APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals Tenth Circuit
June 27, 2022
Christopher M. Wolpert
Clerk of Court

LINDSAY O'BRIEN QUARRIE,
Plaintiff - Appellant,

v.

STEPHEN WELLS, in his individual capacity; KEVIN WEDEWARD, in his individual and official capacity; DANIEL LOPEZ, in his individual capacity; WARREN OSTERGREN, in his individual capacity; SAUCEDO CHAVEZ P.C.; CHRISTOPHER T. SAUCEDO, in his individual and official capacity; BOARD OF REGENTS OF THE NEW MEXICO INSTITUTE OF MINING AND TECHNOLOGY; LORIE LIEBROCK, in her individual capacity; DR. ALY EL-OSERY, in his official capacity,
Defendants - Appellees.

No. 21-2090
(D.C. No. 2:17-CV-00350-MV-GBW) (D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **ROSSMAN**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Lindsay O'Brien Quarrie, pro se,[1] appeals two district court orders dismissing some of his claims under Fed. R. Civ. P. 12(b)(6) and granting summary judgment on his remaining claims to defendants under Fed. R. Civ. P. 56 against the New Mexico Institute of Mining and Technology (NMT) and various individuals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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[1] Because Quarrie proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

BACKGROUND[2]

Quarrie, an African-American, was a student and doctoral candidate at NMT from 2009–2012. In April 2012, NMT terminated him from its PhD program. Quarrie sued NMT in 2013 alleging this termination was racially discriminatory in violation of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d. The district court ultimately dismissed Quarrie's lawsuit, and this court affirmed that dismissal. *See Quarrie v. N.M. Inst. of Mining & Tech.*, 621 F. App'x 928, 934 (10th Cir. 2015).

After this court's affirmance, to resolve any remaining disagreements and end any further appeals or other litigation, the parties entered into a written settlement agreement. Under that agreement, NMT paid Quarrie $6,000. Quarrie agreed that he would "not re-apply for enrollment at [NMT] now or in the future," and that he would " not represent that he graduated from, or received a diploma from, [NMT]." R. vol. 4 at 388. NMT agreed to "permanently remove the words 'TERMINATED FROM GRADUATE PROGRAM' (or any similar language) from [Quarrie's NMT] transcript . . . ." *Id.* NMT further agreed that "no such language shall

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[2] The facts set forth here come either from Quarrie's second amended complaint, the well-pleaded allegations of which we take as true when analyzing a motion to dismiss, *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019), and from the parties' undisputed statements of material facts in their briefing on the motions for summary judgment, see R. vol. 4 at 528–32.

ever be added to [Quarrie's] . . . transcript . . . at any future time." *Id.*

Four days after the parties signed the agreement, Quarrie discovered NMT had added a notation to his transcript which read: "no degree earned." He sent a letter to NMT stating that, in his view, this notation violated the settlement agreement. NMT's counsel responded that the language did not violate the agreement because it did not indicate Quarrie was terminated from his graduate program, merely that he did not receive a degree. Quarrie and NMT's counsel continued to exchange letters regarding the validity of the settlement agreement through late 2015 and 2016. Throughout this exchange, NMT consistently communicated its position that the agreement remained in effect. In June 2016, Quarrie wrote that he had discovered a copy of the letter terminating him from the PhD program in his academic record, and that he believed this constituted an additional reason the agreement was null and void. NMT's counsel responded that it "disagree[d] with [Quarrie's] assertion that the [s]ettlement [a]greement is void" and still "consider[ed] the [s]ettlement [a]greement to be fully enforceable and valid." R. vol. 4 at 450.

In August 2016, Quarrie wrote NMT reiterating his position that the settlement agreement was null and void and stating that "upon [his] official reinstatement in the PhD program in Materials Engineering at NMT and the award of [his] earned doctorate degree, [he] intend[ed] to return the full $6,000 . . . that [he] received as part of the

[s]ettlement [a]greement." *Id.* at 456. He proposed a repayment plan of $500 per month upon his reinstatement. In October 2016, he sent two checks for $100 each to NMT and the State of New Mexico Risk Management Division. In December 2016, he reapplied for admission to the PhD program, paying a $45 application fee. NMT took no action on Quarrie's application and returned the two $100 checks to him in January 2017. In March 2017, Quarrie sent two checks totaling $6,000 to NMT and the State of New Mexico Risk Management Division. NMT, through counsel, returned both checks, stating again it "consider[ed] the [s]ettlement [a]greement to be binding on the contracting parties." R. vol. 4 at 472.

Quarrie sued, alleging the failure to act on his December 2016 application for admission was racially discriminatory and violated his constitutional rights. Defendants included NMT, several individuals who worked at NMT, and NMT's attorney. Quarrie's second amended complaint included five claims for relief. Counts 1, 2, and 4 asserted constitutional claims for libel, slander, and deprivation of property without due process; count 3 asserted a violation of Title VI; and count 5 requested a permanent injunction based on the violations in claims 1 through 4.

The defendants moved to dismiss claims 1, 2, 4, and 5 under Fed. R. Civ. P. 12(b)(6). Adopting the proposed findings and recommended disposition of a magistrate judge, the court granted the motion to dismiss as to those claims, denying it only as to the request in count 5 for an injunction related to the

allegations described in count 3, which was not subject to the motion to dismiss. The court concluded counts 1, 2, and 4 failed because they did not meet the requirements of the "stigma-plus" rule in *Paul v. Davis*, 424 U.S. 693, 712 (1976).

NMT then moved for summary judgment on the remaining claims. Following another recommendation of a magistrate judge, the court granted the motion. The court concluded NMT had a legitimate, nondiscriminatory reason for taking no action on Quarrie's application—the settlement agreement—and Quarrie did not present evidence sufficient to establish this stated reason was pretextual.

Quarrie now appeals, challenging both dismissals.

DISCUSSION

1. *Dismissal of constitutional claims*

"We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (italics, citation, and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To state a 42 U.S.C. § 1983 claim under the Fourteenth Amendment, a claim of damage to a plaintiff's reputation, standing alone, is insufficient because "any harm or injury to that interest, even where . . . inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of . . . status as theretofore recognized under the State's laws." *Paul*, 424 U.S. at 712. Thus, "[f]or a plaintiff to prevail on a claim that the government has violated the Due Process Clause by damaging [his] reputation, that plaintiff must satisfy the 'stigma-plus' standard. That standard requires the plaintiff to demonstrate both (1) governmental defamation and (2) an alteration in legal status." *Martin Marietta Materials, Inc. v. Kan. Dep't of Transp.*, 810 F.3d 1161, 1184 (10th Cir. 2016) (internal quotation marks omitted).

Quarrie argues he met the "stigma-plus" rule because he alleged NMT deprived him of property without due process by accepting his $45 application fee and taking no action on his application. Initially, we note this argument relates to his fourth claim for relief, "malicious and conspiratorial deprivation of financial property right," R. vol. 2 at 48 (boldface and capitalization omitted), but it does not save his first or second claims for defamation by slander and libel, *see id.* at 45–47. Because Quarrie does not address the district court's dismissal of either of these claims in his opening brief, he has waived any arguments related to those claims, and we do not consider them

further. *See Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 737 (10th Cir. 2015).

In any event, considered in connection with Quarrie's fourth claim, we agree with the district court that, while the New Mexico Constitution recognizes persons' "inherent and unalienable rights," including "possessing and protecting property," N.M. Const. Art. II § 4, Quarrie failed to point to any case law or other authority showing this right encompasses the right to receive a response to a graduate school application after paying an application fee. The court therefore correctly dismissed each of Quarrie's due process claims.

2. Grant of summary judgment on Title VI claim

We review the grant of summary judgment de novo. *May v. Segovia*, 929 F.3d 1223, 1234 (10th Cir. 2019). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (internal quotation marks omitted).

