ELLEN F. ROSENBLUM
Attorney General
MARC ABRAMS #890149
Senior Assistant Attorney General
Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
Telephone: (971) 673-1880
Fax: (971) 673-5000
Email: marc.abrams@doj.state.or.us

Attorneys for Defendants *et al.*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ERIC A. DOVER, MD,

Plaintiff,

v.

KATHLEEN HALEY, JD, et al.,

Defendants.

Case No. 3:13-cv-01360-BR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

INTRODUCTION

The Oregon Medical Board ("OMB") exists to protect the public by regulating the medical profession. ORS 677.205. Plaintiff Dr. Eric A. Dover apparently thinks that he is not a member of a regulated profession, or, at the very least, that he can decide when regulation is suitable.

In January 2011, plaintiff's license to practice medicine was revoked.[1] Plaintiff did not appeal. Now, two years and seven months later, plaintiff has filed this action, alleging various vague theories about his rights to due process and equal protection.

Plaintiff's claims should not go forward. They have not been filed within the statute of limitations. The actions complained of are immune from judicial review. The complaint is further deficient as a violation of the *Rooker-Feldman* doctrine. In addition, it fails to state a claim as to many of the individual defendants.[2]

STANDARD ON REVIEW

Motion to Dismiss.

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a trial court accepts all well-pleaded allegations of the complaint as true and gives plaintiff the benefit of all favorable inferences that may be drawn from the facts alleged.

The Court's review is limited to the face of the complaint, documents referenced by the complaint and matters of which the court may take judicial notice. *Levine v. Diamamthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996); *MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986). A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984) (citing 2A J. Moore, Moore's Fed. Practice ¶12.08 at 2271 (2d

---

[1] Abrams Dec. Exh. A. However, this revocation is a published government order of which this Court can take judicial notice. https://techmedweb.omb.state.or.us/Clients/ORMB/OrderDocuments/87d53906-871c-4929-8f93-fd69070694fa.pdf. A State of Oregon final administrative order is suitable for judicial notice pursuant to FRE 201, as it is generally known within this Court's jurisdiction and capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Such documents are also exceptions to the hearsay rule under FRE 803(8), pertaining to public records. It may be considered on a motion to dismiss.

[2] The Department of Justice does not yet, as of this date, have a Request for Representation from Nathalie Johnson, but ultimately expects to represent her as well. Given the nature of the issues raised in this motion, which preclude maintenance of *any* suit, we would request a judgment in favor of the defense, if granted, be entered for all defendants.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

ed. 1982)). When a court considers a motion to dismiss, all allegations of the complaint are construed in the plaintiff's favor. *Sun Savings & Loan Ass'n v. Dierdorff,* 825 F.2d 187, 191 (9th Cir. 1987).

While the court may accept all "well-pleaded" factual allegations, it should ignore legal conclusions. Bare allegations that a government official, "knew of, condoned, and willfully and maliciously agreed" to violate a plaintiff's constitutional rights for improper purpose are not entitled to the assumption of truth. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1951 (2009); *Harlow v. Fitzgerald,* 457 U.S. 800, 817-818, 102 S. Ct. 2727 (1982) (bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery). It is the conclusory nature of the allegations that "disentitles them to the presumption of truth." *Iqbal,* 129 S. Ct. at 1951. Under this standard, plaintiff has failed to state a claim for relief

Motion for Summary Judgment.

Summary judgment is appropriate when there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The purpose of summary judgment is to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita,* 475 U.S. at 586, n. 11. The moving party must show the absence of a genuine dispute as to a material fact. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) "This burden is not a light one * * * The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

The test is whether a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A scintilla of evidence, or evidence

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989). Subjective belief — speculation — is also insufficient. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983); *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

FACTS

For the motion to dismiss, defendants must accept the factual allegations on the face of the Complaint. Those facts are scanty.

