this merely goes to the motion to amend the original complaint, for clerical omissions in providing the appropriate averments sufficient to invoke jurisdiction thereof;

j) While the Plaintiff agrees with the notion that minor children should have their legal rights and interests properly protected, the Magistrate's citations fail to consider: (1) among

the several relational aspects between Plaintiff and the minor children in question, there is also an innate property right aspect under the common law, and a person cannot be prevented *by the law* from adequately defending his own property; (2) Fit parents are implicitly presumed to "act in the best interests of their children" Parham v. J.R., 442 U.S. 584, 602 (1979); (3) well established doctrines of the conservation of judicial resources dictate that all issues and claims involved in a matter should be heard within the same proceedings, with even much caselaw existing regarding the need for consolidation of cases and issues under the same reasoning; (4) forcing the minor children to delay litigation on their own behalf, even maybe for years, is contrary to the public policy concerns for potential loss of evidence, witnesses, and even parties – in effect, denying their justice now and forevermore, simply because of the handicap of their current ages; and (5), the Court can easily appoint a guardian *ad litem* also barred into this Court to represent them in this matter.

11. *Justice delayed is justice denied*, says the maxim and old adage. What better example than the situation involving these injured minor child plaintiffs? To delay their justice is to deny it.

12. Indeed, the minor children stand to realize a sizable compensation in this matter, and an attorney / guardian ad litem *should* be appointed promptly upon restoring this case to Columbia.

13. Moreover, the undersigned Plaintiff now and hereby renews his motion for change of venue, in fact, correctly phrasing it as a motion to ***restore*** original, correct venue, pursuant to:

a) Plaintiff filed with purpose in Columbia Division, *no* party ever asked for a change of venue, *no* motion for change of venue was ever granted, and there was *no* reason to change;

b) Considering the nullity of unlawfully screening the instant complaint, all Defendants named are still perfectly viable, and involved, which includes that total variety of geography;

c) Further, the actual geographies of their various still-unknown *counsel* are yet to be seen;

d) Moreover, the vast majority of the Defendants are *government* units, or *governmental* officials or employees, who will surely be at least initially represented using the State's dime, and the one or more deputy attorneys general who will represent them, are all in Columbia;

e) Additionally, there are three (3) non-governmental Defendants, all of whom are outside of the State of South Carolina, plus the eleven (11) governmental Defendants, all of whom are either located already in Columbia, or to look to Columbia for most of their own supervision;

f) And further, the required appearance of full impartiality has been completely and totally shattered by the recent violations of this Division against my basic access rights to the courts;

g) Moreover, it is highly unlikely that the justices of this Division's Court do not already have longstanding working relationships and personal friendships with most or all of the individually named governmental Defendants, and that the same justices of this Division's Court have also been most likely appointed from among the very same entities and circles of friends as do the majority of the individually named governmental Defendants, and, as such, the Plaintiff simply can not reasonably expect proceedings held within this Division to be completely and totally without even the appearance of bias and/or prejudice, as discussed in further detail above, as to discrimination regarding even basic and fundamental access rights.

14. Accordingly, the Plaintiff hereby incorporates this plain and reasonable motion to restore venue of this case back to its original, filed, and expected location of Columbia, South Carolina.

15. The United States Supreme Court has "long recognized that 'a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction.' *Tennessee Coal, Iron & R. Co. v. George*, 233 U. S. 354, 360 (1914)." *Marshall v. Marshall*, 547 U.S. 293 (2006), at 17.

16. The Court should now VACATE, ANNUL, or otherwise RESCIND the above described report and recommendations in question, at the very least because it would be and is extremely premature, now also promptly and duly ISSUE and EFFECT service upon all of the named Defendants, set various timetables **within reason**, and perform miscellaneous related matters.

**WHEREFORE**, the undersigned principal Plaintiff, David A. Bardes, moves this Court to now vacate, annul, or otherwise rescind the above described report and recommendations in question, promptly and immediately issue and effect service and return of service upon all named Defendants, set various timetables within reason, transfer this cause back to its original venue, perform any related items therein, and moves for all other relief just and proper in the premises.

Respectfully submitted,

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David A. Bardes
1327 Heather Lane
Charlotte, NC 28209
(704) 900-8268
davidbardes@davidbardes.com

CERTIFICATE OF SERVICE

I hereby certify that, on this _____ day of April, 2008, a true and complete copy of the foregoing *Plaintiff's Written Objections to Discrimination and to the Magistrate's Report and Recommendations*, by depositing the same in the United States mail, first class postage prepaid, has been duly served upon:

Sheriff James A. Cannon, Jr., Esq.
Charleston County Sheriff's Office
3505 Pinehaven Drive
North Charleston, SC 29405

and, shall be also served upon all other claimed Defendants, upon notice and direction to so do.

_____
David A. Bardes

David A. Bardes
1327 Heather Lane
Charlotte, NC 28209
(704) 900-8268
davidbardes@davidbardes.com