No. _____

In The
Supreme Court of the United States

GREGORY P. NESSELRODE,
Petitioner,

v.

U.S. SECRETARY OF EDUCATION AND AGENCY,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

APPENDIX FOR WRIT OF CERTIORARI

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October 15, 2018

TABLE OF CONTENTS

APPENDIX A
EXHIBIT A
6th Circuit order denying rehearing, dated August 6, 2018

No. 17-4206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY P. NESSELRODE,

Plaintiff-Appellant,

v.

SECRETARY OF U.S. DEPARTMENT OF EDUCATION,

Defendant-Appellee.

ORDER

Before: SUHRHEINRICH, GILMAN, and SUTTON, Circuit Judges.

Gregory P. Nesselrode petitions the court for a rehearing of our June 18, 2018, order that affirmed the district court's judgment for the defendant.

Upon careful consideration, this panel concludes that the court did not overlook or misapprehend any material point of law or fact when we issued our previous order. *See* Fed. R. App. P. 40(a).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B
EXHIBIT B
6th Circuit order affirming district court judgment, dated June 18, 2018

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-4206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY P. NESSELRODE, Plaintiff-Appellant, v. SECRETARY OF U.S. DEPARTMENT OF EDUCATION, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: SUHRHEINRICH, GILMAN, and SUTTON, Circuit Judges.

Gregory P. Nesselrode, proceeding pro se, appeals the district court's judgment dismissing his complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Between 1992 and 2013, Nesselrode borrowed various sums of money from the federal government to finance his education at several institutions. The United States Department of Education ("the Department") determined at some point that Nesselrode had defaulted on two consolidation loans, which Nesselrode disputes. Thus, in 2013, Nesselrode sued the Department in the United States District Court for the Western District of Washington, where he alleged many claims, including fraud and breach of duty. The district court granted summary judgment in favor of the Department, finding that the Department provided evidence showing that Nesselrode obtained two consolidation loans in September 2000 and that both loans were in

default. *See Nesselrode v. Dep't of Educ.*, No. C13-1271RSL, 2014 WL 3867620, at *2 (W.D. Wash. Aug. 6, 2014) (*Nesselrode I*). The district court concluded that Nesselrode "failed to raise a genuine issue of material fact regarding the existence of a default" or "to establish any wrongdoing" by the Department. *Id.* The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment. *Nesselrode v. Dep't of Educ.*, No. 14-35716 (9th Cir. Apr. 14, 2015).

In January 2016, Nesselrode sued the Department in the United States Court of Federal Claims, where he again asserted that the Department erroneously claimed that he had defaulted on two of his loans. Specifically, Nesselrode's amended complaint alleged claims for fraud, breach of contract, and violations of several federal statutes. The Department moved to dismiss the complaint under Rule 12(b)(1) for lack of subject-matter jurisdiction, and also under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Court of Federal Claims granted the Department's Rule 12(b)(1) motion after concluding that it lacked jurisdiction over Nesselrode's fraud and statutory claims, as well as his claims for equitable relief. *Nesselrode v. United States*, 127 Fed. Cl. 421, 428-31 (2016) (*Nesselrode II*). The court also granted the Department's Rule 12(b)(6) motion, concluding that Nesselrode's complaint failed to state either a breach-of-contract claim or a claim under the Contract Disputes Act of 1978. *Id.* at 431-32. Finally, the court concluded that claim preclusion barred Nesselrode's complaint. *Id.* at 432-33.

In September 2016, Nesselrode filed the present lawsuit in the United States District Court for the Southern District of Ohio, alleging breach of contract, intentional interference with contractual rights, and violations of various federal statutes. The Department again moved to dismiss the complaint under Rule 12(b)(1) for lack of subject-matter jurisdiction or, in the alternative, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The district court granted the Department's Rule 12(b)(6) motion, concluding that Nesselrode's claims are barred by the doctrine of res judicata, or claim preclusion, because he "had a full and fair opportunity to litigate the status of his student loans and credit report." *Nesselrode v. Sec'y of Educ., Agency*, No. 2:16-CV-918, 2017 WL 75 20616, at *6 (S.D. Ohio July 25, 2017). The

district court also granted the Department's Rule 12(b)(1) motion, concluding that, even if Nesselrode's intentional-tort claim were not barred by res judicata, it lacked jurisdiction over the claim because "it is barred by sovereign immunity" pursuant to the Federal Tort Claims Act ("FTCA"). *Id.* Finally, the district court determined that, despite his entire complaint being barred by res judicata, Nesselrode nonetheless "fail[ed] to state a plausible claim of a statutory violation by [the Secretary of Education] that would entitle him to relief." *Id.* at *7.

