UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2243

LISA MARIE KERR,

Plaintiff - Appellant,

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS; GENE BRETT KUHN; JUDITH SOUTHARD; SANDRA BAILEY; TERESA EAGLE; LISA HEATON; DAVID PITTENGER,

Defendants - Appellees.

No. 18-1195

LISA MARIE KERR,

Plaintiff - Appellant,

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS; GENE BRETT KUHN; JUDITH SOUTHARD; SANDRA BAILEY; TERESA EAGLE; LISA HEATON, and; DAVID PITTENGER,

Defendants - Appellees.

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. Thomas E. Johnston, Chief District Judge. (2:14-cv-12333; 2:16-cv-06589)

Submitted: August 23, 2018 Decided: August 28, 2018

Before GREGORY, Chief Judge, and TRAXLER and DUNCAN, Circuit Judges. Affirmed by unpublished per curiam opinion.

Lisa Marie Kerr, Appellant Pro Se. John Andrew Hess, STEPTOE & JOHNSON PLLC, Huntington, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lisa Marie Kerr appeals the district court's order adopting the magistrate judge's recommendation and dismissing her July 2016 complaint pursuant to Fed. R. Civ. P. 12(b)(6). Kerr also appeals the district court's order denying her motion to reopen the judgment in her 2014 action, pursuant to Fed. R. Civ. P. 60(b), and for leave to amend her 2014 complaint, pursuant to Fed. R. Civ. P. 15(a)(2). We have reviewed the records and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Kerr v. Marshall Univ. Bd. of Governors*, No. 2:16-cv-06589 (S.D.W. Va. Sept. 21, 2017); *Kerr v. Marshall Univ. Bd. of*

Governors, No. 2:14-cv-12333 (S.D.W. Va. Feb. 16, 2018). We deny Defendants' motion to deem frivolous Kerr's appeal in No. 17-2243 and deny Kerr's motion for sanctions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

LISA MARIE KERR,

Plaintiff,

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS, et al.,

Defendants.

CIVIL ACTION NO. 2:14-cv-12333

MEMORANDUM OPINION AND ORDER

(Filed Feb. 16, 2018)

Pending before the Court is Plaintiff's Motion to Re-Open the Judgment, and for Leave to Amend Her Complaint. (ECF No. 47.) For the reasons stated below, Plaintiff's motion is **DENIED**.

I. PROCEDURAL HISTORY

This matter again warrants a brief summary of Plaintiff's litigation history in this Court. The Complaint in this case, stemming from Plaintiff's attempted completion of Marshall University's Master of Arts in Teaching ("MAT") program before receiving a "no credit" grade for the program's required MAT Level III Clinical Experience student teaching course, was originally filed on March 14, 2014. (ECF No. 1.) That Complaint alleged the following seven causes of action:

defamation, tortious interference with a business expectancy, the tort of outrage, due process violations, equal protection violations under two theories, and a violation of the Fair Labor Standards Act. Defendants filed a Motion to Dismiss on May 14, 2014, (ECF No. 13), which this Court granted in a memorandum opinion entered March 26, 2015, (ECF No. 28). That memorandum opinion and order dismissed each of Plaintiff's claims for failure to state a claim on which relief could be granted and closed this case. (*See id.*)

Plaintiff appealed the judgment of this Court, and after hearing oral arguments, the Fourth Circuit entered its 42-page published decision on May 24, 2016, affirming this Court's opinion without remanding any aspect of the case for reconsideration. (ECF No. 41.) *See Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016). The court further denied Plaintiff's petition for rehearing, (ECF No. 45), and Plaintiff did not file a petition for certiorari with the Supreme Court. Plaintiff then filed the pending Motion to Re-Open the Judgment, and for Leave to Amend her Complaint on June 30, 2017—over thirteen months after the Fourth Circuit affirmed this Court's opinion dismissing the above-styled action. (ECF No. 47.) Before turning to this motion, the Court finds that a discussion of a subsequent and nearly identical case Plaintiff filed in this Court in 2016 is insightful.

Less than two months after the Fourth Circuit's decision affirming this Court's opinion closing this case, Plaintiff filed a new complaint on July 22, 2016, re-alleging her defamation claim, due process claim,

and equal protection claim based on sexual orientation discrimination. (*See* Civil Action No. 2:16-cv-06589 [hereinafter 2016 Action], ECF No. 2.) However, in the new case, the Complaint raised Plaintiff's equal protection claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and attempted to plead her due process claim as a class action suit. (*See id.*) Defendants again filed a motion to dismiss in the subsequent case, arguing that each of the claims in the new complaint was barred by *res judicata* and the applicable statutes of limitations. (*See* 2016 Action, ECF No. 6.) This Court entered its memorandum opinion and order on September 21, 2017, granting the motion to dismiss and closing the 2016 Action. (*See* 2016 Action, ECF No. 22.)

In the memorandum opinion and order disposing of the 2016 Action, this Court specifically addressed Plaintiff's misapprehension about the result of her previous case—in which the pending motion was filed—and the effect of the Fourth Circuit's opinion. (*See id.* at 4–8 ("Though the Fourth Circuit ultimately affirmed this Court's dismissal of all of Plaintiff's claims, she seems to believe that because the Fourth Circuit's rationale was based on her failure to state a claim, she is automatically entitled to amend her Complaint.").) Among other reasons, this Court found that *res judicata* and application of the Fourth Circuit's mandate affirming the Court's prior opinion served as barriers to Plaintiff's attempt to file a second and nearly identical lawsuit against the same seven Defendants. (*See id.* at 8–10, 12–15.) Predictably, Plaintiff

appealed that judgment to the Fourth Circuit in October 2017, and that appeal is currently being held in abeyance pending resolution of the pending motion currently before the Court in the above-styled matter. (*See* 2016 Action, ECF No. 31.) The Court now turns to the pending motion in Plaintiff's first case.

II. PLAINTIFF'S PENDING MOTION

In considering Plaintiff's motion, the Court is mindful of the fact that Plaintiff is acting *pro se*, and her pleadings will be accorded liberal construction.[1] *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978). She pursues relief from the previous judgment via Federal Rule of Civil Procedure 60(b)(6), and she seeks leave to amend her original Complaint under Federal Rule of Civil Procedure 15(a)(2). Procedurally, Plaintiff has used the proper vehicles in her attempt to persuade this Court to vacate its previous judgment and grant her leave to amend the Complaint filed well over three years before the current motion.

Plaintiff's motion first notes that her original Complaint in this case was never amended during the

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[1] Despite acting *pro se*, the Court notes that Plaintiff has been trained in the law and formerly practiced as a licensed attorney. As the Fourth Circuit noted in its prior opinion in this case, this circuit "has not determined whether a *pro se* plaintiff who is also an attorney receives the benefit of this liberal construction. . . ." *Kerr*, 824 F.3d at 72. Nonetheless, the Court will continue to afford Plaintiff's pleadings the benefit of this liberal construction.

litigation's pendency and claims that her appeal to the Fourth Circuit "was successful in its purpose and substance." (ECF No. 47 at 2.) She relies primarily on *Foman v. Davis*, 371 U.S. 178, 182 (1962), and *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (en banc), in support of the proposition that "entry of judgment is no exception to the doctrine that leave to amend should be liberally granted . . . so that claims may be decided on their merits." (ECF No. 47 at 3, 6–8.) Plaintiff avers that Defendants cannot show that bad faith, unfair prejudice, or futility exists in these circumstances to defeat her ability to amend the Complaint. (*See id.* at 12–14.) She reiterates several of the Fourth Circuit's findings as to the insufficiencies of her original Complaint, notes how her proposed amended complaint resolves those shortcomings, and argues that because both this Court and the Fourth Circuit dismissed her Complaint on the basis that it failed to state a claim, there was no judgment on the merits for those claims. (*See id.* at 9–11 ("Thus, a pre-answer 12(b)(6) dismissal affirmed on appeal for pleading insufficiency is just that—a judgment on the operative *pleading*'s merits, not a judgment that the underlying *claims* lacked merit. . . . Hence, nothing in the [Fourth Circuit's] holding barred Plaintiff from amending her complaint to plead those missing elements. . . ." (emphasis in original)).)

Defendants' response to the motion first focuses on the arduous standard of Rule 60(b)(6), arguing that Plaintiff does not provide adequate justification allowing this Court to provide her relief from the prior

judgment and that the motion is inappropriate and untimely. (*See* ECF No. 48 at 5–11 (noting that Plaintiff waited "more than 13 months after losing her appeal to the Fourth Circuit" to move for leave to amend).) Defendants also state that they would be prejudiced if the Court were to set aside its previous judgment due to the resources expended in response to Plaintiff's numerous filings. (*Id.* at 10–11.) The response harps on Plaintiff's "litigation choices" during this case's pendency and emphasizes that a Rule 60(b) motion cannot be substituted for an appeal. (*Id.* at 11–13.) Just as Defendants argue that Plaintiff cannot meet the standard under Rule 60(b), Defendants aver that Plaintiff similarly fails to provide ample justification for leave to amend her Complaint post-judgment and post-appeal. (*See id.* at 14–18 (characterizing Plaintiff's argument as "a clear effort to rely on the more liberal amendment standard set forth in Rule 15").)

Plaintiff's reply continues to assert that her new and more detailed amended complaint meets the "plausibility" standard of Federal Rule of Civil Procedure 12(b)(6), which her original Complaint did not satisfy when it was dismissed three years ago. (*See* ECF No. 49 at 2–13 ("This is a run-of-the-mill case where leave to amend after 12(b)(6) dismissal serves the interests of truth, and should be granted so that litigation can finally begin.").) She again details how her sexual orientation discrimination claim, her due process claim, and her defamation claim could now withstand a Rule 12(b)(6) challenge as pleaded in the proposed amended complaint. (*See id.* ("Plaintiff's

thorough amendments remediate every basis for [the Fourth Circuit's] affirmance of the 12(b)(6) dismissal. . . .").) Plaintiff proceeds to inform the Court of "troubling fact-intensive questions about the practices of a taxpayer-supported state university" before arguing that there is no bad faith, delay, or prejudice that would preclude her ability to amend the Complaint under *Foman* and *Laber*. (*See id.* at 13–20.)

