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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 **KIM ANDREW BERRY,**

13 Plaintiff,

14 v.

15 **THE STATE OF CALIFORNIA, CALIFORNIA**
16 **STATE ATTORNEY GENERAL BILL LOCKYER,**
17 **CALIFORNIA STATE JUDICIARY, and DOES 1-**
18 **5,**

19 Defendants.

CIV S-04-2580 LKK-KJM-PS

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Date: February 23, 2005
Time: 10:00 a.m.
Courtroom: 26
Judge: HON. KIMBERLY
J. MUELLER

20
21 **INTRODUCTION**

22 By the instant action, Plaintiff Kim Andrew Berry seeks an order from this Court reversing
23 a decision of the Court of Appeal for the Third Appellate District. As will be demonstrated, this
24 action is clearly barred by the *Rooker-Feldman* doctrine as well as by other applicable defenses
25 which counsel that this action should be dismissed. The pertinent facts of the somewhat complicated
26 underlying action are set forth below:

27 In a proceeding in the Superior Court of Sacramento County to dissolve their marriage,
28 Plaintiff Kim Andrew Berry (hereafter "Plaintiff") and Aurelia Berry (hereafter "Wife"), both

1 represented by counsel, entered into a marital settlement agreement (MSA). *Berry I*, *1, *6.^{1/}
2 Significantly, the MSA provided that it settled any and all claims between the parties and that the
3 family law court judge reserved jurisdiction "to make other orders necessary to carry out this
4 judgment."^{2/} *Id.*, *1. Judgment was entered on the MSA on May 4, 2001.

5 Several months later, Plaintiff filed a separate action in civil court against Wife and her
6 attorneys, alleging abuse of process in the procurement of a restraining order that had been entered
7 against him on February 1, 2000, approximately fifteen months prior to entry of the MSA. *Ibid.* The
8 civil law court sustained the defendants' demurrer to Plaintiff's first amended complaint without
9 leave to amend on the grounds, *inter alia*, that the issue could have been raised in the family court
10 and was therefore barred by *res judicata*, and that the issue was waived by the MSA. Wife then
11 sought, and was awarded, her attorney's fees as sanctions in the family law court pursuant to Family

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21 1. The Court is requested to take judicial notice of *In re the Marriage of Aurelia and Kim*
22 *Andrew Berry* (Feb. 21, 2003) C040538 & C041377 (*Berry I*), and of *In re the Marriage of Aurelia*
23 *and Kim Andrew Berry* (July 30, 2004) C045271 (*Berry II*). Copies of these opinions are attached
24 to the Request for Judicial Notice, filed herewith. Although neither opinion is published, both may
25 be cited herein pursuant to California Rules of Court, rule 977, subd. (b), which provides that "[s]uch
26 an opinion may be cited or relied on (1) when the opinion is relevant under the doctrines of law of
27 the case, *res judicata*, or collateral estoppel; . . ." Circuit Rule 36-3(b)(i) provides for an identical
28 exception to the general prohibition against citing unpublished cases. Moreover, the general rule has
been held to apply only to unpublished Ninth Circuit cases, not to "unpublished dispositions issued
by any other courts within our circuit or elsewhere." *Renick v. Dun & Bradstreet Receivable*
Management Services, 290 F.3d 1055, 1058 (9th Cir. 2002).

2. Neither the MSA nor the reservation of jurisdiction by the family law court is mentioned
in the Complaint herein.

1 Code section 271 (hereafter "Section 271") for expenses incurred in defending the civil court action.^{2/}

2 *Ibid.*

3 Plaintiff's subsequent appeal was directed, not to the dismissal of the civil action which
4 he conceded lacked merit due to the MSA, but only to the order awarding fees to Wife. *Id.*, at *3.
5 Before Plaintiff had filed his opening brief, Wife filed another request for fees, this time for expenses
6 necessary to defend the appeal. *Id.*, at *1. Plaintiff argued that such an award would chill his right
7 to appeal. *Ibid.* In granting the second fee award, however, the family law judge determined that
8 the further sanctions were simply a "supplement to the first sanctions, for continuing unnecessary
9 litigation, not as a penalty for a frivolous appeal. '[T]he underlying action, going to the civil court
10 to thwart the family law action, was unreasonable and should not have been brought and, therefore,
11 was subject to sanctions. This is just a continuation of that ruling.'" *Ibid.* Plaintiff filed another
12 appeal, which was consolidated with the first appeal.