On appeal, Nesselrode challenges the district court's judgment. Nesselrode moves for oral argument. He has also filed several motions seeking miscellaneous forms of relief.

We review de novo a district court's decision to dismiss a complaint for lack of subject-matter jurisdiction under Rule 12(b)(1). *See Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014); *In re Carter*, 553 F.3d 979, 984 (6th Cir. 2009). A complaint is subject to dismissal under Rule 12(b)(1) if the facts, accepted as true and viewed in the light most favorable to the plaintiff, show that the court lacks subject-matter jurisdiction. *See Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012).

The district court properly determined that it lacked subject-matter jurisdiction over Nesselrode's intentional-interference-with-contractual-rights claim. The FTCA is a limited waiver of sovereign immunity and subject-matter jurisdiction that permits plaintiffs to pursue state-law claims against the United States where state law would impose liability against a private individual. *See Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012). The FTCA excepts from the waiver of sovereign immunity "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*." *See* 28 U.S.C. § 2680(h) (emphasis added). Federal courts lack subject-matter jurisdiction over any claim that falls within § 2680. *See Milligan*, 670 F.3d at 692. The district court therefore did not err by granting the Department's Rule 12(b)(1) motion with respect to Nesselrode's intentional-tort claim.

The district court also determined that Nesselrode's remaining claims were barred by res judicata. We review de novo a district court's application of res judicata, or claim preclusion. *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009). The burden of establishing the

applicability of res judicata is on the party asserting the doctrine. *Browning v. Levy*, 283 F.3d 761, 773 (6th Cir. 2002). When reviewing a Rule 12(b)(6) motion to dismiss, we construe the complaint in the light most favorable to the plaintiff and determine whether the complaint "contain[s] 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Res judicata is another name for the doctrine of claim preclusion. *See Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). "Under the doctrine of claim preclusion, '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). Claim preclusion applies when: (1) there is a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involved the same parties, or their privies, as the first; (3) the second action raises an issue that was actually litigated or that should have been litigated in the first action; and (4) there is an identity of claims between the first and second actions. *Sanders Confectionery Prods.*, 973 F.2d at 480. "Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" *Id.* at 484 (quoting *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981)).

In this case, all four elements of claim preclusion are satisfied. First, the United States District Court for the Western District of Washington issued a final judgment on the merits when it granted the Department's motion for summary judgment in *Nesselrode I*. Additionally, in *Nesselrode II*, the Court of Federal Claims granted the Department's Rule 12(b)(6) motion after concluding that Nesselrode failed to state a breach-of-contract claim, and also that his entire amended complaint was barred by res judicata. Dismissal for failure to state a claim under Rule 12(b)(6) is a "judgment on the merits" for preclusive purposes. *Moitie*, 452 U.S. at 399 n.3. Second, this case involves the same parties that were involved in both *Nesselrode I* and *Nesselrode II* or their privies. Third, Nesselrode's current claims arise out of the Department's

pronouncement that he defaulted on two consolidated loans and they therefore should have been raised in his prior lawsuits. Finally, given "the substantial overlap in operative facts," *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 318 (2011), there is an identity of claims between this action and Nesselrode's prior lawsuits against the Department. Based on the foregoing, the district court properly granted the Department's Rule 12(b)(6) motion because Nesselrode's claims are barred by the doctrine of res judicata.

Accordingly, we **DENY** Nesselrode's miscellaneous motions and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C
EXHIBIT C
district court order denying alter or amend complaint, dated October 27, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gregory P. Nesselrode,

Plaintiff,

Case No. 2:16-cv-918

v.

Judge Michael H. Watson
Magistrate Judge Jolson

U.S. Secretary of Education Agency,

Defendant.

OPINION AND ORDER

Plaintiff moves for reconsideration of the judgment against him, for leave to amend the complaint, and for an evidentiary hearing. Mot., ECF No. 18. Defendant has not filed a responsive brief, and the motion is now ripe for decision. For the following reasons, Plaintiff's motion is **DENIED.**

I. BACKGROUND

Plaintiff, acting *pro se*, has sued the United States Secretary of Education ("SOE") with respect to his student loans on three separate occasions, most recently in this Court. On July 25, 2017, the Court granted Defendant's motion to dismiss, finding that Plaintiff's claims were barred by the doctrine of *res judicata.* Plaintiff has filed a timely motion for reconsideration.