The Fourth Circuit has been clear as to the interplay between Federal Rules of Civil Procedure 15(a) and 60(b) when a plaintiff relies on both in seeking leave to amend a complaint post-judgment. On this point, Plaintiff is correct. While the Fourth Circuit instructs district courts not to grant a post-judgment motion for leave to amend under Rule 15(a) without first vacating the prior judgment under either Rule 59(e) or 60(b), *see Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 539 (4th Cir. 2013), it also directs courts to ignore the standard associated with the post-judgment motion and focus on the standard for Rule 15(a). *See Laber*, 438 F.3d at 427; *accord Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009). "The court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to [Rule] 15(a). In other words a court should evaluate a postjudgment motion to amend the complaint 'under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or

futility.'"[2] *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011) (quoting *Laber*, 438 F.3d at

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[2] The Fourth Circuit's position on this procedural quandary—applying the more liberal Rule 15(a) standard despite the fact that the motion is filed after the complaint's dismissal—is contrary to the majority of other circuits. *See, e.g., M. v. Falmouth Sch. Dep't*, 875 F.3d 75, 77 (1st Cir. 2017) (internal quotation marks omitted) (citation omitted) (noting that courts "generally do not allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision" because "[s]uch a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances"); *see also Mich. Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017) (explaining that a party seeking leave to amend a complaint after an adverse judgment faces a heavier burden than for leave to amend prior to a final ruling). The Fourth Circuit appeared to advance the rationale of other circuits on this issue in 2013 but did not overturn its position regarding the appropriate standard to employ. *See Calvary Christian Ctr.*, 710 F.3d at 540 ("The Federal Rules of Civil Procedure cannot be so loosely invoked. Each rule serves a procedural purpose that fits into the larger function of providing an orderly process to adjudicate actions. When, in an action, the plaintiff wishes to amend its complaint, Rule 15 governs the process. But when the action has been dismissed, there is no pending complaint to amend. To proceed with a different complaint than that filed originally, a plaintiff can either open the judgment under Rule 60 and then file a motion to amend or commence a new action."). The unusual approach adopted by the Fourth Circuit has been discussed in secondary sources, such as the following:

> The circuits are largely in agreement that a request to amend pleadings after an adverse judgment is not governed by Rule 15(a)(2)'s liberal standard, since the trial court must consider competing considerations, such as protecting the finality of judgments. The party seeking an amendment must therefore not only satisfy Rule 15's "modest requirements," but also the "heavier burden" governing requests to reopen a case. The Fourth

427). It is improper for this Court to focus on the Rule 60(b) motion without considering whether Plaintiff's proposed amended complaint, at this stage of the proceedings, would be prejudicial, futile, or was made in bad faith. *See, e.g.*, *Hart v. Hanover Cty. School Bd.*, 495 F. App'x 314, 316 (4th Cir. 2012) (citing *Murrow Furn. Galleries, Inc. v. Thomasville Furn. Indus., Inc.*, 889 F.2d 524, 526 n.3, 529–30 (4th Cir. 1989)).

Pursuant to Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "[L]eave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 409 (4th Cir. 2013) (alteration in original) (emphasis in original) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (internal citation omitted)). "Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing." *Laber*, 438 F.3d at 427. "A common example of a prejudicial amendment is one that 'raises a new legal

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> Circuit, curiously, takes a different approach, analyzing a postjudgment motion to amend under the liberal Rule 15(a) standard. The Fourth Circuit failed to provide any rationale for why the legal standards of Rules 59(e) or 60(b) need not be satisfied. Rules 59(e) and 60 [sic] are designed to protect the finality of judgments.

3 James Wm. Moore et al., *Moore's Federal Practice* § 15.13[2] (3d ed. 2017) (citations omitted).

theory that would require the gathering and analysis of facts not already considered by" the defendants. *Id.* (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) ("An amendment is not prejudicial, by contrast, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred."). Further, delay alone "is an insufficient reason to deny a motion to amend," but "the further the case progressed before judgment was entered, the more likely it is that the amendment will prejudice the defendant or that a court will find bad faith on the plaintiff's part." *Matrix Capitol Mgmt. Fund, LP*, 576 F.3d at 193 (quoting *Laber*, 438 F.3d at 427); *see Laber*, 438 F.3d at 427 ("For this reason, a district court may not deny such a motion simply because it has entered judgment against the plaintiff—be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits."). For example, the Fourth Circuit determined in *Mayfield v. National Ass'n for Stock Car Auto Racing, Inc.* that the plaintiffs "ha[d] no excuse for failing to include [] additional allegations . . . in their original complaint" where "the conduct giving rise to th[e] lawsuit occurred nearly three years ago, . . . [t]he complaint itself was filed over two and a half years ago, . . . [and] a significant amount of discovery had already been conducted. . . ." 674 F.3d 369, 379 (4th Cir. 2012). Under the standard set forth in *Foman*, "prejudice resulting to the opponent by a grant of leave to amend is reason sufficient to deny amendment." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980).

Futility aside, the cases relied on by Plaintiff in her memorandum of law in support of the motion and her reply are distinguishable from the circumstances here. First, after the district court in *Foman* dismissed the petitioner's complaint for failure to state a claim, the petitioner filed her motions to vacate the judgment and to amend the complaint the next day, weeks before she even filed her notice of appeal. *See* 371 U.S. at 179, 182 ("As appears from the record, the amendment would have done no more than state an alternative theory for recovery."). Therefore, the appeal addressed both "the merits of dismissal of the complaint and denial of petitioner's motions" to vacate the judgment and to amend the complaint. *Id.* at 179–80. Further, the district court in *Foman* provided no justification for its decision to deny the petitioner's motions. *See id.* at 182. The *Foman* Court emphasized that leave should be freely given "[i]n the absence of any apparent or declared reasons—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . ." *Id.* at 182. This Court notes that these *Foman* factors are not exhaustive, and all the factors that may be taken into consideration by a court are not equal. *See Mullin v. Balicki*, 875 F.3d 140, 149–50 (3d Cir. 2017).

In *Laber*, the plaintiff filed his motions for reconsideration and to amend within twenty-eight days of the district court's adverse decision granting summary

judgment to the defendant. *See* 438 F.3d at 414 (omitting specific dates but noting that the district court construed the plaintiff's motion for reconsideration as one under Rule 59(e), which "must be filed no later than 28 days after the entry of the judgment"). The Fourth Circuit noted that the plaintiff was "diligen[t] in filing his motion to amend after the district court entered summary judgment dispel[ling] any inference of bad faith." *Id.* at 428. The court also recognized that the defendant, which "made no argument that it would be prejudiced if Laber were granted leave to amend," would not be prejudiced as the proposed complaint "d[id] not put any new facts at issue but merely state[d] an 'alternative theory' for recovery" like the petitioner in *Foman*. *Id.*

Additionally, Plaintiff here relies on *Pittston Co.*, wherein the plaintiff sought leave to amend the complaint before final disposition to add three claims, one of which "could not have been advanced prior to" a Supreme Court decision issued during the pendency of the litigation. *See* 199 F.3d at 700–01, 705. The other two claims could have been asserted in the original complaint, *see id.* at 705–06 ("Pittston's delay in asserting those claims was unwarranted."), but the Fourth Circuit noted that despite the district court's denial of the motion to amend, the motion "was unopposed and the Government ha[d] not identified any way in which it was prejudiced by Pittston's failure to amend its complaint sooner than it did." *Id.* at 706. The district court "did not indicate that it found any bad faith on Pittston's part and did not identify how it believed the

Government might be prejudiced by the late amendment." *Id.* Rather, "the district court considered that the lateness and delay constituted prejudice per se," *id.*, which this Court recognized above is antithetical to Fourth Circuit precedent.

Similarly, in *In re Lone Star Industries, Inc. Concrete Railroad Cross Ties Litigation* ("*Lone Star*"), Lone Star filed its motion to amend, seeking to add a single claim based on contradictory testimony elicited during discovery, a year and a half before trial and before discovery deadlines or a trial date had been set. *See* Nos. 93-1505, 93-1506, 1994 WL 118475, at *10 (4th Cir. Apr. 7, 1994) [hereinafter *Lone Star*]. While the defendants there opposed the motion, they did not claim intentional delay by the plaintiff or assert that they would be prejudiced by the amendment so early in the litigation. *See id.* In finding that the district court abused its discretion in denying the motion to amend, the Fourth Circuit noted that the motion to amend was filed "only thirty-six days after the deadline" to amend as a matter of right, that "discovery continued for about a year after Lone Star's motion to amend," and that there was "no suggestion that Lone Star was being dilatory" or that the defendants would have been prejudiced by the amendment. *Id.* at *11 ("[T]he factual issues raised by the new claim were encompassed in claims asserted from the outset.").

Finally, Plaintiff relies in the motion on *Davis v. Piper Aircraft Corp.*, wherein a plaintiff moved for leave to amend four months after the defendant filed a responsive pleading that consisted of a motion to

dismiss, or, in the alternative, for summary judgment. *See* 615 F.3d at 609 (noting that the defendant took five months to respond to the plaintiff's complaint). In denying the plaintiff's motion to amend, the district court did not make any finding regarding prejudice to the defendant and went outside the factors in *Foman* to find "other good and sufficient reason(s)" for denying amendment. *See id.* at 613. The only reason relied on by the district court that was discussed in *Foman* was "the delay of four months," which the Fourth Circuit recognized could not alone suffice as reason for denial of the motion. *Id.* Because the district court did not find any prejudice or bad faith, the Fourth Circuit reversed the judgment and remanded the action for further proceedings. *See id.* at 614.

