Appeal Nos. 10-4127, 10-4134

IN THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Nikols,

Plaintiff-Appellant,

v.

David Chesnoff, and Goodman & Chesnoff,

Defendant-Cross Appellant

Appeal from the United States District Court
for the District of Utah in Case No. 2:10-cv-00004
Judge Ted Stewart

APPELLANT'S RESPONSE AND REPLY BRIEF (THIRD BRIEF ON CROSS-APPEAL)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES/RULES

INTRODUCTION

At issue in this case are four parcels of real estate ("Parcels") purchased by appellant John Nikols ("Nikols"), which appellees David Z. Chesnoff and Goodman & Chesnoff (collectively, "Chesnoff") have attempted to seize to satisfy their judgment against Nikols' adult son, Michael John Nikols ("Michael"). As Chesnoff concedes, "the purchase price for the Parcels was paid by Nikols from his legitimate businesses . . . . That fact has never been disputed in this case." Appellees' Principal and Response Brief ("2d Br."), 23. It is likewise undisputed that Chesnoff's judgment is against Michael, not Nikols. Justice should not countenance the application of property admittedly bought by one—Nikols—to satisfy Chesnoff's judgment against another—Michael.

The issue presented in this appeal is whether the trial court erred by ruling that an order entered by the District Court of Utah for the Third Judicial District ("State Court"), in post-judgment collection proceedings on Chesnoff's judgment against Michael, is res judicata as to Nikols' claim that he is the true and rightful owner of the Parcels. The district court erred by giving the State Court's order preclusive effect against Nikols' claim. Because that order was entered in proceedings conducted "under those rules" whose only *legitimate* purpose is "to assist in the collection efforts of

a judgment creditor," the only rights that could have been conclusively adjudicated in those proceedings are the judgment debtor's—i.e., Michael's. *See Brigham Young University v. Tremco Consultants, Inc.*, 156 P.3d 782, 790 (Utah 2007).

Chesnoff tries to distinguish *Tremco* by arguing that he "never sought to enforce his judgment against Nikols." 2d Br. at 20. But Chesnoff *is* trying to enforce against Nikols an order entered in summary proceedings ancillary to that judgment. This Court should reverse because under *Tremco* an order entered in collection proceedings on Chesnoff's judgment against Michael is no more enforceable against Nikols that the judgment itself.

After Nikols and Chesnoff filed their opening briefs, the Utah Court of Appeals issued a Memorandum Decision concluding:

> Nikols was afforded a "proceeding subject to the full spectrum of due process." See Brigham Young Univ. v. Tremco Consultants, Inc., 2007 UT 17, ¶ 47, 156 P.3d 782. As a result, the underlying proceeding resulted in a final decision on the merits. See id.

Chesnoff submitted that paper to this Court pursuant Federal Rule of Appellate Procedure 28(j) ("Rule 28(j)").[1] The Utah Court of Appeals'

[1] Now two State Court orders and two resulting state court appeals have been placed before this Court. The first is the April 29, 2008 order that the district court in this case held was res judicata as to Nikols' ownership, and its affirmance on appeal, *see Nikols v. Goodman & Chesnoff*, 206 P.3d 295 (Utah App. 2009). The second is the State Court's order of May 10, 2010,

pronouncement is instructive—not for what might seem the obvious reasons but because whether Nikols was afforded due process, and whether "the underlying proceedings resulted in a final decision on the merits," *were not even before the Utah Court of Appeals*.

Instead of deciding the issues before it, the Utah Court of Appeals reached out to opine on the district court's ruling in *this* case.[2] Its commentary underscores the seductive simplicity of the result reached by the district court: it is such a facile conclusion that the Utah Court of Appeals echoed it without even having the issue before it, and without the benefit of any briefing. *This* Court should not affirm unless, after conducting its own, independent, *de novo* review, it is satisfied that the district court was not similarly beguiled into giving the *easy* answer, but instead gave the *right* answer, to the issue presented.

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and the resulting November 26, 2010 Memorandum Decision that Chesnoff submitted under Federal Rule of Appellate Procedure 28(j). As explained below, neither the second order nor its appellate disposition have any bearing on this appeal.

[2] Chesnoff submitted the "Memorandum Decision and Order Granting Defendants' Motion to Dismiss" ("Decision") from which *this* appeal is taken to the Utah Court of Appeals, in support of a request to have the appeal pending there dismissed for mootness.

STATEMENT OF THE ISSUE ON CROSS-APPEAL[3]

Chesnoff frames the issue on cross-appeal as: "Did the district court err in denying Appellees' motion or sanction sunder Rule 11 by applying the legal standard set forth in Utah Code Ann. § 78B-5-825 rather than the standard set forth in Fed. R. Civ. Pro. 11?" 2d Br. at 1. Because the district court did not deny that motion, whether by "applying the legal standard set forth in Utah Code Ann. § 78B-5-825" or otherwise, *that issue* is not presented. And because Chesnoff does not present or brief any *other issue*, it appears that there is *no issue* presented on cross-appeal.