II. STANDARD OF REVIEW

Plaintiff's motion is construed as a motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, which provides that an unsuccessful party may seek reconsideration within twenty-eight days of the entry of judgment. Such a motion may be granted if there is a "clear error of law, newly discovered evidence, an intervening change in controlling law or to prevent manifest injustice." *GenCorp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (internal citations omitted). "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (quoting *York v. Tate*, 858 F.2d 322, 326 (6th Cir. 1988). A "motion to alter or reconsider a judgment is an extraordinary remedy and should be granted sparingly." *Minges v. Butler Cnty. Agric. Soc'y*, No. 1:13-cv-3, 2013 WL 6009420, at *2 (S.D. Ohio Nov. 13, 2013). Such a motion "should not provide the parties with an opportunity for a second bite at the apple." *Beamer v. Bd. of Crawford Twp. Tr.*, No. 2:09-cv-213, 2010 WL 1253908, at *2 (S.D. Ohio Mar. 24, 2010). "When a motion for reconsideration raises only a disagreement by a party with a decision of the court, that dispute 'should be dealt with in the normal appellate process, not on a motion for reargument.'" *Id.* (quoting *Database Am., Inc. v. Bellsouth Advertising & pub. Corp.*, 825 F. Supp. 1216, 1220 (D. N.J. 1993)).

III. ANALYSIS

The Court first acknowledges that legal documents filed by *pro se* litigants are to be construed liberally in their favor. However, the *pro se* litigant is not excused from the requirement to raise plausible legal arguments based in fact. *Pliler v. Ford*, 542 U.S. 225, 231 (2004). Adjudicating courts "have no obligation to act as counsel or paralegal" to *pro se* litigants. *Id.*

Plaintiff does not contend that there is a change in applicable law or newly discovered evidence. He asserts that the Court incorrectly applied the law, and he also raises new legal theories. Plaintiff requests that the Court issue a new Opinion and Order in his favor, declaring the previous judgment "unconstitutional." ECF No. 18 at 9. Plaintiff frames his motion as eight separate "federal questions," which the Court will address in turn.

First, Plaintiff argues that the United States District Court for the Western District of Washington and the United States Court of Federal Claims failed to comply with 28 U.S.C. §§ 1331 and 1346 by not consolidating his first two cases against SOE. Not only is this a new argument, but it is also incorrect. Those statutes simply set out, respectively, federal question jurisdiction for United States District Courts and jurisdiction over certain claims against the United States by the Court of Federal Claims. Neither statute contains any language that would obligate the courts to consolidate Plaintiff's or any other litigant's lawsuits.

Next, Plaintiff asserts that the Court improperly applied the doctrine of *res judicata* by dismissing his claims, the subject matter of which had been litigated in two previous matters. For the reasons already articulated in the Court's Opinion and Order, this argument is not well taken.

Plaintiff's third challenge to the judgment is that the Court failed to grant his motion for leave of court to challenge the constitutionality of all "statutes, rules, acts, and all subject matter jurisdiction" applicable to his complaint. ECF No. 12. Because the Court concluded that Plaintiff's claims were barred, that motion was dismissed as moot, and Plaintiff raises no basis for reconsideration at this time.

Plaintiff's fourth argument seeks a declaratory judgment that every citizen of the United States of America "is entitled to an education to meet his or her full potential without financial barriers." ECF No. 18, at 7. This is a new legal argument that was available to Plaintiff previously and is clearly contrary to law. *See, e.g., Thomas v. Gee*, 850 F. Supp. 665, 674 (S.D. Ohio 1994) (discussing generally that a university's obligation to provide instruction is conditional on a student's payment of fees).

Plaintiff subsequently argues that the Court incorrectly construed the Tucker Act of 1887, which was enacted for the purpose of waiving the United States' sovereign immunity for certain classes of claims. 28 U.S.C. § 1505. Plaintiff had claimed that SOE intentionally interfered with his contract rights, a claim sounding in tort. As discussed in the Opinion and Order, Congress has not waived sovereign immunity for intentional tort claims against the United States.

Plaintiff raises no new issue that warrants reconsideration of the Court's conclusion that Plaintiff's intentional tort claim against SOE is barred not only by *res judicata* but also by sovereign immunity.

Plaintiff's sixth challenge requests the Court to grant him a new trial or a declaratory judgment with respect to his constitutional challenge to various legal provisions and this Court's jurisdiction. Plaintiff does not offer any legal basis, such as a change in controlling law or an error in the Court's application of controlling law, that would oblige the Court to revisit its prior analysis.

