IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24–cv–00415–PAB–MDB

KERI L VIEGAS, the individual, and
JAMES VIEGAS, the individual,

Plaintiffs,

v.

PARTNER COLORADO CREDIT UNION,
HARRY L. SIMON,
DANIELLE L. RAMOS,
SARA M. GARRIDO, and
DIANA COFFEY,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Maritza Dominguez Braswell

This matter is before the Court on Defendant Partner Colorado Credit Union's Motion to Dismiss (Doc. No. 6) and the Motion to Dismiss Defendant Harry L. Simon (Doc. No. 28). (collective, the "Motions"). Plaintiffs have filed responses to each Motion (Doc. Nos. 9; 33), to which Defendants have responded (Doc. Nos. 14; 37). The Court has reviewed the Motions, briefing, and applicable law, and **RECOMMENDS** that the Motions be **GRANTED**.

This matter is also before the Court on its Order to Show Cause ("OSC') as to Plaintiffs' failure to effect service as to Defendants Ramos and Coffey. (Doc. No. 46.) Plaintiffs filed a response to the OSC. (Doc. No. 47.) Based on its review of Plaintiffs' response and the

applicable law, the Court **RECOMMENDS** Defendants Ramos and Coffey be **DISMISSED** from this action.

SUMMARY FOR *PRO SE* PLAINTIFFS

The Court is recommending the dismissal of your claims against Defendants Simon and Partner Colorado Credit Union. Under the *Rooker-Feldman* doctrine, the Court lacks subject matter jurisdiction over your Fourth and Fifth Amendment claims because they are inextricably intertwined with the Jefferson County case underlying this action. Further, your claims under the Seventh Amendment fail to state a cause of action and require dismissal. The Court further recommends that Defendant Coffey and Ramos be dismissed for lack of timely service on them. This is only a high-level summary of the Court's Recommendation. The full Recommendation is set forth below, along with information about your right to object to it.

STATEMENT OF THE CASE[1]

I. Plaintiffs' Allegations

This suit arises out of a Jefferson County case initiated by Defendant Partner Colorado Credit Union ("PCCU") against Plaintiffs.[2] (*See* Doc. No. 1; Doc. No. 6 at 1–3.)

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[1] Plaintiffs' Complaint is difficult to sort through. (*See generally* Doc. No. 1.) However, Plaintiffs appear *pro se* and are thus entitled to a liberal reading of their pleadings. Accordingly, the Court takes extra care in its attempt to understand and synthesize Plaintiffs' allegations and claims. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding the allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) ("A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff.").

[2] According to PCCU,

> Defendant [PCCU] sued the Plaintiffs for a bad check arising out of a breach of a retail installment contract for a motor vehicle.... The Complaint sued the Viegas'

Plaintiffs allege that "[o]n or about March 21, 2023, a letter was received [from] Defendant Harry Simon[3] regarding a private automobile ... [saying] that it was paid [for] with a fraudulent check to Defendant [PCCU]" (Doc. No. 1 at ¶ 1.) Plaintiffs say they responded to the letter "stating that an EFT (Electronic Funds Transfer) instrument was accepted and processed by [PCCU] around the end of January[,] 2023." (*Id.*) Plaintiffs contend that something was done by PCCU to "alter[ ]" the EFT. (*Id.*) They go on to allege that sometime in April 2023, "documents were left in the yard" by Defendant Ramos[4]—these documents were ostensibly a complaint and summons connected to the Jefferson County action. (*Id.* at ¶ 3.)

Plaintiffs say they appeared in the Jefferson County suit and filed an answer. (*Id.* at ¶ 4.) An apparently unsuccessful mediation was held "on or about July 20, 2023." (*Id.* at ¶ 5.) Plaintiffs also allege they filed a "Motion to Dismiss to the Clerk of Court" that was rejected by

> for a remaining balance of $10,733.06 (against James Viegas only) and sued both Viegas' for the bad check they wrote to allegedly payoff the remaining balance owed to Defendant Partner for financing one 2019 Toyota Tundra.
>
> The Viegas' used an Electronic Funds Transfer ("EFT") given to the Defendant [PCCU] that appeared to be a normal check. Defendant Partner processed the "check" and mailed the title to James Viegas. Unfortunately, the EFT failed to produce any money for Defendant Partner, thus authorizing the lawsuit.