STATEMENT OF THE CASE ON CROSS-APPEAL[4]

As reflected in the district court's docket, Chesnoff filed a motion to dismiss on February 1, 2010, *see* App. at 2 (Dkt. 10), and a separate motion for sanctions under Rule 11 on February 26, 2010, *see* App. at 3 (Dkt. 22). On May 13, 2010, the district court set the motion to dismiss for hearing on June 21, 2010. *See* App. at 4 (Dkt. 37). On June 21, 2010, "[t]he Court hear[d] argument on defendants' motion to dismiss." *See* App. at 4 (Dkt.

[3] Nikols' statement of the issue on appeal is given in Appellant's Opening Brief ("1st Br.").

[4] This statement addresses only Chesnoff's cross-appeal. Nikols' statement with respect to his own appeal is given in his opening brief.

39). No hearing was ever set or held on the Federal Rule of Civil Procedure 11 ("Rule 11") motion.

The district court's Decision, from which these cross-appeals arise, begins: "This matter is before the Court on Defendants' Motion to Dismiss." App. at 144, Decision at 1. The Decision never references Chesnoff's separate motion for sanctions under Rule 11.

Chesnoff's Memorandum in Support of Motion to Dismiss included a request for sanctions under Utah Code § 78B-5-825. App. at 35-36. The district court applied standards prescribed by Utah statutory and caselaw to that request, and denied it. App. at 155-56, Decision at 12-13.

After (1) dismissing Nikols' Occupying Claimants Act claim "pursuant to Rule 12(b)(6)," (2) dismissing "the equitable lien and quiet title claims . . . pursuant to the doctrine of Res Judicata," and (3) denying the request for sanctions under Utah Code § 78B-5-825, the district court (4) "ORDERED that all other pending motions," including the Rule 11 motion, "are moot." App. at 156, Decision at 13.[5] No other order was ever made with respect to the Rule 11 motion.

[5] The docket entry for the Decision characterizes the Decision as *inter alia* "denying 22 [the docket number for Chesnoff's Rule 11 motion] Motion for Sanctions," App. at 5 (Dkt. 40), but the 13-page Decision itself nowhere references the Rule 11 motion.

Neither the Rule 11 motion that Chesnoff claims was improperly denied, nor any supporting documents or responses or replies thereto, is included in any designation or appendix that has been submitted to this Court.

SUMMARY OF ARGUMENT

As Nikols pointed out in his opening brief, whether the State Court's order in post-judgment collection proceedings is a final judgment with preclusive effect, and whether Nikols was afforded due process in those proceedings, are distinct (albeit related) inquiries. Before the due process issue is even reached it is clear that, as a matter of Utah law, an order in supplemental proceedings is not a final judgment. Chesnoff argues that Utah law gives a definition of "final judgment" that is satisfied by the State Court's order, but his argument is premised on a confusion between the final judgment element of res judicata and finality for purposes of appeal. Thus the district court erred by ruling that the State Court's order in post-judgment collection proceedings was a final judgment.

If the issue were due process, still this Court should reverse. Although, as noted above, the final judgment and due process inquiries are distinct, Utah's distinction between a final judgment and an order in post-

judgment collection proceedings has due process underpinnings. The Supreme Court of Utah has ruled that more process is due in a civil action by which a cause of action is adjudicated than in post-judgment collection proceedings. Although collection proceedings afford sufficient process to adjudicate a judgment debtor's rights, they do not afford enough process to adjudicate the rights of anyone else. Among the process afforded by a civil action that Nikols did not receive in the State Court proceedings are service of a complaint framing the issues and a jury trial thereof.

Chesnoff, trying to free the State Court's order from the "post-judgment" label correctly attached by the district court, characterizes the State Court proceedings as "a full evidentiary trial pursuant to Utah R. Civ. Pro. 64(c)(2)." 2d Br. at 19. But there is no such thing as a *trial* pursuant to that rule, and moreover the Supreme Court of Utah in *Tremco* expressly held that the predecessor of that rule did *not* provide sufficient process to constitute a civil action.

Chesnoff also tries to distinguish *Tremco*, the authority on which Nikols principally (but not exclusively) relies; however, his arguments are unpersuasive. And the Memorandum Decision from Utah's intermediate court of appeal that Chesnoff recently submitted is unpersuasive both because its pertinent commentary is *obiter dicta* (the issue to which those

comments are directed was not before that court) and also because it is directly contrary to *Tremco*.

Turning to Chesnoff's cross-appeal, the district court never made the ruling that Chesnoff asks this Court to review. According to Chesnoff, the district court applied the standards of Utah Code § 78B-5-825 to his request for sanctions under Federal Rule of Civil Procedure 11. But the only request for sanctions ever adjudicated by the district court was a request under Utah Code § 78B-5-825 that Chesnoff included in his memorandum in support of the motion to dismiss that led to this appeal, which Chesnoff concedes was properly denied. Moreover, Chesnoff has not placed before the Court either the motion, the disposition of which he has tried to appeal; or any documents submitted in support, response, or reply thereto. It is unclear whether there is even a cross-appeal to entertain, but if there is, it should be denied. The district court would have been fully justified if it had made the ruling Chesnoff ascribes to it, but it did not; and Chesnoff has failed in any event to provide this Court with a record to review.