Unlike the cases above, Plaintiff here has acted in a dilatory manner that indicates bad faith, and Defendants would face additional prejudice if the Court allows Plaintiff to move forward with her amended complaint, which is seventy-eight pages longer than the original Complaint filed over three years before the pending motion on March 14, 2014. (ECF No. 1.) Defendants' motion to dismiss was filed on May 14, 2014 and relied on the insufficiency of Plaintiff's original pleading in arguing that it should be dismissed for failure to state a claim. (ECF No. 15.) That motion put Plaintiff on notice that her Complaint may have been inadequate to survive the Rule 12(b)(6) stage of the litigation, and Plaintiff could have attempted to amend her Complaint at any point thereafter pursuant to the same procedural rule on which she

now relies. Nonetheless, Plaintiff did not pursue this option and instead opposed the motion to dismiss, arguing that her allegations, as pleaded in the Complaint, were sufficient to support her causes of action. (*See* ECF No. 17.) Even after Defendants filed their reply in support of the motion on June 4, 2014, (ECF No. 19), Plaintiff still could have chosen to seek leave to amend her Complaint, but she decided not to do so in the eight months that passed between the motion's filing and Magistrate Judge Tinsley's filing of his proposed findings and recommendation ("PF&R"). This Court did not enter its memorandum opinion and order adopting the PF&R until the last week of March 2015. (ECF No. 28.) Even yet, Plaintiff did not seek leave to amend her Complaint during the almost two months that the PF&R was pending while knowing that the PF&R recommended dismissal based on the Complaint's numerous deficiencies. She acted contrary to the plaintiffs in *Pittston Co.* and *Lone Star* who sought leave to amend prior to final disposition. *See* 199 F.3d at 700–01; 1994 WL 118475, at *10–11.

After dismissal, Plaintiff again elected not to attempt to amend the Complaint like the plaintiff in *Foman*, *see* 371 U.S. at 179, but subverted that process to appeal this Court's decision, forcing Defendants to file a brief before preparing and attending oral arguments in Richmond, Virginia. The Fourth Circuit entered its opinion affirming this Court's decision on May 24, 2016, (ECF No. 43). Plaintiff could have immediately filed a motion for leave to amend after the Fourth Circuit panel's published opinion was entered, but she

alternatively continued to press her luck by filing a petition for rehearing, which the Fourth Circuit denied. (*See* ECF No. 45.) Finally, over one year later—and almost a full year after compelling Defendants to litigate the 2016 Action that was dismissed by this Court—Plaintiff decided to file the pending motion. Thus, the pending motion is not only the result of undue delay by Plaintiff, which the Court recognizes is not enough to deny the motion, *see Matrix Capitol Mgmt. Fund, LP*, 576 F.3d at 193, but it is the result of Plaintiff's mindful decisions that, when assessed collectively, demonstrate bad faith and will lead Defendants to suffer unfair prejudice.

Plaintiff's proposed amended complaint, which she explains both in her motion and in her reply in support of the motion, adds countless factual allegations, raises her equal protection claim under Title IX, and attempts to plead her due process claim as a class action suit. This would alter the course of the litigation and is easily distinguishable from cases where an amendment would simply state an "alternative theory" for recovery as in *Foman* and *Laber*. *See* 371 U.S. at 182; 438 F.3d at 414. The multitudinous new factual allegations contained in the 102-page amended complaint were curiously omitted during the over two years that the case was under advisement before this Court and the Fourth Circuit. The Fourth Circuit has affirmed a district court's denial of a motion for leave where, like here, "the amendment—coming so belatedly—would change the nature of the litigation. . . ." *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597,

604 (4th Cir.) (citing *Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (noting that "[b]elated claims which change the character of litigation are not favored")), *cert. denied*, 562 U.S. 1003 (2010). Further, "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (internal quotation marks omitted) (citation omitted). Unlike the defendants in *Laber*, *Pittston Co.*, and *Lone Star*, Defendants here have set forth the prejudice they will suffer if the Court allows Plaintiff to amend her Complaint. (*See* ECF No. 48 at 10–11.) *Cf.* 438 F.3d at 428; 199 F.3d at 706; 1994 WL 118475, at *10. The Court agrees with Defendants and finds that the unfair prejudice to be suffered by them warrants denial of Plaintiff's motion. *See Davis*, 615 F.2d at 613.

Plaintiff's suggestion that the Fourth Circuit's opinion affirming this Court's dismissal of her case somehow equates to authorization for her to re-litigate the closed action is wholly unavailing. Even under the liberal standard of Rule 15(a), Plaintiff has not succeeded in persuading this Court that her actions have been anything short of dilatory, and she similarly fails to rebut Defendants' assertion that they will suffer undue prejudice if the pending motion is granted. Plaintiff has strategically drug Defendants through litigious waters for the better part of four years in two separately filed actions. Regardless of whether the proposed amendments would be futile, the Court is convinced that indications of bad faith coupled with the additional prejudice it would cause Defendants are

reason enough to forbid Plaintiff from amending her Complaint at this exceptionally belated point in time.

III. CONCLUSION

For these reasons, Plaintiff's Motion to Re-Open the Judgment, and for Leave to Amend her Complaint, (ECF No. 47), is **DENIED**.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: February 16, 2018

/s/ Thomas E. Johnston
THOMAS E. JOHNSTON,
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

LISA MARIE KERR,

Plaintiff,

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS, et al.,

Defendants.

CIVIL ACTION NO. 2:14-cv-06589

MEMORANDUM OPINION AND ORDER

(Filed Sep. 21, 2017)

Pending before the Court are Defendants Sandra Bailey, Teresa Eagle, Lisa Heaton, Gene Brett Kuhn, Marshall University Board of Governors ("MUBG"), David Pittenger, and Judith Southard's (collectively, "Defendants") Motion to Dismiss (ECF No. 6) and Plaintiff Lisa Kerr's ("Plaintiff") Motion to Reopen and Consolidate Related Actions (ECF No. 10). By Standing Order entered January 4, 2016, and filed in this case on July 22, 2016, this action was referred to United States Magistrate Judge Dwane L. Tinsley for submission of proposed findings and a recommendation ("PF&R"). Magistrate Judge Tinsley filed his PF&R (ECF No. 19) on June 28, 2017, recommending that this Court grant Defendants' Motion to Dismiss and deny Plaintiff's Motion to Reopen and Consolidate Related Actions.

I. BACKGROUND

This is the second civil action Plaintiff has filed stemming from her attempted completion of Marshall University's Master of Arts in Teaching ("MAT") program, for which she was not awarded a degree due to her receipt of a "no credit" grade for the program's required MAT Level III Clinical Experience student teaching course. Plaintiff's Complaint ("2014 Complaint") in her first action relating to these events, Case No. 2:14-cv-12333 ("2014 Action"), was filed in this Court on March 14, 2014. That Complaint named the same seven Defendants named in this action, and alleged seven causes of action: (1) defamation against Defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (2) tortious interference with a business expectancy against Defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (3) the tort of outrage against Defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (4) a violation of the plaintiff's due process rights under 42 U.S.C. § 1983 ("section 1983") against Defendants MUBG, Southard, Bailey, and Eagle; (5) a violation of the plaintiff's equal protection rights under section 1983, based upon sexual orientation discrimination, against Defendants MUBG, Southard, Bailey, Eagle, Heaton, and Pittenger; (6) a violation of the plaintiff's equal protection rights under section 1983, as a "class of one" against Defendants MUBG, Southard, Bailey, Eagle, Heaton, and Pittenger; and (7) a violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, against Defendants MUBG and Kuhn.

Defendants filed a Motion to Dismiss in the 2014 Action on May 28, 2014, and on March 26, 2015, this Court entered its Memorandum Opinion and Order granting that motion and dismissing each of Plaintiff's claims for failure to state a claim on which relief could be granted. *See Kerr v. Marshall Univ. Bd. of Governors*, No. 2:14-CV-12333, 2015 WL 1405537 (S.D. W. Va. Mar. 26, 2015). Plaintiff appealed this Court's judgment, and on March 22, 2016, the United States Court of Appeals for Fourth Circuit heard oral arguments. On May 24, 2016, the Fourth Circuit entered its Opinion affirming this Court's Opinion on all seven counts. *See Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016). Plaintiff's petition for rehearing was denied in a brief opinion, and she did not attempt to appeal the Fourth Circuit's decision to the United States Supreme Court by filing a petition for writ of certiorari.

Plaintiff filed her Complaint in the instant action on July 22, 2016, re-alleging her defamation claim, her due process claim, and her equal protection claim based on sexual orientation discrimination.[1] Plaintiff's Complaint in this action also attempts to plead her due process claim as a class action claim. Defendants filed their Motion to Dismiss on October 13, 2016, arguing that each of the claims in the new complaint was barred by *res judicata* and the applicable statutes of limitations. Plaintiff filed her Motion to Reopen and

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[1] In this action, unlike in her 2014 Complaint, Plaintiff raises her equal protection claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX").

Consolidate Related Actions on October 26, 2016. Both motions were fully briefed, and Magistrate Judge Tinsley filed his PF&R addressing them on June 28, 2017

II. LEGAL STANDARD

The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). In addition, this Court need not conduct a *de novo* review when a party "makes general and conclusory objections that do not direct the Court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). Objections to the PF&R were due on July 17, 2017. Plaintiff filed timely Objections (ECF No. 20) on July 5, 2017, and Defendants filed a Response (ECF No. 21) on July 19, 2017.

III. DISCUSSION

Before addressing Plaintiff's specific objections individually, the Court finds it necessary to address Plaintiff's apparent misapprehension about the result of the 2014 Action. Plaintiff obviously views this

second action as nothing more than an attempt to amend her 2014 Complaint;[2] this is clear from her persistent citations to Rule 15 of the Federal Rules of Civil Procedure throughout her briefing and Objections, regardless of that rule's relevance to the issues.

Plaintiff's belief that she is entitled to amend her 2014 Complaint apparently stems from a fundamental misunderstanding of the implications of this Court's dismissal of the 2014 Action. This Court's Memorandum Opinion and Order did not specify that its dismissal was without prejudice; therefore, according to Fourth Circuit precedent, the dismissal was with prejudice and operated as an adjudication on the merits. *See McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009) ("Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice."); *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) ("A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice."). Plaintiff apparently understood that this Court's dismissal operated as a judgment on the merits, as she filed an appeal to the Fourth Circuit. However, she seems to believe that the dismissal was only with prejudice because this Court based its dismissal on what she terms

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[2] In her Objections, Plaintiff laments that "Defendants and the Magistrate [Judge] have blown Plaintiff's simple act of amending her complaint *way* out of proportion." (ECF No. 20 at 1 (emphasis in original).)

to be the Defendants' "Quasi-immunity academic discretion" argument.[3] (ECF No. 20 at 3–4.) It is apparently Plaintiff's understanding that this was the basis of this Court's dismissal, but that when faced with questioning about this theory during oral arguments, Defendants abandoned this argument on appeal and instead relied on arguments that the Complaint was insufficient on its face to state any claims. Though the Fourth Circuit ultimately affirmed this Court's dismissal of all of Plaintiff's claims, she seems to believe that because the Fourth Circuit's rationale was based on her failure to state a claim, she is automatically entitled to amend her Complaint.