Argument seven in Plaintiff's motion contends that SOE failed to produce any evidence of his default of his student loans 15 and 16. On the contrary, in its opinion granting summary judgment for SOE, the Washington District Court in Plaintiff's first lawsuit explicitly found that there was "no evidence that Plaintiff made payments on those loans, and defendants have provided business documents showing a default." ECF No. 8, Ex. A.

Finally, Plaintiff asserts that the Court "should reopen Plaintiff's cause of action in compliance with Federal Questions 1-7 to answer these questions and hopefully bring an end to this action in favor of Plaintiff." Mot. 9, ECF No. 18. Because none of Plaintiff's challenges to the Court's prior Opinion and Order have merit, there is no reason to reopen his claims, and this request is denied.

Although Plaintiff attempts to frame his assertions in legal reasoning, he is actually arguing that the Court simply came to the wrong conclusion. His arguments are either based on his disagreement with how this Court construed

the law or based on new allegations or legal arguments that do not arise from a change in controlling law. Plaintiff has not established any legal errors that would warrant reconsideration or shown that denial of this motion will result in manifest injustice. Accordingly, the Court **DENIES** Plaintiffs' motion to alter or amend judgment. The requests for a new trial and to amend the complaint comprised in that motion are also **DENIED.**

IV. CONCLUSION

For all the reasons stated above, Plaintiff's motion to alter or amend, ECF No. 18, is **DENIED.** Plaintiff may file a proper notice of appeal, but the Court will entertain no additional motions in this case.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D
EXHIBIT D
district court order granting respondent motion to dismiss, Dated July 25, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GREGORY P. NESSELRODE,

Plaintiff, **Case No. 2:16-cv-918**

v.

JUDGE MICHAEL H. WATSON
Magistrate Judge Jolson

U.S. SECRETARY OF EDUCATION, AGENCY,

Defendant.

OPINION AND ORDER

This matter is now before the Court on the following motions: (1) Defendant's motion to dismiss for lack of subject matter jurisdiction, or in the alternative, for failure to state a claim upon which relief can be granted; (2) Plaintiff's "motion for leave of court for motion for right to demanded new jury trial" and motion for subpoenas, ECF No. 10; and (3) Plaintiff's "motion for leave of court for notice of constitutional challenge," ECF No. 12. For the following reasons, Defendant's motion to dismiss is **GRANTED**, and Plaintiff's motions are **DENIED** as moot.

I. BACKGROUND

This is the third in a series of lawsuits filed *pro se* by Plaintiff against the United States Secretary of Education ("SOE") with respect to his student loans.

A. Plaintiff's Lawsuit Against SOE in the United States District Court for the Western District of Washington

In July of 2013, Plaintiff sued SOE in the United States District Court for the Western District of Washington, Case No. 2:13-CV-01271RSL (*"Nesselrode 1"*), claiming that SOE had fraudulently defaulted certain of Plaintiff's student loans and placed the default on his credit report, in violation of 20 U.S.C. § 1092. Mot. Dismiss, Ex. A, ECF No. 8-1. 20 U.S.C. § 1092 provides, in pertinent part:

> [t]o the extent practicable, and with the cooperation of the borrower, eligible lenders shall treat all loans made to borrower . . . as one loan and shall submit one bill to the borrower for the repayment of all such loans for the monthly or other similar period of repayment.

Plaintiff further alleged in that case that SOE defrauded him by seizing his 2012 tax refund because he was not in default of any student loans.

On August 6, 2014, the Washington District Court granted SOE's motion for summary judgment, finding that Plaintiff's claim "fails on the merits." The court reasoned that § 1092 is limited to practicality, and thus it could not be interpreted to make consolidation of loans mandatory. *Nesselrode 1* at 2, ECF No. 8-2. In addition, the court found that there was "no evidence that plaintiff made payments on those loans, and defendants have provided business documents showing a default." *Id.* at 3. On April 14, 2015, the United States Court of Appeals for the Ninth Circuit held "that the questions raised in [plaintiff's] appeal are so insubstantial as not to require further argument." Docket Sheet for Ninth Circuit Court of Appeals, Mot. Dismiss, Ex. C, ECF No. 8-3. On June 22,

2015, the Ninth Circuit denied plaintiff's motion for reconsideration *en banc*, and on July 1, 2015, it issued a mandate. *Id.*

B. Plaintiff's Lawsuit Against SOE in the Court of Federal Claims

Plaintiff filed another lawsuit against SOE on January 7, 2016, in the United States Court of Federal Claims, Case No. 1:16-cv-26-MMS ("*Nesselrode 2*"). Mot. Dismiss, Ex. D, ECF No. 8-4. In that case, Plaintiff alleged that the SOE committed various statutory violations. The court noted that "[n]either the facts nor the allegations in plaintiff's first amended complaint are clearly articulated," but that the "gravamen of plaintiff's complaint is that the United States Department of Education erroneously claims that he defaulted on two of his loans." *Nesselrode v. United States*, 127 Fed. Cl. 421, 426 (2016).