ARGUMENT

I.
THERE WAS NO FINAL JUDGMENT

A. As a Matter of Utah Law, an Order in Post-Judgment Collection Proceedings Is Not a Final Judgment

As the district court recognized, "the issue" in this appeal "is whether the post-judgment determination of Plaintiff's property interest in the parcels constitutes a final judgment." App. at 152, Decision at 9.[6] To frame the issue is to decide it. As a matter of Utah law, "post-judgment collections proceedings are separate and independent from the action that yielded the judgment that the collection action seeks to satisfy." *Tremco*, 156 P.3d at 784 n. 1. Moreover, the civil action that produces the judgment "must be prosecuted in the manner prescribed in the Utah Rules of Civil Procedure, commencing with the filing of a summons and complaint and not . . . abbreviated post-judgment collection procedures." *Id.* at 790. Because post-judgment proceedings were never "intended . . . to provide an alternative form of summary adjudication of claims that would otherwise be required to be prosecuted as civil actions," *id.* at 791, "the post-judgment determination

[6] Other than references to Appellant's Supplemental Appendix, record citations are to the Appendix that Nikols filed with his opening brief; with parallel citations, if applicable, to the internal pagination of the district court's Decision.

of [Nikols'] property interest" *cannot* "constitute[] a final judgment," *see* App. at 152, Decision at 9.

B. Nikols Did Not Receive the Process Mandated by Utah Law

Notwithstanding the clear teaching of *Tremco*, the district court reasoned:

> Because [Nikols] did not contest jurisdiction to the [State Court] proceeding, and because the proceeding included discovery, an evidentiary hearing, and an appeal, . . . the [post-]judgment procedure was a final judgment.

App. at 153, Decision at 10. With regard to the first of the district court's bases, as Nikols explained in his opening brief, he did not "contest jurisdiction" because there was nothing to contest: "Michael's legal title gave Chesnoff something to attach and the State Court had jurisdiction to entertain Nikols' challenge to Chesnoff's writ." 1st Br. at 23. Because that is all the State Court could or (perforce) did adjudicate, "*Nikols*' rights in the Parcels were not impaired until the district court gave preclusive effect to the State Court's order in *this* case." *Id.* at 24. Chesnoff apparently concedes the point because his brief does not defend this aspect of the district court's ruling.

Chesnoff defends only the second of the district court's bases, that "because the proceeding included discovery, an evidentiary hearing, and an appeal," it resulted in "a final judgment." As Chesnoff puts it,

> En route to the State Court's issuance of the Order Denying Discharge, Nikols was afforded all the due process protections required under Utah law, namely, notice, discovery, trial,[7] calling witnesses, cross-examining witnesses, and an appeal.

2d Br. at 9. But the Supreme Court of Utah has a different list of due process requirements:

> a cause of action must . . . be prosecuted in a civil action commenced by the filing of ***a complaint*** and including the right of a defendant to receive service of process, conduct discovery, enjoy the protections afforded by a trial—including ***a jury trial*** and the allocation of the burden of proof—and the right to appeal.

Tremco, 156 P.3d at 790 (emphasis added). And two protections expressly required by *Tremco* are absent from the district court's and Chesnoff's list of what Nikols was afforded: a complaint and jury trial.[8] *See* 1st Br. at 19-21. Thus under *Tremco*, Nikols has *not* received the process that he is due.

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[7] Chesnoff refers to the post-judgment proceedings in the State Court as a "trial" 18 times. But as the district court recognized, the State Court proceeding was "an evidentiary hearing," not a trial. App. at 153, Decision at 10.

[8] As Nikols explained in his opening brief, two of the three judges of the Utah Court of Appeals that reviewed the State Court's order also recognized that Nikols' ability to call and question witnesses had been compromised by

Chesnoff also quotes (and even italicizes) the following passage from *Tremco*: "The bare essentials of due process thus mandate adequate notice to those with an interest in the matter and an opportunity for them to be heard in a meaningful manner." 2d Br. at 19 (quoting *Tremco*, 156 P.3d at 788). The "bare essentials" are what is due to all; "[t]he same process is not, however, due to everyone who comes before the court." *Tremco*, 156 P.3d at 788. Even "[a] judgment debtor [who] appears in court . . . with his property exposed in summary proceedings," *id.*, is entitled to the "bare essentials" of notice and an opportunity for hearing; but a party whose rights have not yet been adjudicated, like Nikols, is entitled to considerably more: he is entitled to have his rights adjudicated in "a proceeding subject to the full spectrum of due process safeguards," *Tremco*, 156 P.3d at 791, including "the filing of a complaint and . . . the protections afforded by a trial—including a jury trial," *id.* at 790.

C. A "Trial Pursuant to Utah R. Civ. Pro. 64(c)(2)" Is Not a Trial

According to Chesnoff, Nikols "received a full evidentiary trial pursuant to Utah R. Civ. Pro. 64(c)(2) regarding his claimed interest in the Parcels." (2d Br. at 19.) Trials are conducted pursuant to Rules 38-53,

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State Court rulings that improperly burdened and limited Michael's exercise of his Fifth Amendment rights. *See* 1st Br. at 7 n. 5.

comprising Part VI—headed "Trials"—of the Utah Rules of Civil Procedure. Rule 64, by contrast, appears in Part VIII, "Provisional and Final Remedies and Special Proceedings."[9]

Rule 64,[10] in particular, embodies the very "abbreviated post-judgment collection procedures" that *Tremco* held were *not* an adequate substitute for "a civil action . . . prosecuted in the manner prescribed in the Utah Rules of Civil Procedure, commencing with the filing of a summons and complaint." *See Tremco*, 156 P.3d at 790 ("a civil action . . . must be prosecuted in the manner prescribed in the Utah Rules of Civil Procedure,

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[9] The grouping, numbering, and labeling of these Parts and Rules are the same in both the Utah and the Federal Rules of Civil Procedure.