(Doc. No. 6 at 1–2.)

[3] Defendant Simon was serving as counsel for PCCU. (Doc. No. 28 at 2.)

[4] Defendant Ramos appears to have been a process server hired by PCCU and Defendant Simon to serve Plaintiffs. (*See* Doc. No. 6 at 3.)

Defendant Coffey[5] for failure to contain "wet signatures."[6] (*Id.* at ¶ 8.) A trial was eventually held on April 12, 2024.[7] (*Id.* at ¶ 7).

Based on these allegations, Plaintiffs claim each Defendant violated the Fourth, Fifth, and Seventh Amendments. (Doc. No. 1 at 3–5.) They further appear to claim Defendant Ramos and Judge Garrido violated 18 U.S.C. § 241 and 242.[8] (*Id.* at 4, ¶¶ 3, 5.) In his Motion, Defendant Simon argues Plaintiffs' claims are barred by the *Rooker-Feldman* doctrine—an argument in which PCCU joins.[9] (Doc. No. 28; 32.) Defendants Simon and PCCU alternatively argue Plaintiffs have failed to state claims under Federal Rule of Civil Procedure 12(b)(6) or that their Complaint is facially inadequate under Federal Rule of Civil Procedure 8. (*Id.*)

II. Service

[5] Plaintiffs say Defendant Coffey is the "Clerk of Court." (Doc. No. 1 at 6.) The Court's research suggests Defendant Coffey was the Clerk of Court for Colorado's First Judicial District until March 1, 2024. *See* Chief Judge Order 2024-02, State of Colorado First Judicial District, https://www.coloradojudicial.gov/sites/default/files/2024-06/CJO%202024-02%20Order%20Regarding%20the%20Appointment%20of%20the%20Clerk%20of%20Court%20of%20the%20Jefferson%20County%20Combined%20Courts.pdf.

[6] According to Defendant PCCU, "the Viegas' filed a Motion to Dismiss for Insufficiency Process of Service, Lack of Jurisdiction and for Failure to State a Claim." (Doc. No. 6 at 2.) That motion was denied by Defendant Judge Garrido. (*Id.*)

[7] Defendant PCCU notes that Plaintiffs failed to appear at trial. (*See* Doc. No. 28 at 3 ("The [Plaintiffs] failed to appear at trial in the Jefferson County Court on April 12, 2024[,] and the Court entered a judgment in favor of [PCCU] and as against the Plaintiffs ... in the amount of $12, 231.46."); *see also* (Doc. No. 32.)

[8] Plaintiffs also cite 12 U.S.C. § 615 and UCC 3-604 for unclear reasons. (Doc. No. 1 at ¶ 4.)

[9] At the time PCCU filed its Motion, the state court proceeding was still ongoing, and accordingly, PCCU declined to make *Rooker-Feldman*-based arguments. (Doc. No. 6.) On April 29, 2024, PCCU filed a notice indicating the state court matter had concluded, and it joined Defendant Simon's *Rooker-Feldman* argument. (Doc. No. 32.)

Plaintiffs initiated this action on February 12, 2024, naming PCCU, Simon, Garrido, Ramos, and Coffey as Defendants. (Doc. No. 1.) Plaintiffs filed proofs of service as to Defendants PCCU, Simon, and Garrido on February 15, 2024 (Doc. No. 5), March 9, 2024 (Doc. No. 16), and March 10, 2024 (Doc. No. 17), respectively. However, Plaintiffs have not filed proofs of service demonstrating Defendants Ramos and Coffey have been properly served.