Title VI provides: "No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The statute "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). "The two elements for establishing a cause of action pursuant to Title VI are (1) that there is racial . . . discrimination and (2) the entity engaging in discrimination is receiving federal financial assistance." *Baker v. Bd. of Regents*, 991 F.2d 628, 631 (10th Cir. 1993). The parties agreed NMT receives federal financial assistance, so only the first element is at issue.

In claims like Quarrie's involving rejection from an educational institution, we analyze whether there was racial discrimination using the same burden-shifting framework the Supreme Court has established for Title VII employment cases. *See Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 929–30 (10th Cir. 2003). Under this framework,

> [f]irst, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the [inaction on the enrollment application]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (internal citations and quotation marks omitted).[3] "A plaintiff shows pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [decisionmaker's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the [decisionmaker] did not act for the asserted nondiscriminatory reasons." *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1167 (10th Cir. 2007) (internal quotation marks omitted).

The district court concluded that NMT had a legitimate, non-discriminatory reason for taking no action on Quarrie's December 2016 application—namely, his 2015 agreement not to reapply for admission to NMT—and that Quarrie did not present sufficient evidence establishing this reason was pretextual. Quarrie attacks this conclusion on two grounds: he argues first that he rescinded the settlement agreement and second that the district court overlooked evidence of NMT's mendacity when considering whether its stated reliance on the settlement agreement was pretextual.

Regarding his first attack on the district court's conclusion that NMT's reliance on the settlement agreement was not pretextual, Quarrie argues he

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[3] The magistrate judge and district court analyzed Quarrie's claims by reference to *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Since both *McDonnell-Douglas* and *Burdine* use the same framework, *see Burdine*, 450 U.S. at 252–53 (citing *McDonnell-Douglas*, 411 U.S. at 802, 804), the difference is superficial.

had a legal right to unilaterally rescind the settlement agreement because NMT materially breached it by adding "no degree earned" to his academic transcript. He further argues he exercised that right by declaring the agreement invalid and offering to return the $6,000 he received under it. Invoking "the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally," *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (internal quotation marks omitted), he argues the district court erred in considering whether NMT believed the settlement agreement was valid rather than analyzing objectively whether he succeeded in unilaterally rescinding it.

But we have previously rejected Quarrie's proposed approach in cases involving similar contractual provisions barring reapplication. *See Jencks v. Mod. Woodmen of Am.*, 479 F.3d 1261, 1268 (10th Cir. 2007) (concluding employer's reliance on the terms of a settlement agreement in refusal to rehire employee was "one way to reasonably read the contractual terms," and therefore not pretextual); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("This is not an action for breach of the settlement agreement or to enforce the agreement Therefore, we need not determine whether the [defendant's] interpretation of the agreement was correct."). NMT consistently maintained the settlement agreement was valid and repeatedly communicated its disagreement with Quarrie's assertions to the contrary. This belief constitutes a

nondiscriminatory reason for its refusal to act on Quarrie's 2017 application.

And Quarrie offers no basis to conclude NMT's belief in the continued validity of the settlement agreement was so weak, implausible, inconsistent, incoherent, or contradictory so as to indicate it did not act for that asserted reason. *See Swackhammer*, 493 F.3d at 1167. The settlement agreement did not prohibit the "no degree earned" language, which is consistent with Quarrie's agreement that he would not represent he graduated or received a diploma from NMT. While the settlement agreement did proscribe the phrase "'TERMINATED FROM GRADUATE PROGRAM' (or any similar language)," R. vol. 2 at 70, as the magistrate judge stated in his report and recommendation, the phrases are materially distinct: "'Termination' is by its nature involuntary and misconduct might reasonably be inferred from its use. The phrase 'No Degree Earned' simply states a fact which could have come about by any number of reasons such as a financial inability to continue with an educational program." R. vol. 4 at 544.[4] Quarrie likewise argues he had grounds to rescind the settlement agreement based on "material misrepresentation, fraudulent inducement, . . . and

[4] Quarrie did not object to this conclusion in the magistrate judge's report and recommendation, and the firm waiver rule bars him from challenging it now. *See Vega v. Suthers*, 195 F.3d 573, 579 (10th Cir. 1999) ("[A] litigant's failure to file timely objections to a magistrate's [report and recommendation] waives appellate review of both factual and legal determinations.").

violation of public policy." Aplt. Opening Br. at 9. But he does not show how any of these theories would have been so clearly apparent to NMT as to indicate its belief in the validity of the settlement agreement was a pretextual basis not to act on his 2017 application.

In his second attack on the district court's conclusion that NMT's reliance on the settlement agreement was not pretextual, Quarrie argues the district court improperly ignored several examples of NMT's mendacity. Such evidence may support a finding of pretext, but it must call into doubt the defendant's stated reason for its decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."). The examples of mendacity Quarrie points to include statements NMT made regarding when it added the phrase "no degree earned" to his transcript, when it became aware of some of his attempts to rescind the settlement agreement, and whether the parties reached the settlement agreement during a mediation. *See generally* Aplt. Opening Br. at 41–43. He also points to statements NMT made prior to the settlement agreement relating to the circumstances of his termination from the PhD program and its conduct during the litigation of this case. *See id.* at 43–44.

But none of these examples cast doubt on NMT's belief that the settlement agreement precluded

Quarrie from applying to its graduate engineering program. Since the settlement agreement was executed, NMT consistently maintained that it was valid and enforceable. Because reliance on the settlement agreement was an unrebutted legitimate, nondiscriminatory reason for NMT's decision, the district court correctly granted summary judgment on Quarrie's Title VI claims.

CONCLUSION

We affirm the judgment of the district court.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LINDSAY O'BRIEN QUARRIE,

Plaintiff,

v. Civ. No. 17-350 MV/GBW

STEPHEN WELLS, et al.,

Defendants. [Filed July 7, 2021]

FINAL JUDGMENT

Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, and consistent with the Memorandum Opinion and Order filed contemporaneously herewith overruling Plaintiff's Objections and Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, the Court issues its separate judgment finally disposing of this civil case.

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's Third Amended Complaint [Doc. 150] and all of its claims are **DISMISSED with prejudice.**

/s/ Martha Vázquez
Honorable Martha Vázquez
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LINDSAY O'BRIEN QUARRIE,

Plaintiff,

[Filed July 7, 2021]

v.

STEPHEN WELLS, et al.,

Defendants.

Civ. No. 17-350 MV/GBW

ORDER OVERRULING PLAINTIFF'S OBJECTIONS AND ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Plaintiff's Objections (Doc. 447) to Magistrate Judge Wormuth's Proposed Findings and Recommended Disposition ("PFRD") (Doc. 445), recommending that the Court grant summary judgment to Defendants on all claims and dismiss Plaintiff's case with prejudice. Having conducted an independent, *de novo* review of this matter, the Court overrules Plaintiff's objections and adopts the PFRD.

BACKGROUND

Plaintiff brings this suit pursuant to Title VI of the Civil Rights of Act of 1964, 42 U.S.C. § 2000d *et seq.*, and *Ex parte Young*, 209 U.S. 123 (1908), alleging intentional racial discrimination against him, an African-American man, by a recipient of federal financial assistance. Doc. 150 at ¶¶ 82–100. In his Third Amended Complaint (the operative complaint in this matter), Plaintiff alleges that Defendant New Mexico Institute of Mining and Technology ("NMT") engaged in racial discrimination by refusing to readmit Plaintiff to its PhD program in materials engineering. *Id.* at ¶¶ 82–96. Plaintiff also seeks an injunction against Defendants Wells and El-Osery in their official capacities as NMT's President and Dean of Graduate Studies, respectively, requiring them to readmit Plaintiff to the PhD program. *Id.* at ¶¶ 97–100; Doc. 196 at 2.