[10] Current Rule 64 is titled, "Writs in general." Subdivision (c) is as follows:

> (c) Procedures in aid of writs.
>
> (c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.
>
> (c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.
>
> (c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

The "since repealed" rule held by *Tremco* to constitute an inadequate substitute for a civil action similarly "permitted the court to 'order any property of a judgment debtor, not exempt from execution, in the possession of the debtor or other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.'" *Tremco*, 156 P.3d at 791 (quoting Utah R. Civ. P. 69 (s) (2002)).

commencing with the filing of a summons and complaint and not the abbreviated post-judgment collection procedures of rule 69"), 785, n. 2 ("Today, Utah Rule of Civil Procedure 69 has been . . . replaced with . . . Utah Rule of Civil Procedure 64."). Under *Tremco*, a "trial pursuant to Utah R. Civ. Pro. 64(c)(2)"—which is what Chesnoff says Nikols received—is not a civil action wherein Nikols' rights could have been adjudicated.

D. Chesnoff's Authorities Are Inapposite

According to Chesnoff, "the Order Denying Discharge was a final judgment under *Copper State* and *Olson*." (2d Br. at 9.) Under *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387 (Utah App. 1987), "[a] judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." (*See* 2d Br. at 8 [quoting *Copper State*, 735 P.2d at 390.) *Copper State* is inapposite because Nikols does not contest the res judicata effect of "the Order Denying Discharge" by arguing that it was reversed, modified, or set aside.

Chesnoff cites his other authority, *Olson v. Salt Lake City School District*, 724 P.2d 960, 964-65 (1986), for the proposition that a final judgment is whatever "ends the litigation on the merits and leaves nothing for the court to do." (*See* 2d Br. at 8, 14.) *Olson* quoted that standard from *Acha v. Beame*, 570 F.2d 57, 62 (2d Cir. 1978), which in turn quoted it from

Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). The issue in *Olson*, *Acha*, and *Catlin* was finality for purposes of appeal, not whether a judgment had been entered for purposes of res judicata. As this Court has recognized, there is a difference; and "[i]n certain jurisdictions" an adjudication can be final for purposes of appeal even though it lacks "the essential characteristics . . . to constitute it an estoppel under the doctrine of res judicata." *See Coppedge v. Clinton*, 72 F.2d 531, 534-35 & n. 4 (10th Cir. 1934). Utah is one of those jurisdictions in which an order can be final for purposes of appeal without constituting res judicata. *See id.* at 534 n. 4 (citing *State Bank of Sevier v. American Cement & Plaster Co.*, 10 P.2d 1065, 1069 (Utah 1932)).

"[T]he execution order issued by the trial court after issuance of the final judgment on liability and damages" is separately appealable because it "stands as a separate and distinct order from the underlying judgment." *Cheves v. Williams*, 993 P.2d 191, 204 (Utah 1999). But the fact that an order entered in post-judgment collection proceedings can be final for purposes of appeal does not mean it constitutes a final judgment on the merits for purposes of res judicata.

II.
TREMCO IS CONTROLLING

Although Nikols disagrees with Chesnoff's claim that "Nikols relies . . . almost exclusively" on *Tremco*, 2d Br. at 9, *Tremco* is obviously important to the proper disposition of this appeal and unless *Tremco* can be distinguished the district court's ruling cannot be affirmed. The district court determined that "*Tremco* is distinguishable from the instant case" in two respects: first, "[i]n *Tremco*, the post-judgment proceeding involved the court extending liability to third parties never joined in the suit," whereas here Nikols was "a named party in the post-judgment proceeding"; and second, "in the present case, unlike *Tremco*, the judgment debtor, Michael, was the record owner of the property." App. at 153, Decision at 10. To those grounds of distinction, Chesnoff adds a third: "In contrast to *Tremco II*, Chesnoff never sought to enforce his judgment against Nikols." 2d Br. at 20.

As explained below, Chesnoff's arguments in defense of the district court fail: Chesnoff's argument based on Nikols' status as a named party rests on misstatements of the record; and the notion that only paper title holders are entitled to "the full array of due process associated with a civil action," *Tremco*, 156 P.3d at 791, is contrary to Utah law. Chesnoff's additional argument, that he is not trying to enforce against Nikols his

judgment against Michael, is misplaced because Chesnoff *is* seeking to foreclose Nikols' rights through proceedings adjunct to that judgment.

A. Being a Named Party Did Not Deprive Nikols of his Right to the Full Array of Due Process

As Nikols explained in his opening brief, the fact that he was a named party in the State Court proceedings "excuses the absence of a summons and obviated the need for service of process—but that is all"; and "the controlling fact" with respect to res judicata "is that Nikols was and is a stranger to the judgment Chesnoff seeks to enforce." 1st Br. at 26. The only argument Chesnoff adds to the district court's statements on this point is that Nikols "plac[ed] ownership of the Parcels at issue" in the main State Court action, and not just the post-judgment collection proceedings, by alleging in his pleading

> that "[a]s part of . . . [Michael's] federal [criminal] case, prosecutors seized and sought to effect forfeiture of certain real . . . property *belonging to [Michael]*, and that Chesnoff "failed to file any motions challenging the forfeiture proceedings[.]" App. 60, 64 (emphasis added).