The Court ordered Plaintiffs to show cause "as to why Defendants Ramos and Coffey should not be dismissed without prejudice, pursuant to Federal Rule of Civil Procedure 4(m), for lack of service." (Doc. No. 46 at 2.) Plaintiffs were advised that if they "fail[ed] to show good cause for their failure to serve Defendants Ramos and Coffey, the Court [would] recommend the dismissal of Defendants Ramos and Coffey from this action without further notice." (*Id.*)

Plaintiffs responded to the OSC on July 23, 2024. (Doc. No. 47.) In the response, Plaintiffs contend, "Defendant Ramos provided a false statement in process server affidavit and committed perjury." (*Id.* at ¶ 4.) They further state that "Defendant Ramos is aware of said complaint and is avoiding service .... Defendant Ramos received summons and complaint by certified mail and will be subpoenaed as a witness regarding the untruths in her process service document to the Jefferson County Court." (*Id.* at ¶ 5.) Finally, Plaintiffs say, "Defendant Coffey was served via the agent for her at the Attorney Generals (sic) office. Amy Colony, acting as agent, has acknowledged receipt of documents per ECF 35." (*Id.* at ¶ 6.)

LEGAL STANDARD

I. Federal Rule of Civil Procedure 12(b)(1)

Federal courts are courts of limited jurisdiction and, as such, "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter

jurisdiction." *The Wilderness Soc. v. Kane Cty., Utah*, 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Indeed, courts have an independent obligation to determine whether subject matter jurisdiction exists, *Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG*, 762 F.3d 1016, 1029 (10th Cir. 2014), even in the absence of a challenge from any party, *1mage Software, Inc. v. Reynolds & Reynolds, Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may bring either a facial or factual attack on subject matter jurisdiction, and a court must dismiss a complaint if it lacks subject matter jurisdiction. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1147 n.4 (10th Cir. 2015). For a facial attack the court takes the allegations in the Complaint as true; for a factual attack the court may not presume the truthfulness of the Complaint's factual allegations and may consider affidavits or other documents to resolve jurisdictional facts. *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 n.1 (10th Cir. 2012) (citing *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995)). The burden of establishing jurisdiction rests with the party asserting jurisdiction. *See Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017).

II. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 at 1109. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a Rule 12(b)(6) motion to dismiss, means that the plaintiff pleaded facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The *Iqbal* evaluation requires two prongs of analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," *i.e.,* those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id*. at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 681. If the allegations state a plausible claim for relief, the claim survives the motion to dismiss. *Id*. at 679.

III. *Pro Se* Plaintiffs

Plaintiffs are proceeding *pro se*. The court, therefore, "review[s] [their] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see Haines*, 404 U.S. at 520–21 (holding the allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged or that a defendant has violated

laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (stating that a court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiffs' *pro se* status does not entitle them to an application of different rules. *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

ANALYSIS

I. Motions to Dismiss

A. The *Rooker-Feldman* Doctrine

"The *Rooker-Feldman* doctrine provides that only the Supreme Court has jurisdiction to hear appeals from final state court judgments." *Mayotte v. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169, 1173 (10th Cir. 2018) (quoting *Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006)) (alteration omitted); *see also Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923). The doctrine prevents lower federal courts from exercising jurisdiction "over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the [federal] district court proceedings commenced.'" *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). Because the *Rooker-Feldman* doctrine "implicates [the Court's] subject matter jurisdiction," the Court addresses it "before turning to the merits of the case." *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1193 (10th Cir. 2010).

The doctrine applies to claims where "(1) the plaintiff lost in state court, (2) the state court judgment caused the plaintiff's injuries, (3) the state court rendered judgment before the plaintiff filed the federal claim, and (4) the plaintiff is asking the district court to review and reject the state court judgment." *Bruce v. City & Cnty. of Denver*, 57 F.4th 738, 746 (10th Cir. 2023) (citing *Exxon Mobil*, 544 U.S. at 284). "Where these factors exist, [a federal district court] lack[s] subject matter jurisdiction." *Id.* (citing *Lance*, 546 U.S. at 465). It precludes claims "actually decided by a state court," as well as claims "inextricably intertwined with a prior state-court judgment." *Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1256 (10th Cir. 2006)). "A claim is inextricably intertwined if the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks *redress.*" *Tal*, 453 F.3d at 1256 (internal quotation marks and citation omitted) (emphasis in original).