The court held that it did not have subject matter jurisdiction to adjudicate claims under the criminal code or claims under statutes that were not money-mandated. *Id.* at 428. It explained that Plaintiff's civil fraud claim was not remediable in the Court of Federal Claims because under the Federal Tort Claims Act "jurisdiction over tort claims lies exclusively in United States district courts." *Id.* at 430. The court also held that it lacked subject matter jurisdiction over Plaintiff's claims for equitable relief tied to and subordinate to a money judgment because he failed to state a plausible breach of contract claim under the Contract Disputes Act of 1978 or otherwise under the Master Promissory Note ("MPN"). *Id.* at 430–431. In conclusion, the court noted that "[u]ltimately, the doctrine of *res judicata* bars this court's consideration of plaintiff's first

amended complaint." *Id. at* 432 (*citing Campos v. OPM*, 636 F. App'x 798, 799 (Fed. Cir. 2016)).

C. Plaintiff's Lawsuit Against SOE in the United States District Court for the Southern District of Ohio

Plaintiff filed the instant action ("*Nesselrode 3*") in September of 2016, which action he entitled "Complaint With Appendix for Defendant [sic] Intentional Interference of Plaintiff [sic] Contractual Rights Under the Master Promissory Note 28 § 2680, Note 112, Breach of Contract." Compl., ECF No. 3. Plaintiff pleads that this Court's subject matter jurisdiction is based on the Federal Tort Claims Act, which exempts "any claim arising out of libel, slander, or interference with contractual rights." *Id.* p. 6; 28 U.S.C. § 1346(b); 28 U.S.C. §2671–2680. In support of jurisdiction, he refers to the court's comment in *Nesselrode 2* that United States district courts have exclusive jurisdiction over federal tort claims.

Plaintiff's complaint is fairly convoluted and does not clearly set out separate claims for relief. However, the basis for his claims arise from the same facts alleged in the previous lawsuits—that SOE wrongly placed two of his student loans in default, which caused him harm by damaging his credit report. According to Plaintiff, all of his federal student loans were consolidated on September 18, 2000, including the loans at issue in this case (15 and 16), into one payment for deferment, but in 2011, loans 15 and 16 were removed from consolidation. After being removed from consolidation, Plaintiff alleges that, even though the loans were in good standing, SOE placed them in default and

involved its Debt Management and Collections Department without Plaintiff's knowledge. *Id.* ¶ 19. Plaintiff attaches a copy of a "Master Promissory Note" ("MPN") which appears to be printed from the website of Federal Student Aid, a division of SOE. Compl. Ex. K, ECF No. 3. Plaintiff asserts that the MPN was previously unavailable and not considered by the district court in Washington. He alleges that SOE breached the MPN and also violated federal statutes.

Specifically, Plaintiff contends that SOE failed to comply with the following provision of the MPN:

> **Acceleration and Default**
>
> At [SOE]'s option, the entire unpaid balance of a loan made under this MPN will become immediately due and payable (this is called "acceleration") if any one of the following events occur:
> (1) You do not enroll as at least a half-time student at the school that certified your loan eligibility;
> (2) You do not use the proceeds of the loan solely for your education expenses;
> (3) You make a false representation that results in your receiving a loan for which you are not eligible; or
> (4) You default on the loan.
>
> The following events will constitute default on your loan:
>
> (1) You do not pay the entire unpaid balance of the loan after [SOE] has exercised its option under items (1), (2), and (3) above;
> (2) You do not make installment payments when due and your failure to make payments has continued for at least 270 days; or
> (3) You do not comply with other terms of the loan, and [SOE] reasonably concludes that you no longer intend to honor your repayment obligation.