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15 3. Family Code section 271 provides, in relevant part:

16 (a) Notwithstanding any other provision of this code, the court may
17 base an award of attorney's fees and costs on the extent to which the
18 conduct of each party or attorney furthers or frustrates the policy of
19 the law to promote settlement of litigation and, where possible, to
20 reduce the cost of litigation by encouraging cooperation between the
21 parties and attorneys. An award of attorney's fees and costs pursuant
22 to this section is in the nature of a sanction. In making an award
23 pursuant to this section, the court shall take into consideration all
24 evidence concerning the parties' incomes, assets, and liabilities. The
25 court shall not impose a sanction pursuant to this section that imposes
26 an unreasonable financial burden on the party against whom the
27 sanction is imposed. In order to obtain an award under this section,
28 the party requesting an award of attorney's fees and costs is not
required to demonstrate any financial need for the award.

(b) An award of attorney's fees and costs as a sanction pursuant to
this section shall be imposed only after notice to the party against
whom the sanction is proposed to be imposed and opportunity for that
party to be heard.

1 Addressing the propriety of awarding sanctions to cover the costs of defending the action
2 in civil court, the appellate court noted that, in enacting Section 271, the Legislature "adopted a
3 policy . . . to promote settlement and reduce the costs of litigation by encouraging cooperation
4 between the parties and attorneys. To the extent this policy is frustrated, the court is authorized
5 . . . to award attorney fees, not based upon need and ability to pay, but as a sanction for such conduct."
6 (Citation.)" *Id.*, at *2. The Court then held that filing the civil action "directly contravened the MSA
7 § provision waiving all claims," and was simply an attempt by plaintiff to keep all of the benefits he
8 derived from the MSA by asserting a "claim plainly barred by it, thus depriving Wife of a significant
9 benefit of the MSA." *Id.* at *3. Citing a number of cases supporting its decision, the Court held that
10 "a party who uses litigation to undermine a family law judgment should be sanctioned under section
11 271."^{4/} *Ibid.*

12 Plaintiff's assertion that sanctions were improper under Section 271 without a finding that
13 the filing of the separate action was frivolous was likewise rejected. Although the appellate court
14 found that filing the separate action *was* frivolous,^{5/} it noted that Section 271 does not require a
15 finding that an action is frivolous before sanctions can be imposed. "All the statute requires is that
16 a party frustrate a settlement. As applied to his conduct, which was a willful effort to take the
17 benefits and avoid the burdens of the settlement, we perceive no unwarranted 'chill' took place."
18 *Ibid.* The Court acknowledged that Plaintiff "certainly has the right to file a lawsuit, as an aspect of
19 his right to petition the government, but the State has the right to ensure judgments are enforceable,
20 particularly in family law matters, and to curtail abuse of the court system." *Ibid.*

22 4. The Court rejected Plaintiff's claim that "he had to file a separate action 'to seek punitive
23 damages against the attorneys who wrongfully evicted him from his home,'" stating that "even if this
24 is so, that does not explain why he named his wife as a defendant, depriving her of the benefits of
25 the claim waiver in the MSA." *Id.*, at *6. In the instant action, Plaintiff neglects to mention the fact
26 that he included Wife as a defendant in the separate civil action. Complaint, ¶ 16, and fn. 4. The
27 omission is significant because it was Wife's inclusion in that separate action, and only her inclusion
28 in that action, that led to the imposition of sanctions under Section 271 for seeking to frustrate the
settlement into which the two had entered.

5. Plaintiff disingenuously alleges that the "civil action was not deemed frivolous nor subject
to sanctions *by the court that presided over it.*" Complaint, ¶ 16. (Emphasis added.)