2d Br. at 14 (as in original). This supporting argument is simply a misstatement of the record.

The pleading paragraphs "quoted" by Chesnoff, in context, are as follows:

> 10. As part of the federal [criminal] case, prosecutors seized and sought to effect forfeiture of certain real and personal properly belonging to M. Nikols (herein referred to as "M. Nikols' property").
> 11. Additionally, federal prosecutors improperly seized and or placed liens on the following real and personal properties belonging to J. Nikols (herein referred to as "J. Nikols' property"):
>
> (a) J. Nikols' Coachmans Restaurant;
> (b) J. Nikols' GMC Yukon; and
> (d) J. Nikols' $1,792.00 in U.S. Currency from the Coachmans Restaurant.
>
> 25. From July 2005, to and including October 2005, Mr. Chesnoff failed to perform and/or blatantly refused to fulfill or attempt to fulfill the terms his Promises and Guarantee. Specifically, Mr. Chesnoff:
>
> . . .
> (e) failed to file any motions challenging the forfeiture proceedings against J. Nikols property and seeking release and return of J. Nikols' property.

App. at 60, 63-64. Chesnoff has misstated the record in three respects: first, the "real property" characterized in the pleading as "M. Nikols' property" is a house that was owned by Michael and has since been forfeited to the federal government, not the Parcels at issue in this case; second, the only real property encompassed in "J. Nikols' property" is a restaurant owned by Nikols, not the Parcels at issue in this case; and third, the allegation

regarding Chesnoff's failure to file motions is directed to "J. Nikols' property," not "M. Nikols' property."[11]

The district court did not ascribe any preclusive effect to the summary judgment that ended the main State Court action; and Chesnoff's misstatements of the record give this Court no reason to do so, either.

B. Even Those Lacking Paper Title Are Entitled to Due Process

Chesnoff neatly captures the district court's second ground of distinction as follows:

> *Tremco II* would only apply if Chesnoff sought to collect his judgment against Michael by attaching property in Nikols' name. If that were the case, *Tremco II* would require Chesnoff to bring a civil complaint against Nikols . . .

2d Br. at 21. The notion that a party claiming ownership otherwise than by legal title is entitled to less process has been squarely rejected by the

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[11] This third misstatement appears also in Chesnoff's "Statement of the Facts," where it is stretched even further:

> Nikols alleged in his Amended Answer and Counterclaim that Chesnoff owed a duty of care to Nikols to have the Parcels released from the federal seizure. App. 60-61. Nikols claimed that, although the Parcels had been titled in Michael's name since 1988 (the previous 17 years), the Parcels really belonged to Nikols and the federal government had no right to seize them. *Id.*

Chesnoff has flatly mischaracterized Nikols' State Court pleading, which makes no reference whatsoever to the Parcels at issue in this case. *See* App. at 60 (defining "J. Nikols' property" to include "J. Nikols' Coachmans Restaurant," but not the four Parcels).

Supreme Court of Utah. *See Holland v. Wilson*, 327 P.2d 250, 252 (Utah 1958) ("the mere fact that the naked legal title rests in the United States of America is not sufficient to deprive plaintiff of his right to have a jury adjudge the issues of fact in determining the beneficial title and the right to possession of the mining claims").

C. Chesnoff Is Using Proceedings Ancillary to his Judgment against Michael to Foreclose Nikols' Rights

As a third ground of distinction, in addition to the two cited by the district court, Chesnoff also argues: "In contrast to *Tremco II*, Chesnoff never sought to enforce his judgment against Nikols," 2d Br. at 20; "Chesnoff never sought to attribute his State Court judgment to Nikols," *id.* at 10. Nominally, it might be true that Chesnoff has not "sought to enforce his judgment against Nikols"; but substantially, that is exactly what Chesnoff is doing.

The sole purpose of post-judgment collection proceedings is to "to assist in the collection efforts of a judgment creditor." *See Tremco*, 156 P.3d at 790. They are not freestanding adjudicative proceedings but are instead ancillary to the judgment sought to be enforced through them. While Chesnoff might not directly "attribute his State Court judgment to Nikols," *see* 2d Br. at 10, he does "attribute" to Nikols proceedings whose sole legitimate function is "to assist in [his] collection efforts" on that judgment,

see Tremco, 156 P.3d at 790. Indeed Chesnoff's entire argument, and the sum and substance of the district court's Decision, is that Nikols' rights were conclusively adjudicated by a ruling obtained in collection proceedings ancillary to Chesnoff's judgment against Michael. Whether or not this is *labeled* "enforcement of Michael's judgment against Nikols," that is its material *effect*.

Just as "a violation of due process does occur if a court permits a cause of action that should properly be prosecuted as a civil action to proceed under those rules promulgated to assist in the collection efforts of a judgment creditor," *Tremco*, 156 P.3d at 790, so too a violation of due process *did* occur in this case when the district court gave a ruling made "under those rules promulgated to assist in the collection efforts of a judgment creditor" preclusive effect against a stranger to the creditor's judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 797, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) ("extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'").