Most of what is alleged is conclusory or recitation of legal terminology such as stating the defendants "conspired," Complaint ¶ 14; "violated," Complaint ¶ 14; engaged in an "abuse of power," Complaint ¶¶ 15, 16, 18, 25; "participated in a joint activity," ¶¶ 16, 18, 24, "aided and assisted," Complaint ¶ 19; "willfully participated," Complaint ¶ 20; "acquiesced with other defendants intending to deprive this plaintiff of his constitutional rights," Complaint ¶ 21, participated in "unjust, excessive, and unfair conduct," complaint ¶ 22, and in "malicious and predatory conduct," Complaint ¶ 32. These are largely unspecific adjectives and adverbs, not facts.

For the purposes of this motion, however, only a few facts matter. First, as is a matter of public record, plaintiff's license to practice medicine in Oregon was revoked on January 14, 2011. Abrams Dec. Exh. A; https://techmedweb.omb.state.or.us/Clients/ORMB/Order Documents/87d53906-871c-4929-8f93-fd69070694fa.pdf. Second, all of the individual defendants fall into one of four categories of individuals. They are either:

> (1) members of the Oregon Medical Board, including Joseph Thaler, Linda Johnson, Ralph Yates, Roger McKimmy, Donald Girard, George Koval, Ramiro Gaiten, Douglas Kirkpatrick, Lewis Neace, Patricia Smith, Gary LeClair, Sarojoini Budden, Clifford Deveny, Keith White, Kent Williamson III, Nathalie Johnson, Shirin Sukumar, Clifford Mah, Michael Mastrangelo, and Angelo Turner. Complaint ¶¶ 82, 86, 91, 96, 101, 106, 111, 116, 121, 126, 131, 136, 141, 146, 151, 156, 161, 166, 171, 176, 181 and 186;

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

(2) staff of the Oregon Medical Board, including Executive Director Kathleen Haley, Nicole Krishnaswami, Jim Peck, Phillip Parshley, James Calvert,[3] Jay Drum, Gary Stafford, and Eric Brown. Complaint ¶¶ 26, 44, 67, 72, 77, 86, 191, 196, 201;

(3) an administrative law judge, Rick Barber. Complaint ¶¶ 23, 56; or

(4) attorneys at the Oregon Department of Justice: then-Attorney General John Kroger and Assistant Attorney General Warren Foote. Complaint ¶¶ 49, 62.

This action was filed August 7, 2013.

ARGUMENT

I. This Action is Untimely.

Each of the five claims that raised by the complaint alleges a violation of the federal Constitution asserting either a right to due process or equal protection. Complaint ¶¶ 285-336. Such federal constitutional claims are brought pursuant to 42 U.S.C. § 1983. When Congress has not provided a time limitation for a federal cause of action, the court applies the local statute of limitations, *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). In *Wilson*, the United States Supreme Court held that each state must apply "the *one* most appropriate statute of limitations for *all* [of its] § 1983 claims." *Id.* at 275 (*emphasis added*). The two-year statute of limitations under ORS 12.110(1) applies to Plaintiff's section 1983 claims. *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002).

The last applicable action for this litigation — the issuance of the Final Order — occurred on January 11, 2011.[4] This matter was filed August 7, 2013. The action is not timely filed. Without more, that should end this case.

[3] Calvert, as a hired expert witness, is staff for the purposes of determining immunity under ORS 677.335.

[4] To the extent plaintiff seeks recovery for the bill of costs from his hearing, and that bill of costs was submitted on May 19, 2013, that, too, is untimely.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

II. The Oregon Medical Board and those assisting it are immune.

A. Statutory Immunity.

In order that the OMB might perform its role of protecting the citizens of Oregon from unsafe medical practices, the Legislative Assembly enacted ORS 677.335, which states:

> **677.335 Official actions of board and personnel; privileges and immunities; scope of immunity of complainant.** (1) Members of the Oregon Medical Board, members of its administrative and investigative staff, medical consultants, and its attorneys acting as prosecutors or counsel shall have the same privilege and immunities from civil and criminal proceedings arising by reason of official actions as prosecuting and judicial officers of the state. (2) No person who has made a complaint as to the conduct of a licensee of the board or who has given information or testimony relative to a proposed or pending proceeding for misconduct against the licensee of the board, shall be answerable for any such act in any proceeding except for perjury committed by the person. [1975 c.776 §2; 1989 c.830 §26]

The impact of this statute is clear and plain: all of the persons intimately involved in the process of regulating the medical profession have judicial immunity. That set of individuals explicitly includes three of the four groups of individuals involved herein: the Board, staff and consultants, and their attorneys. The sole remaining individual, the administrative law judge, is protected by his judicial role by immunity. *See. e.g., Gambee v. Cornelius ("Gambee II")*, 2011 WL 1311782 (D. Or. April 1, 2011); *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or. App. 610, 625 n. 13 (2007); *Jones-Clark v. Severe*, 118 Or. 270 (1993) (actions equivalent to judicial actions give rise to judicial immunity).

None of the individual defendants are subject to suit herein.

B. Common Law Immunity.

As noted above, plaintiff's entire action rests challenges the acts of the OMB members in the performance of their duty to protect the public from unsafe medical practitioners. Because this function is analogous to that of a judge, federal common law as well as Oregon statutory grant provides defendants with absolute prosecutorial immunity from the claims brought under the Fourteenth Amendment.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

"Absolute immunity is generally accorded to judges and prosecutors functioning in their official capacity." *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004) (Board of Medicine absolutely immune); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). "[T]his immunity reflects the long-standing 'general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.'" *Olsen*, 363 F.3d at 922, *quoting Bradley v. Fisher*, 80 U.S. 335 (1871).

Certain classes of state officials who are not judges or prosecutors in the regular courts are also entitled to absolute immunity. In deciding whether to extend absolute immunity to officials who are not traditionally considered judges, the court considers what function the official performs and examines whether that function is similar to a function that would have received absolute immunity when Section 1983 was enacted by Congress. *Mishler v. Clift*, 191 F.3d 998, 1002 (9th Cir. 1999).[5] Under this functional approach, an official who "functions as the equivalent of judge or prosecutor will likely be entitled to absolute immunity for any acts committed in that role." *Yoonessi v. Albany Med. Center*, 352 F. Supp. 2d 1096 (C.D. Cal. 2005) (citing *Olsen*, 363 F.3d at 923). The Supreme Court has held that executive branch officials, when contributing to a federal administrative agency's adjudicative process, are entitled to absolute immunity because they perform functions comparable to those of judges and prosecutors. *Mishler*, 191 F.3d at 1003 (*citing Butz v. Economou*, 438 U.S. 478, 512-13 (1978)).

The State of Oregon, as noted, has decided that the OMB and its staff and its lawyers are statutorily entitled to the same immunities from liability as prosecuting and judicial officers of the state:

---

[5] The Nevada State Board of Medical Examiner was found immune except for the ministerial function of responding to an inquiry from another state government. Every act taken in discipline and licensure was held to be subject to a grant of immunity. A similar distinction, granting immunity broadly to everything other than issuance of a billing statement, was made in *Olson*, 363 F.3d at 928. None of the actions complained of herein are ministerial in nature.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

> Members of the Board of Medical Examiners for the State of Oregon, members of its administrative and investigative staff, medical consultants, and its attorneys acting as prosecutors or counsel shall have the same privilege and immunities from civil and criminal proceedings arising by reason of official actions as prosecuting and judicial officers of the state.

ORS 677.335(1).

This determination is consistent with judicial determinations regarding boards across the county. *See. e.g., Olsen*, 363 F.3d 916 (Idaho); *Mishler*, 191 F.3d 998 (Nevada); *Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698 (1st Cir. 1995); *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 19912); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490-91 (10th Cir. 1991) (Colorado); *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 782-83 (1st Cir. 1990) (Massachusetts); *Mason v. Arizona*, 260 F. Supp. 2d 807, 820-22 (D. Ariz. 2003).