Id. p.2. Plaintiff further asserts that SOE "intentionally interfered with Plaintiff [sic] contractual rights by the consolidation of the federal student loans 15 and 16 with

all other loans September 18 2000, then defaulted loans 15 and 16 in the year 2011 while loans 15 and 16 and all other loans were current and in good standing, and intentionally kept loans 15 and 16 in default on Plaintiff [sic] credit report without Plaintiff [sic] knowledge and department of education debt management and collections department." *Id.* ¶ 23.

Plaintiff references the following section of the MPN in support of his standing to bring claims of violation of federal statutes against SOE:

> The terms and conditions of loans made under this MPN are determined by the HEA and other applicable laws and regulations. These laws and regulations are referred to as "the Act" throughout this Borrower's Rights and Responsibilities Statement. Under applicable state law, except as preempted by federal laws you may have certain borrower rights, remedies, and defenses in addition to those stated in the MPN and this Borrower's Rights and Responsibilities Statement.

Id. ¶ 28. Plaintiff asserts that his claims for breach of contract and intentional interference with contractual rights against SOE are authorized by the Federal Tort Claims Act. *Id.*

Plaintiff also alleges that SOE violated a number of federal statutes. SOE, he claims, violated 28 U.S.C. § 1097 (Criminal Penalties) by knowingly and willfully giving false statements to him and intentionally interfering with his contractual rights by defaulting his loans that were in good standing. *Id.* Plaintiff also revisits the allegation raised in *Nesselrode 1* that SOE violated 20 U.S.C. § 1092(c) (Simplification of Lending Process for Borrowers) by failing to maintain all of his loans on a consolidated basis. *Id.* ¶ 25. Although unclear, Plaintiff also

appears to contend that SOE should have sold his loans to a qualified purchaser, which the SOE has authority to do under both the MPN and 20 U.S.C. § 1082. *Id.* ¶¶ 26–27.

By way of relief, Plaintiff seeks a declaratory judgment that (1) neither *res judicata* nor *collateral estoppel* are available to SOE as defenses and that (2) he was not in default of his SOE loans. He seeks injunctive relief that the Court direct SOE to (1) consolidate his loans 15 and 16 with the remainder of his outstanding loans and (2) remove any defaulted loans from his credit report or any records of any other government or private entity. Finally, Plaintiff seeks monetary damages in the amount of $8,750,000,000.00 "without conditions or contingencies, clear, and tax free." *Id.* p.19.

The Court will now consider the pending motions.

II. STANDARD OF REVIEW

The Court first acknowledges that *pro se* complaints are to be construed liberally in favor of the pleader. However, having done so, the court must be able "to derive from the complaint any set of facts or legal theory that would give rise to a valid . . . cause of action." *Stanley v. Vining*, 602 F.3d 767, 771 (6th Cir. 2010).

A. Rule 12(b)(1)

SOE moves to dismiss Plaintiff's claim pursuant to Federal Rule of Civil Procedure 12(b)(1). Federal Rule of Civil Procedure 12(b)(1) permits dismissal for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The Supreme

Court has explained that subject matter jurisdiction is a threshold determination. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998); *Am. Telecom Co., L.L.C. v. Republic of Lebanon,* 501 F.3d 534 (6th Cir.2007).

"Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods. v. Sherwin–Williams Claims,* 491 F.3d 320, 330 (6th Cir.2007) (citing *Ohio Nat'l Life Ins. Co., v. United States,* 922 F.2d 320, 325 (6th Cir.1990)). "A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading." *Id.* "When reviewing a facial attack, a district court takes the allegations in the complaint as true. . . . If those allegations establish federal claims, jurisdiction exists." *Id.* "When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court must weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter." *Golden v. Gorno Bros., Inc.,* 410 F.3d 879, 881 (6th Cir.2005). In this case, SOE disputes the facts underlying Plaintiff's complaint, i.e. his assertion that his loans were not in default. SOE also presents a facial challenge and asserts that the pleading is insufficient and that the Court does not have subject matter jurisdiction. *See generally, RMI Titanium Co. v. Westinghouse Elec. Corp.,* 78 F.3d 1125, 1134–35 (6th Cir.1996).

B. Rule 12(b)(6)

SOE alternatively moves to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure. A motion to dismiss under Rule 12(b)(6) attacks the legal sufficiency of the complaint. *Roth Steel Prod. v. Sharon Steel Co.*, 705 F.2d 134, 155 (6th Cir. 1983). A claim survives a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) if it "contain[s] 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, 677 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

A court must also "construe the complaint in the light most favorable to the plaintiff." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir.2002). In doing so, however, plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir.2007).