1 As to the second award of sanctions, however, the Court *agreed* with Plaintiff, finding that
2 the "second sanction order would tend to chill his right to file an appeal."^{6/} *Id.*, at *7. The Court
3 explained that Wife's remedy was to seek fees after the appeal is concluded, and directed the family
4 court to determine the appropriate amount, "for having been dragged through this unnecessary
5 excursion in the civil court. [Citation.]" *Ibid.* The Court therefore affirmed the first award of fees
6 and reversed the second, with directions to the family law court to reconsider the actual amount of
7 appellate expenses and designated Wife the prevailing party on appeal. *Id.*, at *8.

8 On remand, the family law court awarded Wife fees in the nature of a sanction to cover
9 the costs of defending the appeal and Plaintiff again appealed, and again argued that it was error to
10 award attorney fees and costs because "there was no finding that the appeal was frivolous, as
11 required by *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*)," and because "the trial court
12 failed to comply with the requirements of California Rules of Court, rule 27(e) in awarding sanctions
13 on appeal."^{7/} *Berry II*, at *2; Complaint, ¶ 26.

14 After noting that it had already resolved the issue of the applicability of Section 271 to
15 attorney fees and costs on appeal in *Berry I*, a decision which was by then final, the Court of Appeal
16 reviewed the requirements for making such an award and held that the trial court had not erred in
17 ordering Plaintiff to pay fees in the nature of a sanction in the case. *Id.*, at *3.

18 After observing that "Section 271 provides an independent basis for sanctions in family
19 law actions" (*Berry II*, at *3), the Court stated:

20 Section 271 applies a different and less stringent standard than other statutes.
21 By its express language, section 271 authorizes sanctions in response to
22 reprehensible conduct that does not rise to the level of bad faith required under
23 Code of Civil Procedure section 128.5, or *Flaherty*, *supra*, 31 Cal.3d 637. As
24 we explained, the standard for an award of attorney's fees and costs under
25 section 271 is whether the opposing party's conduct 'frustrates the policy of the
26 law in favor of settlement, and increases the cost of litigation.' [Citation.]
27 *Flaherty* sets a different and a higher standard to justify an *appellate court's*
28 imposition of sanctions for a frivolous appeal under Civil Code [sic] section 907

26 6. The lengthy Complaint is devoid of any reference to the Court's holding on this highly
27 significant point.

28 7. This was also the issue presented to the California Supreme Court in Plaintiff's
unsuccessful petition for review. Complaint, ¶ 6.

1 and California Rules of Court, former rule 26(a) [now rule 27(e)], holding that
2 'an appeal should be held to be frivolous only when it is prosecuted for an
3 improper motive - to harass the respondent or delay the effect of an adverse
4 judgment - or when it indisputably has no merit - when any reasonable attorney
5 would agree that the appeal is totally and completely without merit.' (Emphasis
6 added.)⁸

7 *Berry II*, at *4.

8 The Court then noted that "it is well-established that an award of appellate attorney's fees
9 under section 271 must be addressed to the *trial court* in the first instance pursuant to motion under
10 California Rules of Court, rule 870.2(c)." *Ibid*. The Court noted that that is precisely what had
11 occurred in the prior appeal when it reversed the award of fees to cover the costs of defending the
12 appeal while the appeal was pending. In that case, the Court of Appeal ruled "'because of the
13 inextricable connection between [husband's] supposedly civil causes of action and the family law
14 case (this case is merely family law waged by other means), we direct the *family law* court to make
15 an appropriate attorney fee award in [wife's] favor for having been dragged through this unnecessary
16 excursion in the civil court.'" (Citation omitted.) *Ibid*.

17 The Court of Appeal also rejected Plaintiff's argument that the trial court should have
18 applied Rule of Court, rule 27(e), in considering the fees issue, noting that that rule only applies
19 where an appellate court itself imposes sanctions "on specific grounds not applicable here: "(A)
20 taking a frivolous appeal or appealing solely to cause delay; [¶] (B) including in the record any
21 matter not reasonably material to the appeal's determination; or [¶] (C) committing any other
22 unreasonable violation of these rules.'" *Id.*, at *5.

23 Finally, the Court noted that Wife had given ample notice of the motion for attorney fees
24 and costs on appeal and that Plaintiff had appeared and argued the matter. The family law court's
25 imposition of fees on appeal was affirmed. *Ibid*.

26 Plaintiff's petition for review by the California Supreme Court was denied. Complaint,
27 ¶¶ 6, 32.

28 8. The reference to "Civil Code section 907" was clearly intended to read "Code of Civil
Procedure section 907."