Most importantly, this Court has already found the OMB to be "absolutely immune with regard to acts performed in their statutory capacity as quasi-judicial prosecutors or judges." *Gambee v. Williams*, 971 F. Supp. 474, 477 (D. Or. 1997) (*"Gambee I"*). In 1995, plaintiff in that action challenged his prior suspension by bringing suit alleging a 42 U.S.C. § 1983 claim, a claim or conspiracy to violate Section 1983, and a claim that the members of the OMB (then called the Board of Medical Examiners) had violated plaintiff's rights under the Racketeering Influenced and Corrupt Organizations Act. The Board members asserted immunity. The Court wrote:

> Agency judges and prosecutors are entitled to absolute, quasi-judicial immunity with regard to acts performed in a court-like setting. *Hirsh v. Justices of the Supreme Court of California*, 67 F.3d 709, 715 (9th Cir. 1995) (members of state bar disciplinary board absolutely immune from section 1983 liability). Other circuits have applied the absolute immunity doctrine in the context of a physician's section 1983 challenge to his license revocation. *See Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 689, 701, 702 (1st Cir 1995) and *Horwitz v. Bd. of Medical Examiners*, 822 F.2d 1508, 1515 (10th Cir. 1987), *cert. denied*, 484 U.S. 964, 108 S. Ct. 453, 98 L. Ed.2d 394 (1987). I find that BME members are absolutely immune with regard to acts performed in their statutory capacity as quasi-judicial prosecutors or judges.

Id. at 477; *see also Bergin v. McCall*, 2007 WL 2344924 at *4 (D. Or. 2007).

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

The language of *Gambee I* is clear, absolute, and unambiguous. Moreover, the immunity from suit was recently affirmed in *Gambee II,* 2011 WL 1311782 (D. Or. April 1, 2011).

Gambee II followed the analysis in *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916 (9th Cir. 2004), and in *Butz v. Economou*, 438 U.S. 478, 512-13 (1978). Olsen brought Section 1983 and state law claims against individual members, counsel, and staff of the Idaho State Medical Board ("ISMB") and Board of Professional Discipline ("BOPD"), the disciplinary arm of the ISMB. *Id.* at 918-19. Olsen alleged that the defendants prevented her from reinstating her physician's assistant license by engaging in protracted administrative process with discriminatory motives. *Id.* at 919. She asserted that the defendants' decisions and actions in revoking and denying her license violated her due process and equal protection rights. *Id.* Specifically, she claimed that a letter informing her of the ISMB's intent to deny her license, the ISMB's decision not to hold a hearing, and the ISMB' s administrative order denying her application were specific acts or decisions that violated her rights. *Id.* at 927-28.

The court held that ISMB and BOPD, their members, and their professional staff and legal counsel were all entitled to absolute immunity because their acts and decisions were all "procedural steps involved in the eventual decision denying Olsen her license reinstatement." *Id.* at 928. "Such acts are inextricably intertwined with [defendants'] statutorily assigned adjudicative functions and are entitled to the protections of absolute immunity." *Id.* Likewise, the Executive Director of the Board and its investigatory staff were all entitled to the protections of absolute immunity for all procedural steps involved.

Olson utilized the factors set forth by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 512-13 (1978), to determine whether defendant's activities were to be accorded absolute immunity. *Butz*, 438 U.S. at 512. These factors are: (1) the need to assure that the defendant can perform its functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

(3) the agency's insulation from political influence; (4) the importance of precedent; (5) the adversary nature of the process; and (6) the correctability of error on appeal. *Id.*

As determined in *Gambee II*, the factor analysis requires that defendants are accorded protections of absolute immunity for all conduct complained of.