III. ANALYSIS

SOE challenges the Court's subject matter jurisdiction over Plaintiff's claims on the grounds of *res judicata* and sovereign immunity.

A. Res Judicata

Under the doctrine of *res judicata*, or claim preclusion, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Montana v. U.S.*, 440 U.S. 147, 153 (1979). The United States Court of Appeals for the Sixth Circuit has instructed that *res judicata* requires proof of the following four elements:

> (1) A prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.

Kane v. Magna Mixer Co., 71 F.3d 555, 560 (6th Cir. 1995). The purpose of *res judicata* is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources. *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981).

Plaintiff's case meets all four factors for claim preclusion. The parties have been the same in all three lawsuits, and the claims arose from the same set of transactions and events. These claims have been adjudicated not only once but twice—in *Nesselrode 1* and *Nesselrode 2*. Both lawsuits arose from Plaintiff's allegation that SOE defaulted his loans even though the loans were in good standing. In *Nesselrode 1*, the district court rendered a final decision on the merits by granting summary judgment in favor of SOE. *See Helfrich v. Metal Container Corp.*, 11 F. App'x 574, 576 (6th Cir. 2001) (grant of summary

judgment is deemed a final decision on the merits for the purposes of *res judicata*). In *Nesselrode 1*, the court made the following determinations:

1. Plaintiff failed to identify any valid authority under 20 U.S.C. § 1092c or otherwise that would mandate SOE to consolidate all of his loans. Compl. Ex. K, pp 2–3, ECF No. 3.

2. Plaintiff is precluded from seeking injunctive relief against SOE based on alleged violations of 20 U.S.C. § 1092c. *Id.*

3. Plaintiff failed to raise a genuine issue of material fact regarding existence of a default, as he did not offer evidence that his loans were in good standing and SOE provided evidence of a default. *Id.* at 3.

The court further found that "Plaintiff offers no evidence to substantiate his bare allegation that the credit reports were fraudulent or even incorrect." *Id.* It also noted that, to the extent Plaintiff alleged that SOE defrauded him of his tax refund, "claims based on misrepresentations are excepted from the broad waiver of sovereign immunity provided by the Federal Tort Claims Act." *Id.* (citations omitted).

In *Nesselrode 2*, the Federal Court of Claims dismissed several allegations for lack of subject matter jurisdiction and determined that Plaintiff had not pled a plausible breach of contract claim. Plaintiff made virtually the identical argument in *Nesselrode 2* as he does in the instant case that SOE violated the "terms of the MPN," and the Court of Claims held that there "is nothing within the text of the MPN that imposes a duty on the United States to consolidate a borrower's loans." The court noted that "in support of his breach of contract claim, plaintiff attaches a blank MPN to his first amended complaint" and that Plaintiff "fails to

state a breach of contract upon which relief can be granted." *Nesselrode* 2, p. 12. The court concluded by acknowledging that, ultimately, *res judicata* would bar any of Plaintiff's remaining claims.

Plaintiff attempts to sidestep *res judicata* by arguing that the MPN which he alleged SOE has breached was not considered by the courts in the previous two lawsuits. Resp. at 13, ECF No. 9. This argument is not well taken. The MPN is essentially a general terms and conditions obtained from the SOE website, which would have been available to Plaintiff during the previous litigation. To the extent that there are new specifics to Plaintiff's claims in the immediate action, those could have been asserted in the earlier two actions. The claims in all three of Plaintiff's cases arise out of SOE's alleged wrongdoing in placing his student loans in default. Plaintiff has had a full and fair opportunity to litigate the status of his student loans and credit report, and his claims are barred by *res judicata.*

B. Sovereign Immunity

Plaintiff argues that he has a new claim over which this Court has jurisdiction—intentional interference with his contract rights. Setting aside the *res judicata* discussion, the intentional tort claim cannot proceed because SOE is entitled to sovereign immunity. "Sovereign immunity prevents suit against the United States without its consent. Absent an unequivocal waiver of sovereign immunity and consent to be sued, a court does not have jurisdiction over any claims made against the United States and its agencies." *Gibbs v. Philadelphia Police Dept.*, No. 2:12-CV-17, 2012 WL 6042841, at *2 (S.D. Ohio Dec. 4, 2012)

(internal quotation marks and citations omitted). "Sovereign immunity is jurisdictional, and the 'terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (*quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

One such limited waiver is the FTCA, wherein the United States government has consented to certain suits sounding in tort. *Gibbs*, *supra*, at *2. Plaintiff argues that he is entitled to sue SOE for intentionally interfering with his contract rights because the FTCA exempts intentional interference with contracts and other intentional torts. This is a misreading of the statute, which provides quite the opposite. *See* 28 U.S.C. § 2680 (waiving sovereign immunity for certain tort claims against the United States and explicitly excluding from such waiver claims for interference with contract rights). In other words, Congress has *not* waived sovereign immunity for claims falling within the exceptions. *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012). Thus, even if the intentional tort claim was not barred by *res judicata*, it is barred by sovereign immunity.