"The *Rooker-Feldman* doctrine 'has a narrow scope.'" *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1232 (10th Cir. 2013) (quoting *Chapman v. Oklahoma*, 472 F.3d 747, 749 (10th Cir. 2006)). The doctrine "does not deprive a federal court of jurisdiction to hear a claim just because it could result in a judgment inconsistent with a state-court judgment." *Mayotte*, 880 F.3d at 1174. "There is no *jurisdictional* bar to litigating the same dispute on the same facts that led to the state judgment." *Id.* (emphasis in original); *see Lance*, 546 U.S. at 466 ("*Rooker-Feldman* is not simply preclusion by another name.")." What *is* prohibited under *Rooker-Feldman* is a federal action that tries to *modify or set aside* a state-court judgment because the state proceedings should not have led to that judgment." *Mayotte*, 880 F.3d at 1174 (citing *Exxon Mobil*, 544 U.S. at 291) (emphasis in original). "The essential point

is that barred claims are those 'complaining of injuries caused by state-court judgments." *Campbell v. City of Spencer*, 682 F.3d 1278, 1283 (10th Cir. 2012) (quoting *Exxon Mobil*, 544 U.S. at 284). "In other words, an element of the claim must be that the state court wrongfully entered its judgment." *Id.*

Here, Plaintiffs take issue with the process and results of the Jefferson County action and contend that a deprivation of their rights resulted in an unfavorable ruling. (*See* Doc. No. 1 at ¶ 5 ("Due process was not followed."); ¶ 7 ("[Defendants] violated the Plaintiffs['] 4th, 5th, and 7th Amendments.").) Plaintiffs appear to invoke the unreasonable search and seizure provision of the Fourth Amendment, the Fifth Amendment's Due Process Clause, and the right to a jury trial found in the Seventh Amendment to the United States Constitution. (*See* Doc. No. 1 at 4.)

Plaintiffs have made similar allegations under similar circumstances. *See* 23-cv-02939-PAB-MDB (in which Plaintiffs contend that a State of Colorado Rule 120 foreclosure hearing violated their Fourth, Fifth, and Seventh Amendment rights). Moreover, other courts in this District have considered similar *Rooker-Feldman* challenges on similar claims. For example, in *Driskell v. Thompson*, 971 F. Supp. 2d 1050, 1065 (D. Colo. 2013), the plaintiff argued that a Rule 120 foreclosure proceeding violated his Fourth, Fifth, and Seventh Amendment rights. *Id.* at 1056. As here, the *Driskell* court considered *Rooker-Feldman*'s application to plaintiff's constitutional claims, determining plaintiff's Fourth and Fifth Amendment claims were barred, but his Seventh Amendment claim could proceed to a merits review. *Id.* at 1062–65.

As the Court found in its 23-cv-02939-PAB-MDB Recommendation, the *Driskell* decision accurately and persuasively applied the *Rooker-Feldman* doctrine and is therefore instructive. Thus, the Court proceeds similarly here. To the extent Plaintiffs attempt to state a

Fifth Amendment due process claim based on the fairness of the Jefferson County proceeding, the relief here would necessarily challenge the adjudication in state court. In other words, this claim is inextricably intertwined with the state court proceeding. *See Tal*, 453 F.3d at 1256 (stating a claim is inextricably intertwined with the state court proceeding when a plaintiff alleges the state court proceeding actually and proximately caused the injury alleged in federal court). Thus, the claim is barred by *Rooker–Feldman* and should be dismissed.