1. Ensuring performance of functions without harassment.

The Board is an agency that is charged with the regulation and discipline of state-licensed medical practitioners. ORS 677.205. Furthermore, the Board has the authority to conduct investigations and hearings and take action with respect to licensing. ORS 677.208, 677.265. As the court noted in *Olsen*, "in *Mishler*, we found that immunity for medical board and its members serves important public interests." *Olsen*, 363 F.3d at 924 (*citing Mishler*, 191 F.3d at 1005). In particular, there is a need to ensure that medical boards can perform disciplinary functions, without the fear of harassment or intimidation, in order to effectively address the strong public interest in quality health care. *Id.* This Court in *Gambee II* noted that precisely the type of suit presently before this Court is such a threat, and itself shows the need for immunity. *Gambee II at *4; Mishler v. Clift*, 191 F.3d at 1005; *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 774, 783 (1st Cir. 1990). Here, as mentioned above, the Board's functions include regulating and disciplining physicians in Oregon. ORS 677.205. Granting absolute immunity allows these functions to continue without harassment and intimidation.

2. Safeguards reducing the need for private damages.

Similar to Medical Boards in *Olsen* and *Mishler*, the Oregon Board of Medical Examiners functions under a complete set of statutes. Furthermore, there are ample procedural rules and regulations for the Board's activities under the Oregon Administrative Procedures Act ("APA"). ORS 677.208, 183.310. The Oregon APA sets forth the proper and required procedures. Thus, like *Olsen* and *Mishler*, the Court in *Gambee II* concluded that the procedures set out in Oregon statutes provided complete and necessary safeguards to Plaintiff. *Gambee II* at *4.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

3. Insulation from political influences.

The Board is created to help protect the "interests of the health, safety and welfare of the people of this state," and grant and regulate the privilege of the practice of medicine in order to protect the public from the unauthorized or unqualified practice of medicine and from unprofessional conduct by a licensee. ORS 677.015. The Board consists of twelve members, seven of whom hold degrees in Doctor of Medicine, two of whom hold degrees in Doctor of Osteopathy, one of whom holds a degree in Doctor of Podiatric Medicine and two of whom are public members representing health consumers. ORS 677.235(1). The *Gambee II* Court found that the presence of non-physician members on the Board diminished the risk that members of the Board will act out of financial self-interest. *Gambee II* at *5 ; *Olsen*, 363 F.3d at 925 (*citing Mishler*, 191 F.3d at 1007).

4. Remaining factors: precedent, adversariness and correctability.

The *Gambee II* Court also found the remaining *Butz* factors to be present in OMB procedure and practice. *Gambee II* at *5. Disciplinary are conducted in accordance with ORS Chapter 183, and therefore both apply precedent and are necessarily adversarial. Any errors made by the Board can be corrected on appeal to the Oregon Court of Appeals. As such, it is clear that by "viewing the *Butz* factors in totality, the Board members are functionally comparable to judges and prosecutors." *Mishler*, 191 F.3d at 1007. Therefore, the individual defendants should be afforded absolute immunity and are entitled to judgment as a matter of law.

III. This Action is Barred by *Rooker-Feldman*.

Federal courts other than the Supreme Court lack the jurisdiction to correct state court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983). Federal courts also lack jurisdiction to review constitutional claims under 42 U.S.C. § 1983 that are inextricably intertwined with the state court's decision. *Feldman*, 460 U.S. at 486-87.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

The *Rooker-Feldman* doctrine is basically a common-sense determination that the federal courts do not provide access to parties merely to seek a review of a state court decision dressed up as a constitutional challenge. A four-part test determines whether *Rooker-Feldman* bars a suit from going forward: (1) that plaintiff in the federal suit lost in the state court proceeding; (2) that the state court determination is at the core of the federal lawsuit; (3) that the federal lawsuit seeks review and rejection of the state court verdict; and (4) that the state court judgment was entered prior to the commencement of the federal action. *McKeithen v. Brown*, 481 F.3d 89, 97 (2d Cir. 2007); *Chapman v. Trout*, 2011 WL 2160941; *see also Exxon Mobil Corp. v. Saudi Basic Indust. Corp.*, 544 U.S. 280, 284, 287 (2005).

In the present action, all four elements are clearly met. This Court need only compare the decision in *In the Matter of Eric Alan Dover, MD, License No. 16996.* Dover lost his state court proceeding.[6] Abrams Dec. Exh. A. The issues at the core of the OMB proceeding are what Dover now claims were falsehood that create the constitutional basis for his claim. At the core of the complaint is his tale of prosecution and license revocation, and this action seeks damages and for this Court to rectify the "constitutional defects" of the OMB procedure and reinstate plaintiff's medical license. Finally, the state action concluded with the OMB ruling on January 14, 2011. This action was filed on August January 31, 2013, three years and almost five months later.

Rooker-Feldman bars this action and it should be dismissed for lack of subject matter jurisdiction. Indeed, it is, as one court has noted, "iconic" *Rooker-Feldman* when reviewing constitutional attacks on professional licensure. *Marshall v. Washington State Bar Ass'n*, 2012 WL 1884680, *4 (W.D. Wash 2012); *see also Roy v. Tennessee,*287 Fed. Appx. 281 (6th Cir. 2012). *Caffey v. Alabama Supreme Court*, 469 Fed. Appx. 748 (11th Cir. 2102).

[6] Administrative proceedings that are quasi-judicial and result in a final order properly can form the basis for *Rooker-Feldman* preclusion. *E.g., Murray v. Dept. of Consumer and Business Services,* 2010 WL 3604675 (D. Or. Aug. 12, 2010); *Lawrence v. Board of Election Comm'rs of the City of Chicago,* 524 F.Supp.2d 1011, 1017 (N.D.Ill.2007). this is particularly true where, as here, appeal is (as it would be from Circuit Court) to the court of Appeals should it be taken.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

IV. If The Matter Proceeds, Most of the Defendants Should Be Dismissed.

If this Court determines that this action should go forward, there are still significant subsidiary matters that can be resolved on a motion to dismiss and that remove most of the defendants.

A. Plaintiff's Statutory Challenge May Not Proceed.

At base, despite raising five claims for relief, plaintiff seems to have two primary concerns: (1) the alleged unconstitutionality of ORS 677.190 and ORS 677.205, and (2) the perceived unfairness of his license revocation procedure.

The first of these issues can be dealt with simply. Plaintiff's contention that there are "fundamentally unfair, arbitrary and unconstitutional procedures in ORS 677.190, ORS 677.205 * * *," Complaint ¶ 289, is based on a misreading of those statutes. Indeed, neither is a procedural statute at all. Both list grounds for discipline, suspension or license revocation. The procedural component of OMB hearings is set forth simply in ORS 677.200 and .208, and calls for a contested case hearing under the State's Administrative Procedure Act, ORS Chapter 183. That the statutes in Chapter 183 are constitutional has been determined repeatedly, is not challenged here, and therefore will not be discussed further.

If there is no longer a challenge to the statutes, the equitable relief sought is no longer in the case and, therefore, the non-individual defendants State and OMB are no longer appropriate defendants in a Section 1983 claim, as legal, financial recovery may not be had from them. *Will v. Michigan State Dept. of Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989).

B. Black Letter Recitations Do Not a Claim Make Against Specific Defendants.

That leaves plaintiff's allegations of unconstitutional behavior by the defendants. Plaintiff has named *thirty-two* individual defendants in addition to the State and OMB.[7] Even under a notice pleading standard, plaintiff must do more than make conclusory allegations as to any specific defendant. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1951 (2009).

[7] It should be noted that the State and OMB are not legally separate entities and are properly only one defendant.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

However, specifics are few and far between in the Complaint. *Nothing* is specifically alleged as to defendants Calvert, Johnson, Yates, McKimmy, Girard, Koval, Gaiten, Kirkpatrick, Neace, Smith, LeClair, Budden, Deveny, White, Williamson, Johnson, Sukumar, Mah, Mastrangelo, Turner, Drum, Stafford or Brown.[8] Each of these individuals should be dismissed with prejudice should this matter otherwise proceed.

C. The Claim Against John Kroger for Supervisory Responsibility Must Fail.

The Complaint contains no factual allegations regarding AG Kroger other than the conclusory legal assertion that he supervise AAG Foote. Complaint ¶ 266. No factual details are provided.

---

[8] A review of the pleading shows that only the following are even arguably specific:

- Defendant Foote "bullied" plaintiff into admissions in the hearing. Complaint ¶ 213. This appears to be no more than cross-examination, not implicating any legal right.
- ALJ Barber "concocted revocation theories" and "distorted plaintiff's statements" Complaint ¶ 217. Again, this seems to be a protest of the adversarial nature of the proceeding.
- OMB and Cornelius acted as "rubber stamps" for Haley, Foote and Barber. Complaint ¶ 218. This is no more than subjective belief.
- Haley and Krishnaswami conspired to stigmatize plaintiff by posting false, malicious and defamatory statements. Complaint ¶ 219.
- Foote and Haley withheld information necessary to Plaintiff for rebuttal of OMB's witness" Complaint ¶ 255. Plaintiff does not state what the information is or why he has any legal right to it.
- Haley, OMB and Foote concealed the witness in rheumatology, chronic pain and chart review was himself under investigation Complaint ¶¶ 256, 257, which was "covered up" by Thaler and Peck. Complaint ¶ 268. At most, this goes to weight and credibility.
- Foote and Barber talked out of hearing of plaintiff's counsel. Complaint ¶ 259.
- Peck Parshley and Thaler "withheld material information and documents necessary to vindicate Plaintiff's innocence * * *." Complaint ¶ 267. Again, it is unclear what documents and whether plaintiff had any right.

Several of these allegations are, simply, factually incorrect, as will be demonstrated should this matter proceed.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Plaintiff does not allege that Kroger personally acted to violate his due process or their equal protection rights, only that Kroger allegedly failed to stop Foote from doing so.[9]

Liability under Section1983 only arises upon a showing of personal participation by the defendant. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). State officials are not liable under 42 U.S.C. §1983 on a *respondeat superior* theory. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691-94, 98 S. Ct. 2018 (1978); *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987). Vicarious liability is inapplicable to §1983 suits, so "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. at 1948 (2009). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989), *citing Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81 (9th Cir. 1984). *See also*, *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598 (1976) (supervisors cannot be held liable simply because they have the authority to control their subordinates).

Plaintiff does not allege that Kroger participated in Foote's conduct or directed Foote to engage in any conduct whatsoever. As plaintiff has failed to allege facts that would establish that Foote violated plaintiff's federal rights, there was no such violation for Kroger to know of or prevent. Plaintiffs' generic and vague allegation that Kroger acquiesced in Foote's conduct is the very type of supervisory conduct that does *not* give rise to Section1983 liability.[10] *Iqbal*, 129 S. Ct. at 1948. Therefore, plaintiff's Section 1983 procedural due process claim against Kroger fails.

---

[9] Plaintiff alleges that former AG Kroger had "authority" over the Oregon Medical board. Complaint ¶ 62. This is a false statement of *law*, not of fact, and need not be accepted as true. The Attorney General does not control the OMB, which is an independent body. ORS 677.235, 677.265. Nothing in ORS 180.060 is to the contrary.

[10] Even more specific allegations fail for the reasons set forth in Section V(C), below.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

V. Defendants are entitled to qualified immunity.

Plaintiff sues the individual defendants for damages in their personal as well as official capacities. Personal capacity suits seek to impose personal liability on government officials for the actions they take under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099 (1985); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). To establish personal liability in a Section 1983 action, it is necessary to show that the official, acting under color of state law, caused the deprivation of a federal right. *Monroe v. Pape*, 365 U.S. 167 (1961). Even if plaintiff can make such a demonstration, individual State defendants may be found qualifiedly immune by this Court if they have objectively reasonably relied on existing law. *Imbler v. Pachtman*, 42 U.S. 409 (1976) (absolute immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity).

Qualified immunity shields government officials from liability for damages when they make decisions that, even if constitutionally deficient, reasonably misapprehend the law governing the circumstances confronted. *Brosseau v. Haugen*, 543 U.S. 194, 202 (2004); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Officials are denied qualified immunity only when "[t]he contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity is immunity from suit, not merely a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Like absolute immunity, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.* Consequently, the Court has repeatedly stressed resolving immunity questions at the earliest possible stage in litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Recently, the Supreme Court changed its stance on the test that has been used for qualified immunity. *See Pearson v. Callahan*, 129 S. Ct. 808 (2009). In *Pearson*, the Court held that it is no longer mandatory for lower courts to utilize both steps in the test from *Saucier v.*

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Katz when determining whether qualified immunity applies. *Id.* at 818. Under *Saucier*, the Court developed a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The first question that must be answered in deciding if qualified immunity should be permitted: did the official violate the plaintiff's constitutional rights? *Id.* If the answer to this question is no, then the official is entitled to qualified immunity. *Id.*

If the answer to the first questions is yes, then the court must answer an additional question before granting qualified immunity: was the law governing that right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. If the answer to the second question is no, then the official is entitled to qualified immunity. *Id.*

In *Pearson*, the Court explicitly held that the sequence of steps required under *Saucier* "should no longer be regarded as mandatory." *Pearson*, 129 S. Ct. at 808. Accordingly, while courts *may* continue to use the *Saucier* ordered test, courts have the discretion to determine "whether that procedure is worthwhile in particular cases." *Id.* at 821. Regardless of whether this Court decides to use one or both *Saucier* steps, Defendants are entitled to qualified immunity because there was no constitutional or statutory violation, and there was no clearly established law alerting reasonable officials that their actions violated Plaintiff's rights.

Plaintiff has alleged that defendants have acted improperly by *carrying out the law*. Complaint ¶ 223. He does not explain why a government official should "know" that a statute they are enforcing is unconstitutional particularly, as in this case, where there is no history of a challenge to either statute.

Each of the individual State defendants is entitled to the application of qualified immunity, dismissing them from the case.

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CONCLUSION

Plaintiff sues the members of the OMB for acts taken in the process of regulation and suspension of his license. These are classic investigatory and adjudicative functions that are immune from suit. Even were this case timely filed, and even were immunity not to attach, plaintiff has received well more than the minimum quantum of process needed to satisfy the Fourteenth Amendment. He had notice, an opportunity to present his case, an attorney, and considerable detail as to the bases of the charges against him.

In addition, he has not alleged facts from which it could be deduced that a violation of equal protection rights had occurred.

This matter should be dismissed with prejudice.

DATED August 26, 2013.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Marc Abrams
MARC ABRAMS #890149
Senior Assistant Attorney General
Trial Attorney
Tel (971) 673-1880
Fax (971) 673-5000
marc.abrams@doj.state.or.us
Of Attorneys for Defendants

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

CERTIFICATE OF SERVICE

I certify that on August 26, 2013, I served the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

Eric A. Dover, MD
1615 Cloverleaf Rd.
Lake Oswego OR 97034

___ HAND DELIVERY
_X_ MAIL DELIVERY
___ OVERNIGHT MAIL
___ TELECOPY (FAX)
___ E-MAIL
___ E-FILE

s/ Marc Abrams
MARC ABRAMS #890149
Senior Assistant Attorney General
Trial Attorney
Tel (971) 673-1880
Fax (971) 673-5000
marc.abrams@doj.state.or.us
Of Attorneys for Defendants

Department of Justice
1515 SW Fifth Ave, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000