It is true that, when the Fourth Circuit affirms a dismissal on a different basis than that relied on by a district court, it *may* remand the action to the district court to determine if the dismissal should be without prejudice. *See Carter*, 761 F.2d at 974–75 (remanding action to district court for a determination of whether dismissal should be with or without prejudice after affirming dismissal on 12(b)(6) grounds where district court relied on 12(b)(1)). However, this is inapplicable here, as the Fourth Circuit affirmed the dismissal of

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[3] The Court notes that, in its opinion dismissing the 2014 Action, it determined that sovereign immunity barred suit against MUBG and the individual Defendants to the extent they were sued in their official capacities. *See Kerr*, 2015 WL 1405537 at *9–11. However, as this holding did not entirely eliminate any of Plaintiff's claims, it does not seem to be the basis for Plaintiff's view that her 2014 Action was dismissed on a "quasi-immunity" basis.

Plaintiff's 2014 Complaint on the same Rule 12(b)(6) grounds upon which this Court relied.

Apparently, due to her belief that the Fourth Circuit affirmed this Court's dismissal of her 2014 Complaint on a different basis than this Court relied on, Plaintiff declares that "[t]he Fourth Circuit's opinion was essentially a victory for Plaintiff." (ECF No. 20 at 9.) As an initial matter, Plaintiff fundamentally misunderstands this Court's Memorandum Opinion and Order granting Defendants' Motion to Dismiss in her 2014 Action. In that order, this Court found that each of the claims Plaintiff had attempted to raise failed to state a claim upon which relief could be granted.[4] This Court determined that Plaintiff's defamation claim was legally insufficient because it was premised on alleged statements that were not provably false and thus could not be defamatory. *See Kerr*, 2015 WL 1405537, at *11–12. With respect to her equal protection claim based on sexual orientation, this Court determined that Plaintiff's allegations did not show that the Defendants knew of her homosexual orientation, that they harbored discriminatory animus, or that they treated her differently than similarly-situated heterosexual students. *See id.* at *22. On Plaintiff's procedural due process claim, this Court found that the alleged decision to give Plaintiff a "no credit" grade was

[4] Though Plaintiff initially attempted to raise other claims in her first action, she is only attempting to reassert her defamation, due process, and equal protection based on sexual orientation claims in this action. Accordingly, the Court declines to specifically discuss its disposition of her other claims in the 2014 Action.

an academic evaluation, such that she could only demonstrate a constitutional violation by showing that Defendants' decision was arbitrary and capricious.[5] *See id.* at *20. The Court found that the alleged conduct

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[5] As explained in this Court's opinion in Plaintiff's first action, the Fourth Circuit standard for evaluating the procedural due process of a subjective decision differs from an objective one, in that "the process due one subject to [a] highly subjective evaluative decision can only be the exercise of professional judgment by those empowered to make the final decision in a way not so manifestly arbitrary and capricious that a reviewing court could confidently say of it that it did not in the end involve the exercise of professional judgment." *Siu v. Johnson*, 748 F.2d 238, 245 (4th Cir. 1984). This Court determined that, as alleged in her Complaint, the Defendants' decisions that Plaintiff believes were made in violation of her procedural due process rights—her "no grade" evaluation and her subsequent inability to graduate the MAT program—were subjective evaluations subject to this relaxed standard. *See Kerr*, 2015 WL 1405537, at *18–20. There is significant support from both the United States Supreme Court and the Fourth Circuit for the understanding that an academic evaluation, like the one Plaintiff alleged, is a subjective decision. *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012) ("In the context of due-process challenges, the Supreme Court has held that a court should defer to a school's professional judgment regarding a student's academic or professional qualifications."); *Betts v. Rector & Visitors of Univ. of Va.*, No. 97-1850, 1999 WL 739415, at *8 (4th Cir. 1999) (applying the "arbitrary and capricious" standard for subjective decisions to a procedural due process challenge to a school's determination that a student had not met the standards for admission into a medical school).

Plaintiff based her due process claim on was not arbitrary and capricious, and thus dismissed Plaintiff's procedural due process claim for failure to state a claim. *See id.* at *20. The Court similarly found that the Defendants' alleged conduct was not egregious and arbitrary, so she could not state a substantive due process claim. *See id.* at *21. The Fourth Circuit affirmed the dismissal of these claims based on Plaintiff's failure to state a claim for which relief could be granted. *See Kerr*, 824 F.3d at 73–74.

Plaintiff's misinterpretation of this Court's decision to dismiss her initial case seems to come from the analysis of her due process claim. This Court determined that, because the decisions Defendants made to assign Plaintiff a grade of "no credit" for her student teaching course and to decline to allow her to graduate the MAT program were academic in nature, she could only demonstrate a violation of her due process rights by showing that the decision was arbitrary and capricious. To the extent the Court can determine the source of Plaintiff's belief that her initial claim was dismissed on the basis of "quasi-immunity academic discretion," it appears to stem from this procedural due process standard. It seems that Plaintiff interpreted this Court's recognition of the relevant—and highly deferential—standard for evaluating procedural due process claims based on academic evaluations as a legal finding analogous to immunity for the Defendants.[6]

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[6] Plaintiff also makes much of some questioning that occurred at oral argument. According to Plaintiff, due to "intensive

Unfortunately for Plaintiff, as detailed above, this Court dismissed her 2014 Action because her allegations failed to state any claims on which relief could be granted. Plaintiff needed to plead facts showing that Defendants' academic evaluation of her was arbitrary and capricious in order to state a claim that they violated her procedural due process rights. This Court found that the Defendants' alleged conduct at issue was not arbitrary and capricious, so she could not state a procedural due process claim. While the Fourth Circuit discussed some of Plaintiff's claims in greater depth than this Court initially did,[7] and in several

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panel questioning" the Defendants "retreated from their merits positions in oral argument, and urged the panel to rely solely on insufficiencies in Plaintiff's initial pleading." (ECF No. 20 at 2, 9.) The Court offers no opinion on whether Defendants initially attempted to assert a merits argument during oral argument, because it is irrelevant. As discussed above, this Court dismissed Plaintiff's complaint in her initial action because it failed to state a claim, and the Fourth Circuit affirmed this Court's dismissal on the same basis. *See Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 741 F.2d 41, 44 (4th Cir. 1984) ("Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, the judgment must govern.") Whether Defendants misinterpreted this Court's opinion in the same way Plaintiff did is immaterial.

[7] As discussed above, it appears that Plaintiff's misunderstanding of this Court's initial decision came from its analysis of her procedural due process claim. In the context of this claim, the Fourth Circuit discussed the internal processes Marshall provided Plaintiff in assigning her a "no credit" grade and in allowing her to appeal that grade. The Fourth Circuit observed that this process would have been sufficient to protect her due process

instances focused on different legal insufficiencies, it ultimately affirmed this Court's dismissal on the same rationale.[8]

A. *Application of Fourth Circuit Mandate*

Plaintiff's first specific objection purports to object to the PF&R's failure to follow the Fourth Circuit's mandate, in violation of the "mandate rule." She asserts there is no indication in the Fourth Circuit's

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rights, if she had sufficiently pled a protected property interest, which that Court determined she had not. *See Kerr*, 824 F.3d at 80–81. It is possible that this more specific discussion of the process she was afforded caused Plaintiff to believe the Fourth Circuit had arrived at a different holding than this Court. However, the Fourth Circuit not only found that Plaintiff failed to allege deficient procedure, it also found that her allegations showed she was not entitled to a property interest sufficient to trigger due process rights—a fact that this Court presumed for the purposes of the Rule 12(b)(6) stage. That the Fourth Circuit found that she failed to state a due process claim for more reasons than this Court did does not change the basis for dismissal; both courts determined Plaintiff's allegations, taken as true, were legally insufficient to state a claim for a violation of her due process rights.

[8] Bafflingly, in a move that contradicts her accounts of the 2014 Action nearly everywhere else and undermines essentially all of her arguments, Plaintiff acknowledges in her Complaint in the instant action that "[t]he District Court dismissed the seven original claims in an opinion dated March 26, 2015, on the basis of 12(b)(6) pleading defects." (ECF No. 2, ¶ 20.) Here she also asserts that this Court's dismissal was without prejudice, which not only contradicts her apparent understanding of the dismissal as a final appealable order, but also misconstrues federal law. *See Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) ("A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice.").

decision that the Court "intended the extremely rare outcome of precluding Plaintiff from amending her complaint to remediate the basis for their decision." (ECF No. 20 at 5.) Accordingly, Plaintiff believes the PF&R errs in its understanding that this Court's dismissal with prejudice of Plaintiff's 2014 Action was upheld on appeal.

The mandate rule is a "more powerful version of the law of the case doctrine." *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414 (4th Cir. 2005). "Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is 'controlling as to matters within its compass.'" *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). This rule prevents district courts from considering questions the higher court has addressed conclusively or addressing issues on remand that could have been raised on appeal but were not. *See Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) (citations omitted).

Plaintiff's argument here rests on her misapprehension discussed above; Plaintiff claims the PF&R errs in its proposed finding that this Court's dismissal of Plaintiff's 2014 Action was unequivocally upheld on appeal. Plaintiff argues that the Defendants abandoned their "quasi-immunity academic discretion" argument on appeal, and as a result the Fourth Circuit's decision was based exclusively on Plaintiff's failure to state legally viable claims. As noted, Plaintiff apparently believes that a Rule 12(b)(6)-based dismissal for failure to state a claim is without prejudice by

definition. However, this is contrary to clearly-established precedent, which explains that a Rule 12(b)(6) dismissal for failure to state a claim is with prejudice and serves as a decision on the merits unless it is expressly without prejudice. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (quotations omitted) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits.") Accordingly, Plaintiff's belief that it was implicit within the Fourth Circuit's affirmance of this Court's dismissal of Plaintiff's 2014 Action that the dismissal should no longer be with prejudice is misplaced.