III.
THE UTAH COURT OF APPEALS' RECENT MEMORANDUM DECISION IS UNPERSUASIVE

A. The Memorandum Decision Is *Obiter Dicta*

The Utah Court of Appeals proceedings that yielded the November 26, 2010 Memorandum Decision lately submitted by Chesnoff arose out of the State Court's May 10, 2010 order authorizing execution on the Parcels, over Nikols' objection. *See* Supp. App. at 194, 214.[12] Nikols had objected to execution because his claim under Utah's Occupying Claimants Act was still pending in the district court in *this* case; and that Act provides:

> no execution shall issue to put the owner in possession . . . after the filing of a complaint as hereinafter provided, until the provisions of this chapter have been complied with.

Utah Code § 57-6-1. The State Court refused to entertain Nikols' objection to execution because Nikols had not presented his occupant's claim in support of his 2008 motion to discharge Chesnoff's writ. *See* Supp. App. at 217. Nikols appealed because the Supreme Court of Utah has expressly

[12] In conjunction with this brief, Nikols is moving to supplement the record with Appellant's Supplemental Appendix ("Supp. App."), comprising the briefing that yielded the November 26, 2010 Memorandum Decision from the Utah Court of Appeals, numbered consecutive to the Appendix Nikols submitted with his opening brief. If any consideration is to be given to that pronouncement, then this Court should grant Nikols' motion so it can be placed in context.

ruled, as a matter of statutory construction, that a claim under the Act need not be presented in the same action as ownership: "The intention of the stature is clear that the occupying claimant need not prefer his claim until he 'is afterwards in a proper action found not to be the owner' of the land in controversy," i.e., "[t]he appellant was not required to file the petition for improvements until it was finally determined whether he or the respondent was found to be the owner of the land in controversy." *Fares v. Urban*, 151 P. 57, 58 (Utah 1915); *see* Supp. App. at 219.

Chesnoff apparently agreed that the State Court's stated rationale was indefensible because his own briefing in the resulting appeal said nothing about *Fares* (or res judicata).[13] Instead Chesnoff argued—as he did in this case—that Nikols had not stated an occupant's claim. *See* Supp. App. at 231. Thus, the *only* questions presented to the Utah Court of Appeals and briefed by the parties were whether the State Court's ruling was contrary to the Occupying Claimants Act, as construed by *Fares*; and whether Chesnoff had presented alternative grounds for affirmance (viz., failure to state a claim). The Memorandum Decision submitted by Chesnoff did not decide (or even address) either issue. *See* Supp. App. at 280-82.

[13] Chesnoff has also limited his res judicata argument in *this* case to claims *other than* Nikols' occupant's claim. *See* App. at 30-35.

Instead of addressing the issues presented on appeal and briefed by the parties, the Memorandum Decision concludes: "Nikols was afforded a 'proceeding subject to the full spectrum of due process.' As a result, the underlying proceeding resulted in a final decision on the merits." Supp. App. at 282 (citations omitted). But the Utah Court of Appeals was never asked to decide either issue, and neither of them was briefed. *See* Supp. App. at 208-29 (Nikols' brief), 233-51 (Chesnoff's brief).

The Utah Court of Appeals' pronouncements on issues not briefed and not before it should have no bearing on the reasoning of this Court. *See Orleans Parish v. N.Y. Life Ins. Co.*, 216 U.S. 517, 518, 30 S. Ct. 385, 54 L. Ed. 597 (1910) (even with respect to issues of state law, "*obiter dicta* of the state court as to facts in a case which was never brought before it, and the record of which its members never saw, are entitled to no weight").

B. This Court Applies the Law as Set Forth by the Supreme Court of Utah, not Contrary Statements by the Utah Court of Appeals

Even if it were not *obiter dicta*, still the statement by Utah's intermediate court of appeals that post-judgment collection proceedings are "a 'proceeding subject to the full spectrum of due process,'" Supp. App. at 282, should be disregarded because the Supreme Court of Utah has ruled that proceedings "under those rules promulgated to assist in the collection

efforts of a judgment creditor" do *not* provide sufficient process for the adjudication of "a cause of action that should properly be prosecuted as a civil action," *Tremco*, 156 P.3d at 790; and *this* Court "appl[ies] the law as set forth by the relevant state's *highest* court," *see Long v. St. Paul Fire & Marine Ins. Co.*, 589 F.3d 1075, 1081 (10th Cir. 2009) (emphasis added).

IV.
EQUITY FAVORS NIKOLS

As Nikols observed in his opening brief, "Utah is self-consciously moderate in its res judicata jurisprudence," 1st Br. at 29, "resolv[ing] all doubts in favor of permitting parties to have their day in court on the merits of a controversy," *id.* (quoting *Baxter v. Department of Transportation*, 705 P.2d 1167, 1169 (Utah 1985)). Utah law is particularly reluctant to apply res judicata where "there is a substantial likelihood" that the party against whom it is asserted was "cheated, imposed upon, or unfairly dealt with." 1st Br. at 30 (quoting *McBride v. Jones*, 615 P.2d 431, 433 (Utah 1980)).