And while Plaintiffs' invocation of the Fourth Amendment is vague and of unclear application to the facts at issue, it appears Plaintiffs seek to challenge the $12,231.46 judgment as some form of unreasonable search and seizure. If so, that too is barred by the *Rooker–Feldman* doctrine. *See Exxon Mobil*, 544 U.S. at 284 (explaining that *Rooker-Feldman* applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."); *see also McDonald v. Eagle Cnty.*, 2018 WL 6531696, at *6 (D. Colo. Dec. 12, 2018), *report and recommendation adopted*, 2019 WL 1058204 (D. Colo. Mar. 6, 2019) (saying *Rooker-Feldman* applied to constitutional claims that would require the court "to overrule the state court's determination that [the plaintiff] was indebted to [a defendant] in the amount of $14,664.09"). If not, the Court cannot discern a cognizable claim.

B. Plaintiffs' Seventh Amendment Claim

On the other hand, Plaintiffs' Seventh Amendment claim ostensibly challenges the *procedure* by which the state court case was adjudicated—namely, the lack of a jury trial—rather than the outcome itself, and thus may not be barred by *Rooker-Feldman*. However, even assuming a lack of a jurisdictional bar, the Plaintiffs' Seventh Amendment claim is entirely

unexplained and unsupported in the Complaint and, accordingly, must be dismissed under Fed. R. Civ. P. 12(b)(6). *See Iqbal*, 556 U.S. at 678 (stating that a court must dismiss a complaint which "tenders' naked assertion[s]' devoid of 'further factual enhancement'" (citation omitted)).[10]

II. Service of Defendants Ramos and Coffey

Plaintiffs have failed to properly serve Defendants Ramos and Coffey within the time provided by Fed. R. Civ. P. 4(m). (*See* Doc. No. 46 at 1–2 (noting "Plaintiffs filed an Affidavit of Nonservice as to Defendant Ramos" (citing Doc. No. 35), and further noting Plaintiffs' filings as to Defendant Coffey "were stricken by the Court" as improper (citing Doc. Nos. 10; 12)).)

In response to the Court's OSC addressing this issue, Plaintiffs contend Defendant Ramos is avoiding service (Doc. No. 47 at ¶¶ 4–5 (citing Doc. No. 35)), and Defendant Coffey "was served via the agent for her at the Attorney Generals (sic) office." (*Id.* at ¶ 6 (citing Doc. No. 35).) In support of both arguments, Plaintiffs cite the Affidavit of Nonservice regarding Defendant Ramos.[11] (*See* Doc. No. 35.) The affidavit discusses four attempts to serve Defendant Ramos at her purported address between April 21 and April 28, 2024. (*Id.*) The process server indicated there was no answer at the door on any attempt. (*Id.* at 1–2.) He further noted that the house was quiet and dark for attempts 1, 3, and 4. (*Id.*) Moreover, during the second attempt, the process server spoke with a neighbor who did not know who lived at the address in question and

[10] Additionally, though it is unclear whether Plaintiffs attempt to assert a claim via the Complaint's reference to 12 U.S.C. § 615 and UCC 3-604 (*see* Doc. No. 1 at ¶ 4; *supra* at n. 7), the reference is unexplained and unsupported and thus also requires dismissal under Rule 12(b)(6).

[11] Plaintiffs filed this document on May 9, 2024. (Doc. No. 35.)

did not recognize Defendant Ramos' name. (*Id.* at 2.) The Affidavit of Nonservice makes no mention of Defendant Coffey. (*See id.*)

"If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. "If Plaintiff shows good cause for the delay, however, the district court must extend the time to serve the defendant." *Wischmeyer v. Wood*, 2008 WL 2324128, at *2 (D. Colo. June 2, 2008) (citing *Espinoza v. United States*, 52 F.3d 838, 840–41 (10th Cir. 1995)). A plaintiff's "meticulous efforts to comply with the rule" may support a finding of good cause. *In re Kirkland*, 86 F.3d 172, 176 (10th Cir. 1996). Even if the plaintiff fails to show good cause, the district court must consider whether the situation warrants a "permissive extension of time." *Espinoza*, 52 F.3d at 841–42; *see also Wischmeyer*, 2008 WL 2324128, at *2.