Additionally, as explained in detail above, this Court's dismissal of Plaintiff's 2014 Complaint was based on her failure to state a claim, not any doctrine analogous to immunity, as she suggests.[9] Had the Fourth Circuit affirmed dismissal on a different basis than that relied on by this Court, that Court could have remanded the action for this Court to decide if its dismissal should have been without prejudice. *See Carter*,

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[9] In her argument on this objection, Plaintiff cites to the Fourth Circuit's statement in a footnote that "we may affirm on any grounds supported by the record, notwithstanding the reasoning of the district court." (ECF No. 20 at 5.) The Court finds this citation to be misguided at best; the Fourth Circuit made this statement in the context of its finding that Plaintiff failed to state a claim for defamation both because the statements alleged were incapable of defamatory meaning and because they were privileged. *See Kerr*, 824 F.3d at 75–76. This not only affirmed this Court's basis for dismissal—that Plaintiff failed to state a defamation claim because the alleged statements could not be defamatory—but also took it a step further.

761 F.2d at 975 ("Because we are affirming on Rule 12(b)(6) grounds which were not the basis for dismissal by the district court, we remand for its decision whether to dismiss with or without prejudice and express no thoughts on the merits of that determination."). The Fourth Circuit also could have affirmed this Court's dismissal on the same basis this Court relied on, but modified it to be without prejudice. *See King v. Rubenstein*, 825 F.3d 206, 225 (4th Cir. 2016) ("Accordingly, we affirm the dismissal as to Rubenstein and Goodin but modify it to reflect that it is without prejudice."). Given that the Fourth Circuit affirmed this Court's decision on the same Rule 12(b)(6) basis this Court used, and declined to modify the decision to be without prejudice or remand for this Court to consider the issue of prejudice, the Court finds no reason to infer an intent to modify the dismissal.

Accordingly, Plaintiff's first objection is **OVERRULED**.

B. Application of the Savings Statute

Plaintiff's second objection protests the PF&R's finding that West Virginia's savings statute does not prevent the claims raised in the instant action from being time-barred. West Virginia's savings statute provides, in relevant part:

> (a) For a period of one year from the date of an order dismissing an action or reversing a judgment, a party may refile the action if the initial pleading was timely filed and: (i) the

> action was involuntarily dismissed for any reason not based upon the merits of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.

W. Va. Code § 55-2-18(a). The PF&R finds that this statute is inapplicable to Plaintiff's claims because "her first Complaint was involuntarily dismissed on the merits and the initial judgment has not been reversed." (ECF No. 19 at 14.)

It is clear that this objection rests upon Plaintiff's previously discussed misinterpretation of the Fourth Circuit's Opinion affirming the dismissal of her 2014 Action. Plaintiff argues that "it was an error for the Magistrate to treat the Original Action as dismissed 'on the merits' at all, because the [Fourth Circuit's] opinion was a controlling component of the mandate for the three amended claims." (ECF No. 20 at 7–8.) Plaintiff asserts that "[a]ffirmance of 12(b)(6) dismissal was 'not based upon the merits of the action.'" (ECF No. 20 at 8.) As explained above, Plaintiff's presumption that a dismissal under Rule 12(b)(6) is without prejudice is directly contrary to Fourth Circuit law, which explains that such dismissals are presumed to be with prejudice and judgments on the merits unless the court indicates otherwise. *See McLean*, 566 F.3d at 396. This Court's dismissal of Plaintiff's 2014 Action was rendered with prejudice, and thus operates as a judgment on the merits. Thus, West Virginia's savings statute does not prevent Plaintiff's claims from being time-barred by the applicable statutes of limitations.

Accordingly, Plaintiff's second objection is **OVERRULED**.

C. Waiver of Right to Amend

Plaintiff's third specific objection asserts that the PF&R erred in its finding that Plaintiff waived her right to amend her 2014 Complaint. The PF&R proposes that this Court find Plaintiff waived her right to amend her Complaint because she did not file a motion to amend before her 2014 Complaint was dismissed, she has not succeeded in having the judgment set aside,[10] and she did not continue her appeal to the United States Supreme Court. (ECF No. 19 at 11.) To the extent Plaintiff addresses the PF&R's reasoning on this recommendation, her arguments are based on her erroneous interpretation of the Fourth Circuit's decision affirming this Court's dismissal of her 2014

[10] The PF&R construes Plaintiff's Motion to Reopen and Consolidate Related Cases (ECF No. 10) as a Motion for Relief From Judgment under Rule 60(b), and recommends its denial. As discussed below, this Court adopts the PF&R's recommendation on that issue and denies Plaintiff's Motion for Relief, so her attempt to have the judgment set aside was unsuccessful. The Court notes that Plaintiff has also filed a motion under Rule 60(b) seeking relief from judgment in her earlier case, with an included request to amend her Complaint. While the Court has not yet addressed this motion in her 2014 Action, it is unnecessary to do so before resolving the motions in the instant action. If the Court grants that motion, Plaintiff would be relieved from the judgment and amendment would be proper in that case, rendering this action duplicative. If the Court denies that motion, Plaintiff would still be subject to that judgment. Accordingly, the Court finds that it is unnecessary to address that motion before rendering disposition in this matter.

Complaint. As this Court has already thoroughly addressed Plaintiff's underlying argument that the Fourth Circuit affirmed this Court's dismissal on a different basis than this Court relied on, the Court finds no reason to repeat that analysis.[11]

Accordingly, Plaintiff's third objection is **OVERRULED**.

D. Application of Res Judicata *to Bar Amendment*

Plaintiff's fourth specific objection asserts that the PF&R erred in applying *res judicata* to bar Plaintiff from amending her 2014 Complaint with her new Complaint in the instant action. Plaintiff does not argue under the law of *res judicata* in this objection, but instead proceeds as if the filing of the instant action should be decided under Rule 15 of the Federal Rules of Civil Procedure's standard governing motions to amend.[12] However, coupled with her arguments in her

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[11] The Court also finds that, because Plaintiff's claims are otherwise barred by *res judicata* and the applicable statutes of limitations, her argument that she did not waive her right to amend is moot.

[12] Plaintiff's discussion of the motion to amend standard is irrelevant to the application of *res judicata*. As the PF&R notes, "a motion to amend filed after a judgment of dismissal has been entered cannot be considered until the judgment is vacated." *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 539 (4th Cir. 2013). Accordingly, to the extent the standard for amendment of pleadings could be relevant at all in this case, Plaintiff's arguments under that standard presume her success in obtaining relief under Rule 60(b) from this Court's dismissal of her 2014 Action. However, the PF&R recommends denying Plaintiff's Motion to Reopen and Consolidate Related Actions to the

Response to the underlying Motion to Dismiss, it appears Plaintiff contests the application of *res judicata* purely on the grounds of whether there was a prior final judgment.

The doctrine of *res judicata* "bars a party from relitigating a claim that was decided or could have been decided in an original suit." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 161 (4th Cir. 2008) (citing *Pueschel v. United States*, 369 F.3d 345, 355 (4th Cir. 2004)). "The application of *res judicata* turns on the existence of three factors: '(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.'" *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 210 (4th Cir. 2013) (quoting *Pueschel*, 369 F.3d at 354).[13] *Res judicata* prevents litigation of claims actually raised and litigated in a prior action, as well as "litigation of all

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extent it seeks relief under Rule 60(b)(6) on the grounds that it fails to demonstrate exceptional circumstances for relief. As the Objections [sic] do not object to that finding, this Court adopts it, and there is no complaint for Plaintiff to amend. Additionally, the Court finds that, in light of Plaintiff's filing of a motion under Rule 60(b) in the 2014 Action, this issue is more appropriate for consideration in that case.

[13] Though Plaintiff does not raise the issue of which law of *res judicata* applies—instead arguing that the instant action should be treated as a Motion to Amend under Rule 15 of the Federal Rules of Civil Procedure and that *res judicata* is inapplicable entirely—the Court notes that because the prior relevant decision was issued by a federal court, federal *res judicata* law is applicable. *See Andrews v. Daw*, 201 F.3d 521, 524 (4th Cir. 2000) (citing *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989)).

grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (citing *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)). "Courts presume that a litigant has 'done his legal and factual homework' and raised all grounds arising out of the same factual context to support his claims." *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 596 (7th Cir. 1986)).

As noted, Plaintiff does not contest much of the *res judicata* analysis. Plaintiff acknowledges in her Complaint that the defamation, due process, and equal protection claims she asserts in this action are "amended and re-asserted" versions of claims she raised in her previous action.[14] (ECF No. 2, ¶ 18.) A review of the

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[14] Plaintiff does not argue that her equal protection claim is a new cause of action in this case because she raised it under Title IX, presumably based on her view that she is merely attempting to amend her 2014 Complaint and as such *res judicata* is inapplicable. Regardless, the PF&R addresses the issue, relying on Fourth Circuit guidance that, for the purposes of *res judicata* "claims are part of the same cause of action when they arise out of the same transaction or series of transactions, or the same core of operative facts." *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough (In re Varat Enters., Inc.)*, 81 F.3d 1310, 1316 (4th Cir. 1996). The PF&R recommends a finding that Plaintiff could have raised her Title IX claim in her 2014 Complaint, as it stems from the same core of operative facts. (ECF No. 19 at 7–8, 11.) Indeed, Plaintiff acknowledges in her Response to Defendants' Motion to Dismiss that she attempted to raise this Title IX claim on appeal, but the Fourth Circuit declined to consider it

parties named in the Complaint shows that they are the same Defendants named in the 2014 Complaint. (ECF No. 2, ¶ 28–35.) Accordingly, the second and third factors of *res judicata* are easily satisfied in this case, and Plaintiff does not appear to contest as much.