1 Plaintiff, having lost the argument that an award of fees and costs by the trial court for
2 having to defend an appeal cannot be imposed in the absence of a finding that the appeal was
3 frivolous pursuant to *Flaherty* and Rule of Court 27(e) (Complaint, ¶ 47), now seeks equitable relief
4 from this Court to overturn the state appellate decision by issuing an order declaring Section 271
5 unconstitutional on its face and as applied to him, as well as an order enjoining the California State
6 Judiciary from "sanctioning appeals" under Family Code section 271. Complaint, ¶¶ 63, 64.

7 This foray into federal court is clearly barred by the *Rooker-Feldman* doctrine, leading
8 ineluctably to the conclusion that this action must be dismissed because the Court lacks jurisdiction
9 over the subject matter of the Complaint. Moreover, the Complaint fails to state facts upon which
10 relief can be granted because of the applicability of other legal doctrines based on the Eleventh
11 Amendment to the U.S. Constitution and the doctrines of *res judicata* and judicial immunity.

12 ARGUMENT

13 I.

14 THIS COURT LACKS SUBJECT MATTER JURISDICTION

15 A. The Rooker-Feldman Doctrine

16 Plaintiff contends that a trial court's award of attorney's fees and costs to cover the
17 expenses of defending an appeal, entered after remand to that court, chills rights arising under the
18 Petition Clause of the First Amendment unless there has first been a finding that the appeal was
19 frivolous. Complaint, ¶¶ 4, 5. As noted above, the Court of Appeal found in favor of Plaintiff in
20 the situation where fees are imposed as sanctions pending the appeal; however, it disagreed with his
21 contention that fees cannot be imposed on remand from the Court of Appeal absent a finding that
22 the appeal was frivolous. Having had his petition for review to the California Supreme Court
23 summarily denied, Plaintiff is now before this court seeking a declaration that Section 271 is
24 unconstitutional on its face and as applied to him. Complaint, ¶ 63. In effect, Plaintiff is asking this
25 court to reverse the prior state court decisions addressing the same issues. This request violates the
26 basic precept that federal district courts are courts of limited original jurisdiction, not appellate
27 tribunals established to review final decisions of state courts, "even if those challenges allege that
28 the state court's action was unconstitutional." *Allah v. Superior Court of the State of California*, 871

1 F.2d 887, 890-891 (9th Cir. 1988), citing *Atlantic Coast Line Railroad Co. v. Brotherhood of*
2 *Locomotive Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416,
3 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486-487,
4 103 S.Ct. 1303, 1317, 75 L.Ed.2d 206 (1983).

5 The *Rooker-Feldman* doctrine, derived from the last two cases cited, prohibits the exercise
6 of subject matter jurisdiction by a district court when a plaintiff's constitutional challenge is
7 "inextricably intertwined" with a state court decision. Claims are inextricably intertwined with a
8 state court decision "if the district court must 'scrutinize not only the challenged rule itself, but the
9 [state court's] application of the rule. . . .' If, in order to resolve the claim, 'the district court would
10 have to go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as*
11 *applied* by the state court to the particular factual circumstances of [the plaintiff's] case,' then the
12 court lacks jurisdiction." *Worldwide Church of God v. McNair*, 805 F.2d 888, 892 (9th Cir. 1986);
13 *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898, 899 (9th Cir. 2003).

14 In the instant matter, of course, there is nothing on the face of Section 271 to suggest that
15 it violates the Petition Clause of the First Amendment. Thus, the Court would be required to
16 scrutinize the application of the statute to Plaintiff in order to determine the constitutional issue.
17 And, in fact, that is precisely what Plaintiff has asked this Court to do: revisit the section *as applied*
18 to him and to declare it unconstitutional. Complaint, ¶ 63. Such an act by this Court would be a
19 clear violation of the *Rooker-Feldman* doctrine. "Where the district court must hold that the state
20 court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are
21 inextricably intertwined," and the federal court action must be dismissed. *Doe & Associates Law*
22 *Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

23 Because Plaintiff is seeking to overturn a state court decision, the *Rooker-Feldman*
24 doctrine is applicable and this court lacks subject matter jurisdiction. Where a court lacks subject
25 matter jurisdiction, dismissal of the action is the appropriate disposition. *MacKay v. Pfeil*, 827 F.2d
26 540 (9th Cir. 1987).

27 ///

1 **B. Younger Abstention Is Appropriate In This Case**

2 As is made clear in *Berry I* and *Berry II*, there is an MSA in effect between Plaintiff and
3 Wife, over which the Sacramento family law court has retained jurisdiction. Plaintiff seeks an
4 injunction against enforcement of Section 271 on the ground that, unless it is enjoined by this Court,
5 it will "cause great and irreparable injury to Plaintiff, and those similarly situated, in that Plaintiff
6 will be chilled from appealing from unjust and improper family law orders for fear that the judge
7 who made the order will deem his appeals unnecessary litigation and sanction him in excess of
8 \$13,000." Complaint, ¶ 58.

9 To the extent that the Sacramento Superior Court has retained jurisdiction over the
10 settlement, there are ongoing state court proceedings counseling abstention in this case pursuant to
11 the principles set forth in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).
12 "*Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state
13 interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. [Citations.]
14 When the case is one in which the *Younger* doctrine applies, the case must be dismissed." *H.C. v.*
15 *Koppel*, 203 F.3d 610, 613 (9th Cir. 2000).

16 In the instant case, the three requirements are met. The Superior Court has retained
17 jurisdiction over the settlement agreement, a violation of which by Plaintiff was the basis for the
18 *Berry I* and *Berry II* decisions. In addition, the United States Supreme Court and the Ninth Circuit
19 have both held that "family relations are a traditional area of state concern." *Ibid*. Moreover, "a state
20 has a vital interest in protecting 'the authority of the judicial system, so that its orders and judgments
21 are not rendered nugatory. [Citations.] This is a particularly appropriate admonition in the field of
22 domestic relations, over which federal courts have no general jurisdiction, [citation], and in which
23 the state courts have a special expertise and experience. [Citation.] *Ibid*."

24 Finally, Plaintiff not only has an adequate state forum in which to pursue his federal
25 claims, he has already done so.

26 Although the majority of the panel in *Koppel* held that the *Younger* doctrine applied to the
27 case and affirmed the trial court's dismissal on that ground, the concurring judge would have upheld
28 the trial court's dismissal on *Rooker-Feldman* grounds. *Id.*, at 614.

1 The Ninth Circuit has also denied diversity jurisdiction over domestic relations cases,
2 noting that, in so doing, "we are reaffirming a time-honored boundary between the domains of
3 federal and state governments. As Justice Holmes said in *Ohio ex rel. Popovici v. Alger*, 280 U.S.
4 379, 383, 50 S.Ct. 154, 155, 74 L.Ed. 489, 497-98 (1930), "It has been understood that, "the whole
5 subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the
6 states, and not to the laws of the United States."'" *Csibi v. Fustos*, 670 F.2d 134, 138 (9th Cir. 1982).

7 Plaintiff herein is seeking, not only to overturn a final state court decision, but also to
8 divest the state courts of jurisdiction over an extant marital settlement agreement. This Court should
9 apply *Younger* abstention and dismiss this action for lack of subject matter jurisdiction.

10 II.

11 THE COMPLAINT FAILS TO STATE FACTS UPON 12 WHICH RELIEF MAY BE GRANTED

13 A. Res Judicata

14 *Res judicata* precludes parties and those in privity with them from relitigating a cause of
15 action that has been finally determined by a court of competent jurisdiction. "Any issue necessarily
16 decided in such litigation is conclusively determined as to the parties or their privies if it is involved
17 in a subsequent lawsuit on a different cause of action." *Teitelbaum Furs, Inc. v. Dominion Insurance*
18 *Company*, 58 Cal.2d 601, 604 (1962).

19 The principles of *res judicata* preclude a federal court from entertaining constitutional
20 issues which were not, but could have been, submitted to and determined by the state court in the
21 previous action. *Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481, 485 n. 5 (9th Cir. 1973), cert.
22 denied 415 U.S. 916 (1973), citing *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657 91 L.Ed. 832
23 (1947). "The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States
24 Supreme Court." *Francisco Enterprises, supra*, at 485.