Plaintiff was enrolled in this program from 2009 until his termination in 2012. UMF 1–2.[1] In 2013, Plaintiff filed suit against NMT alleging racial discrimination in his termination. UMF 3. On October 8, 2015, the parties executed a settlement agreement and mutual release (hereinafter, "Settlement Agreement") of all claims relating to Plaintiff's 2013 lawsuit. UMF 4. The Settlement Agreement contains two provisions pertinent to the parties' dispute. First, it provides:

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[1] Plaintiff has raised no objections to the Undisputed Facts contained in the Magistrate Judge's PFRD. *See generally* Doc. 447. The Court hereby adopts the Undisputed Facts as its own. Citations to "UMF " refer to the respective undisputed material fact(s) in the PFRD. *See* Doc. 445 at 4–8.

> The Parties agree that the Office of Registrar of [NMT] will permanently remove the words "TERMINATED FROM GRADUATE PROGRAM" (or any similar language) from Plaintiff's [NMT] transcript, as well as from any other related documents in Plaintiff's academic and/or administrative files at [NMT], within five (5) business days from the execution of this Settlement Agreement. The Parties further agree that no such language shall ever be added to Plaintiff's [NMT] transcript (or to any other related documents in Plaintiff's academic and/or administrative files at [NMT]) at any future time by Defendants. Plaintiff agrees that he will not represent that he graduated from, or received a diploma from, [NMT].

UMF 6. Second, it bars Plaintiff from applying for readmission to NMT: "Plaintiff agrees that he will not re-apply for enrollment at [NMT] now or in the future." UMF 5.

For more than a year after the Settlement Agreement was executed, Plaintiff sent multiple letters and emails to representatives of NMT asserting that NMT had breached the Settlement Agreement in various ways. UMF 7–15. Each time, representatives of NMT responded by stating NMT's position that the Settlement Agreement was valid and enforceable. *Id.* On two separate occasions, Plaintiff attempted to return (either in part or in full) the $6,000 he had received under the Settlement Agreement. UMF 16, 20. Each time, Defendants returned the checks to Plaintiff, informing him that

they considered the Settlement Agreement binding. UMF 19, 21. On December 2, 2016, Plaintiff applied for readmission to NMT's PhD program in materials engineering. UMF 17. Defendant NMT states that it "took no action whatsoever" on Plaintiff's application due to the "No Future Application" provision of the Settlement Agreement. UMF 18.

Defendants' Motion for Summary Judgment was filed on November 16, 2020, and fully briefed on January 15, 2021. Docs. 410, 419, 434, 435. On January 29, 2021, Plaintiff sought leave to file a surreply, asserting that Defendants' reply had raised new factual and legal arguments. Doc. 440. Plaintiff's motion was fully briefed on February 26, 2021. Docs. 442, 443, 444. The Magistrate Judge filed his PFRD on March 23, 2021, recommending that this Court grant Defendants' Motion for Summary Judgment and deny Plaintiff's Motion for Leave to File a Surreply. Doc. 445. Plaintiff timely filed his objections on April 6, 2021, to which Defendants filed a response on April 20, 2021. Docs. 447, 451.

STANDARD OF REVIEW

This case was referred to the Magistrate Judge to conduct hearings and perform legal analysis pursuant to 28 U.S.C. § 636(b)(1)(B). *See doc. 85.* Under that referral provision, the Court's review of a magistrate judge's PFRD is *de novo*. *See* 28 U.S.C. § 636(b)(1)(C). When resolving objections to a magistrate judge's PFRD, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The

district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Moreover, "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001).

In adopting the Magistrate Judge's PFRD, the district court need not "make any specific findings; the district court must merely conduct a *de novo* review of the record." *Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000). "[T]he district court is presumed to know that de novo review is required. Consequently, a brief order expressly stating the court conducted de novo review is sufficient." *Northington v. Marin*, 102 F.3d 1564, 1570 (10th Cir. 1996) (citing *In re Griego*, 64 F.3d 580, 583–84 (10th Cir. 1995)). "[E]xpress references to de novo review in its order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise." *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cty.*, 8 F.3d 722, 724 (10th Cir. 1993). A "terse" order containing one sentence for each of the party's "substantive claims," which did "not mention

his procedural challenges to the jurisdiction of the magistrate to hear the motion," was held sufficient. *Garcia*, 232 F.3d at 766. The Supreme Court has explained that "in providing for a 'de novo determination' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (quoting 28 U.S.C. § 636(b)) (citing *Mathews v. Weber*, 423 U.S. 261, 275 (1976)).

ANALYSIS

In recommending summary judgment on Plaintiff's Title IV claim, the Magistrate Judge applied the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, "the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination." *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cty.*, 334 F.3d 928, 930 (10th Cir. 2003) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981)). If the plaintiff succeeds in proving a prima facie case, then "the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason" for its adverse decision against the plaintiff. *Id.* If the defendant carries its burden, then the burden returns to plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for

discrimination." *Id.* A plaintiff can show pretext by demonstrating "either that a discriminatory reason more likely motivated the [defendant] or that the [defendant's] proffered explanation is unworthy of credence." *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1218 (10th Cir. 2003). Evidence of pretext may take a variety of forms, including direct evidence that the defendant's proffered reason was false or evidence that the plaintiff was treated differently from similarly situated persons. *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1167–68 (10th Cir. 2007).

Applying the *McDonnell Douglas* framework, the Magistrate Judge first set forth the requisite elements of a prima facie case: "(i) Plaintiff belongs to a protected class; (ii) he applied and was qualified for admission to an educational program with Defendant NMT; (iii) he was rejected; and (iv) applicants outside of Plaintiff's protected class were accepted for admission." Doc. 445 at 9. After rejecting Defendants' only argument for granting summary judgment on Plaintiff's prima facie case, *id.* at 10–12, the Magistrate Judge turned to Defendants' nondiscriminatory reason for rejecting Plaintiff's application for readmission: the parties' Settlement Agreement barred Plaintiff from applying for readmission to NMT. *See generally* Doc. 410. Plaintiff did not dispute that this reason is legitimate and nondiscriminatory but presented multiple arguments for finding it pretextual. *See generally* Doc. 419. The Magistrate Judge rejected Plaintiff's arguments and therefore recommended that this Court grant

summary judgment to Defendants and dismiss Plaintiff's complaint. Doc. 445 at 12–24.

I. The Statistical Evidence Presented by Plaintiff Is Insufficient to Establish Pretext.

Plaintiff first objects to the Magistrate Judge's finding that Plaintiff failed to adduce sufficient statistical evidence to support a finding of pretext. Plaintiff provided evidence that (1) NMT has not awarded a PhD in materials engineering to an African-American student in thirty years; and (2) NMT has no African-American professors in the materials engineering department. Doc. 419 at 20. The Magistrate Judge rejected this evidence, noting that statistics must be provided for a *comparative* population, broadly meaning applicants to NMT's materials engineering PhD program. Doc. 445 at 21. The Magistrate Judge identified the more specific comparative population as applicants "who had previously sued the school (and/or its officials) and subsequently settled with an agreement not to reapply" or otherwise had some "negative or litigative history with the school." *Id.* at 22 & n.2.

Plaintiff objects that the standard set by the Magistrate Judge is "impossible and unnecessary." Doc. 447 at 6. As to impossibility, Plaintiff points to evidence that no students were admitted into NMT's materials engineering program in 2016 (the year that Plaintiff reapplied). *Id.* If probative statistical evidence is not available to establish pretext (because, for example, the sample size is too small), Plaintiff must find another way. *See Mayor of*

Philadelphia v. Educ. Equality League, 415 U.S. 605, 620–21 (1974). The Court need not accept insufficient evidence simply because that is all Plaintiff can provide. *Id.* In any event, the Magistrate Judge did not insist on limiting statistical evidence to the year Plaintiff reapplied. *See* Doc. 445 at 22 ("Plaintiff provides no evidence regarding the composition of the applicant pool in 2016 (the year he applied) *or any other year*.") (emphasis added).