Nikols' opening brief summarizes Chesnoff's conduct as follows:

> Here, Chesnoff admits that Michael, not Nikols, is his sole judgment debtor; and that Nikols, not Michael, bought and paid for the Parcels by which he seeks to have the judgment satisfied. App. at 20, 133. Chesnoff tried to elbow the federal government aside in Michael's federal criminal case by solemnly advising Judge Cassell of the district court that the Parcels were Nikols', not Michael's; then obtained from the State Court his own writ attaching the Parcels to satisfy his own claim against

> Michael by submitting a perjurious affidavit falsely swearing that he was "unaware of any other persons or entities besides the federal government presently claiming an interest in any of the Real Property." App. at 129, 133. And Chesnoff persuaded the State Court to make what two of the three judges of the Utah Court of Appeals that reviewed the State Court's order recognized were questionable rulings, at best, regarding his own former client's Fifth Amendment rights; then substitute an adverse inference for what everyone knew would have been the corroborating testimonial evidence from Michael and Chesnoff that was thus suppressed. App. at 52. *Nikols*, 206 P.3d at 299 (McHugh, J., concurring in the result), 302 (Davis, J., dissenting).

App. at 30-31. The *only* aspect of that summary Chesnoff challenges is the characterization of his affidavit as perjurious; the rest he apparently concedes. *See* 2d Br. at 22-23.

In the referenced affidavit, Chesnoff had testified that he was unaware of anyone other than the federal government claiming an interest in the Parcels; i.e., he did not know that Nikols claimed an interest. App. at 129. Chesnoff now tries to defend that statement, in the face of his apparently contrary representation during a hearing in Michael's criminal case, by saying all he meant by what he said in the federal criminal proceedings was "that the purchase price for the Parcels was paid by Nikols from his legitimate businesses—rather than from Michael's drug money." 2d Br. at 23. Chesnoff never says he was unaware that Nikols claimed an interest in

the Parcels; he just points out that is not *exactly* what he told the judge hearing Michael's criminal case.

In the State Court proceedings, Chesnoff was protected from examination about what he meant and what he knew by his artful manipulation of the Fifth Amendment rights of his erstwhile client, Michael. *See Nikols*, 206 P.3d at 302 (Davis, J., dissenting) ("It is clear that it was in Chesnoff's best interest to avoid testifying that he had previously stated on the record during Son's federal criminal proceedings that the Properties belonged to Plaintiff. And Chesnoff's counsel vigorously worked to create a situation whereby such testimony would come in only at great cost to Son."); *see also id.* at 299 (McHugh, J., concurring in result) ("I am troubled by the trial court's restrictions on Son's invocation of the Fifth Amendment"). Now he is trying to shelter in the resulting ambiguity. But the fact that he *still* does not squarely deny that he knew Nikols claimed an interest in the Parcels reinforces the inference that he did, and thus he perjured himself in his affidavit.

Chesnoff also argues, "Nikols is the one with unclean hands in this case," because he supposedly "admitted . . . that he placed the Parcels in Michael's name for the purpose of avoiding Nikols' creditors." 2d Br. at 23. That simply is not true. Nikols did not place the Parcels in Michael's name

to avoid any creditors, and he never admitted that he did. *See* App. at 79-80. Although one member of the fractured panel of the Utah Court of Appeals that decided the appeal from the State Court's 2008 order concurred in the result on the ground that Nikols supposedly had made such an admission, that premise and reasoning were squarely rejected by the lead opinion, which observed an unresolved conflict between a stipulation made by Nikols' counsel, which is not operative or binding in this case, and Nikols' actual testimony:

> Plaintiff's testimony and the stipulation reached by the parties raise factual questions as to what Plaintiff's motivations were in titling the Properties in Son's name. The trial court has not determined, factually, whether Plaintiff's actions were indeed an attempt to defraud his creditors and whether such fraud actually occurred. Furthermore, even if we assume that Plaintiff intended to defraud his creditors, Chesnoff is clearly not one of Plaintiff's creditors.

Nikols, 206 P.3d at 297 n. 1.

V.
CHESNOFF'S CROSS-APPEAL IS MISDIRECTED TO A RULING THAT WAS NEVER MADE

The sole issue ostensibly presented by Chesnoff's cross-appeal is: "Did the district court err in denying Appellees' motion or sanction sunder Rule 11 by applying the legal standard set forth in Utah Code Ann. § 78B-5-

825 rather than the standard set forth in Fed. R. Civ. Pro. 11?" 2d Br. at 1. But that simply is not what the district court did.

Chesnoff filed a motion to dismiss on February 1, 2010, *see* App. at 2 (Dkt. 10), which on May 13, 2010 was set for hearing, *see* App. at 4 (Dkt. 37), on June 21, 2010 was heard, *see* App. at 4 (Dkt. 39), and on June 28, 2010 was decided, *see* App. at 144, Decision at 1 ("This matter is before the Court on Defendants' Motion to Dismiss."). Chesnoff's Memorandum in Support of Motion to Dismiss included a request for sanctions under Utah Code § 78B-5-825. App. at 35-36. The district court applied the standards prescribed by Utah statutory and caselaw to that request. App. at 155-56, Decision at 12-13. Chesnoff does not argue that the district court applied the wrong standards to his request for sanctions under Utah Code § 78B-5-825, or that the district court misapplied those standards. Instead, Chesnoff complains of something that never happened.