Instead, Plaintiff argues that there is no final judgment on the merits to bar the claims in her new Complaint. (ECF No. 9 at 10–11.) A dismissal for failure to state a claim is a final order on the merits for the purposes of *res judicata* if the dismissal is with prejudice. *See Moitie*, 452 U.S. at 399 n.3; *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1471 (4th Cir. 1991) ("[A] dismissal under Rule 12(b)(6) is accorded res judicata effect. . . ."). Plaintiff acknowledges in her Response to the underlying Motion to Dismiss that a Rule 12(b)(6) dismissal can be a final decision for the purposes of *res judicata*, but asserts that this is only the case when a party fails to appeal it. (ECF No. 9 at 11.) Plaintiff argues that, since she appealed this Court's dismissal of her 2014 Action to the Fourth Circuit, this Court's prior opinion no longer has any preclusive effect. (ECF No. 9 at 11.) In her view, the Fourth Circuit's affirmance of this Court's dismissal is "the operative final judgment on the merits," and because it dismissed on the basis of her failure

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because she had not included it in her complaint. (ECF No. 9 at 14.) Accordingly, this Court agrees with the PF&R's reasoning and finds that Plaintiff's Title IX equal protection claim was available to her in her 2014 Action, so it is now barred by *res judicata*.

to state her claims, it has no preclusive effect. (ECF No. 9 at 11.)

Once again, Plaintiff's argument relies on her distorted view of her prior case's history. As discussed above, Plaintiff's claims in her 2014 Complaint were dismissed with prejudice for failure to state a claim, and the Fourth Circuit affirmed the dismissal on the same grounds. The Fourth Circuit did not modify the dismissal to be without prejudice or remand for this Court to consider whether the dismissal should have been without prejudice, though it was within that Court's power. Plaintiff has not cited to any law supporting the proposition that a district court's final judgment, which would have preclusive effect if left unappealed, is stripped of its preclusive effect by an appellate affirmance. Accordingly, this Court's prior dismissal of Plaintiff's 2014 Action serves as the necessary final order on the merits for the purposes of *res judicata*.

Accordingly, Plaintiff's fourth objection is **OVERRULED**.

E. Class Action

Plaintiff's final objection asserts that the PF&R errs in its recommendation that this Court find that she cannot serve as a class representative. In addition to noting that Plaintiff had not yet filed a motion for class certification, the PF&R notes that her own due process claim has already been dismissed with prejudice in her 2014 Action. In her objection, Plaintiff

argues that it is premature to address the actual issue of class certification, but she does not address the issue of her own claim being barred.

The Supreme Court has held that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). A plaintiff cannot serve as the class representative where she does not have valid claims which give her the same interest and injury as the class she seeks to represent. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 274 (4th Cir. 2005). As the PF&R notes, Ms. Kerr is currently the only plaintiff, and her due process claim is barred by *res judicata*. This Court finds that it is unnecessary to address any of the other class certification criteria or decide whether such considerations would be premature if Plaintiff's individual due process claim were not barred by *res judicata*. Plaintiff has no valid claim, so she cannot serve as a class representative.

Accordingly, Plaintiff's fifth objection is **OVERRULED**.

IV. CONCLUSION

For the foregoing reasons, the Court **OVERRULES** the Objections (ECF No. 20), **ADOPTS** the PF&R (ECF No. 19), **GRANTS** Defendants' Motion to Dismiss (ECF No. 6), **DENIES** Plaintiff's Motion to

Reopen and Consolidate Related Actions (ECF No. 10), and **DISMISSES WITH PREJUDICE** this matter from the Court's docket.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 21, 2017

/s/ Thomas E. Johnston
THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
CHARLESTON**

LISA MARIE KERR,

Plaintiff,

v. **Case No. 2:16-cv-06589**

**MARSHALL UNIVERSITY
BOARD OF GOVERNORS,
GENE BRET KUHN,
JUDITH SOUTHARD,
SANDRA BAILEY, TERESA
EAGLE, LISA HEATON
and DAVID PITTINGER,**

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

(Filed Jun. 28, 2017)

This matter is assigned to the Honorable Thomas E. Johnston, United States District Judge, and it is referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). Pending before the court is a Motion to Dismiss filed collectively by all of the defendants (ECF No. 6) and the plaintiff's Motion to Reopen and Consolidate Related Actions (ECF No. 10).

THE PLAINTIFF'S ALLEGATIONS AND PROCEDURAL HISTORY

This is the second civil action filed by the plaintiff concerning her attempted completion of Marshall's University's Master of Arts in Teaching ("MAT") program, her receipt of a "No Credit" grade for a required student teaching course therein[1], and the failure to award her a degree and teaching credential. The defendants named in the present Complaint, which are the same as those named in the plaintiff's initial Complaint, are: the Marshall University Board of Governors (hereinafter "MUBG")[2], Gene Brett Kuhn, an employee of the Boone County Public School District,

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[1] In the fall of 2013, the plaintiff enrolled in EDF 677 MAT Level III Clinical Experience, which is a Credit/No Credit student teaching program (hereinafter "MAT Clinical III program" or "student teaching experience").

[2] The new Complaint asserts that the MUBG is the policy-making body for Marshall University and "is the proper party to be sued in an official capacity on behalf of Marshall University, MUGC and/or COEPD" under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), and for the purpose of any prospective injunctive relief. (ECF No. 2 at 9, 11 ¶¶ 29, 37). The new Complaint also identifies the *current* members of the MUBG, noting that its membership periodically changes. (*Id.* at 9, ¶ 28). The Complaint asserts that, "if the Board directly participated in unlawful policy actions, the Board is also capable of being sued in a personal capacity." (*Id.*, ¶ 29). Additional allegations in the new Complaint allege that the MUBG, collectively, failed to enforce Marshall University's Title IX policy against discrimination based upon sexual orientation and other University policies, which led to the denial of her due process rights. As noted, *infra*, however, these additional allegations are not actionable because all of the plaintiff's claims are barred by res judicata, and are otherwise untimely.

whom plaintiff asserts was temporarily under contract with Marshall University as a "Public School Supervising Teacher" for the plaintiff in the MAT Clinical III program; Judith Southard, the plaintiff's "University Supervisor" in the MAT Clinical III program; Sandra Bailey, Marshall's Coordinator of the MAT Clinical III program; Teresa Eagle, the Dean of Marshall's College of Education and Professional Development (the "COEPD"); Lisa Heaton, another Dean of the COEPD and the Program Director for Elementary and Secondary Education, and David Pittenger, the Interim Dean of Graduate Studies at Marshall's Graduate College ("MUGC").

The plaintiff's initial Complaint, which was filed on March 14, 2014, and docketed as Case No. 2:14-cv-12333, alleged seven causes of action: (1) defamation against defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (2) tortious interference with a business expectancy against defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (3) the tort of outrage against defendants MUBG, Kuhn, Southard, Bailey, and Eagle; (4) a violation of the plaintiff's due process rights under 42 U.S.C. § 1983 ("section 1983") against defendants MUBG, Southard, Bailey, and Eagle; (5) a violation of the plaintiff's equal protection rights under section 1983, based upon sexual orientation discrimination, against defendants MUBG, Southard, Bailey, Eagle, Heaton, and Pittenger; (6) a violation of the plaintiff's equal protection rights under section 1983, as a "class of one" against defendants MUBG, Southard, Bailey, Eagle, Heaton, and Pittenger; and (7) a violation

of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, against defendants MUBG and Kuhn.

On March 26, 2015, the presiding District Judge entered a Memorandum Opinion and Order granting the defendants' Motion to Dismiss with respect to the plaintiff's initial Complaint, *Kerr v. Marshall Univ. Bd. of Governors*, Case No. 2:14-CV-12333, ECF No. 28, 2015 U.S. Dist. LEXIS 38206 (S.D.W. Va. Mar. 26, 2015) ("District Court Opinion"). The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed the District Court's decision on May 24, 2016. *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016) ("Fourth Circuit Opinion").

Accepting as true all of the allegations in the initial Complaint, the Fourth Circuit addressed, *de novo*, each of the seven claims raised by the plaintiff and found that the District Court properly dismissed each of those claims. The Fourth Circuit Opinion did not remand the case for amendment or further consideration of any of the plaintiff's claims. The plaintiff did not seek a writ of certiorari for review in the Supreme Court of the United States.

The plaintiff then filed this second civil action on July 22, 2016. The present Complaint, numbering 102 pages, re-alleges a defamation claim, an equal protection claim based upon sexual orientation discrimination, which is now pled under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), and a due process claim against the same defendants. The plaintiff's present Complaint also attempts to plead

her due process claim as a class action on behalf of "Marshall graduate students denied a West Virginia teaching credential." (*Id.* at 94-95).

On October 26, 2016, the plaintiff filed a Response to the Motion to Dismiss (ECF No. 9) and a Motion to Reopen and Consolidate Related Actions (ECF No. 10), On November 2, 2016, the defendants filed a Reply to the plaintiff's Response to the Motion to Dismiss (ECF No. 11). On November 9, 2016, the defendants filed a Response to the plaintiff's Motion to Reopen and Consolidate Related Actions (ECF No. 12). On November 16, 2016, the plaintiff filed a Reply in support of her Motion to Reopen and Consolidate Related Actions (ECF No. 13). The content of these documents will be discussed as necessary *infra*. This matter is ripe for adjudication.

STANDARD OF REVIEW

A trial court must dismiss a complaint if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Furthermore, "Rule 12(b)(6) authorizes dismissal based upon a dispositive issue of law." *Guthrie v. Blue Ridge Sav. Bank, Inc.*, 114 F. Supp.2d 431, 433 (W.D.N.C. 2000) (citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). The affirmative defense of res judicata is a dispositive

legal issue that can subject a complaint to dismissal under Rule 12(b)(6). *See Dovani v. Va. Dept. of Transp.*, 434 F.3d 712, 720 (4th Cir. 2006); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000). Similarly, where an affirmative defense such as the application of a statute of limitations is apparent from the face of the Complaint, such defense may also be resolved in a motion to dismiss under Rule 12(b)(6). *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007).

ANALYSIS

A. This civil action is barred by res judicata.

The defendants' Motion to Dismiss asserts that dismissal of the plaintiff's first civil action was a dismissal on the merits and with prejudice. The motion further asserts that the instant civil action, which asserts identical or similar claims against the same defendants and arising out of the same facts, is barred by the doctrine of res judicata.