As to the lack of necessity, Plaintiff argues that hinging the statistical analysis on whether an individual had previously sued the school runs afoul of Title VI's anti-retaliation provision. Doc. 447 at 6. Plaintiff fails to grasp the role that a litigative history plays in this particular inquiry. To establish pretext by statistical evidence, such evidence "must focus on eliminating nondiscriminatory explanations for the disparate treatment" Plaintiff receives. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1115 (10th Cir. 2007) (internal quotation marks and citation omitted). Here, the nondiscriminatory explanation for Plaintiff's treatment is that he was subject to a settlement agreement barring his reapplication. Any comparative analysis must provide a basis to eliminate this reason for Defendants' rejection of his reapplication. If Plaintiff could show that other applicants had entered into similar settlement agreements (or at least had a similar litigative history) but received *more favorable* treatment than he did, such evidence would support an inference that the Settlement Agreement was not the true reason for Defendants' refusal to consider Plaintiff's reapplication. Absent such evidence,

Defendants' proffered reason for rejecting his reapplication is unrebutted.

Next, Plaintiff asserts that he did not provide additional statistical evidence because Defendants did not compare his application to other students, "thereby rendering Plaintiff's alleged comparator students moot." Doc. 447 at 6. Plaintiff supplies additional evidence that he asks this Court to consider pursuant to 28 U.S.C. § 636(b)(1)(C). *Id.*; *see* Doc. 448. In its discretion, the Court has reviewed the new evidence and finds that it still fails to show "either that a discriminatory reason more likely motivated [Defendants] or that [Defendants'] proffered explanation is unworthy of credence." *Stinnett*, 337 F.3d at 1218. To be probative, statistical evidence "should be closely related to the issues in the case." *Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981). The issues in this case are, briefly, Defendants' rejection of Plaintiff's reapplication and the existence of a Settlement Agreement barring his reapplication. Plaintiff's evidence does not undermine Defendants' reliance on the Settlement Agreement, because he provides no evidence for applicants with a similar litigative history. Nor does his evidence support an inference that discrimination was a more likely explanation for Defendants' rejection of his application. Instead, his evidence indicates that *no* African-American candidates other than Plaintiff sought admission to NMT's materials engineering PhD program. Doc. 448 at 7 ("As far as the American Black students are concerned, never applied, none of them."); *id.* at 10 ("African-American students have not applied, and I

told you last time in my personal deposition."); *id.* at 12 ("I consider the problem that we have few African-Americans at New Mexico Tech in general. However, that also is directly related to the number of applications."). It follows that no African-American candidates other than Plaintiff were rejected. Thus, the Court cannot infer from Plaintiff's proffered evidence that Defendants' rejection of his application was part of a discriminatory pattern.

Plaintiff concludes his discussion of statistical evidence by stating that he "has established a prima facie case of racial discrimination." Doc. 447 at 7. Whether Plaintiff has proved a prima facie case is only the first question under the *McDonnell Douglas* framework, and the Magistrate Judge made no finding against Plaintiff on his prima facie case. *See* Doc. 445 at 9–12. At the pretext inquiry, "the presumption of discrimination created by the plaintiff's prima facie case 'simply drops out of the picture.'" *Swackhammer*, 493 F.3d at 1167 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). At this stage, the burden on Plaintiff is considerably higher and, where statistical evidence is invoked, must be targeted at eliminating the nondiscriminatory reason for Defendants' adverse decision. Plaintiff has failed to carry this burden.

II. In Order to Rebut Defendants' Reliance on the Settlement Agreement, Plaintiff Had to Show that Defendants Did Not Honestly Believe It Was Enforceable.

Plaintiff objects that the Magistrate Judge failed to apply "controlling" state contract law to the present case. Doc. 447 at 7. The Magistrate Judge thoroughly explained his reason for not analyzing the parties' dispute through the lens of state contract law. *See* Doc. 445 at 13–19. Specifically, the Magistrate Judge reviewed several cases in which a no-reapplication provision of a settlement agreement was alleged as pretext for impermissible discrimination and/or retaliation. *Id.* at 14–18. This review included two precedential Tenth Circuit cases: *Kendall v. Watkins*, 998 F.2d 848, 850–52 (10th Cir. 1993), and *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1266–68 (10th Cir. 2007). Based on these cases, plus several extra-circuit cases, the Magistrate Judge concluded that the critical question for purposes of the pretext inquiry is whether the defendant honestly believed its position as to the enforceability of a no-reapplication provision of a settlement agreement. Doc. 445 at 18.

For example, in *Kendall*, the settlement agreement provided that the defendant would "have no further obligation" to the plaintiff, which the defendant construed to mean that it could refuse to consider any future applications by the plaintiff. 998 F.2d at 850. The Tenth Circuit declined to resolve the parties' contractual dispute because, even if the defendant's interpretation of the settlement agreement was "wrong or unreasonable," the plaintiff had failed to rebut the defendant's reliance on it. *Id.* at 851–52. Likewise, the Magistrate Judge declined to resolve the parties' dispute about rescission because, even if Plaintiff did successfully rescind the

Settlement Agreement, he must still establish that Defendants did not honestly believe it was still in force. Doc. 445 at 19.

Plaintiff makes no objections to the Magistrate Judge's analysis of this case law, except to say that it is not "on point" because none of the cases involved rescission. *See* Doc. 447 at 2. In fact, one of the cases cited by the Magistrate Judge did involve rescission, although the plaintiff in that case claimed that it was the defendant that had elected to rescind. *See* Doc. 445 at 18 (discussing *Kersey v. Wash. Metro. Area Transit Auth.*, 586 F.3d 13 (D.C. Cir. 2009)). Plaintiff does not articulate any reason why the absence of case law with more closely analogous facts rendered the Magistrate Judge's analysis defective. Upon *de novo* review, the Court agrees with the Magistrate Judge that the precedent cited by him controls this case. In line with that precedent, the critical question is whether Defendants honestly believed that the Settlement Agreement was enforceable.

III. Plaintiff's Asserted Grounds for Invalidating the Settlement Agreement Are Not Sufficiently Convincing to Undermine Defendants' Reliance on It.

Two findings underlie the Magistrate Judge's conclusion that Defendants honestly believed that the Settlement Agreement provided a basis to reject Plaintiff's reapplication: (1) Defendants "consistently treated the Settlement Agreement as enforceable," and (2) "none of Plaintiff's theories for the invalidity

or avoidance of the Settlement Agreement are so overwhelmingly convincing that Defendants' belief that it was enforceable strains credulity." Doc. 445 at 19–20. Plaintiff's central theory to defeat Defendants' reliance on the Settlement Agreement is that he effectively rescinded the Settlement Agreement by offering to return the $6,000 that he received under it. Doc. 419 at 23. Accordingly, Plaintiff contends that Defendants could not have honestly believed that the Settlement Agreement was enforceable because they were aware of all the facts supporting his rescission. Doc. 447 at 7.

Rescission of a contract is permitted on the basis of certain, specified grounds. *Famiglietta v. Ivie-Miller Enters, Inc.*, 966 P.2d 777, 781 (N.M. Ct. App. 1998) (rescission on grounds of material breach); *Prudential Ins. Co. of Am. v. Anaya*, 428 P.2d 640, 643 (N.M. 1967) (rescission on grounds of misrepresentation of a material fact); *Putney v. Schmidt*, 120 P. 720, 723 (N.M. 1911) (rescission on grounds of fraud). The parties spend more time and energy arguing about the correct *procedure* for rescinding a contract than whether Plaintiff had *grounds* to rescind. As to the grounds, the Magistrate Judge noted that Plaintiff advanced only one theory for the invalidity of the Settlement Agreement, despite alleging several theories in his operative complaint. Doc. 445 at 20; *see also id.* at 2–3. Plaintiff's objections, too, present arguments and authority for only this theory, which centers around NMT's addition of the phrase "No Degree Earned" to Plaintiff's transcript after the parties executed the Settlement Agreement. Plaintiff presents three

separate arguments for why this phrase rendered the Settlement Agreement invalid.

First, Plaintiff contends that the phrase "No Degree Earned" is false and defamatory because he fulfilled NMT's requirements for (and thus "earned") both a Master's and a PhD in materials engineering.[2] Doc. 447 at 18. The relevance of this alleged defamation is not obvious, especially as this Court has rejected multiple attempts by Plaintiff to include a defamation claim in this case. *See* Doc. 90 at 5–9; Doc 129 at 10–11. Plaintiff's argument appears to be that defamation voids a contract. Plaintiff cites no legal authority for such a proposition. Instead, Plaintiff asserts that "[j]ust because a given contract does not state every conceivable thing that cannot be done does not mean that it licenses any unstated thing to be done." Doc. 447 at 18. Plaintiff argues that a contrary position would permit Defendants to add "any language whatsoever [to Plaintiff's transcript] no matter how derogatory or defamatory," such as a racial slur. *Id.* The addition of a racial slur to Plaintiff's transcript would certainly provide relevant evidence here, but not because it would violate the Settlement Agreement. Rather, the presence of racial slurs on an official record could support an inference that Defendants were

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[2] Plaintiff does not explain what makes this phrase defamatory beyond its alleged falsity. *See, e.g.,* Doc. 447 at 8 ("Plaintiff earned two degrees while at NMT and . . . therefore the addition of the language 'No Degree Earned' . . . was indeed defamatory."). To be defamatory, a statement must harm one's reputation. *Defamation*, Black's Law Dictionary (11th ed. 2019). Falsity is a necessary but not sufficient requirement. *See id.*

motivated by discriminatory animus—which is, after all, the real subject of this case. *See, e.g.*, *Guyton v. Ottawa Truck Div., Kalmar Indus. U.S.A., Inc.*, 15 F. App'x 571, 581 (10th Cir. 2001) (unpublished) (holding that language showing racial animus "may be significant evidence of pretext") (quoting *Jones v. Bessemer Carraway Med. Ctr.*, 151 F.3d 1321, 1323 n.11 (11th Cir. 1998)). The fact that the addition of *certain* language to Plaintiff's transcript might support his case does not mean that the addition of *any* language that Plaintiff finds objectionable constitutes equally compelling evidence.

Plaintiff also argues that the addition of the phrase "No Degree Earned" to his transcript "violated both the letter and spirit of the Settlement Agreement and defeated the essential purpose and inducing feature of the contract." Doc. 447 at 18. Therefore, Plaintiff concludes, it was a material breach that gave Plaintiff a right to rescind the contract. *Id.* The Magistrate Judge discussed and rejected the argument that "No Degree Earned" violated the Settlement Agreement. Doc. 445 at 20. The Magistrate Judge found that nothing in the Settlement Agreement expressly prohibited the language "No Degree Earned" and that such language was not clearly included within the prohibition on language similar to "Terminated from the Graduate Program." *Id.* The Magistrate Judge also noted the different connotations of each phrase, with "Terminated" implying misconduct while "No Degree Earned" is more neutral. *Id.* Plaintiff

articulates no objection to these findings.[3] The Court agrees with the Magistrate Judge that there is no basis to find that the addition of the phrase "No Degree Earned" constituted a material breach of the Settlement Agreement.

Plaintiff's final argument is that the addition of "No Degree Earned" after the parties executed the Settlement Agreement constituted misrepresentation. Doc. 447 at 18–19. Plaintiff contends that Defendants' failure to disclose that this phrase would be added to his transcript was a material omission that induced him to enter the Settlement Agreement. *Id.* Plaintiff cites cases involving both fraudulent and negligent misrepresentation. *See id.* at 12 (citing *Robison v. Katz*, 610 P.2d 201, 206 (N.M. Ct. App. 1980), and *Maxey v. Quintana*, 499 P.2d 356, 359 (N.M. Ct. App. 1972)). Misrepresentation of a material fact provides a basis to rescind a contract, regardless of whether the misrepresentation is fraudulent or negligent. *Maxey*, 499 P.2d at 359; *Anaya*, 428 P.2d at 643. A fact is material if it operates as an inducement to enter the contract. *Modisette v. Found. Reserve Ins. Co.*, 427 P.2d 21, 26 (N.M. 1967). Viewing the facts in the light most favorable to Plaintiff, the Court will assume that the addition of the phrase "No Degree Earned" was material to Plaintiff based on his avowal that he was induced into the Settlement Agreement by an expectation that such language would not be added. *See* Doc. 419-

[3] Plaintiff irrelevantly contends that "No Degree Earned" is not standard language on NMT's transcripts. Doc. 447 at 18. Nonstandard language does not equal impermissible language.

4 at ¶ 9. But misrepresentation requires much more than a party's subjective inducement.

A misrepresentation may arise by commission or omission, but a misrepresentation premised on an omission requires that the defendant had a duty to disclose the material fact at issue. *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 766 P.2d 928, 932 (N.M. Ct. App. 1988); *Cobb v. Gammon*, 389 P.3d 1058, 1070 (N.M. Ct. App. 2016). New Mexico follows the Second Restatement of Torts in assessing the duty to disclose. *McElhannon v. Ford*, 73 P.3d 827, 831 (N.M. Ct. App. 2003). A duty to disclose often arises where there is a fiduciary relationship or other relationship of trust between the parties. *Peck*, 766 P.2d at 933; Restatement (Second) of Torts § 551(2)(a). A duty to disclose may also arise where the material fact at issue renders a statement by the defendant misleading or untrue. *See* Restatement (Second) of Torts § 551(2)(b)–(c). In rarer circumstances, a duty to disclose arises where the defendant learns that the plaintiff is acting in reliance upon a false statement that was made without an expectation that the plaintiff would rely on it. *See id.* § 551(2)(d). Finally, a duty to disclose may arise where the defendant knows that the plaintiff is mistaken as to a basic fact of the contract. See id. § 551(2)(e). A "basic" fact is not the same as a "material" fact. *Id.* § 551(2)(e) cmt. j. A material fact "may serve as [an] important and persuasive inducement[] to enter into the transaction," but a basic fact is "is an important part of the substance of what is bargained for" and "assumed by the parties as a basis for the transaction itself." *Id.*

Plaintiff provides no basis to find that Defendants had a duty to disclose their intention to add certain language to his transcript. No fiduciary relationship exists between the parties. *See Branch v. Chamisa Dev. Corp.*, 223 P.3d 942, 951 (N.M. Ct. App. 2009) (characterizing a settlement agreement as an arm's-length transaction creating no fiduciary duty). Plaintiff neither shows nor alleges that Defendants made representations during negotiations that were false or misleading due to their subsequent addition of the phrase "No Degree Earned" to his transcript. *See* Doc. 150 at ¶¶ 47–52; Doc. 419 at 10–11. Plaintiff contends that "Defendants assuredly knew that if they had disclosed their true intentions before executing the Settlement Agreement, Plaintiff would never have signed it." Doc. 447 at 19. Knowledge by Defendants creates a duty to disclose only if Plaintiff's objection to "No Degree Earned" was a basic fact assumed by both parties and at the heart of their bargaining. *See* Restatement (Second) of Torts § 551(2)(e). It is difficult to understand how Plaintiff could possibly prove that his unstated[4] expectation—which he did not bargain for[5] and which he might have guessed would be a subject of

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[4] Plaintiff neither shows nor alleges that he expressed this expectation during the parties' negotiations. *See* Doc. 150 at ¶¶ 47–52; Doc. 419 at 10–11.

[5] Plaintiff's expectation concerning "No Degree Earned" stands in direct contrast to his expectation concerning "Terminated from the Graduate Program," which he specifically bargained to include in the Settlement Agreement. UMF 6.

disagreement[6]—was a basic fact of the Settlement Agreement. But the Court need not draw any firm conclusions on the validity of Plaintiff's theory. For purposes of Plaintiff's claim of racial discrimination, the dispositive point is that this theory is not, in the Magistrate Judge's words, "so overwhelmingly convincing that Defendants' belief that [the Settlement Agreement] was enforceable strains credulity." Doc. 445 at 20.

Having rejected all arguments concerning the phrase "No Degree Earned," the Court turns to Plaintiff's objection that the Magistrate Judge failed to consider Plaintiff's proffered evidence that he had earned two degrees while at NMT. Doc. 447 at 2, 8. Simply put, this evidence is not relevant to any material fact. To reiterate, the subject of this case is racial discrimination—not defamation, not breach of contract, and not NMT's academic standards for conferring a degree. There is no basis for the Court to provide any opinion whatsoever on whether Plaintiff "earned" any degree at NMT.

IV. Plaintiff Has Failed to Rebut Defendants' Honest Belief that the Settlement Agreement Was Enforceable.

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[6] Defendants specifically bargained to prevent Plaintiff from representing that he had "received a diploma" from NMT. *See* UMF 6. While this provision does not clearly encompass Plaintiff's assertion that he "earned" two degrees, it indicates that Plaintiff's asserted completion of any academic program at NMT was a sore point of contention between the parties.

Plaintiff next objects that the Magistrate Judge failed to consider "numerous examples of Defendants' mendacity." Doc. 447 at 2. Evidence that attacks the defendant's honesty *as to its proffered reasons* may support a finding of pretext. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511. The Court emphasizes that the role of mendacity in this inquiry is *accompaniment* to disbelief of a defendant's proffered reasons. Any alleged mendacity must be related to the defendant's proffered reasons in order to undermine those reasons. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (restating *Hicks* as follows: "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1293–94 (D.C. Cir. 1998) (discussing *Hicks* and reasoning that a "jury can conclude that an employer who fabricates a false explanation has something to hide," which "may well be discriminatory intent"). So, for example, where a defendant proffers multiple reasons for an adverse decision, many of which are suspicious, a factfinder may properly infer dishonesty as to all the reasons proffered. *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000). *But see Ramsey v. Labette Cty. Med. Ctr.*, 297 F. App'x 730, 735 (10th Cir. 2008) (unpublished) (insufficient grounds to

infer pretext where only two of eleven proffered reasons were weak). Reasons fabricated post-hoc also permit an inference of pretext. *Plotke v. White*, 405 F.3d 1092, 1103 (10th Cir. 2005).

Here, Defendants have presented a single, consistent basis for rejecting Plaintiff's application for readmission—the no-reapplication provision of the Settlement Agreement. As the Magistrate Judge found, the evidence in the record confirms that Defendants have maintained their position that the Settlement Agreement is valid since its execution. UMF 7–21. None of the alleged acts of dishonesty identified by Plaintiff relate to Defendants' belief that the Settlement Agreement was enforceable. Plaintiff alludes to dishonesty concerning his "academic achievements" and "illegitimate termination" from NMT. Doc. 447 at 2. Facts concerning Plaintiff's academic record and termination from NMT predate the alleged discriminatory act that forms the basis of this suit. Any act of dishonesty in that context does not undermine Defendants' honest belief that the Settlement Agreement provided a legitimate, nondiscriminatory reason to reject Plaintiff's reapplication. Plaintiff also contends that Defendant Wells lied about receiving letters from New Mexico State Representative Sheryl Stapleton (advising him of her personal opinion that the Settlement Agreement was unenforceable) and checks from Plaintiff (returning the $6,000 received under the Settlement Agreement). *Id.* at 16. These facts relate to Plaintiff's purported rescission of the Settlement Agreement. As previously discussed, Plaintiff has

failed to establish that he had grounds to rescind. Absent such grounds, whether Defendants had notice of the facts supporting Plaintiff's purported rescission is irrelevant to whether Defendants honestly believed that the Settlement Agreement was enforceable.

Having reviewed the evidence in the record and overruled Plaintiff's objections, the Court agrees with the Magistrate Judge that Plaintiff has failed to rebut Defendants' honest belief that the Settlement Agreement was enforceable and provided a legitimate, nondiscriminatory reason to reject Plaintiff's application for readmission. Therefore, the Court holds that Defendants are entitled to summary judgment on Plaintiff's Title VI claim.

V. Plaintiff's Claim for Injunctive Relief Must Be Dismissed.

Having concluded that Defendants are entitled to summary judgment on Plaintiff's Title VI claim, the Court agrees with the Magistrate Judge that Plaintiff's claim for injunctive relief against the individual Defendants pursuant to *Ex parte Young* also fails.

VI. Plaintiff's Motion for Leave to File a Surreply Will Be Denied.

Having concluded that Defendants are entitled to summary judgment on all of Plaintiff's claims, the Court agrees with the Magistrate Judge that the content of Plaintiff's proposed surreply is not

relevant to any dispositive issue. The Court also notes that Plaintiff has transplanted many of the arguments from his proposed surreply to his objections. *Compare* Doc. 440 at 11–19 *with* Doc. 447 at 8–19. Thus, the Court's consideration of his objections renders the Motion for Leave to File a Surreply moot.

CONCLUSION

For the foregoing reasons, **IT IS ORDERED** as follows:

(i) Plaintiff's Objections (Doc. 447) are **OVERRULED**;

(ii) Magistrate Judge Wormuth's PFRD (Doc. 445) is **ADOPTED**;

(iii) Defendants' Motion for Summary Judgment (Doc. 410) is **GRANTED**;

(iv) Plaintiff's Motion for Leave to File a Surreply (Doc. 440) is **DENIED**; and

(v) Plaintiff's Third Amended Complaint (Doc. 150) and all its claims are

DISMISSED WITH PREJUDICE.

/s/ Martha Vázquez
MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LINDSAY O'BRIEN QUARRIE,

Plaintiff,

v. No. CIV 17-350-MV-GBW

STEPHEN WELLS, et al.,

Defendants.

[Filed December 27, 2018]

MEMORANDUM OPINION AND ORDER GRANTING SAUCEDO DEFENDANTS' MOTION TO DISMISS & GRANTING IN PART AND DENYING IN PART NMT DEFENDANTS' MOTION TO DISMISS

THIS MATTER is before the Court on Plaintiff's Objections (*doc. 89*) to the Magistrate Judge's Proposed Findings and Recommended Disposition ("PFRD") (*doc. 88*). The Magistrate Judge recommended granting in full Saucedo Defendants' Motion to Dismiss (*doc. 78*) and granting in part and denying in part NMT Defendants' Motion to Dismiss (doc. 76). Having conducted an independent, *de novo* review of both Motions to Dismiss (*docs. 76, 78*), the attendant briefing (*docs. 79, 80, 81, 83*), and the

Magistrate Judge's PFRD (*doc. 88*), this Court overrules Plaintiff's objections and adopts the PFRD.

BACKGROUND

Plaintiff filed his Second Amended Complaint, the operative complaint in this action, on February 14, 2018.[1] *Doc. 75*. He alleged claims against Defendants Board of Regents of the New Mexico Institute of Mining and Technology, Lorie Liebrock, Daniel Lopez, Warren Ostergren, Kevin Wedeward, and Stephen Wells ("NMT Defendants") and against SaucedoChavez, P.C. and Christopher Saucedo ("Saucedo Defendants"). On February 28, 2018, NMT Defendants, who were named in all counts of the Second Amended Complaint, moved to dismiss all claims against them except for the Title VI claim of racial discrimination. *Doc. 76*. Also on February 28, 2018, Saucedo Defendants moved to dismiss all claims against them. *Doc. 78*. Saucedo Defendants, however, were only included in Counts I and V of the Second Amended Complaint, in claims for defamation and a permanent injunction prohibiting further defamation. *Doc. 75* at 19–24.

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[1] As noted in the PFRD, *see doc. 88* at 3, this is not Plaintiff's first suit involving the New Mexico Institute of Mining and Technology. Plaintiff's prior suit was dismissed with prejudice on January 6, 2015. *See Quarrie v. New Mexico Inst. of Mining & Tech., et al.*, No. 13-cv-0349 MV/SMV, 2014 WL 11456614 (D.N.M. Jan. 6, 2015). Plaintiff does not object to the Magistrate Judge's conclusion that any relitigation of the issues involved in that suit is precluded. *See doc. 89* at 8 ("Plaintiff is in full concurrence with the magistrate judge's position" on this point).

On August 21, 2018, this Court referred the case to Magistrate Judge Gregory B. Wormuth, pursuant to 28 U.S.C. §§ 636(b)(1)(B), (b)(3), and *Va. Beach Fed. Sav. & Loan Ass'n v. Wood*, 901 F.2d 849 (10th Cir. 1990). *See doc. 85.* The Magistrate Judge subsequently issued a Proposed Findings and Recommended Disposition ("PFRD") on October 22, 2018. *Doc. 88.* The Magistrate Judge recommended dismissal of the following for failure to state a claim: Counts I and II (constitutional defamation claims against NMT Defendants and Saucedo Defendants), Count IV (unconstitutional deprivation of a property right in application fees under 42 U.S.C. § 1983), and the portion of Count V requesting an *Ex Parte Young* injunction prohibiting future defamation. *See id.* at 1, 2, 26–27. He recommended denial of NMT Defendants' Motion to Dismiss as it pertained to the Count V request for injunctive relief against racial discrimination. *See id.* at 27.

Plaintiff filed his objections to the PFRD on November 5, 2018. *Doc. 89.* He objects to all of the Magistrate Judge's recommendations except for the recommendation to deny NMT Defendants' Motion to Dismiss on the Count V claim for injunctive relief against racial discrimination. *See id.* at 2. Ultimately, following a *de novo* review, the Court finds Plaintiff's objections to be without merit and adopts the recommendations of the Magistrate Judge.

LEGAL STANDARD

Defendants' Motions (*docs. 76, 78*) were referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B). *See doc. 85.* Under that referral provision, the Court's standard of review of a magistrate judge's PFRD is *de novo. See* 28 U.S.C. § 636(b)(1)(C). When resolving objections to a magistrate judge's PFRD, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Moreover, "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996). *See also United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.")

In adopting a PFRD, the district court need not "make any specific findings; the district court must merely conduct a de novo review of the record." *Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000). "[T]he district court is presumed to know that de novo review is required. Consequently, a brief order expressly stating the court conducted de

novo review is sufficient." *Northington v. Marin*, 102 F.3d 1564, 1570 (10th Cir. 1996) (citing *In re Griego*, 64 F.3d at 583–84). "[E]xpress references to de novo review in its order must be taken to mean it properly considered the pertinent portions of the record, absent some clear indication otherwise." *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 724 (10th Cir. 1993). A "terse" order containing one sentence for each of the party's "substantive claims," which did "not mention his procedural challenges to the jurisdiction of the magistrate to hear the motion," has been held sufficient. *Garcia*, 232 F.3d at 766. The Supreme Court has explained that "in providing for a de novo determination rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (quoting 28 U.S.C. § 636(b)) (citing *Mathews v. Weber*, 423 U.S. 261, 275 (1976)).

Federal Rule of Civil Procedure 12(b)(6) permits the Court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Specifically, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing whether a complaint meets this standard, the Court is to first "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Then, accepting only the well-pleaded factual

allegations as true and viewing them in the light most favorable to the plaintiff, the court is to consider whether "they plausibly give rise to an entitlement to relief." *Barrett v. Orman*, 373 F. App'x 823, 825 (10th Cir. 2010) (unpublished) (quoting *Iqbal*, 556 U.S. at 677–78); *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Where, as here, a party is proceeding *pro se*, the court is to liberally construe his pleadings. *Casanova*, 595 F.3d at 1125. "But the court [is] not [to] 'assume the role of advocate for the pro se litigant.'" *Baker v. Holt*, 498 F. App'x 770, 772 (10th Cir. 2012) (unpublished) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). In other words, "[t]he broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Hall*, 935 F.2d at 1110.

ANALYSIS

I. Defamation Claims

Plaintiff objects to the Magistrate Judge's recommendation to dismiss his constitutional defamation claims on the following grounds: (1) the Fourteenth Amendment guarantees equal protection and treatment; (2) Plaintiff is not required to show that he has a constitutional or state right to public

higher education, but only that New Mexico has undertaken to provide public higher education; (3) Plaintiff was deprived of his right to equal protection by NMT Defendants' refusal to admit him based on their defamation; and (4) Plaintiff has met the requirements of the stigma-plus rule of *Paul v. Davis*, 424 U.S. 693 (1976). *Doc. 89* at 13. For the following reasons, the Court will overrule Plaintiff's objections and adopt the recommendations contained in the PFRD.

A. Plaintiff may not raise new theories at the objections stage.

At the outset, the Court notes that Plaintiff is barred from raising any new theories in his Objections to the PFRD. *See Garfinkle*, 261 F.3d at 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). Therefore, to the extent that Plaintiff raises a Fourteenth Amendment equal protection argument for the first time in these Objections, that theory is waived and the Court is not required to consider it. There is no mention of equal protection or treatment in the Second Amended Complaint (*doc. 75*), Plaintiff's Response to Saucedo Defendants' Motion to Dismiss (*doc. 79*), or Plaintiff's Response to NMT Defendants' Motion to Dismiss (*doc. 80*). Instead, Plaintiff proceeded under the theory that the alleged defamation violated his liberty interest and property rights. *See doc. 75* at 19–21. However, in the interest of cleanly disposing of Plaintiff's Objections, the Court will briefly discuss

why Plaintiff fails to state a defamation claim in conjunction with the Equal Protection Clause as well.

B. Plaintiff fails to state a defamation claim based on a violation of equal protection.

Plaintiff argues that, because Defendants violated his right to equal protection under the Fourteenth Amendment by refusing to readmit him based on their defamation, his claim satisfies the "stigma-plus" rule of *Paul v. Davis*. *See doc.* 89 at 13. Even construing Plaintiff's claims liberally, this argument fails for two reasons.

First, Plaintiff appears to have confused equal protection rights with due process rights. A constitutional violation of equal protection, even if it could be shown,[2] would not give rise to a constitutional defamation claim. Defamation may rise to the level of a constitutional claim where it "involve[s] the deprivation of a liberty or property interest protected under the Constitution." *Hadley v. Moon*, 1994 WL 582907 at *1 (10th Cir. Oct. 21, 1994) (unpublished) (citing *Davis*, 424 U.S. at 709–12). This Court, upon *de novo* review, agrees with the Magistrate Judge's analysis and conclusion that Plaintiff has failed to identify a liberty or property interest of which he was deprived. *See doc.* 88 at 6–

[2] The Court declines to analyze Plaintiff's equal protection argument outside of the defamation context because Plaintiff's claim is one of constitutional defamation, not denial of equal protection. Plaintiff may not, at this stage, transform his constitutional defamation claim into an equal protection claim.

15. Plaintiff argues that he was, contrary to the Magistrate Judge's determination, deprived of a property interest in public higher education and identifies the "determinative questions" as follows: "(1) Is there a right to public higher education in New Mexico? (2) If so, did NMT deny Plaintiff the equal protection of that right?" *Doc. 89* at 4. While the first question is certainly determinative, the second confuses the rule of *Davis* and its progeny. Though both are enumerated in the Fourteenth Amendment, see U.S. Const. amend. XIV, § 1, "the Due Process Clause and Equal Protection Clause 'trigger[]...distinct inquir[ies].'" *O'Neal v. Newton-Embry*, 501 F. App'x 718, 726 (10th Cir. 2012) (modifications in original) (quoting *Evitts v. Lucey*, 469 U.S. 387, 405 (1985)). A constitutional defamation claim may be supported by an accompanying deprivation of liberty or property interests, but the *Davis* rule does not allow constitutional defamation claims accompanied solely by a violation of the right to equal protection. *See Davis*, 424 U.S. at 709– 12.

Second, a right to equal protection in higher education does not establish a property interest in higher education. The fact that state governments providing public higher education must do so in a non-discriminatory fashion does not, contrary to Plaintiff's assertion (*see doc. 89* at 4–5), create a property interest in public higher education. Indeed, Plaintiff's own cited legal authority contradicts him. He states: "Thus, even though '[t]he United States Constitution does not secure to [one] the right to an education', it does secure his 'right to *equal*

treatment where the state has undertaken to provide public education to the persons within its borders.'" *Doc. 89* at 5 (modifications and emphasis in original) (quoting *Flemming v. Adams*, 377 F.2d 975, 977 (10th Cir. 1967)). The Tenth Circuit in *Flemming*, however, specifically explained the distinction between a constitutional right to education (which does not exist) and an equal protection-based right to equal treatment in education where the state has undertaken to provide public education. *Id.* at 977–78 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). Students and applicants have a right to equal treatment in public higher education, but this does not confer a *right to public higher education.* Plaintiff cites no case law to the contrary. Therefore, the Court adopts the Magistrate Judge's conclusion that Plaintiff has demonstrated no state or federal right to public higher education.[3] Plaintiff raises no objections to the Magistrate Judge's conclusions that he was not deprived of an interest in continued or future employment. Accordingly, this Court agrees with and adopts the PFRD's determination that Plaintiff has failed to state a claim of constitutional defamation.

C. The Court is not required to accept Plaintiff's legal conclusions as true.

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[3] Because Plaintiff has failed to demonstrate the deprivation of an educational or other property right or liberty interest, the Court need not (and does not) address any of the further considerations mentioned by Plaintiff, *see doc. 89* at 7, 10.

Plaintiff argues that "NMT Defendants have refused, contrary to the standard of review, to accept as true Plaintiff's well-pled factual allegations that he was defamed by NMT Defendants and that their defamation of him has a direct causal link to their refusal to readmit him." *Doc. 89* at 7. This characterization of the 12(b)(6) pleading standard is inaccurate. While the Court must accept as true all of Plaintiff's well-pleaded *factual* allegations on a motion to dismiss, it is not required to accept as true his *legal* conclusions. *Iqbal*, 556 U.S. at 678. Neither Defendants nor the Court must accept as true Plaintiff's allegation that Defendants defamed him. Indeed, whether Defendants defamed Plaintiff is one of the very legal questions at issue in this case.

Similarly, the Court is not required to accept as true all of Plaintiff's allegations about his prior dismissal from NMT's PhD program. For instance, the Court is certainly not required to accept as true Plaintiff's allegation that his due process rights were violated by his termination from the program (*see doc. 89* at 10). Even setting aside the question of preclusion, this allegation is a legal conclusion not entitled to automatic acceptance by the Court.

In any event, however, facts relating to the reasons for Defendants' alleged defamation are irrelevant because of Plaintiff's failure to demonstrate the deprivation of an accompanying property or liberty interest. Therefore, Plaintiff fails to state a constitutional defamation claim as against both NMT Defendants and Saucedo Defendants.

II. Application Fee Deprivation Claim

Plaintiff presents two arguments in favor of his position that NMT Defendants' acceptance of his $45 application fee without responding to his application deprived him of a property right without due process. The first is that because NMT Defendants violated Plaintiff's Fourteenth Amendment right to equal protection, and New Mexico has undertaken to provide public higher education, Plaintiff has established a property interest in receiving a response for his application fee. *See doc. 89* at 11–12. The second, alternative argument is that the New Mexico Constitution creates such a property interest, because it protects the "inherent and inalienable rights" of persons including "possessing and protecting property." *Doc. 89* at 15 (quoting N.M. Const. art. II, § 4).

Plaintiff's first argument is untenable for the same reasons discussed above in relation to his defamation claims. A right to equal treatment in a particular arena does not, without more, create a property interest. *Flemming*, cited by Plaintiff once again, establishes only that public higher education must not be provided in a discriminatory manner; it does *not* establish a freestanding right to public higher education. 377 F.2d at 977. Therefore, Plaintiff's argument that he can establish a constitutionally protected property right by way of showing unequal treatment, *see doc. 89* at 14–15, is without merit. Moreover, once again, Plaintiff is not entitled to introduce new theories at the objections stage. *See Garfinkle*, 261 F.3d at 1031. Plaintiff's Second Amended Complaint contains no reference to

the Equal Protection Clause or to equal treatment. *See doc. 75* at 22.

As for Plaintiff's second argument, while the New Mexico Constitution does establish a general right to *possess property*, it does not establish a right to receive a response to one's application in exchange for one's application fees. *See* N.M. Const. art. II, § 4. This Court agrees with the Magistrate Judge's reasoning that Plaintiff "has not cited to any state law (or any other independent source) that would serve as the source of a property interest in application fees." *Doc. 88* at 18. None of the arguments made in Plaintiff's Objections successfully challenge this conclusion. Accordingly, Plaintiff's due process argument fails and the claim must be dismissed.

III. Injunctive Relief Claim

Plaintiff objects to the Magistrate Judge's recommendation to dismiss his claim for injunctive relief against further defamation on the grounds that "Plaintiff has indeed stated a valid federal defamation claim against both NMT Defendants and Saucedo Defendants." *Doc. 89* at 16. In light of the foregoing determinations that Plaintiff has not stated a valid federal defamation claim against either defendant, the Court overrules Plaintiff's objections and adopts the Magistrate Judge's recommendation.

CONCLUSION

It is therefore ORDERED, ADJUDGED, AND DECREED that Plaintiff's Objections (*doc. 89*) are overruled, and the Magistrate Judge's Proposed Findings and Recommended Disposition (*doc. 88*) is ADOPTED upon *de novo* review.

IT IS FURTHER ORDERED that Saucedo Defendants' Motion to Dismiss (*doc. 78*) is GRANTED in its entirety. NMT Defendants' Motion to Dismiss (*doc. 76*) is GRANTED as it pertains to Counts I and II (defamation), Count IV (deprivation of property right in application fee), and the Count V request for injunctive relief against further defamation; and DENIED as it pertains to the Count V request for injunctive relief against discrimination. Plaintiff's claims in Counts I, II, IV, and V (for defamation, deprivation of property right in application fee, and injunctive relief against further defamation) are hereby DISMISSED WITH PREJUDICE.

/s/ Marth Vázquez
MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE

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