C. Alleged Statutory Violations—Failure to State a Claim

Plaintiff's complaint alleges that SOE violated a laundry list of federal statutes that entitle him to relief. Although the Court finds Plaintiff's entire complaint barred by *res judicata*, for completeness, it will succinctly address the alleged statutory violations.

1. 20 U.S.C. § 1082(D)(iii)—Master Promissory Note

SOE correctly points out that Plaintiff's citation is erroneous, and the correct citation should be 20 U.S.C. § 1082(m)(1)(D)(iii). Plaintiff's argument seems to imply that this provision, in conjunction with § 1092c, mandates that the SOE consolidate his student loans. As discussed above, these provisions are not mandatory and provide simply that SOE should consolidate "where practicable." Plaintiff also asserts that SOE should have been required to sell or assign his loans under these §1082(m)(1)(D)(iii). However, this provision merely permits, but does not require, SOE to sell or assign loans.

2. 20 U.S.C. § 1082(i)—Authority to Sell Defaulted Loans

Once again, Plaintiff's claim is difficult to follow. He asserts that this statute authorizes SOE to sell defaulted loans to eligible entities and appears to claim that his two loans were wrongfully defaulted and should have been sold to another loan processor. This is again a statute that is not mandatory in nature, and there are no facts pled that would imply that SOE violated this statute.

3. 20 U.S.C. § 1087(e)—Terms and Conditions of Loans

Although difficult to discern, Plaintiff appears to cite this statute as authority to hold SOE accountable under the MPN and for him to sue pursuant to any "other applicable federal laws and regulations." Compl. ¶ 6, ECF No. 3. Plaintiff alleges that he did "not meet any condition of default with federal student loans 15 and 16." *Id.* As discussed above, the *Nesselrode 1* court found that Plaintiff was unable to show evidence of a genuine issue of material fact that his student

loans were not in default. To the extent Plaintiff attempts to raise this as a stand-alone statutory violation by SOE, such claim is not plausible.

4. 20 U.S.C. § 1082(a)(2)—Legal Powers and Responsibilities

Plaintiff claims that this statute establishes this Court's jurisdiction and entitles him to monetary damages "without contingencies or conditions and tax free." Compl. p. 19, ECF No. 3. Not only is this statute not a money-mandating statute but Plaintiff also pleads no facts that state a claim that he is entitled to relief under this provision.

5. 20 U.S.C. § 1082(g)—Civil Penalties

This is another statute misinterpreted by Plaintiff. It provides that SOE may impose civil penalties against lenders and agencies participating in the student loan program under certain circumstances and does not convey any right on a plaintiff to bring direct claim against SOE.

6. 20 U.S.C. § 1097—Criminal Penalties

Plaintiff argues that "[c]learly [SOE] violated 20 U.S.C. § 1097 by knowingly, willfully, misapplied [sic], and gave false statements to Plaintiff and prior courts and intentional [sic] interfered with Plaintiff [sic] contractual rights under the MPN." Compl. ¶ 23, ECF No. 3. This claim fails for a number of reasons, most significantly because Plaintiff has no authority to initiate criminal proceedings and because SOE is not a "person" under that statute against whom criminal charges may be brought. *See, Kafele v. Frank & Wooldridge Co.*, 108 F. App'x 307, 308–

9 (6th Cir. 1997) (private citizens have no authority to initiate federal criminal prosecutions for alleged unlawful acts).

Although also barred by the doctrine of *res judicata*, Plaintiff fails to state a plausible claim of a statutory violation by SOE that would entitle him to relief.

IV. CONCLUSION

For all the reasons stated above, the Defendant's motion to dismiss, ECF No. 8, is **GRANTED**, and Plaintiff's remaining motions are denied as moot. The Clerk shall enter judgment and terminate the case.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E
EXHIBIT E
respondent Navient federal student loan summary declares Petitioner in good standing, dated September 6, 2018

Additional material from this filing is available in the Clerk's Office.