Res judicata "bars a party from relitigating a claim that was **decided or could have been decided in an original suit**." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 161 (4th Cir. 2008) (emphasis added by the defendants). (ECF No. 7 at 6). As noted by the defendants, the doctrine of res judicata serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parkline Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). (*Id.* at 6-7).

"The application of res judicata turns on the existence of three factors: '(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.'" *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 210 (4th Cir. 2013) (quoting *Puesehel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). The Fourth Circuit has broadly applied the doctrine in order to "eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent results." *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 77 (4th Cir. 1967). Thus, the Court has made clear that "the preclusive effect of a prior judgment extends beyond claims or defenses actually presented in previous litigation," *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991), and "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Peugeot Motors of Am., Inc. v. E. Auto Distributors, Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (4th Cir. 1979)).

Noting that the plaintiff has admitted that this civil action is entirely derivative of her first case, the defendants' motion asserts that the instant case meets all of the requirements for application of res judicata. First, the defendants contend that the District Court's dismissal of the plaintiff's first case was a judgment on the merits and a dismissal with prejudice. (ECF No. 7 at 5). Their Memorandum of Law asserts that the

Fourth Circuit has conclusively addressed the fact that a dismissal for failure to state a claim under Rule 12(b)(6) is with prejudice, unless the court specifically orders dismissal without prejudice. *See McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009); *see also Carter v. Norfolk Cmty. Hosp. Ass'n*, 761 F.2d 970, 974 (4th Cir. 1985). (*Id.*) In *McLean*, the Court held:

> When the word "dismissed" is coupled with the words "[for] fail[ure] to state a claim upon which relief can be granted, the complete phrase has a well-established legal meaning. Courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a judgment on the merits and to be rendered with prejudice.

566 F.3d at 396.

The defendants further assert that the plaintiff cannot dispute that the parties in both suits are identical and that the claims "arise out of the same transaction or series of transactions, or the same core operative facts." *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough*, 81 F.3d 1310, 1316 (4th Cir. 1996). (*Id.* at 8). Their Memorandum of Law asserts:

> This action shares an identical core of operative facts with the first action. In this case, just like in the first case, all of the alleged causes of action stem from plaintiff's time as a student teacher in Marshall University's Master of Arts in Teaching program during

> the fall of 2013. (ECF 2 ¶¶ 16, 126, *generally*); *Kerr*, 2015 U.S. Dist. LEXIS 38206, at *2. plaintiff's first case, just like this case, alleged causes of action for defamation, due process violations and equal protection related to sexual orientation discrimination, amongst other things. *Kerr*, 2015 U.S. Dist. LEXIS 38206, at *11; (ECF 2). Most importantly, according to Plaintiff's subject Complaint she admits that she brought this action to **"amend[ ] and re-assert[ ]" these causes of action**. (ECF 2 ¶ 18) (emphasis added). Moreover, according to Plaintiff, her new action only contains an **"amended and reinstated Complaint [that] merely corrects 12(b)(6) pleading defects in the Original Actions Claims One (defamation), Four (due process) and Five (equal protection based on sexual orientation bias)."** (*Id.* at ¶ 24) (emphasis added). In light of the identical causes of action that all arise from plaintiff's student teaching experience in the fall of 2013 and Plaintiff's admission that her new claim is entirely derivative of her initial claim, it is clear that plaintiff's Complaint raises causes of action that are identical to the causes of action raised in her initial case (Civil Action No. 2:14-cv-12333). Thus, even if plaintiff's new Complaint contains a more detailed version of her allegations, her claims are barred by res judicata claim preclusion.

(*Id.* at 8-9).

The defendants further assert that the plaintiff's attempts to include references to Title IX in association

with her equal protection claim cannot save this civil action from dismissal because the plaintiff "could have and should have formally alleged Title IX in her initial action." (*Id.* at 9).[3] The defendants further assert that [t]he Title IX aspect of her subject action clearly arose from the 'same transaction or series of transactions' as her initial claim and shares [the] 'same core of operative facts' with her first action." (*Id.*) (quoting *First Union Commercial Corp.*, *supra*, 81 F.3d at 1316). Thus, the defendants contend:

> In light of the well settled law, plaintiff's admission regarding the derivative nature of her current claims, and the outcome of the first case, Plaintiff unquestionably already had her opportunity to litigate these issues. She even received the privilege of an oral argument before the Fourth Circuit. *Kerr*, 824 F.3d [at] 62. After briefing and oral argument, the Fourth Circuit affirmed this Court's decision in a thorough opinion. *Id.* Thus, the issues set forth in her Complaint were **already adjudicated on the merits and dismissed with prejudice**. As explained herein, the Court must dismiss Plaintiff's current action.

(ECF No. 7 at 6) (emphasis added).

The plaintiff's Response to the Motion to Dismiss asserts that her claims are not barred by res judicata,

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[3] The defendants' Memorandum of Law acknowledges that the plaintiff referenced Title IX in her appellate briefs and argument in the first case. However, the Fourth Circuit specifically found that she did not assert a claim under Title IX in her initial Complaint. *Kerr*, 824 F.3d at 73.

but are, rather, an amendment of her earlier claims "in compliance with the Fourth Circuit's decision on appeal." (ECF No. 9 at 1). The plaintiff argues that "the Fourth Circuit affirmed the dismissal, but declined to adopt the District Court's rationale, or the factual recitals therein." (*Id.* at 7). She further contends:

> Instead, in line with the Defendants' tactical retreat at oral argument, the controlling appellate decision in *Kerr I* relied only on *pleading* insufficiencies in the Original Complaint. The May 24, 2016 judgment of the Court of Appeals stated that the dismissal was affirmed "in accordance with the decision of this court." Mandate was issued on June 29, 2016.

(*Id.*)

Thus, the plaintiff believes that the Fourth Circuit Opinion gave her license to amend her claims to attempt to more thoroughly plead them, and she asserts that her instant Complaint remedies the cited deficiencies. Her Response contends that "[a] district court's 12(b)(6) judgment may be 'final' for res judicata purposes – but *only* when a party fails to appeal it." (*Id.* at 11) (citations omitted). The plaintiff further contends that "[i]n contrast, when a 12(b)(6) ruling has been appealed, the only 'final judgment on the merits' is the judgment of the appellate court and the specific grounds on which it rests." (*Id.*) Her Response further argues that:

> The *Kerr I* appellate decision was limited to pleading insufficiencies, which are fully remedied in Plaintiff's new Complaint. That

> is the operative final judgment on the merits, and Plaintiff has complied with it. The changes are not minor or conclusory. Her Original Complaint contained only 24 pages. In contrast, her amended Complaint comprises 102 pages – more than four times its original length, although only three of the seven claims are re-asserted! The new Complaint also includes eight exhibits from Marshall's records, which were not part of the Original Complaint, and which corroborate the abrupt change in Marshall's treatment of Plaintiff after learning of her homosexual orientation. *See supra* at 7-9 (cataloging extensive revisions, and linking them with each element of the appellate ruling). The Complaint is therefore sufficient as a matter of law, and not barred.

(*Id.* at 12).

However, as noted previously herein, the Fourth Circuit did not remand the initial civil action in order to allow the plaintiff to amend, a course of action which the appellate court has employed where the court believed that a dismissal with prejudice was inappropriate. *See, e.g.*, *King v. Rubenstein*, 825 F.3d 206 (4th Cir. 2016) (remanding pro se civil rights action to permit amendment where court believed there were potentially cognizable claims).[4] Rather, the Fourth Circuit specifically addressed each of the plaintiff's seven

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[4] Here, the District Court is reminded that, although the Complaint was brought pro se, the plaintiff is a trained attorney with more than 15 years of experience.

claims, found that the District Court appropriately dismissed each claim, and affirmed the District Court Opinion without modification or remand for additional proceedings. *Kerr,* 824 F.3d 62, *passim.*

As discussed in the defendants' Reply:

> Despite Plaintiff's inappropriate and confusing argument, the Fourth Circuit's decision that affirmed this Court's decision regarding the first action was certainly on the merits and with prejudice. Specifically, the Fourth Circuit analyzed Plaintiff's defamation claim at length. *Kerr*, 824 F.3d at 73-77. First, the Fourth Circuit agreed with this Court's decision that the alleged defamatory statements were not capable of defamatory meaning. *Id.* at 75. Whether or not a statement is capable of defamatory meaning is a gatekeeping function that is delegated to courts to decide as a matter of law. *Syl. Pt. 6, Long v. Egnor*, 346 S.E.2d 778, 779 (W. Va. 1986). Moreover, the Fourth Circuit even went further than this Court did regarding defamation and found that, even if Defendants "had made statements capable of defamatory meaning. [Defendants'] statements would still be protected by qualified privilege." *Kerr*, 824 F.3d at 75. The Fourth Circuit also engaged in a lengthy analysis of Plaintiff's due process and equal protection claims. *Id.* at 79-82. According to the Fourth Circuit, both of those claims were

> properly dismissed by this Court because they failed as a matter of law. *Id.*

(ECF No. 11 at 4-5). The defendants further note that, if the Fourth Circuit had considered the District Court's dismissal to be without prejudice and subject to amendment of the Complaint, it would have dismissed the appeal for lack of jurisdiction and remanded the case to the District Court to allow the plaintiff to amend the Complaint. *See Goode v. Central Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619, 623 (4th Cir. 2015) (a case also relied upon by the plaintiff to support her contention that the District Court's 12(b)(6) dismissal was a "final, appealable order.") (ECF No. 9 at 13; ECF No. 11 at 5-6).

The dismissal of the plaintiff's first case under Rule 12(b)(6) was undoubtedly a dismissal on the merits and was with prejudice. That determination was unequivocally upheld on appeal. The instant case attempts to re-file three of the same claims, or similar claims arising out of the same core operative facts (including the plaintiff's claim brought pursuant to Title IX, which should have been properly asserted in the first action), against the same defendants. Thus, the undersigned proposes that the presiding District Judge **FIND** that the instant Complaint is barred by the doctrine of res judicata and must be dismissed with prejudice.