25 A federal court must give to a state court judgment the same preclusive effect as would
26 be given that judgment under the particular state's law. *Migra v. Warren City Sch. Dist. Bd. of*
27 *Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). In California, "a prior judgment is *res*
28 *judicata* as to all matters that were actually litigated, or *which could have been litigated* in the prior

1 proceeding." *Lefcourt v. Superior Court of the County of San Francisco*, 63 F.Supp.2d 1095, 1101-
2 1102 (N.D. Cal. 1999).

3 In the instant case, Plaintiff alleges that the "appellate briefs, petition for review, and
4 *Flaherty* all raised the unconstitutional chilling effect of Section 271 sanctions against appeals during
5 the State of California's jurisdiction." Complaint, ¶ 5. That is, he not only could have raised his
6 constitutional claims in the State court, he *did* raise them there. Moreover, the summary denial of
7 his petition for review by the California Supreme Court was a decision on the merits and therefore
8 final. Cal. Const., art. 6, § 1; Cal. Rules of Court, rule 954(b); *See, e.g. In re Rose*, 22 Cal.4th 430,
9 431-432 (2000); *Communications Telesystems International, Inc. v. California Public Utility*
10 *Commission*, 196 F.3d 1011, 1018-1019 (9th Cir. 1999). This, therefore, is precisely the type of case
11 to which the principles of *res judicata* apply.

12 The United States Supreme Court has endorsed the application of the *res judicata* doctrine:

13 The doctrine of *res judicata* serves vital public interests beyond any individual
14 judge's ad hoc determination of the equities in a particular case. There is simply
15 "no principle of law or equity which sanctions the rejection by a federal court
16 of the salutary principle of *res judicata*. [] This Court has long recognized that
17 "[p]ublic policy dictates that there be an end of litigation; that those who have
18 contested an issue shall be bound by the result of the contest, and that matters
19 once tried shall be considered forever settled as between the parties. [] We have
20 stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or
21 procedure inherited from a more technical time than ours. It is a rule of
22 fundamental and substantial justice, 'of public policy and of private peace,'
23 which should be cordially regarded and enforced by the courts...."

19 *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d
20 103 (1981).

21 In the instant case, Plaintiff's allegation regarding the constitutionality of Section 271 not
22 only could have been adjudicated in the state court proceedings, it was adjudicated there. The
23 application of the *res judicata* doctrine leads to the conclusion that the Complaint fails to state a
24 claim upon which relief may be granted; therefore, this action must be dismissed.

25 **B. The Complaint Is Barred By The Eleventh Amendment**

26 The Eleventh Amendment to the United States Constitution bars suits that seek either
27 damages or equitable relief against a state, an arm of the state, its instrumentalities or its agencies.
28 *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Durning v. Citibank, N.A.*, 950 F.2d 1419,

1 1422-1423 (9th Cir. 1991); *Brooks v. Sulphur Springs Valley Electric Cooperative*, 951 F.2d 1050,
2 1053 (1991).

3 In the instant action, Plaintiff has sued the State of California, Attorney General Bill
4 Lockyer,⁹ and the entire California state judiciary. All of these defendants are entitled to immunity
5 under the Eleventh Amendment.

6 Unless a State has waived its Eleventh Amendment immunity, or Congress has overridden
7 it, a State cannot be sued directly in its own name, regardless of the relief sought. *Alabama v. Pugh*,
8 438 U.S. 781, 781-782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). California has not consented to this
9 lawsuit, and Plaintiff has not invoked any federal statute purporting to waive that immunity. Thus,
10 the State clearly is entitled to the immunity herein and the Complaint as to it must be dismissed.

11 Similarly, the Complaint fails to state a claim against Attorney General Lockyer in his
12 official capacity. In addition to being entitled to the same immunity, the Attorney General is without
13 authority or capacity to grant the relief requested by Plaintiff, in any event.

14 The State judiciary is an arm of the State; therefore, a suit against the court is a suit against
15 the State, barred by the Eleventh Amendment. *Franceschi, supra*, at 831; *Greater Los Angeles*
16 *Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987). Moreover, "since the
17 eleventh amendment by its terms bars suits against a state 'in law or equity,' [the] holding
18 necessarily applies also to plaintiffs' claims against the Superior Court for injunctive and declaratory
19 relief." *Zolin, supra*, at 1110, n. 10.