The Court finds Plaintiffs' response to the OSC fails to demonstrate "good cause" for their failure to serve Defendants Ramos and Coffey within the period specified by Rule 4(m). As to Defendant Ramos, four service attempts over the course of a single week—at least three of which were made while the home in question was "quiet" and/or "dark"—is not necessarily evidence of evasion. (Doc. No. 35.) For example, there is no indication that someone was moving around in the home and refused to come to the door, or that they answered a doorbell camera but then refused to open the door. Moreover, it is unclear if Plaintiffs even have the right address for Defendant Ramos, as a neighbor reportedly told the process server she did not recognize Defendant Ramos' name. (*Id.* at 2.) Additionally, Plaintiffs' last attempt to serve Defendant Ramos appears to have been on April 28, 2024. (*Id.*) Over two months before the

Court's OSC—and over three months before this Recommendation. The Court has no information indicating Plaintiffs have made new efforts to serve Defendant Ramos. This lack of diligence further counsels against a finding of good cause.

Likewise, Plaintiffs have failed to demonstrate good cause as to their failure to timely serve Defendant Coffey. As the Court noted, Plaintiffs' attempts to serve Defendant Coffey by publication and mail in March 2024 were explicitly stricken by the Court as improper. (Doc. Nos. 10; 11; 12; 13.) Further, as with Defendant Ramos, Plaintiffs have apparently not made any additional efforts at serving Defendant Coffey and thus have not demonstrated diligence in this task. Finally, Plaintiffs' OSC response that Defendant Coffey is aware of this case through her "agent," Ms. Colony, and citations to ECF 35—a document noting the service attempts of Defendant Ramos (Doc. No. 47 at ¶ 6)—are unexplained and unpersuasive in demonstrating good cause.

However, even though Plaintiffs have not shown "good cause" for their failure to serve Defendants within 90 days, this does not end the Court's inquiry. *See Espinoza,* 52 F.3d at 841. The Court must consider whether a "permissive extension of time" to serve Defendants Coffey and Ramos is warranted. *Id.* ("If the plaintiff fails to show good cause, the district court must still consider whether a permissive extension of time may be warranted."). Here, the Court does not see any basis for such an extension. Plaintiffs have failed to provide any information suggesting their service attempts have been thwarted by unique hardship or that they are likely to successfully serve Defendants Coffey or Ramos in the near future. Moreover, the Court notes Plaintiffs have already been afforded a *de facto* Rule 4(m) extension as this case has been pending for over five months. (Doc. No. 1.)

CONCLUSION

For the foregoing reasons the Court **RECOMMENDS** Defendant Partner Colorado Credit Union's Motion to Dismiss (Doc. No. 6) and the Motion to Dismiss Defendant Harry L. Simon (Doc. No. 28) be **GRANTED** as follows:

- Plaintiffs' Fourth Amendment and Fifth Amendment claims against Defendants PCCU and Simon be dismissed without prejudice. *See Strozier v. Potter*, 71 F. App'x 802, 804 (10th Cir. 2003) ("A district court's dismissal for lack of subject matter jurisdiction should be without prejudice.").

- Plaintiffs' Seventh Amendment claim be dismissed with prejudice.[12]

The Court further **RECOMMENDS** Defendants Ramos and Coffey be **DISMISSED** from this action.

ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo

[12] Though the Court would ordinarily recommend the dismissal of Plaintiffs' Seventh Amendment claim without prejudice, Plaintiffs have caused Defendants and the Court to expend significant time and resources on what appears to be a meritless claim. *See Avery v. Wade*, 2022 WL 17544077, at *2 (10th Cir. Dec. 9, 2022) (finding that the district court "didn't abuse its discretion in dismissing [the plainitff's] claims with prejudice" because he raised "indisputably meritless legal theor[ies]." (quoting *Northington v. Jackson*, 973 F.2d 1518, 1520 (10th Cir. 1992)).

review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059-60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate judge's ruling). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 23rd day of August, 2024.

BY THE COURT:

Maritza Dominguez Braswell
United States Magistrate Judge