The defendants further assert that the plaintiff's new Complaint is barred by the doctrines of waiver and estoppel. (ECF No. 7 at 11-12). The undersigned

agrees with the defendants' argument to the extent that a party may not seek amendment of a complaint after its dismissal, unless the party is successful in setting aside the dismissal order. *See Calvary Christian Ctr. v. City of Fredericksburg, Va.*, 710 F.3d 536, 537-38 (4th Cir. 2013). Here, because the plaintiff failed to seek amendment of her Complaint before it was dismissed, has failed to have the dismissal order properly set aside[5], and further failed to continue her appeal to the United States Supreme Court, the undersigned proposes that the presiding District Judge **FIND** that she has waived the ability to seek relief in a second civil action.

B. The instant Complaint is untimely.

The defendants' Motion to Dismiss and Memorandum of Law also assert that the instant Complaint was untimely filed. (ECF No. 6 at 1; ECF No. 7 at 12-13). The Memorandum of Law further asserts that, because the untimeliness is apparent from the face of the Complaint, it is appropriate to raise such a defense in a Rule 12(b)(6) motion. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (noting that a Rule 12(b)(6) challenge cannot reach the merits of an affirmative defense, except in "relatively rare circumstances where facts sufficient to rule on an affirmative defense

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[5] In section D, *infra*, the undersigned has recommended that the plaintiff's Motion to Reopen and Consoldiate [sic] Related Cases (ECF No. 10), which the undersigned has construed as a Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure, be denied.

are alleged in the complaint. . . ."). (ECF No. 7 at 12). Noting that the new Complaint specifically alleges that "Plaintiff's claim accrued on or about January 29, 2014," (ECF No. 2 at 7), the defendants contend that the "Complaint is specific enough to allow Defendants to use the above-described exception" and that "the statute of limitations issue is ripe for adjudication." (*Id.*)

There is no specified statute of limitations set forth under Title IX or section 1983. However, it is well-established that civil rights cases filed in federal court follow the analogous state limitation. *Blanck v. McKeen*, 707 F.2d 817 (4th Cir. 1983). West Virginia has a two-year statute of limitations for cases similar to § 1983 cases and other personal injuries. W. Va. Code § 55-2-12(b); *see McCausland v. Mason County Bd. of Educ.*, 649 F.2d 278 (4th Cir. 1981); *Rodgers v. Corporation of Harpers Ferry*, 371 S.E.2d 358 (W. Va. 1988). Thus, a two-year statute of limitations applies to the plaintiff's proposed federal claims. Moreover, West Virginia law provides a one-year statute of limitations on defamation claims. W. Va. Code § 55-2-12(c); *Wilt v. State Auto. Mut. Ins. Co.*, 506 S.E.2d 608, 613 (W. Va. 1998) ("Numerous torts such as libel, defamation, false arrest, false imprisonment and malicious prosecution take the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c)."); *see also Herbert J. Thomas Mem. Hosp. Ass'n v. Nutter*, 795 S.E.2d 530, 545-546 (W. Va. 2016) (finding defamation claim was barred by one-year statute of limitations). Thus, taking as true the plaintiff's allegation that her claims

accrued on or about January 29, 2014, the defendants assert that the statute of limitations had expired for all of the plaintiff's claims asserted in her new Complaint before it was filed on July 22, 2016. (ECF No. 7 at 12-13).

The plaintiff, on the other hand, asserts, without citing any authority in support thereof,[6] that the applicable statutes of limitations were tolled during the pendency of her first civil action. Her response states "Pendency of an action tolls the statute of limitations – a bedrock principle that Defendants ignore." (ECF No. 9 at 15). In further support of her assertion, the plaintiff cites to paragraphs 15-23 of her new Complaint in which she emphasizes her belief that "*THIS COMPLAINT IS NOT TIME-BARRED*" and contends that the "applicable limitations periods were tolled between March 14, 2014 and June 29, 2016" (the time period between when she filed her first Complaint and when the Fourth Circuit issued its mandate affirming the dismissal thereof). (ECF No. 9 at 15; ECF No. 2 at 7). Thus, she maintains that "*Less than THREE MONTHS have elapsed without an action pending on Plaintiff's claims. This Complaint is therefore not time-barred.*" (*Id.*) The undersigned is unaware of any legal

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[6] In a footnote in her Response, the plaintiff does cite to Fed. R. Civ. P. 3, which simply states that a civil action is commenced by filing a complaint with the court. (ECF No. 9 at 4 n.3). However, Rule 3 does not in any way address whether the filing of a Complaint tolls the statute of limitations with respect to claims not raised in an initial Complaint or those that are subsequently dismissed and attempted to be re-asserted in a new civil action.

authority upon which the plaintiff's assertions may be grounded.

The plaintiff further asserts that, even absent her tolling argument, her claims should still be found to be timely using the West Virginia "savings statute," found in W. Va. Code § 55-2-18, which provides as follows:

> (a) For a period of one year from the date of an order dismissing an action or reversing a judgment, a party may refile the action if the initial pleading was timely filed and: (i) the action was involuntarily dismissed for any reason not based upon the merits of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.

W. Va. Code § 55-2-18(a). Because the plaintiff's first Complaint was involuntarily dismissed on the merits and the initial judgment has not been reversed, the undersigned proposes that the presiding District Judge **FIND** that the West Virginia savings statute is inapplicable to the plaintiff's case. The undersigned further proposes that the presiding District Judge **FIND** that all of the plaintiff's claims asserted in her new Complaint are barred by the applicable statutes of limitations.

C. The plaintiff cannot serve as a class representative.

The plaintiff's new Complaint seeks to litigate her due process claim as a class action brought on behalf

of "Marshall graduate students denied a West Virginia teaching credential." (*Id.* at 94-95). On pages 94 and 95 of the Complaint, the plaintiff attempts to set forth the criteria necessary for class certification; however, the undersigned notes that she has not filed a separate motion for class certification. Significantly, the plaintiff's Complaint asserts that "as a representative party, Plaintiff will fairly and adequately protect the interests of the class." (*Id.* at 94, ¶ 289(d)). However, the plaintiff is the sole plaintiff listed in the Complaint and, in light of the fact that her due process claim was previously dismissed with prejudice, the undersigned proposes that the presiding District Judge **FIND** that she cannot serve as a proper class representative.

D. The plaintiff's Motion to Reopen and Consolidate Related Actions.

In conjunction with her Response to the defendants' Motion to Dismiss, the plaintiff filed a Motion to Reopen and Consolidate Related Actions (ECF No. 10), in which she requests that this Court consolidate this second civil action with her closed first civil action, Case No. 2:14-cv-12333, and "reopen the judgment" in the first civil action, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.[7] Rule 60(b), Federal Rules of Civil Procedure, reads, in pertinent part, as follows:

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[7] The undersigned notes that the Rule 60(b) motion has not been docketed in the plaintiff's first civil action, Case No. 2:14-cv-12333, which is closed.

> **(b) Grounds for Relief from a Final Judgment, Order or Proceeding.** On motion and just terms, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A motion under Rule 60(b) is addressed to the sound discretion of the district court. *Central Operating Co. v. Utility Workers of Am.*, 491 F.2d 245, 252 (4th Cir. 1974); *Consol. Masonry & Fireproofing v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967).

The plaintiff's Rule 60(b) motion is brought under subsection (6) which states that relief from judgment may be granted for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The Fourth Circuit has emphasized that a party must demonstrate "extraordinary circumstances" in order to employ Rule 60(b)(6) "as a bypass around routinely available procedures, particularly when his failure to use those procedures

was the product of his strategic litigation choices." *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011) (en banc). More recently, another district court within the Fourth Circuit found that:

> Relief in this 'catch all' category is exceedingly rare, *In Re: Guidant Corp. Implantable Defibrilators Prod. Liab. Litig.*, 496 F.3d 863, 868 (8th Cir. 2007), and rests on a highly fact-intensive balancing of finality and doing justice, *West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015).

Belfor USA Grp., Inc. v. Banks, No. 2:15-CV-01818-DCN, 2017 WL 372060, at *2 (D.S.C. Jan. 26, 2017).

The plaintiff asserts that she made this motion within a "reasonable time" as required by Rule 60(c)(1). However, beyond referencing her Response to the defendants' Motion to Dismiss and "the interests of justice," she offers no further basis for why the District Court should revisit its final judgment and wholly fails to establish any "extraordinary circumstances" to justify reconsideration of the court's final judgment in her first case. Rather, her motion largely focuses on the request for consolidation, asserting that consolidation "would promote judicial efficiency, accuracy and economy." (ECF No. 10 at 2). Nonetheless, in light of the proposed findings that the plaintiff's first complaint was dismissed with prejudice and the new Complaint is barred by res judicata and is untimely, the undersigned proposes that the presiding District Judge **FIND** that there is no valid basis for reconsideration of the first judgment or consolidation of these matters.

RECOMMENDATION

For the reasons stated herein, it is respectfully **RECOMMENDED** that the presiding District Judge **GRANT** the defendants' Motion to Dismiss (ECF No. 6), and dismiss this civil action with prejudice. It is further respectfully **RECOMMENDED** that the presiding District Judge **DENY** the plaintiff's Motion to Reopen and Consolidate Related Actions (ECF No. 10).

The parties are notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable Thomas E. Johnston, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this "Proposed Findings and Recommendation" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendation" to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Copies of such objections shall be served on the opposing parties and Judge Johnston.

The Clerk is directed to file this "Proposed Findings and Recommendation" and to mail a copy of the same to the plaintiff and to transmit a copy to counsel of record.

June 28, 2017

/s/ Dwane L. Tinsley
Dwane L. Tinsley
United States
Magistrate Judge

FILED: October 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2243 (L)
(2:16-cv-06589)

LISA MARIE KERR

Plaintiff - Appellant

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS; GENE BRET KUHN; JUDITH SOUTHARD; SANDRA BAILEY; TERESA EAGLE; LISA HEATON; DAVID PITTENGER

Defendants - Appellees

No. 18-1195
(2:14-cv-12333)

LISA MARIE KERR

Plaintiff - Appellant

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS; GENE BRET KUHN; JUDITH SOUTHARD; SANDRA BAILEY; TERESA EAGLE; LISA HEATON, and; DAVID PITTENGER

Defendants - Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Duncan, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk