APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 21-2651

JOHN W. FINK,

Appellant

v.

JONATHAN L. BISHOP; KAYDON A. STANZIONE;
JOSEPH M. TROUPE;
STEVEN W. DAVIS; SUEZ WTS USA INC.;
STEVEN W. DAVIS; ADT INC.;
EDGELINK, INC.; PRAXIS TECHNOLOGIES
CORPORATION; PRAXIS
TECHNOLOGIES, INC.; J. PHILIP KIRCHNER;
FLASTER/GREENBERG P.C.

(D.C. Civil Action No. 1:21-cv-00063)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, AMBRO,
JORDAN, HARDIMAN, GREENAWAY, JR.,

RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and RENDELL,* *Circuit Judges*

The Petition for Rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

By the Court,

s/ MARJORIE O. RENDELL
Circuit Judge

Dated: November 28, 2022
amr/cc: All counsel of record

* Pursuant to Third Circuit I.O.P. 9.5.3., the vote of Senior Judge Rendell is limited to panel rehearing only.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2651

JOHN W. FINK,

Appellant

v.

JONATHAN L. BISHOP; KAYDON A. STANZIONE;
JOSEPH M. TROUPE;
STEVEN W. DAVIS; SUEZ WTS USA INC.;
STEVEN W. DAVIS; ADT INC.;
EDGELINK, INC.; PRAXIS TECHNOLOGIES
CORPORATION; PRAXIS
TECHNOLOGIES, INC.; J. PHILIP KIRCHNER;
FLASTER/GREENBERG P.C.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:21-cv-00063)
District Judge: Honorable Robert B. Kugler

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
July 21, 2022

Before: RESTREPO, PHIPPS and RENDELL,
Circuit Judges

(Opinion filed September 28, 2022)

OPINION*

PER CURIAM

John Fink appeals pro se from the District Court's August 16, 2021 order dismissing, with prejudice, a complaint that he purported to file pursuant to Federal Rule of Civil Procedure 60(d).[1] For the reasons that follow, we will affirm that judgment.

I.

Between 2009 and 2019, Fink filed four civil actions in the District Court related to, in one way or

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] Fink filed his complaint in the United States District Court for the Southern District of New York, which then transferred it to the United States District Court for the District of New Jersey. Each of our references to "the District Court" in this opinion refers to the United States District Court for the District of New Jersey.

another, a series of credit agreements and a subsequent settlement between Fink and Advanced Logic Systems, Inc. *See* Dist. Ct. Case Nos. 1:09-cv-5078, 1:12-cv-4125, 1:13-cv-3370, & 2:19-cv-9374. The District Court granted summary judgment against Fink in the 2009 and 2012 cases, and it dismissed the 2013 and 2019 cases with prejudice on, inter alia, preclusion grounds. In each of the four cases, Fink appealed. And in each case, we affirmed the District Court's judgment and subsequently denied panel rehearing and rehearing en banc. *See* C.A. Nos. 12-2229 (concerning the 2009 case), 17-1170 (the 2012 case), 15-2689 (the 2013 case), & 20-3572 (the 2019 case).[2] The United States Supreme Court denied certiorari in the 2012 case, *see* S. Ct. No. 18-399; Fink did not seek certiorari in the other three cases.

In December 2020, Fink filed another civil action, this time purporting to rely on Rule 60(d). That rule provides, in pertinent part, that Rule 60 does not limit a court's power to "entertain an independent action to relieve a party from a judgment" or "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(1), (3). Fink's 115-page complaint in this latest case was brought against a

[2] Our review in C.A. No. 20-3572 was limited to the District Court's order denying Fink's recusal motion and his "amended motion to declare void," because Fink's notice of appeal was untimely as to the District Court's earlier orders in that case. *See Fink v. United States*, No. 20-3572, 2021 WL 4490240, at *2 (3d Cir. Oct. 1, 2021) (per curiam).

host of defendants, each of which/whom had been a defendant in one or more of Fink's previous four cases. The complaint alleged, inter alia, that the District Court had violated Fink's due process rights in his previous cases, that the District Court had committed "fraud upon the court," and that we had relied too much on the District Court's opinions in resolving his appeals in those cases. Fink asserted that he was "seek[ing] a new trial . . . for the purposes of pursuing the various defendants . . . who, but for [the District Court's alleged due process violations], would have had to stand trial for the[ir] various offenses." (Compl. 2.)

Fink's 2020 case was assigned to a District Judge who had not presided over any of Fink's previous cases. Thereafter, some of the defendants moved to dismiss the 2020 case pursuant to Federal Rule of Civil Procedure 12(b)(6). Fink opposed the motions to dismiss and twice sought permission to amend his complaint, though his proposed amendments reiterated the aforementioned allegations from his original complaint. On August 16, 2021, the District Court denied Fink's requests to amend, granted the motions to dismiss, and dismissed Fink's complaint in its entirety with prejudice. In doing so, the District Court concluded that Fink's "allegations fall woefully short of satisfying the exacting Rule 60(d) grave miscarriage of justice standard," Dist. Ct. Op. entered Aug. 16, 2021, at 1, and that his claims against the defendants were barred by the doctrine of claim

preclusion (also known as res judicata).[3] This timely appeal followed.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court's dismissal of a complaint at the Rule 12(b)(6) stage. *See Talley v. Wetzel*, 15 F.4th 275, 286 n.7 (3d Cir. 2021).[4]

"Rule 60(d) permits a court to entertain an independent action to relieve a party from a judgment in order to 'prevent a grave miscarriage of justice.'" *Jackson v. Danberg*, 656 F.3d 157, 166 (3d Cir. 2011) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)). Where, as here, the movant's pursuit of an independent action is based on allegations of fraud on the court, "there must be: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005). This is "a demanding

[3] The terms "claim preclusion" and "res judicata" "often are used interchangeably." *Brownback v. King*, 141 S. Ct. 740, 747 n.3 (2021).

[4] Some, but not all, of the appellees assert that some aspect of the District Court's decision, related to Fink's purported reliance on Rule 60(d), warrants review under an abuse-of-discretion standard rather than a plenary standard. But we need not resolve this issue because we conclude that, under either standard, Fink's challenge to the District Court's Rule 60(d) analysis lacks merit.

standard," *id.* at 390; "a determination of fraud on the court may be justified only by the most egregious misconduct directed to the court itself," and "it must be supported by clear, unequivocal and convincing evidence." *Id.* at 386-87 (internal quotation marks omitted).

We have no trouble concluding that the demanding standard for establishing fraud on the court has not been met in this case. Fink's fraud-on-the-court allegations, as well as his other allegations directed at the District Judges who presided over his previous cases, amount to nothing more than disagreements with the District Judges' rulings in those cases. And we see no other basis that would support asserting an independent action in connection with those cases. Fink exercised his right to appeal in each of them. Although he takes issue with the outcome of those appeals, his recourse was to petition the Supreme Court for a writ of certiorari, not pursue yet another action in the District Court.

In view of the above, we see no error in the District Court's denial of Rule 60(d) relief.[5] We also

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[5] The District Court observed that Fink's 2020 complaint also "seems to invoke Rule 60(b)(4)," Dist. Ct. Op. entered Aug. 16, 2021, at 7, which permits a court to relieve a party from a judgment that is void. But as the District Court appeared to conclude, Fink has failed to show that he is entitled to such relief. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (explaining that a judgment is not void simply because it may have been erroneous, that a Rule 60(b)(4) motion is not a substitute for an appeal, and that such

see no error in the District Court's decision to dismiss Fink's 2020 complaint in its entirety, and without leave to amend, pursuant to the doctrine of claim preclusion. *See Beasley v. Howard*, 14 F.4th 226, 232 (3d Cir. 2021) (explaining that this doctrine is satisfied when there is "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." (citation to quoted case omitted)); *see also Papera v. Pa. Quarried Bluestone Co.*, 948 F.3d 607, 610 (3d Cir. 2020) (explaining that (a) "judgment on the merits" is a term of art that "is confusing because it does not require an actual verdict or summary judgment," and (b) that "[t]he on-the-merits requirement is better understood in terms of its functional equivalent: whether a dismissal is *with prejudice*"); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (indicating that leave to amend need not be granted if amendment would be futile).[6] Accordingly, and

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a motion "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard").

[6] We agree with the District Court that, "[s]imply because [Fink's 2020 complaint] has asserted some new factual allegations and a new legal theory does not mean claim preclusion is inapplicable." Dist. Ct. Op. entered Aug. 16, 2021, at 11; *see Beasley*, 14 F.4th at 231-32; *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 173-74 (3d Cir. 2009).

because Fink's appellate briefing raises no meritorious issues,[7] we will affirm the District Court's judgment.[8]

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[7] Although Fink believes that each of the District Judges who has presided over aspects of his litigation is biased against him, we see no evidence of any such bias. *See generally Arrowpoint Cap. Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 330 (3d Cir. 2015) (explaining that "adverse rulings . . . are not in themselves proof of prejudice or bias").

[8] We grant the request of Appellees J. Philip Kirchner and Flaster Greenberg, P.C., to supplement the appendix with a copy of Fink's 2020 complaint. We also grant Fink's request to supplement the appendix with copies of certain District Court orders that were entered in one of his four previous cases and referred to in his 2020 complaint. To the extent that Fink's supplemental appendix also includes copies of our affirmance and denial of rehearing and rehearing en banc in C.A. No. 20-3572 — rulings that came after Fink filed the present appeal — we may take judicial notice of those rulings for the purpose of resolving this appeal. *See Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 164 n.15 (3d Cir. 2004) ("[W]e recognize that we have the power to take judicial notice of subsequent developments in related proceedings since the appeal in each case was filed." (alteration in original) (citation to quoted case omitted)). To the extent that Appellees Kirchner and Flaster Greenberg seek to supplement the appendix with copies of those same rulings from C.A. No. 20-3572, that request is denied as duplicative. As for Fink's October 25, 2021 request to file an "affidavit" that, inter alia, references C.A. No. 20-3572, that request is granted, and we liberally construe that affidavit as a supplement to his contemporaneously filed opening brief in the present appeal. To the extent that any party seeks any other relief from this Court, that relief is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-2651

JOHN W. FINK,

Appellant

v.

JONATHAN L. BISHOP; KAYDON A. STANZIONE; JOSEPH M. TROUPE; STEVEN W. DAVIS; SUEZ WTS USA INC.; STEVEN W. DAVIS; ADT INC.; EDGELINK, INC.; PRAXIS TECHNOLOGIES CORPORATION; PRAXIS TECHNOLOGIES, INC.; J. PHILIP KIRCHNER; FLASTER/GREENBERG P.C.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:21-cv-00063)
District Judge: Honorable Robert B. Kugler

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
July 21, 2022

Before: RESTREPO, PHIPPS and RENDELL,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on July 21, 2022. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered August 16, 2021, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/Patricia S. Dodszuweit
Clerk

Dated: September 28, 2022

APPENDIX D

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE

JOHN W. FINK,
Plaintiff,

v.

JONATHAN L. BISHOP, ET. AL.,
Defendants.

Civil Action No. 21-00063 (RBK/SAK)

ORDER

KUGLER, United States District Judge:

Presently before the Court are Defendants Flaster Greenberg P.C. ("F.G."), Philip Kirchner ("Kirchner"), Suez WTS USA, Inc. ("Suez"), and Steven W. Davis ("Davis"), Motions to Dismiss (Doc. No. 7, 33), Defendant F.G. and Kirchner's Motion for Sanctions (Doc. No. 8), and Plaintiff's Motions for Leave to File an Amended Complaint Pursuant to

Rule 15(a)(2) (Doc. No. 22, 37); for the reasons set forth in the corresponding opinion

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss (Doc. No. 7, 33) are **GRANTED**, the Motion for Sanctions and Pre-Filing Injunction (Doc. No. 7,8) are **DENIED**, and Plaintiff's Motions (Doc. No. 22, 37) are **DENIED**; and

IT IS FURTHER OREDED that Plaintiff's Complaint be **DISMISSED WITH PREJUDICE** and the Clerk of the Court shall close this matter.

s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

Dated: 8/16/2021

APPENDIX E

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE

JOHN W. FINK,
Plaintiff,

v.

JONATHAN L. BISHOP, ET. AL.,
Defendants.

Civil Action No. 21-00063 (RBK/SAK)

OPINION

KUGLER, United States District Judge:

Presently before the Court are Defendants Flaster Greenberg P.C. ("F.G."), Philip Kirchner ("Kirchner"), Suez WTS USA, Inc. ("Suez"), and Steven W. Davis ("Davis"), Motions to Dismiss (Doc. No. 7, 33), Defendant F.G. and Kirchner's Motion for Sanctions (Doc. No. 8), and Plaintiff's Motions for

Leave to File an Amended Complaint Pursuant to Rule 15(a)(2) (Doc. No. 22, 37). For the reasons set forth below, Defendants' Motions are **GRANTED** in part, and Plaintiff's Motions are **DENIED**.

I. BACKGROUND

Plaintiff's one-hundred fifteen-page, eighteen count complaint attempts to rehash previously litigated claims under the guise of Rule 60(d). Because Plaintiff's allegations fall woefully short of satisfying the exacting Rule 60(d) grave miscarriage of justice standard, and his claims are barred by claim preclusion, they will be dismissed with prejudice.

A. Factual Background

i. The Genesis of the Dispute

In late 2000, John W. Fink, began working as a financial consultant for Advanced Logic Systems, Inc. ("ALSI"), a New Jersey software development firm founded by Defendants Johnathan Bishop and Kaydon Stanzione. (Doc. No. 1, Compl. at ¶¶ 20–21). In mid-2001, Mr. Fink entered into a series of credit agreement with ALSI, extending it over $835,000 for working capital, and in return, Mr. Fink received rights to purchase a certain amount of stock in ALSI. (*Id.* at ¶¶ 21–25).

In March of 2003, Mr. Fink filed suit against ALSI, Stanzione, and other related entities in the New Jersey Superior Court, claiming breaches of the

various credit agreements. (*Id.* at ¶ 32). Over three years later, the parties entered into a settlement agreement. (*Id.* at ¶ 54). Sometime shortly thereafter, Mr. Fink hired Defendants Philip Kirchner and his firm Flaster Greenberg, P.C. to represent him. (*Id.* at ¶¶ 32, 55, 59).

In July of 2007, Mr. Fink filed a complaint against ALSI claiming it breached the terms of the settlement agreement; Defendant Kirchner represented him in this litigation. (*Id.* at ¶¶ 59– 60). After a hearing in state court, the matter was referred to binding arbitration. (*Id.* at ¶ 64). Mr. Fink alleges that during the arbitration Defendant Kirchner altered an email which effectively sabotaged his chances of recovering against ALSI. (*Id.* at ¶ 82). In July of 2008, the arbitrator issued a final decision finding that ALSI did not breach the settlement agreement, but that it did owe Mr. Fink the fees he incurred in enforcing the agreement. (*Id.* at ¶ 101–102). Ultimately, ALSI filed for bankruptcy in October of 2008, and Mr. Fink's state court case was dismissed. (*Id.* at ¶ 104).

ii. Offshoots: *Fink v. EdgeLink, Fink v. Bishop, and Fink v. Kirchner*

Approximately one year after the dismissal of Mr. Fink's state court case, he filed the first of four lawsuits that stemmed from this original dispute. The first, filed in October of 2009 against Defendant EdgeLink, Inc., claimed that Defendant Stanzione, the co-owner of ALSI, fraudulently transferred its

valuable assets to Advanced Logic Services, Inc., and then eventually to EdgeLink in order to deprive Mr. Fink of his rightful ownership of the assets. (*Id.* at ¶¶ 120– 159). Judge Hillman presided over this case and ultimately granted summary judgment in favor of Defendants finding that Mr. Fink presented no evidence of successor liability nor fraudulent transfer. (*Id.* at ¶¶ 160–167). The Third Circuit affirmed this decision on appeal. (*Id.* at ¶ 175); see also *Fink v. EdgeLink, Inc.*, 553 F. App'x 189, 190 (3d Cir. 2014).

The second lawsuit, Fink v. Bishop, involved allegations that Defendants Steven Davis and Suez WTS USA, Inc., ("Suez" formerly GE Betz) fraudulently concealed evidence in connection with Mr. Fink's investigation of ALSI's bankruptcy proceeding and his lawsuit against EdgeLink. (*Id.* at ¶ 182). Judge Hillman again presided over this action and dismissed Plaintiff's complaint due to issue preclusion and failure to meet the heightened pleading standard for fraud. (*Id.* at ¶ 234). The Third Circuit again affirmed Judge Hillman's decision. (*Id.* at ¶ 248).

The third suit concerned Defendants Kirchner and Flaster Greenberg alleged malpractice during the 2007 arbitration and their alleged attempt to extort money from him for unpaid legal bills. (*Id.* at ¶ 257). Mr. Fink claimed that Defendants committed legal malpractice, breach of their fiduciary duty, and fraud. (*Id.* at ¶ 263). These claims, and a short-lived spoliation claim, were resolved in favor of

Defendants at summary judgment because Mr. Fink failed to establish causation. (*Id.* at ¶ 318). The Third Circuit also affirmed Judge Hillman's decision on appeal. (*Id.* at ¶ 350). Mr. Fink's petition for writ of certiorari was subsequently denied by the Supreme Court. (*Id.* at ¶ 356).

The fourth and final lawsuit was filed on April 3, 2019, against Judge Hillman and the same defendants as the third lawsuit. (*Id.* at ¶ 358). Mr. Fink contended that Judge Hillman committed fraud on the court when he ruled in favor of Defendants. (*Id.*). Judge McNulty presided and dismissed Mr. Fink's claims against Judge Hillman and the other judicial defendants due to judicial immunity. (*Id.* at ¶ 365). Mr. Fink's claims against the other defendants were dismissed because they were barred by claim preclusion. (*Id.* at ¶ 370).

On December 11, 2020, Mr. Fink filed the current complaint in the District Court for the Southern District of New York asserting eighteen counts against Defendants Jonathan Bishop, Kaydon Stanzione, Joseph Troupe, Steven Davis, Suez WTS USA, Inc., ADT Inc., EdgeLink, Inc., Praxis Technologies Corporation, Praxis Technologies, Inc., Philip Kirchner, and Flaster Greenberg, P.C. (Doc. No. 1). The case was subsequently transferred to this Court. (Doc. No. 3). On January 15, 2021, Defendants Flaster Greenberg and Philip Kirchner moved to dismiss the complaint and for sanctions and seek a pre-filing injunction. (Doc. No. 7, 8). Defendants Suez and Davis also moved to dismiss

the complaint. (Doc. No. 33). Plaintiff opposes these motions and seeks leave to amend. (Doc. No. 22, 37).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n.9 (3d Cir. 2011). For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014).

Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570; *see also West Run Student Housing Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 169 (3d Cir. 2013). That facial-plausibility standard is met "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) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

Affirmative defenses, such as res judicata or the statute of limitations, may raise issues of fact unsuitable for resolution under the Rule 12(b)(6) standards outlined above. In a proper case, however, such defenses may be cognizable on a motion to dismiss where, as here, the necessary facts are "apparent on the face of the face of the complaint" and other documents properly considered on a motion to dismiss. *Rycoline Products, Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997)

Documents properly considered on a motion to dismiss include ones attached to or relied on by the complaint, or ones on which the complaint is based. *In re Burlington Coat Factory Sec, Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Likewise, on a motion to dismiss, we may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *see also Funk v. Commissioner*, 163 F.2d 796, 800–01 (3d Cir. 1947)

(whether a court may judicially notice other proceedings depends on what the court is asked to notice and on the circumstances of the instant case). Thus, for res judicata specifically, a prior decision may be noticed for its existence and its legal effect on the current proceeding. *See, e.g., M&M Stone Co. v. Pennsylvania*, 388 F. App'x 156, 162 (3d Cir. 2010); *Gage v. Warren Twp. Com. & Planning Bd. Members*, 463 F. App'x 68, 71 (3d Cir. 2012).

III. DISCUSSION[1]

Plaintiff's complaint speaks for itself. He recites the lengthy history of the three cases presided over by Judge Hillman, the one by Judge McNulty, and contends that because both judges allegedly denied him of due process, he should be granted a new trial. Although Mr. Fink makes clear that the entirety of his complaint is premised on the success of his Rule 60(d)(1) and (3) actions, because he proceeds pro se, we will also construe his complaint as attempting to assert independent causes of action.

A. Rule 60(d)

Mr. Fink filed this action under Federal Rule of Civil Procedure 60(d) purportedly seeking relief

[1] Defendants' also raise the entire controversy doctrine and statute of limitations as independent bars to Plaintiff's claims. However, we need not address these issues because the claims against Defendants are resolved by claim preclusion.

from all prior decisions rendered by Judge Hillman or Judge McNulty because they allegedly denied him due process and Judge Hillman allegedly committed fraud on the court. Defendants Suez and Davis argue Plaintiff has not met the grave miscarriage of justice standard imposed by Rule 60(d) nor shown by clear and convincing evidence that Judge Hillman committed fraud on the court. In response, Mr. Fink throws the kitchen sink. He asserts that Judge Hillman denied him due process by giving zero weight to much of the physical evidence he produced, accepting the defendants' statements and testimony as truthful in the face of contradictory evidence, used "extrajudicially sourced facts" in his opinion, and mischaracterized his statements.

Rule 60(d)(1) permits the court "to entertain an independent action to relieve a party from a judgment, order, or proceeding." Fed. R. Civ. P. 60(d)(1). Relief under Rule 60(d)(1) is available only in extraordinary circumstances where it is necessary to prevent a grave miscarriage of justice. *See Jackson v. Danberg*, 656 F.3d 157, 166 (3d Cir. 2011) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)). The petitioner must show a meritorious claim or defense and relief "is reserved for the rare and exceptional case where a failure to act would result in a miscarriage of justice." *Sharpe v. United States*, 2010 WL 2572636, at *2 (E.D. Pa. June 22, 2010).

Mr. Fink's argument under Rule 60(d)(1) that Judge Hillman denied him of due process seems to

invoke Rule 60(b)(4) because he is essentially arguing that the prior judgment or decision is void. Rule 60(b)(4) provides relief from judgment if "the judgment is void." Fed.R.Civ.P. 60(b)(4). Under Rule 60(b)(4), "'[a] judgment is not void' . . . 'simply because it is or may have been erroneous.'" *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (quoting *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir.1995)). "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Johnson v. Rardin*, 700 F. App'x 170, 172 (3d Cir. 2017).

Mr. Fink's assignment of legal errors allegedly committed by Judge Hillman smacks more of disagreement with the rulings rather than a true charge of partiality and is wholly insufficient to demonstrate even a specter of bias. *See Liteky v. United States*, 510 U.S. 540, 554, (1994) (recognizing that adverse judicial rulings almost never constitute a basis for finding judicial bias); *see also Pierre v. Beebe Hosp./Med. Ctr.*, No. CV 13-2102-SLR, 2015 WL 2064406, at *2 (D. Del. May 4, 2015) (concluding the plaintiff's assignment of legal error, without more, does not justify granting relief under Rule 60(b)(4)).

Likewise, Mr. Fink's contentions regarding fraud upon the court are in substance the same and thus, they too fail. Rule 60(d)(3) allows a court to set aside a judgment through an independent action for

fraud on the court. Fed. R. Civ. P. 60(d)(3). For these actions, the Court of Appeals for the Third Circuit has determined they are permitted only in the case of "the most egregious misconduct directed to the court itself," and it "must be supported by clear, unequivocal, and convincing evidence." *Herring v. United States*, 424 F.3d 384, 387 (3d Cir.2005). The requirements such a claim must meet, are: "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." *Id.* at 386.

Mr. Fink claims Judge Hillman committed fraud upon the Third Circuit by failing to view certain evidence in the light most favorable to him and then incorporating unfavorable evidence and excluding the favorable evidence from his opinion. The problem with this argument, which Defendants point out, is that Mr. Fink raised these points on appeal, and they were rejected. (Doc. No. 1, Compl. at ¶¶ 172–174). There can be no deception when Mr. Fink presented these arguments and the *entire record* to the Third Circuit for review. Thus, while Mr. Fink attempts to use Rule 60(d)(3) as a vehicle for disagreement with the previous decisions, he is pulling the wool over no one's eyes. *800 Servs., Inc. v. AT&T Corp.*, 822 F. App'x 98, 98 (3d Cir. 2020) (explaining that "[l]itigants routinely disagree about how courts should view the evidence" but a "losing party cannot just repackage that disagreement to claim" fraud on the court). Accordingly, Mr. Fink has

failed to clear the high bar imposed by Rule 60(d)(1) or (3).

B. Res Judicata

Defendants Kirchner, Flaster Greenberg, Suez, and Davis request that Plaintiff's complaint be dismissed with prejudice under the doctrine of claim preclusion because he is reasserting the exact same claims that were previously affirmed by the Third Circuit in their favor. Plaintiff does not seem to dispute this contention, rather he argues that claim preclusion should not apply because the instant complaint contains more facts than those previously asserted since he now includes allegations that both Judge Hillman and Judge McNulty deprived him of due process. Plaintiff also argues that claim preclusion should not apply because he is asserting an action under Rule 60(d)(1) and (d)(3). Both arguments are completely meritless.

Claim preclusion applies when three circumstances are present: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action. *Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 279 (3d Cir. 2016). The third factor "generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims." *Id.*

This is not a close case. First, there was a final judgment on the merits because the Third

Circuit affirmed Judge Hillman's grant of summary judgment to Defendants Flaster Greenberg and Kirchner for lack of causation. *Fink v. Kirchner*, 731 F. App'x 157, 158 (3d Cir. 2018). Second, this case and the prior case involves the same parties in the same procedural posture— Mr. Fink against Defendants Kirchner and Flaster Greenberg. Third, Plaintiff's claims are in substance identical to the claims previously asserted before Judge Hillman and the Third Circuit. In the current complaint, he asserts six claims against Defendants Kirchner and Flaster Greenberg, specifically claims for legal malpractice, breach of fiduciary duty, fraud, concealment of evidence, tampering with evidence, and fraud on the court. In the previous complaint, Plaintiff asserted five of these six claims based on the same factual allegations. Therefore, these five claims are clearly barred by claim preclusion. The sixth claim—fraud on the court—simply repackages many of the same allegations into a new legal theory. Thus, it too is barred by claim preclusion.

Plaintiff's claims against Defendants' Davis and Suez suffer from the same flaws. In counts nine, ten, and twelve of the current complaint Mr. Fink asserts claims of fraudulent concealment and negligent supervision against Defendants Davis and Suez. In the Bishop litigation, he also asserted claims of fraudulent concealment of evidence and negligent supervision against the same Defendants. Although Mr. Fink made slight changes to the fraudulent concealment and negligent supervision

claims asserted in the current complaint, they are substantively identical to those asserted in the Bishop litigation, which the Third Circuit affirmed dismissal of with prejudice. *Fink v. Bishop*, 641 F. App'x 134, 138–139 (3d Cir. 2016); *see also Gimenez v. Morgan Stanley DW, Inc.*, 202 F. App'x. 583, 584 (3d Cir.2006) ("A dismissal that is specifically rendered 'with prejudice' qualifies as an adjudication on the merits and thus carries preclusive effect"). Therefore, counts nine and ten are barred by claim preclusion. Likewise, even though count twelve arguably asserts some new allegations, it is merely a continuation of the "same fraudulent activity" that was previously dismissed with prejudice by the Third Circuit and therefore is insufficient to escape the bounds of claim preclusion. *See 3G Wireless, Inc. v. Metro PCS Pennsylvania LLC*, No. CV 15-6319, 2016 WL 823222, at *5 (E.D. Pa. Mar. 2, 2016) (citing *Foster v. Denenberg*, 616 F.App'x. 472, 473 (3d. Cir. 2015)).

Plaintiff knows his arguments in opposition are futile because they have been repeatedly shot down. Therefore, we need not belabor this point. Simply because Plaintiff has asserted some new factual allegations and a new legal theory does not mean claim preclusion is inapplicable. *Haefner v. North Cornwall Twp.*, 40 F. App'x 656, 658 (3d Cir. 2002) (explaining that claim preclusion applies even where new claims are based on newly discovered evidence, unless the evidence was either fraudulently concealed or it could not have been

discovered with due diligence, but finding that the plaintiff's bald and unsupported allegations of fraudulent concealment to avail himself of the application of the exception to the claim preclusion doctrine were not persuasive). What matters is the essential similarity of the underlying events giving rise to the claims, not the theory of recovery. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 277 (3d Cir. 2014) (explaining it is not dispositive that plaintiff asserts a different theory of recovery or seeks different relief in the two actions). There is no question that the requisite level of homogeneity is present here. Accordingly, Plaintiff's claims against Defendants are dismissed with prejudice.

C. Motion for Sanctions

Defendants Flaster Greenberg and Kirchner have conceded that they failed to comply with Rule 11(c)(2) and therefore their motion for sanctions will be denied. *Albibi v. Tiger Mach. Co.*, No. CIV.A. 11-5622 JLL, 2014 WL 3548312, at *2 (D.N.J. July 17, 2014) (denying a motion for sanctions, in part, because the movant failed to send the adversary the actual motion as opposed to an informal letter).

D. Pre-Filing Injunction

Defendants Flaster Greenberg and Kirchner move for an injunction that prevents Mr. Fink from filing additional complaints against them without the Court's permission. A pre-filing injunction is an exception to the general rule of free access to the

courts and its use against a pro se plaintiff must be approached with caution. *See In re Oliver*, 682 F.2d 443, 445 (3d Cir.1982). However, pursuant to the all Writs Act, 28 U.S.C. § 1651(a), a district court may enjoin a pro se litigant from future filings so long as the injunction complies with three requirements: (1) the litigant must be continually abusing the judicial process; (2) the litigant must be given notice of the potential injunction and an opportunity to oppose the court's order; and (3) the injunction must be narrowly tailored to fit the specific circumstances of the case. *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir.1993).

Because this Court has not provided Mr. Fink with an opportunity to show cause as to why the Defendants' proposed injunction should be denied, we decline to further evaluate the Defendants' request. However, as discussed throughout this Opinion, the Court notes that Mr. Fink previously commenced a similar action that contained the same general allegations against many of the same parties, which was dismissed. Additionally, Plaintiff has filed a number of appeals and other related actions stemming from the same underlying conduct, all of which have been denied. *See generally, Fink v. EdgeLink*, 553 Fed. App'x. 189, 190 (3d Cir. 2014); Fink v. Bishop, 641 F. App'x 134, 136 (3d Cir. 2016); Fink v. Kirchner, 731 F. App'x 157, 158 (3d Cir. 2018). Should Mr. Fink file another action premised on the same alleged misconduct, the Court will consider enjoining him from filing similar lawsuits.

At that point, the Court will consider whether he is "continually abusing the judicial process" such that a narrowly tailored pre-filing injunction is necessary. *Grossberger v. Ruane*, 535 F. App'x 84, 86 (3d Cir. 2013).

IV. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are granted and therefore Plaintiff's motion for leave to amend the complaint is denied. Defendants Flaster Greenberg and Kirchner's motion for sanctions and pre-filing injunctions are also denied. An appropriate order follows.

s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

Dated: 8/16/2021

APPENDIX F

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN W. FINK,
Plaintiff,

v.

JONATHAN L. BISHOP, ET. AL.,
Defendants.

Civil Action No. 22-10978 (RA)

TRANSFER ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff John W. Fink commenced this action seeking relief under Fed. R. Civ. P. 60(d)(1) and 60(d)(3). He alleges that three federal district judges in the United States District Court for the District of New Jersey—the Honorable Noel J. Hillman, the Honorable Kevin McNulty, and the Honorable Robert B. Kugler—deprived him of his due process rights by "committing numerous judiciary violations." Complaint ¶ 1. Plaintiff asserts that Judges Hillman, McNulty, and Kugler committed

the violations in five prior cases that Plaintiff filed in the District of New Jersey, but because they have "personal immunity from prosecution," he does not name them as Defendants in this action.[1] *Id.* ¶ 5. The District Court for the District of New Jersey has already considered—and denied—a Rule 60(d) action brought by Plaintiff challenging the outcome of his previous actions. Dkt. 3 at 50. Plaintiff now seeks to have this Court enter judgment against Defendants. That application is denied, and this Court transfers this action to the United States District Court for the District of New Jersey.

DISCUSSION

Federal Rule of Civil Procedure 60(d) provides that a court may "entertain an independent action to relieve a party from a judgment," Fed.R.Civ.P. 60(d)(1), or "set aside a judgment for fraud on the court," Fed.R.Civ.P. 60(d)(3); *see LinkCo, Inc. v. Naoyuki Akikusa*, 367 F. App'x 180, 182 (2d Cir. 2010). As distinct from fraud on a litigant, fraud on the court "does or attempts" to "defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Id.* (quoting *Hadges v. Yonkers Racing Corp.*, 48 F.3d

[1] Plaintiff acknowledges that he appealed all five cases to the United States Court of Appeals for the Third Circuit, but claims that the Third Circuit has also "deprived [him] of due process." (*Id.* ¶ 3.)

1320, 1325 (2d Cir. 1995)). Because Rule 60(d) does not by itself create subject matter jurisdiction, a movant bringing a Rule 60(d) action must establish an independent ground for jurisdiction. *Mazzei v. The Money Store*, No. 20-CV-3702 (AT), 2020 WL 7774492, at *7 (S.D.N.Y. Dec. 30, 2020). As is relevant here, a motion for relief from a judgment "is generally brought in the district court rendering the judgment." *Covington Indus., Inc. v. Resintex A.G.*, 629 F.2d 730, 733 (2d Cir. 1980); *see Iorio v. @Wireless LLC*, No. 3:18-CV-1793 (RNC), 2022 WL 19335, at *4 (D. Conn. Jan. 3, 2022) (noting that Rule 60(d) actions may be brought in a court that did not render the judgment only "if the plaintiff has no adequate remedy in the district that rendered the judgment"). Indeed, courts have consistently declined to entertain independent actions seeking relief from judgments issued by other courts on the ground that "[c]onsiderations of comity and orderly administration of justice demand[ ] that the nonrendering court should decline jurisdiction of such an action and remand the parties to the rendering court, so long as it is apparent that a remedy is available there." *See Lemke v. Jander*, No. 20-CV-362 JLS (KSC), 2021 WL 778653, at *2 (S.D. Cal. Mar. 1, 2021), *appeal dismissed sub nom. RICHARD G. LEMKE, Plaintiff Appellant, v. GARY DALE JANDER, Defendant-Appellee.*, No. 21-55243, 2021 WL 2456858 (9th Cir. Apr. 19, 2021) (quoting *Treadway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1421 n.2 (9th Cir. 1986)); *see also United States v. Foy*, 803 F.3d 128, 134 (3d Cir.

2015) (affirming dismissal of Rule 60(d) proceeding challenging judgment in a different district court where Plaintiff "[did] not point to [] any independent ground for jurisdiction").

Here, Plaintiff asks this Court to set aside judgments of the District Court for the District of New Jersey and enter judgment in his favor. He argues that the original judgments in the District of New Jersey relied on "extrajudicially sourced facts," and asserts that each judge in the previous proceedings exhibited "glaring bias against" him. Dkt. 3 at 28. Having reviewed the allegations in Plaintiff's 138-page complaint, this Court disagrees and has identified no grounds for considering Plaintiff's motion to set aside the prior judgments. *Treadway*, 783 F.2d at 1421; *see also Iorio*, 2022 WL 19335, at *4. Nor, of course, is the District Court for the District of New Jersey's denial of his previous Rule 60(d) motion itself a basis for reconsideration in this Court. In any event, Plaintiff has alleged no facts indicating that this Court is a proper venue for this action. According to the Complaint, Defendants are citizens of New Jersey and Pennsylvania. Compl. ¶¶ 9-19. The fact that Plaintiff is a resident in the Eastern District of New York also does not make this Court the appropriate venue for this action. 28 U.S.C. § 1391(b).

Accordingly, the Court transfers this action to the District Court for the District of New Jersey. *See* 28 U.S.C. § 1406(a) (providing that if a case is filed

in the incorrect district, the court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought"); *see also Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 435 (2d Cir. 2005) ("Courts enjoy considerable discretion in deciding whether to transfer a case in the interest of justice.").

LITIGATION HISTORY AND WARNING

A review of the Public Access to Court Electronic Records (PACER) system shows that in 2020, Plaintiff filed two actions in this court against the same Defendants, alleging violations of his rights in the District of New Jersey. In both cases, the Court transferred the actions to the District of New Jersey. *See Fink v. Bishop*, ECF 1:20-CV-10533, 3 (S.D.N.Y. Dec. 17, 2020); *Fink v. Kirchner*, ECF 1:20-CV-5128, 3 (S.D.N.Y. July 8, 2020).

In light of Plaintiff's history of filing repetitive and duplicative actions in this court, regarding the alleged violation of his rights in the District of New Jersey, the Court warns Plaintiff that further duplicative litigation in this court, will result in an order barring Plaintiff from filing any new actions in this court without first seeking permission of the court. *See* 28 U.S.C. § 1651.

CONCLUSION

The Clerk of Court is directed to transfer this action to the United States District Court for the District of New Jersey. A summons shall not issue from this Court. This order closes this case. Plaintiff's request to stay the transfer of his complaint to another court (ECF No. 3) and his requests for the issuance of summonses (ECF Nos. 7-17) are denied.

Plaintiff is warned that further duplicative litigation in this court will result in an order barring Plaintiff from filing any new actions in this court without first seeking permission of the court. *See* 28 U.S.C. § 1651.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962) (holding that an appellant demonstrates good faith when he seeks review of a nonfrivolous issue). SO ORDERED.

s/ Ronnie Abrams
RONNIE ABRAMS
United States District Judge

Dated: January 25, 2023
New York, New York