

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (DME-KMT)

KENNETH L. SMITH,

Plaintiff,

v.

HON. MICHAEL L. BENDER, et al.,

Defendants.

**PLAINTIFF’S REPLY TO DEFENDANT UNITED STATES OF AMERICA’S
RESPONSE TO PLAINTIFF’S MOTION FOR
INJUNCTIVE AND/OR DECLARATORY RELIEF**

Comes now plaintiff Kenneth L. Smith (“Smith”), *in propria persona*, who states as follows in reply to Defendant United States of America only:

1. Defendant United States asserts that it opposes “the proposed order attached to Plaintiff’s Motion, as it purports to find violations of federal law without due process and to establish other unsupported findings and findings that are contrary to fact.” *Def. United States’ Resp. to Pl’s Mot. For Injunctive and/or Declaratory Relief (hereinafter, “Resp.”) at 2.*

2. Smith is at a loss to understand where the taking of judicial notice by this Court upon a proper request as permitted under Fed. R. Evid. 201(d) is violative of any litigant’s due process rights, as affected parties are afforded a fair opportunity to respond pursuant to Rule 201(e).

3. Similarly, it is impossible to fathom counsel’s claim that the Order as submitted finds a violation of federal law without due process. Judicially noticeable facts that even counsel does not dispute are established conclusively, see Fed. R. Evid. 201(g); the only open questions are

questions of law -- which this Court is *expected* to decide as a matter of law, consistent with the Due Process Clause.

4. The one fact central to this Motion is that, on August 18, 2005, the Justices¹ purported to decide a jurisdictional question in *Smith v. Mullarkey*, No. 04-CA-0949 (Colo.App. filed May 14, 2004), despite having “a direct, personal, substantial, pecuniary interest in reaching a conclusion against [Smith] in his case,” in self-evident violation of the Fourteenth Amendment. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). As under Colorado law, a judge with such a conflict is deprived of jurisdiction, *Erbaugh v. People*, 140 P. 188, 190 (Colo. 1914), any subsequent act they purported to take under color of law was strictly *coram non judice*.

5. This Court has no discretion in its application of Colorado law, as “[i]t is axiomatic that any action taken by a court when it lacked jurisdiction is a nullity.” *People v. Dillon*, 655 P.2d 841, 1982.CO.40021 ¶ 36 (Colo. 1982) (citation omitted); *Davidson Chevrolet, Inc. v. City and County of Denver*, 330 P.2d 1116 (Colo. 1958) (same); *see also, In re Marriage of Pierce*, 720 P.2d 591 (Colo.App. 1985) (same). A “judgment either is void or it isn't and relief must be afforded accordingly.” *In re Marriage of Stroud*, 631 P.2d 168, 170 n.5 (Colo. 1981).

6. As to the question of whether other findings in the Order are properly supported, that is a matter for the Court to decide upon appropriate briefing. All this Court asks is that Smith supply a Proposed Order for its consideration, which it is free to accept, reject, or modify.

7. As counsel has openly admitted, *Resp. at 1*, Defendant United States doesn't have a dog in this hunt; as it has waived its opportunity to present specific objections to the Motion, its conclusory and factually unsupported opinion should not be considered by this Court at all.

¹ Defendants Michael L. Bender, Nathan B. Coats, Gregory J. Hobbs, Jr., Rebecca Love Kourlis, Alex J. Martinez, Mary J. Mullarkey, and Nancy E. Rice are referred to herein as “the Justices.”