20 Accordingly, the Complaint fails to state a claim upon which relief may be granted and the
21 action must be dismissed.

22
23
24 9. The sole reference to Attorney General Lockyer in the Complaint is found in paragraph
25 13 which alleges that, as Attorney General, he "has a duty to assure that judicial orders pursuant to
26 state statutes that deprive citizens of their liberty and property comply with the U.S. Constitution."
27 Disregarding the internal inconsistency of the allegation, it would surely come as a surprise to the
28 Attorney General (not to mention the judiciary) if he were, in fact, found to be endowed with such
authority. Out of an abundance of caution, Defendant Lockyer notes that conclusions of law
disguised as allegations of fact are not deemed admitted and should be disregarded by the Court.
See, Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

1 **C. Claims Against State Judiciary Are Barred By Absolute Immunity**

2 Although Plaintiff does not mention 42 U.S.C. §1983 in the Complaint, it is clear that that
3 is the only avenue available to him for alleging a claim against the State judiciary. The Ninth Circuit
4 has held that "there is no basis for permitting a constitutionally based suit against state defendants
5 where the plaintiff has a statutory remedy under § 1983." *Ward v. Caulk*, 650 F.2d 1144, 1148 (9th
6 Cir. 1981). However, it is well settled that states and state officials sued in their official capacities
7 are not "persons" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*,
8 491 U.S. 58, 62-71, 109 S.Ct. 2304, 2307-2312, 105 L. Ed. 2d 45 (1989). The Ninth Circuit, too,
9 has consistently held that "state agencies which are but arms of the state government are not
10 'persons' for purposes of the Civil Rights Act. [42U.S.C. § 1983 and 1985]." *Rutledge v. Arizona*
11 *Board of Regents*, 660 F.2d 1345, 1349-1350 (9th Cir. 1981); *See also, Allison v. California Adult*
12 *Authority*, 419 F.2d 822, 823 (9th Cir. 1969).

13 Moreover, the Ninth Circuit has held that "judges adjudicating cases pursuant to state
14 statutes may not be sued under § 1983 in a suit challenging the state law." *Grant v. Johnson*, 15 F.3d
15 146, 148 (9th Cir. 1994). The Court's ruling was based on the fact that no case or controversy exists
16 between a judge who adjudicates claims under a particular statute and a litigant who challenges the
17 constitutionality of that statute. *Ibid.*

18 Based on the foregoing, neither the State nor the other defendants, acting in their official
19 capacities, are amenable to suit under 42 U.S.C. § 1983; therefore, the Complaint fails to state a
20 claim upon which relief may be granted and this action must be dismissed.

21 **CONCLUSION**

22 The Court of Appeal for the Third Appellate District rejected Plaintiff's position that his
23 right to file an appeal is chilled by an award of fees and costs imposed as a sanction pursuant to
24 Section 271 *following* remand, absent a finding that the appeal was frivolous.^{10/} In this Court, he is
25 making the identical claim - that the ability of the family law court to impose fees and costs as a
26

27 10. Plaintiff nowhere explains how the imposition of sanctions *following* remand could even
28 arguably chill the antecedent filing of an appeal.

1 sanction chills his right to appeal. This is an impermissible effort to solicit this Court's assistance
2 in launching a collateral attack on a final state court judgment. Under the *Rooker-Feldman* doctrine,
3 this Court lacks jurisdiction over the subject matter of the action and must dismiss it. Because
4 Plaintiff cannot escape the preclusive effect of the doctrine, he cannot amend the Complaint in a way
5 that would allow the Court to assume jurisdiction. Accordingly, this action must be dismissed with
6 prejudice.

7 Moreover, application of *res judicata* and/or *Younger* abstention leads to the same result.
8 Plaintiff has had his day in court on this claim and, in the words of the Supreme Court, it is time to
9 put an end to this litigation. *Federated Department Stores, supra*, 452 U.S. at 401.

10 Defendants respectfully request that the Court dismiss this action with prejudice.

11 Dated: January 20, 2005

12 Respectfully submitted,

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