According to Chesnoff, "the District Court applied the standard set forth in Utah Code Ann. § 78B-5-825 instead of the standard set forth in Fed. R. Civ. Pro. 11" to his Rule 11 motion. 2d Br. at 10-11. But the district court never applied *any* standards to Chesnoff's Rule 11 motion. Instead, after (1) dismissing Nikols' Occupying Claimants Act claim "pursuant to Rule 12(b)(6)," (2) dismissing "the equitable lien and quiet title

claims . . . pursuant to the doctrine of Res Judicata," and (3) denying the request for sanctions under Utah Code § 78B-5-825, the district court (4) "ORDERED that all other pending motions," including the Rule 11 motion, "are moot." App. at 156, Decision at 13. Chesnoff's cross-appeal should be denied because it is taken from a ruling that was never made.

Had Chesnoff accurately described the district court's disposition of his Rule 11 motion, he might have argued that the district court erred by declaring his Rule 11 motion moot. In order to do so, he would have had to place that motion before the Court.

As the record *now* stands, the *only* request for sanctions in the record submitted to the Court is the request for sanctions under Utah Code § 78B-5-825 that Chesnoff made in his Memorandum in Support of Motion to Dismiss, which Chesnoff concedes was properly denied. There is nothing else before the Court to review. *See* Fed. R. App. P. 30(a)(1) ("The appellant[14] must prepare and file an appendix to the briefs containing: . . . (B) the relevant portions of the pleadings . . ."); 10th Cir. R. 10.3(A) ("Counsel must designate a record on appeal that is sufficient for considering and deciding the appellate issues."), 10.3(D)(2) ("When the

[14] With respect to his cross-appeal, Chesnoff has the appellant's responsibilities. Even if that were not the case, "An appellee who believes that the appellant's appendix omits items that should be included may file a supplemental appendix with the answer brief." 10th Cir. R. 30.2(A)(1).

appeal is from an order disposing of a motion or other pleading, the motion, relevant portions of . . . supporting documents (including any supporting briefs, memoranda, and points of authority), filed in connection with that motion or pleading, and any responses and replies filed in connection with that motion or pleading must be included in the record."), 30.1(A)(1) ("The appellant must file an appendix sufficient for considering and deciding the issues on appeal. The requirements of Rule 10.3 for the contents of a record on appeal apply to appellant's appendix.").[15]

CONCLUSION

In the State Court proceedings, Chesnoff attached and executed upon "all of [Michael's] right, title, and interest" in and to the Parcels, whatever that was. Because Michael held legal title, there was *something* to be attached and executed upon, some basis for the State Court's exercise of jurisdiction. But those proceedings, by their express terms, left Nikols' right and interest in the Parcels, whatever it is, unimpaired. *See* 1st Br. at 22-24.

[15] Had the district court applied the standards of Utah Code § 78B-5-825 to Chesnoff's Rule 11 motion, still his cross-appeal should be denied because the foregoing *at an irreducible minimum* shows Nikols' position was objectively reasonable, with respect to res judicata; and with respect to the occupants' claim, Chesnoff has presented *no* analysis that could support a finding that Nikols' position was not objectively reasonable. *See St. Anthony Hosp. v. U.S. Dept. of H.H.S.*, 309 F.3d 680, 691 (10th Cir. 2002) ("In civil cases such as this, the party challenging the action below bears the burden of establishing that the error prejudiced that party.").

Nikols then commenced his action in the district court to obtain an adjudication of his right and interest in and to the Parcels. The district court erred when it ruled that an order originating in supplemental proceedings on Chesnoff's judgment against Michael had conclusively adjudicated Nikols' rights, as well.

Even if Nikols had done no more than raise a *doubt* as to whether his rights had been conclusively adjudicated in the State Court collection proceedings on Chesnoff's judgment against Michael, governing Utah law "resolve[s] all doubts in favor of permitting parties to have their day in court on the merits of a controversy." *Baxter*, 705 P.2d at 1169. Nikols respectfully submits that the foregoing raises far more than a mere doubt and instead demonstrates that he has not yet received the full measure of process he is due, he has not yet had his day in court. Therefore this Court should reverse.

Respectfully submitted on this 16th day of December, 2010.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7,366 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman.

DATE: December 16, 2010

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CERTIFICATE OF SERVICE

I certify that on this 16th day of December, 2010, a true and correct copy of the foregoing **APPELLANT'S RESPONSE AND REPLY BRIEF (THIRD BRIEF ON CROSS-APPEAL)** was filed with the court and served via ECF and U.S. Mail and Federal Express on the parties set forth below:

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CERTIFICATE OF SERVICE

I certify that on this 16th day of December, 2010, I caused the foregoing **APPELLANT'S SUPPLEMENTAL APPENDIX** to be served by U.S. Mail and Federal Express on the parties set forth below for delivery on December 17, 2010:

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy redactions were necessary. This Appellant's Response And Reply Brief (Third Brief On Cross-Appeal), submitted in digital form, is an exact copy of the written document filed with the Clerk. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (using McAfee which is updated daily) and, according to the program, is free of viruses.

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